Antitrust Doctrine and the Sway of Metaphor

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After case citations and market share figures have faded from memory, the judge or lawyer who has read an antitrust opinion is likely to remember, if anything, a metaphor. Competitive pricing is the "central nervous system" of the economy; the local telephone exchange or football stadium is subject to the "bottleneck" doctrine; the plaintiff is outside the "target area"; a "bathtub conspiracy" has been charged; the defendant, a potential entrant, is "waiting in the wings"; a sales policy amounts to a "price squeeze"; the acquiring company possesses a "deep pocket" or is making a "toehold" acquisition; the new product is a "fighting brand." Such phrases ornament antitrust law, but the question remains, does metaphor play any larger role in legal discourse?[1]

My thesis is that in several different roles, metaphor is of practical importance to legal doctrine beyond mere decoration. At the rhetorical level, metaphor translates the abstract concept into concrete and often vivid terms, shaping the concept with connotations and giving it a weight and carrying power independent of its true worth. Persuasive as rhetoric, metaphor is even more potent as a concealed form of argument by analogy; analogy, of course, is a mode of reasoning to which lawyers and judges are already predisposed by training, and concealment of the analogy within the metaphor may strengthen its influence. Finally, metaphor, which is itself intimately connected to the growth of language and thought, is a means of discovering new insights in law, as elsewhere.[2]

An initial assay of these roles of metaphor in law is all that can be expected. Linguists and philosophers are sharply divided about the nature and effects of metaphor.[3] Antitrust law, chosen to illustrate the workings of met-

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1. Interest has grown in the subject of law and literature, *see, e.g., Law and Literature*, 32 RUTGERS L. REV. 603 (1979) (annotated bibliography), but the current concern of writers is largely with text interpretation. *See generally Law and Literature*, 60 TEX. L. REV. 373 (1982). The subject of metaphor in law has a closer kinship to the role of language in legal reasoning, addressed in older studies. *See, e.g.*, Chafee, *The Disorderly Conduct of Words*, 41 COLUM. L. REV. 381 (1941) (drawing upon C. OGDEN & I. RICHARDS, THE MEANING OF MEANING (4th ed. 1936)).

2. Each of these roles of metaphor—as rhetoric, reasoning device, and means of discovery—is separately discussed and illustrated in the succeeding parts of this essay. The separation is a convenience of presentation. The roles are overlapping and the underlying mechanism of metaphor is the same.

3. Any collection of modern essays on metaphor reveals sharp disagreements among the writers

aphor, is now in a state of unquiet change both in its formal doctrines and its intellectual underpinnings.[4] Still, any progress in exploring the interface of metaphor and antitrust law should repay the effort several times over. What can be learned of the roles of metaphor in antitrust law will assuredly teach lessons about metaphor in other branches of law and even about the processes of legal reasoning and persuasion.

I. THE INVISIBLE HAND

It is natural to be skeptical of the notion that metaphor, primarily a literary device, can mold antitrust doctrine and affect judicial judgments condemning a trade association or disallowing a merger. To the casual observer, a metaphorical phrase in a legal opinion will appear to be only poetic adornment. Yet metaphor, to borrow one of the most famous images in economics, is often a kind of "invisible hand" that guides events from afar without detection.[5]

It ought to soften skepticism to remember that, only a half century ago, Keynes had to remind his readers of the powerful effect wrought by the ideas of "defunct economists" and "academic scribblers" on the practical world of business and politics.[6] No one would doubt Keynes' dictum today, as antitrust doctrine is being remade with the ideas of economists and law professors. Metaphor presents a like case of remote influence. Just as ideas shape events in the practical world, so language and the devices of rhetoric shape the ideas themselves.

Antitrust law is an apt field in which to explore the power of metaphor. Constitutional law, among other realms, offers an even richer harvest of metaphor.[7] Yet antitrust decisions, possessing a surprisingly deep vein of metaphor, have a comparative advantage: antitrust allows us to test results

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on basic issues including what metaphor is, how it works, and its relation to other subjects such as literature, philosophy, science, and psychology. *See generally* METAPHOR AND THOUGHT (A. Ortony ed. 1979); ON METAPHOR (S. Sacks ed. 1979); PHILOSOPHICAL PERSPECTIVES ON METAPHOR (M. Johnson ed. 1981).

4. *See, e.g.*, Copperweld Corp. v. Independent Tube Corp., 467 U.S. 752 (1984) (disgarding the intra-enterprise or "bathtub conspiracy" doctrine). *Compare* R. BORK, THE ANTITRUST PARADOX (1978) (consumer welfare and economic efficiency should govern antitrust analysis) *with* Rowe, *The Decline of Antitrust and the Delusion of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511 (1984) (economic models should not be used as legal antitrust norms).

5. The phrase, of course, is from A. SMITH, WEALTH OF NATIONS (1776).

6. J. KEYNES, GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY 383 (1936).

7. In constitutional law, metaphors not only abound, but in some cases approach the status of doctrine. For example, in applying the establishment clause, courts repeatedly ask whether an activity breaches the "wall of separation" between church and state. *E.g.*, Larken v. Grendel's Den, Inc., 459 U.S. 116, 123 (1982). Under the fourth amendment, evidence may be excluded as "the fruit of the poisonous tree." *E.g.*, United States v. Crews, 445 U.S. 463, 469 (1980). *See generally* R. Parker, Political Vision in Constitutional Argument (1979) (unpublished manuscript) (copy on file at *Georgetown Law Journal*).

implicated by metaphor against results reached by more rigorous economic analysis. And if seeming airy metaphors prove to have force against the dense weight of traditional antitrust analysis, their influence in other realms of law will hardly be open to doubt.

In considering the influence of metaphor, it is simplest to begin with its rhetorical role, illustrated by a doctrine now loose in the lower federal courts. Among the riddles posed by antitrust law, few are as difficult as deciding what business conduct violates the statutory bar against monopolization and attempts to monopolize.[8] One of the efforts to answer the riddle is the so-called "bottleneck" doctrine that the lower courts have been crafting during the past two decades. Both the influence of the doctrine, and its dubious character, contain lessons about metaphor.

The bottleneck doctrine, a supposed rule expressed as a metaphor, is also described more plainly as the "essential facilities" doctrine. A recent and fairly typical formulation appears in *United States v. AT&T*,[9] where Judge Greene stated:

> It may be helpful at the outset to state the applicable legal standard. Any company which controls an "essential facility" or a "strategic bottleneck" in the market violates the antitrust laws if it fails to make access to that facility available to its competitors on fair and reasonable terms that do not disadvantage them.[10]

The opinion cited a number of Supreme Court and lower court decisions for this proposition.[11]

This bottleneck doctrine, couched in similar terms by other courts of appeals and district courts, is not an idle fancy but is intended as a rule of decision. Among other applications, it has been employed against a football team with an exclusive lease on a Washington stadium,[12] petroleum storage facilities in American Samoa,[13] a gas pipeline,[14] an electric power grid,[15] a

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8. Sherman Act § 2, 15 U.S.C. § 2 (1982).

9. 524 F. Supp. 1336 (D.D.C. 1981).

10. *Id.* at 1352-53.

11. Judge Greene cited United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912), and Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). Although these are the Supreme Court decisions most commonly cited, Associated Press v. United States, 326 U.S. 1 (1945), and United States v. Griffith, 334 U.S. 100 (1948), are, among others, invoked by lower courts in support of the doctrine from time to time.

12. Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

13. United States v. Standard Oil Co., 362 F. Supp. 1331, 1341 (N.D. Cal. 1972), *aff'd mem.*, 412 U.S. 924 (1973).

14. Venture Technology, Inc. v. National Fuel Gas Distribution Corp., 1980-81 Trade Cas. (CCH) ¶ 63,780, at 78,169 (W.D.N.Y. 1981), *rev'd on other grounds*, 685 F.2d 41 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982).

15. United States v. Otter Tail Power Co., 331 F. Supp. 54 (D. Minn. 1971), *aff'd in pertinent part*, 410 U.S. 366 (1973).

distribution system for newspapers,[16] a realty listing service,[17] and a Colorado ski resort.[18] Courts often state the doctrine in the confident and unqualified terms used by Judge Greene. The bottleneck doctrine is also a favorite in pleadings filed by the Justice Department's Antitrust Division with courts and administrative agencies, usually accompanied by a reference to *United States v. Terminal Railroad Association*[19] and *Associated Press v. United States*.[20]

The phrasing seems to have become popular over a decade ago after an English scholar, A.D. Neale, referred to "bottleneck" monopolies to summarize the message of cases condemning "one-man boycotts" or the "refusal by a dominant firm to trade."[21] Only a few years later in 1974, a survey of the case law found that the "bottleneck analysis" had been relied on by a number of lower courts[22] and cases thereafter continued to use the term like an incantation.[23] Other commentary, without always using the term, began to absorb the gist of the underlying doctrine.[24] The latest law review commentary in 1983 endorsed the bottleneck doctrine with enthusiasm, arguing that it ought to be made even more rigid and demanding.[25]

Yet when one examines the Supreme Court decisions commonly cited for the doctrine by lower courts, they do not offer much support. The first Supreme Court case, and the one most often cited, is the 1912 decision in *Terminal Railroad*.[26] There, a group of railroads had formed a company that successively acquired the main railroad terminal in St. Louis and each of the river-crossing facilities, thus bringing under their control the movement of traffic to or through this major gateway.[27] Citing both sections 1 and 2 of the Sherman Act,[28] the Supreme Court ruled that competitors had to be al-

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16. Byars v. Bluff City News Co., 609 F.2d 843 (6th Cir. 1979).

17. United States v. Realty Multi-List, 629 F.2d 1351 (5th Cir. 1980).

18. Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509 (10th Cir. 1984), *aff'd on other grounds*, 472 U.S. 585 (1985).

19. 224 U.S. 383 (1912).

20. 326 U.S. 1 (1945).

21. A. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES 66-70, 127-33 (2d ed. 1970), *quoted in* Hecht v. Pro-Football, Inc., 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *cf.* T. ARNOLD, THE BOTTLENECKS OF BUSINESS (1940) (study of antitrust enforcement).

22. Note, *Refusals to Deal by Vertically Integrated Monopolists*, 87 HARV. L. REV. 1720 (1974).

23. *See supra* notes 12-18 (listing lower court cases invoking the doctrine).

24. In 1977, Lawrence Sullivan published his antitrust treatise, asserting flatly that a firm with a lawful monopoly "by reason of ownership of a unique resource" is guilty of monopolization "if it exploits that resource in ways which exclude or disadvantage customers arbitrarily or invidiously." L. SULLIVAN, ANTITRUST § 48, at 125 (1977), citing *Terminal Railroad* and several other Supreme Court cases.

25. Note, *Unclogging the Bottleneck: A New Essential Facility Doctrine*, 83 COLUM. L. REV. 441 (1983).

26. United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912).

27. *Terminal Railroad*, 224 U.S. at 391-94.

28. 15 U.S.C. §§ 1-2 (1982).

lowed to own shares in the terminal company if they wished, and had to be allowed to use the facilities on equal terms in any event.[29] *Terminal Railroad* can readily be explained by accepted principles—under both section 1[30] and section 2[31]—without any resort to the notion underlying the bottleneck doctrine.

The next decision usually cited, *Associated Press*,[32] provides even less support for the bottleneck doctrine. In that case, the Supreme Court struck down bylaws of Associated Press, a consortium of major newspapers designed to exchange news among members.[33] The bylaws in question barred individual newpapers from supplying news to nonmembers and gave members a right to veto membership applications of nonmembers operating in the same cities.[34] The case presented an explicit agreement framed with patently anticompetitive intent, and the Supreme Court's own language treats the conduct as a violation of section 1.[35] Contrasting "individual" enterprise, the Court condemned "the collective power of an unlawful combination."[36]

Three years later, in *United States v. Griffith*,[37] the Supreme Court held unlawful an effort by a multicorporation theater chain with monopolies in certain towns to use its bargaining power to obtain first-run exclusive licenses in towns where the chain faced competition.[38] In a widely quoted sentence, the opinion said "that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."[39] The quoted language cannot be taken

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29. *Terminal Railroad*, 224 U.S. at 411. In framing the remedy, the Supreme Court said that access must be afforded "upon such just and reasonable terms and regulations as will, in respect of use, character, and cost of service, place every such company upon as nearly an equal plane as may be . . . ." *Id.* This language, describing the outcome—not the basis for liability—is quoted in United States v. AT&T, 524 F. Supp. 1336, 1353 (D.D.C. 1981), as a basis for the doctrine.

30. Both the formation of the company and its acquisitions can be viewed as reflecting agreements by its owner railroads, so their conjoined action is easily described as a conspiracy under § 1 of the Sherman Act.

31. Viewed under § 2 of the Sherman Act, the successive purchases amounted to willful acquisition of monopoly power, so the defendants' intent provides a ready ground for condemning the result. Much of the Court's discussion of the facts is devoted to affirming the deliberate and progressive engrossment of all of the facilities that provided cross-river transportation. *Terminal Railroad*, 224 U.S. at 392-94.

32. Associated Press v. United States, 326 U.S. 1 (1945).

33. *Associated Press*, 326 U.S. at 18-19.

34. *Id.* at 9-10.

35. *Id.* at 16, 18-19.

36. *Id.* at 15. The decision also stopped short of ordering general access to the press agency for all competitors and contented itself with requiring Associated Press to revoke the restrictive bylaws. *Id.* at 5, 24.

37. 334 U.S. 100 (1948).

38. *Id.* at 108-09.

39. *Id.* at 107.

literally,[40] and the facts of the case lend little support to bottleneck notions. The case did not involve a refusal to deal with competitors or share an "essential facility" but evidenced instead the extension of monopsony power from one market to another, a practice that would now be described as leveraging.

The final case in the quartet, *Otter Tail Power Co. v. United States*,[41] offers more harm than help to the bottleneck doctrine. In *Otter Tail*, an integrated electric power system refused to allow its intercity distribution network to be used to provide power to municipal systems which Otter Tail itself wanted to supply. The district court had no difficulty in bringing the bottleneck doctrine to bear in condemning this action.[42] Largely affirming the result, Justice Douglas ignored the bottleneck rhetoric and emphasized Otter Tail's intent to destroy competition.[43] In implicating intent, the *Otter Tail* decision remains in the mainstream of section 2 doctrine.[44]

Only recently the Supreme Court gave new evidence that it is not yet willing to endorse the bottleneck concept. In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[45] the Court reviewed a decision of the Tenth Circuit that relied directly on the essential facility doctrine to condemn a ski resort under section 2 of the Sherman Act after it terminated a joint ticketing arrangement with a dependent competitor.[46] Affirming the decision below on more conventional grounds—the improper intent of the defendant to harm the competitor—the Supreme Court observed that "we find it unnecessary to consider the possible relevance of the 'essential facilities' doctrine."[47]

A lack of Supreme Court support for the bottleneck doctrine is only the

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40. A monopolist who engages in dual distribution forecloses some competition; one who uses monopoly profits for research and development surely gains an advantage over competitors; and every time a monopolist who also distributes directly terminates an existing distributor for cause, the monopolist destroys the competitor.

41. 410 U.S. 366 (1973).

42. United States v. Otter Tail Power Co., 331 F. Supp. 54, 61 n.3 (D. Minn. 1971) (relying directly upon A. NEALE, *supra* note 21), *aff'd in part and vacated in part*, 410 U.S. 366 (1973).

43. *Otter Tail*, 410 U.S. at 377. This emphasis on intent predominates in the reasoning of this decision. *Id.* at 377-79. There are a few references to Otter Tail's "strategic dominance," but any monopoly refusing to deal with competitors could be so described. The point is that Justice Douglas did not stop with that description and infer an obligation to deal; instead, he repeatedly referred to the defendant's malign intent, citing ample evidence to support that finding. *Id.* at 369-72.

44. *Otter Tail*'s approach was anticipated by an earlier Supreme Court case sometimes cited in connection with the bottleneck doctrine, Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927). There, Kodak's refusal to supply a competing distributor was condemned as part of a pattern evidencing a deliberate intent to secure a monopoly for Kodak. The jury was charged that refusal to deal might be justified for purposes of "improving" Kodak's own business but not if the jury found that the purpose was "strangling and destroying" a competitor. Note, *supra* note 22, at 1733.

45. 472 U.S. 585 (1985).

46. Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1520-21 (10th Cir. 1984).

47. 472 U.S. at 611.

first warning signal. Doubts multiply as one ponders the implications of a general obligation for a monopolist to "share" its essential facility with its competitors. Is it truly the case that the dominant producer in an industry, having skillfully designed a plant of unique efficiency, has to let competitors use its factory at night so that they too can enjoy the benefits of this "essential facility"? If a soft drink company supplies most of the market because its secret formula produces a widely liked beverage, does section 2 require it to supply distributors even though it wishes to do all its own wholesale distribution? As the permutations pass in review, it is apparent that there are no easy answers to the problem of a monopolist dealing or refusing to deal with competitors.

Indeed, the "problem" itself is not unitary. The source of the monopoly power varies, from a natural monopoly due to economies of scale, or acquired by skill and foresight, to one granted by government franchise or patent, to one illegally acquired. The conduct may be a refusal to provide facilities, services, or supplies to a competitor or merely a discrimination in supply, price, or information. The competitor may be trying to compete in the monopolized market, a geographically adjacent one, or one vertically related. Within each class of cases, facts vary as to intent, administrative regulation, feasibility of remedies, and the economic (or other) justifications offered for denying access, refusing to deal, or discrimination. It would be amazing if this collection of concerns and variables could all be reduced to order by a one-sentence doctrine asserting that a monopolist controlling an essential facility has a duty to deal with competitors.[48]

It is not surprising that the most acute commentary rejects such a notion. Without using the "bottleneck" label, the Areeda-Turner treatise rejects any such obligation.[49] An early law review critique, reviewing the bottleneck cases, cogently described economic conditions where an obligation to deal would curtail efficiency or prove impossible to administer.[50] Sullivan, although generally sympathetic to requiring monopolists to deal, concedes that there is a range of different problems involved and that the obligation cannot be extended mechanically from one case to the next.[51] Even the Anti-

48. In certain circumstances, imposing obligations on larger competitors in their dealings with smaller ones may actually handicap competition. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); Telex Corp. v. IBM Corp., 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975).

49. 3 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 728a, at 229 (1978) ("We now consider whether § 2 should impose any constraints on an integrated monopolist's dealings with non-integrated competitors. We conclude, again with narrow exceptions, that it should not.").

50. Note, *supra* note 22, at 1730-32.

51. For example, while assuming that there is a duty not to discriminate in offering access, Sullivan is increasingly cautious in considering whether there should be a duty to sell at "reasonable" prices or to sell to downstream competitors when the monopolist wants to perform the distribution function itself. L. SULLIVAN, *supra* note 24, at 126-27.

trust Division, once a fervent apostle for the bottleneck doctrine, is beginning to have heretical second thoughts.[52]

Despite its embarrassing weakness, the bottleneck doctrine is nevertheless alive and well in the lower federal courts, doing mischief and gaining momentum. Some account is needed of this result, doubly puzzling because Supreme Court cases provide the doctrine little support and the Court has passed by several opportunities to endorse it. It would go too far to assert that the doctrine exists because it is an effective metaphor, although the label may have played some role as a catalyst. A more modest suggestion would be that the metaphor has helped to shape the doctrine and has abetted the tendency of courts to treat it as if it were a self-executing rule.

The ability of the metaphor to shape the doctrine can be traced in the decisions. The Supreme Court cases cited for the doctrine have tended to stress intent as the key to deciding whether the monopoly is being misused.[53] Intent is often more of a conclusion than a test, but its imprecision offers great flexibility, allowing a court to deny access in some cases and to require it in others based on a host of factors. The law for monopolists dealing or refusing to deal with competitors might have continued to develop in this direction and emerged under a suitable sobriquet, such as the "selfish trader" doctrine.[54]

Instead, the lower courts, where the controversy has been played out, adopted the bottleneck label. Rhetorically, that term shifts attention away from intent and toward the question whether monopoly power exists and can be related to some scarce facility or resource ("the bottleneck"). Once such a facility is found, it is a short step to a presumption that reasonable access is required, shifting the burden to the defendant to justify its refusal.[55] Some judges in the lower federal courts are quite conscious of this distinction: several cases state that there are two different rules governing monopoly facilities, one of which depends on intent and the other on the objective character

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52. In congressional testimony, the spokesman for the Antitrust Division observed not long ago that "the 'essential facility' doctrine . . . has proven difficult to apply in practice and can be criticized as denying the facility's owner a legitimate return on its investment." Statement of Charles F. Rule before the Senate Committee on the Judiciary concerning S. 447, April 23, 1985, at 6 (copy on file at *Georgetown Law Journal*).

53. *Eastman Kodak*, *Griffith*, and *Otter Tail*, involving single enterprises, spoke primarily in terms of intent. *Terminal Railroad* and *Associated Press* are, as already noted, more easily viewed as conspiracy cases, although they too involved anticompetitive intent.

54. Compare this metaphor to the phrase "fighting brand" to describe a low priced, heavily promoted product. *See, e.g*, Copperweld Corp. v. Independent Tube Corp., 467 U.S. 752, 794 (1984) (Stevens, J., dissenting). Redolent with suggestions of aggressive intent, the phrase is in its own way as misleading as "bottleneck."

55. An intent standard leaves the plaintiff with the burden of showing circumstances, beyond monopoly power, to justify a claim of access. The bottleneck doctrine encourages shifting the burden to the defendant to justify its refusal since it is phrased so as to imply that "reasonable" access is ordinarily feasible and desirable.

of the facility.[56] A defendant, in the view of these courts, can be condemned under either doctrine. By naming the doctrine in the way they did, the lower courts have subtly expanded the substantive law.

In still another respect the bottleneck label shapes the doctrine because it suggests an unfavorable view of the defendant's conduct in denying access. The immediate subjective associations of "bottleneck" are almost all unfavorable, for the term summons up pictures of the overlong checkout line at the supermarket or the access ramp to the bridge clogged with cars.[57] So far as connotations are concerned, to call something an essential facility does not go very far in answering the question whether it should be shared with competitors or whether the owner is entitled to serve the entire public by himself. To call the same facility a bottleneck—when the plaintiff is clamoring for access—is a call for intervention by the courts, a call played on a muted trumpet.

As rhetoric, metaphor is able not only to shape doctrine but also to increase its weight or influence with courts. Antitrust law is a difficult subject, and the underlying economics are even more baffling to most judges and lawyers. An understandable impulse to simplify antitrust law is reflected in many places, including per se rules, cost tests for predatory pricing, and mathematical formulas for determining undue concentration or monopoly power.[58] Metaphors meet the same felt need for graspable ideas in a different way by making the abstractions of antitrust more concrete and often more dramatic.

Of course, the graspable metaphor need not distort or mislead, as the bottleneck label has done. A properly chosen metaphor may improve the embodied doctrine. For example, the concept of "tying" probably captures Congress' concern better than the literal language of section 3 of the Clayton Act.[59] The statute draws attention to the case of a seller making a buyer promise not to use goods of the seller's competitors.[60] The more common

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56. *E.g.*, Byars v. Bluff City News Co., 609 F.2d 843, 855 (6th Cir. 1979) ("there exist two conceptually similar lines of cases which impose a duty to deal upon a monopolist"); Mid-Texas Communications Sys., Inc. v. AT&T, 615 F.2d 1372, 1387 & n.12 (5th Cir.) (discussing "somewhat different [intent and bottleneck theory] approaches" to analysis of refusal to deal by monopolist), *cert. denied*, 449 U.S. 912 (1980).

57. "*Bottleneck* is a useful and picturesque metaphor to denote the point of constricting of something that ought to be flowing freely . . . ." E. GOWERS, THE COMPLETE PLAIN WORDS 84 (1954).

58. *E.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945) (percentages tests for monopoly power); U.S. DEP'T OF JUSTICE, MERGER GUIDELINES § 3 (1984), 49 Fed. Reg. 26,824, 26,831 (1984) (HHI index for merger concentration). *See generally* Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 278-279 (1960).

59. 15 U.S.C. § 14 (1982).

60. Section 3 of the Clayton Act forbids a person under certain circumstances from making a sale on condition that the purchaser "shall not use or deal in the goods . . . of a competitor" of the seller. 15 U.S.C. § 14 (1982).

case is one in which the seller is silent about his competitors but links the sale of his own products together to inflict one of them on an unwilling buyer.[61] It is this situation that the tying metaphor embraces. It sums up, more tersely and vividly than any abstract paraphrase of the statute, a basic concept—linkage of products—for applying the statute to an important class of situations.[62]

By being more vivid and concrete, a metaphor also makes the accompanying doctrine more memorable to lawyers or judges in future cases. Precedent, after all, cannot do its work either as authority or by force of persuasion unless it is recollected. As the new metaphor is applied in successive cases, it is likely to acquire new shades of meaning, and the metaphor itself begins to be understood as a summary of prior applications.[63] For a time, therefore, an antitrust metaphor may gain in sway and subtlety as it is repeated in briefs and opinions.

Eventually, through repeated use, a metaphor is likely to exhaust itself. In the case of the "tying" doctrine, for example, the metaphor has almost completed its life cycle and most lawyers use the word as a term of art rather than as a metaphor.[64] The "bottleneck" doctrine is at midpoint in this linguistic journey. The term "market," surely once a metaphor of extraordinary power and freshness, is now used in antitrust opinions without arousing any of the original associations.[65] By the journey's end, the metaphor has done its work in shaping legal doctrine. The dead metaphor is its own monument.

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61. It did not take the courts long to recognize that § 3 should extend to the latter cases as well as to the former. *See* United Shoe Mach. Corp. v. United States, 258 U.S. 451, 457 (1922) (practical effect of such a provision is to forbid use of competitor's goods).

62. For other examples of the metaphor as shorthand see United States v. Falstaff Brewing Co., 410 U.S. 526, 537 (1973) ("toe-hold" acquisition to describe potential entrants' option to buy small company in field rather than large one); Ogilvie v. Fotomat Corp., 641 F.2d 581, 587 n.19 (8th Cir. 1981) ("bathtub conspiracy" to describe intra-enterprise conspiracies); Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Co., 579 F.2d 20, 24 (3d Cir.) ("price squeeze" to address special type of foreclosure) *cert. denied*, 439 U.S. 876 (1978); Southern Concrete Co. v. Unites States Steel Corp., 535 F.2d 313, 316 (5th Cir. 1976) ("target area" to limit antitrust liability based on concepts akin to standing or proximate cause), *cert. denied*, 429 U.S. 1096 (1977).

63. The process is akin to the more familiar one in which courts change the substance of legal rules by applying the rules to different sets of facts.

64. Modern language, it has been said, is apparently nothing but a "tissue of dead, or petrified, metaphors." O. BARFIELD, POETIC DICTION: A STUDY IN MEANING 63 (3d ed. 1973).

65. The notion of a "market" in an industrial economy is one of the most subtle and abstract concepts in economics. For a substantial period of history, the concept must have been influenced by the mental picture and connotations of a physical marketplace in a town or village. *See generally* A. MARSHALL, PRINCIPLES OF ECONOMICS 324 (8th ed. 1948) (first published 1890) (comparing the traditional marketplace with the economists' concept).

II. UNPACKING THE FIGURE[66]

One of the curiosities of metaphor is that it is at once a literary device—one of several falling in the category of "figures of speech"[67]—and a reasoning device. The aesthetic and emotive role is familiar and apparent; the reasoning role less familiar and partly concealed. The combination is potent.

Classically defined, a metaphor is a word or a phrase having an understood literal meaning but used nonliterally to refer to something else, whether an event, a person, or an idea.[68] A local telephone exchange or football stadium is not a bottleneck in the familiar literal senses of the word. Rather, when a judge uses the term bottleneck to refer to a local telephone exchange or football stadium, the effect is to associate them with bottlenecks in the mind of the reader. Through such an association, one of the common uses of metaphor is to imply some resemblance or similarity between two different things and thus to offer them for "tacit comparison."[69] The metaphors important in antitrust law usually do involve comparisons and that is the place to start thinking about them.[70]

The comparison can have, and is often intended to have, effects that we think of as "literary." A metaphor may render the underlying idea more concise or concrete. It may make it more striking or memorable by the drama of the substitution or merely by the use of the metaphor as a stylistic contrast to literal description. By connotation, the metaphor may arouse emotions associated with the metaphor and let them rub off on the subject. The bottleneck doctrine, already discussed, is a marginal example of these literary effects at work.

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66. "During a departmental meeting you call your chairman a bolshevik. . . . Once the chairman knows that you speak figuratively, he has then to unpack the figure to understand why you call him a bolshevik." Cohen, *Metaphor and the Cultivation of Intimacy*, in ON METAPHOR, *supra* note 3, at 6-7.

67. A figure of speech is any usage that departs from literal and normal usage. Some such departures, often called tropes, involve changes in meaning (*e.g.*, metaphor, irony). Other departures involve no change in meaning but achieve their effects in other ways (*e.g.*, alliteration, ellipsis).

68. *See* ARISTOTLE, POETICS 1457b, *reprinted in* 2 THE COMPLETE WORKS OF ARISTOTLE 2332 (J. Barnes ed. 1984) ("Metaphor consists in giving the thing a name that belongs to something else."). On varieties of modern definition, see Johnson, *Introduction*, in PHILOSOPHICAL PERSPECTIVES ON METAPHOR, *supra* note 3, at 3.

69. H. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 558 (E. Gowers ed. 1965). The conception of metaphor as an implicit or condensed comparison has endured for centuries and traces its lineage to Aristotle who said that "a good metaphor implies an intuitive perception of the similarity in dissimilars." ARISTOTLE, supra note 68, at 1459a, *reprinted in* 2 THE COMPLETE WORKS OF ARISTOTLE 2335 (J. Barnes ed. 1984).

70. It is not the place to end. Since publication of I.A. Richards' *The Philosophy of Rhetoric* in 1936, competing views on metaphor have developed, the most prominent being a so-called "interaction" conception of metaphor. *See* Black, *Metaphor*, in PHILOSOPHICAL PERSPECTIVES ON METAPHOR, *supra* note 3, at 72-77, 79 (interaction of metaphor and subject produces unique meaning different from either). Most criticisms of the Aristotelian view suggest not that it is wrong but that it is incomplete, failing to explore fully the distinctive manner and effect of the comparison.

Yet, so far as it compares two things, metaphor is also a reasoning device—a specialized means of reasoning by analogy.[71] When a judge describes an electric power grid as a "bottleneck" or calls an underpriced product a "fighting brand," he may be hoping that some of the metaphor's connotations are contagious. But he is also going to be widely understood to assert that, in some respect, a bottleneck and a power grid are similar or that there are some properties shared by fighters and underpriced products.[72] Thus the metaphor has become a vehicle to assert an analogy. Analogy is, after all, a form of argument—useful for description and prescription alike—whose engine is the assertion that two things have characteristics in common.[73]

As condensed analogy, metaphor has a natural appeal to lawyers versed in common law reasoning. In the common law tradition, it is an accepted method of justification for lawyers to argue, and judges to conclude, that the instant case is sufficiently "like" the prior case that the two cases should be decided in the same way. "The basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case."[74] A metaphor in an antitrust case may actually invoke prior antitrust cases, as the bottleneck metaphor does after enough cases have accumulated, but the point is a broader one. Metaphorical reasoning is likely to "feel right" to a lawyer as a method of argument because he is accustomed to using analogy and seeing it used.

Although a metaphor may contain an argument by analogy, it is likely to be a concealed argument. The metaphor usually does not avow itself to be

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71. C. PERELMAN & L. OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION 410 (1969): "Metaphor, an analogical fusion, fulfils all the functions of analogy itself. In certain regards it works even better, because it strengthens the analogy; the condensed metaphor integrates it into the language." *See also* Murray, *The Role of Analogy in Legal Reasoning*, 29 UCLA L. REV. 833, 856 n.75 (1982) ("Metaphor would seem to represent one special form of analogical argument.").

72. A strict theorist might argue that what distinguishes analogy from mere resemblance is that it is a "resemblance of structures." C. PERELMAN & L. OLBRECHTS-TYTECA, *supra* note 71, at 372. The term analogy can be used in both ways; the distinction involved does not happen to be critical to this essay. For present purposes, it is enough to think of an analogy as a comparison designed to invite reasoning by example or, in Aristotle's phrase, from "part to part." ARISTOTLE, PRIOR ANALYTICS 69a, *reprinted in* 1 THE COMPLETE WORKS OF ARISTOTLE 110 (J. Barnes ed. 1984).

73. An argument by analogy is often used to suggest that two different things, known to have a resemblance in certain respects, also resemble each other in other ways so that a known property of one can be attibuted to the other. W. KILGORE, AN INTRODUCTORY LOGIC 297 (2d ed. 1979) ("Inductions by analogy identify two sets of objects that have a set of known elements in common. They then derive the conclusion that an additional element known to characterize one set of objects will also characterize the second set."). Analogy can be used this way in a legal argument, since lawyers are often concerned with inferring facts in order to build rules. However, more often lawyers use analogy not to invite inferences about further similarities but to invoke the accepted norm that, if two different situations are sufficiently alike, they should be treated alike by the law. Guest, *Logic in the Law*, in OXFORD ESSAYS IN JURISPRUDENCE 190-91 (A. Guest ed. 1961).

74. E. LEVI, AN INTRODUCTION TO LEGAL REASONING 1 (1949) (footnote omitted).

deliberate comparison between two things, as do analogy or simile.[75] Even where the metaphor is understood as a comparison, questions about *which* similarities are being asserted—and what their significance is—are often left to the reader's imagination to answer. A telephone exchange is like a bottleneck, yes; but in what ways, and why do the similarities matter?

This concealment of arguments has distinctive effects, making metaphor a sharper weapon and one more difficult to parry. These consequences are better considered after looking more closely at how the analogy locked inside the metaphor can work in an antitrust case. Justice Douglas' opinion for the court in *United States v. Socony-Vacuum Oil Co.*[76] aptly serves the purpose. The metaphor is a description of competitive pricing as "the central nervous system of the economy."[77]

In *Socony-Vacuum*, the defendants, mostly major oil companies, were charged with violating section 1 of the Sherman Act by adopting a plan for purchasing "distress" gasoline. Because of reduced demand for gasoline during the Depression and excessive supplies due to new oil field discoveries, this distress gasoline was being sold at very low prices, arguably below cost in some instances, because independent refiners had no other way to stay in business.[78] To cope with this condition, the major companies agreed to match themselves as "dancing partners" with independent refiners selling distress gasoline. They would then buy that refiner's distress gasoline each month, according to a formula supposed to set purchases at the "fair going market price."[79]

The case reached the Supreme Court following a jury conviction of the defendants in the district court and a reversal and remand by the court of appeals. In the Supreme Court, the defendants argued that their arrangement aimed only to maintain prices at a normal competitive level; that it was reasonable to remove a threat to commerce posed by distress gasoline; and that they lacked power to alter the competitive prices for ordinary gasoline

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75. The simile would say that a telephone exchange is like a bottleneck; the metaphor that it is a bottleneck. Where metaphor is used, the issue remains how the reader is told to insert the word "like" and to read a metaphorical statement figuratively instead of literally. Simple answers (*e.g.*, the literal reading is untrue or absurd) usually suffice for the metaphors used in antitrust decisions.

76. 310 U.S. 150 (1940).

77. *Id.* at 226 n.59.

78. *Id.* at 170-71. Speaking of the independent refiners, Justice Douglas said:

> In spite of their unprofitable operations they could not afford to shut down, for if they did so they would be apt to lose their oil connections in the field and their regular customers. Having little storage capacity they had to sell their gasoline as fast as they made it. As a result their gasoline became "distress" gasoline—gasoline which the refiner could not store, for which he had no regular sales outlets and which therefore he had to sell for whatever price it would bring.

Id. at 171.

79. *Id.* at 179-80.

sales. Defendants argued both that their conduct was reasonable and that they lacked power to affect prices.[80]

The Supreme Court reversed the court of appeals and reinstated the convictions. Much of the opinion directly responded to the arguments of the defendants. Justice Douglas found that the combination did influence the market price for ordinary gasoline and the defendants' purpose for doing so—to hold up prices in order to avoid "ruinous competition"—was not an acceptable justification under the antitrust laws.[81] In language often quoted thereafter, Justice Douglas concluded that "any combination which tampers with price structures is engaged in unlawful activity."[82]

The decision might have remained unremarkable if it had stopped there, given the explicit findings of actual effect on price and illicit intent. Justice Douglas then went on to say, however, in a lengthy footnote, that neither power nor effect was necessary to the antitrust violation.[83] The footnote strongly implied that no justification for price fixing could ever be acceptable. These potent thoughts were knotted together in a single metaphor. Price-fixing agreements are all banned, Justice Douglas said, "because of their actual or potential threat to the central nervous system of the economy."[84]

The implicit equating of price setting in the competitive market with "the central nervous system of the economy" is an ingenious argument by analogy. In some respects the central nervous system and the competitive pricing system can be viewed as structurally similar. The competitive market, like the central nervous system, does work by "signals" (prices, neural impulses). Each system can be viewed as a web or network connecting disparate parts of the whole (the body, the economy). In each, the proper functioning of the signaling system can be viewed as vital to the entity and disruptions as threatening (neurological disease, misallocation of resources). In short, out of these unspoken resemblances, the basis for an analogy has been fashioned. Acquiescing, the reader of the opinion is like a trial witness lured into an easy concession the import of which now becomes apparent.

Given the state of medical knowledge and skill in 1940, when the decision was written, it may well have been fair to suppose (descriptively) that the central nervous system was delicate and vulnerable and (prescriptively) that

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80. *Id.* at 159-64.

81. *Id.* at 220-21.

82. *Id.* at 221.

83. *Id.* at 224-26 n.59.

84. *Id.* at 226 n.59. On an initial reading, the metaphor appears directed only to the issue of justification, because it immediately follows the statement that "whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness." *Id.* However, the preceding discussion in the footnote concerns the power and effect question, and the metaphor proves relevant to that subject as well.

deliberate interference with it could almost never be justified.[85] If the pricing system is equated with the central nervous system, then analogy encourages the reader to suppose that it too shares those characteristics and should be subject to the same rule debarring intervention. Not only does the metaphor argue against allowing price fixing to be justified, but it also supports a refusal to consider power or effect. For where the threat of harm is great and justifications are thought to be absent, it is efficient for judges to condemn the inchoate attempt without worrying about whether it could have been or was effective.

Quite apart from its power as an argument from analogy, the metaphor is a fine piece of handiwork in other, more literary respects. A measure of drama exists in the medical-biological comparison that draws attention to the arguments it implies. Further, the metaphor bolsters the Court's result by inviting the emotional associations. The image of tampering with the central nervous system provokes a sense of discomfort and unease that is doubly effective because it is felt rather than understood. These literary qualities conspire with the central analogy to make the metaphor persuasive.

Although persuasive, the analogy contained in the metaphor is weak and the inferences it invites are doubtful. For example, the central nervous system analogy implies that the economy is a single, centrally directed organism. This may be an apt image for a marxist or other command economy. But Justice Douglas was concerned with pricing in a capitalist or free enterprise system, a regime of many individual decisionmaking units, interdependent but without a common source of authority. On the crudest level, dispersal of power among economic units suggests that anticompetitive behavior in one sector of the economy may pose less threat to the economy as a whole than does neurological disease to a single organism.[86]

To offer another contrast, both the pricing mechanism and central nervous system may be delicate, but the orders of magnitude are quite different. A single serious injury to the spinal column could cripple an individual for life. A major price conspiracy is likely to cause only limited damage for a limited period of time. In fact, everyday operation of the economy assumes a number of lawful and expected interferences with competitive pricing, including price setting by lawful monopolies and oligopolies, rate fixing by utilities and commissions, joint price setting or bargaining in certain industries where statutory authority exists, and government price support programs for

85. Plainly, the persuasive effect of an analogy does not depend on actual characteristics of the thing used as a metaphor but rather on its commonly believed attributes.

86. Of course, the distinction, although significant, amounts to a difference in degree so far as impact is concerned. Equilibrium analysis teaches, and experience confirms, that pricing decisions and distortions in one corner of the economy can have profound effects in distant sectors.

certain areas of the economy. In short, the central nervous system analogy overstates the case against price tampering.

The metaphor in *Socony-Vacuum*, buried at the end of a long footnote in an emphatic and repetitious opinion, surely did not influence the outcome of that case. The most one can say is that the metaphor mirrored the attitude underlying the decision's influential dictum that purpose and effect are unnecessary to a violation and its holding that price fixing cannot be justified as necessary to prevent destructive competition. Opinions, however, are written for future cases as well as the case at hand, and Justice Douglas' metaphor recurs in four later and quite important decisions. Two of them tell the story best.[87]

The earlier of the two is *Broadcast Music, Inc. v. Columbia Broadcasting System*[88] *(BMI)*. The Court held that the per se rule against price fixing did not apply to contractual arrangements permitting Broadcast Music, Inc., as the agent of competing composers, to set a single price for a blanket license covering the composers' works. In the course of the opinion, Justice White offered, in introducing several paragraphs of discussion, the following thought:

> Finally, we have some doubt—enough to counsel against application of the *per se* rule—about the extent to which this practice threatens the "central nervous system of the economy" . . . that is, competitive pricing as the free market's means of allocating resources.[89]

Since the *BMI* opinion held that the blanket license in that case might be justified, Justice White's quotation of the central nervous system metaphor hardly appears at first glance to be proof of the force of the metaphor's concealed reasoning. The lessons are more subtle. A metaphor is often generous enough to give a judge room to maneuver.[90] Justice White apparently found the central nervous system image memorable enough to address even in an opinion that leans against the thrust of *Socony-Vacuum*. In adopting the metaphor, Justice White helped to entrench even more deeply an analogy that ultimately points away from *BMI* and back toward *Socony-Vacuum*.

The Court followed that signpost in *Arizona v. Maricopa County Medical Society*,[91] decided only three years after *BMI*. The Court struck down an

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87. The other two, not discussed now but generally consistent with *Socony-Vacuum*, are National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978), and White Motor Co. v. United States, 372 U.S. 253, 265 n.2 (1963) (Brennan, J., concurring).

88. 441 U.S. 1 (1979).

89. *Id.* at 23.

90. Where a metaphor is sufficiently resonant to throw off a series of ideas, it can be exploited for different purposes. If delicacy and vulnerability are attributes of the central nervous system, centrality is another, and Justice White merely took advantage of that quality to distinguish *BMI* from *Socony-Vacuum*.

91. 457 U.S. 332 (1982).

agreement among doctors setting maximum fees that they would charge for service provided under a health insurance plan. In its opinion, the Court addressed the doctors' "principal argument" that the per se rule should not apply because the arrangement had procompetitive justifications; Justice Stevens said that the "anticompetitive potential" in all price fixing agreements justified automatic invalidation. He bolstered this claim with a footnote: the footnote did nothing more than quote the two sentences from *Socony-Vacuum* concluding with the central nervous system metaphor.[92]

Generally consistent with *Socony-Vacuum*, *Maricopa* goes beyond it by rejecting a justification for price fixing that is far more attractive than the excuse offered in *Socony-Vacuum*. One could argue that *Maricopa*, unlike *Socony-Vacuum*, involved a problem of market failure for which the price fixing agreement was an apt solution.[93] In vain, the dissenters in *Maricopa* invoked the reasoning and authority of *BMI* to urge a balancing of costs and benefits in appraising the doctors' agreement.[94] It might be fair to say that the majority in *Maricopa*, confronted with *BMI*, preferred the message of the metaphor to the message of the decision.

Maricopa concerned maximum price fixing in a horizontal context where, whatever market failure may exist, maximum price fixing involves lurking dangers of minimum price fixing. But the Court had earlier held in *Albrecht v. Times Herald*[95] that maximum price fixing was a per se violation even in a vertical context, and it cited *Albrecht* with approval in *Maricopa*.[96] So far as the *Socony-Vacuum* metaphor has encouraged the Court to adhere to this rigid view, it is a fine example of a metaphor's malign influence, for the per se ban on vertical maximum price fixing is very hard to defend.

No great insight is required to see that where a manufacturer gives a dealer an exclusive area within which to distribute the product, the manufacturer in fixing a maximum resale price may actually be protecting consumers against exploitation by a local monopolist. If an exclusive distributor is the most efficient means of distribution, the public is not served by forcing the manufacturer to abandon this method and resort to self-distribution or competing

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92. "Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." *Id.* at 351 n.23 (quoting *Socony-Vacuum*, 310 U.S. at 226 n.59).

93. It is hard to view *Socony-Vacuum* as involving market failure; basically, the large oil companies did not like the downward pressure on prices produced by an abundant supply and reduced demand for their product. In *Maricopa*, the price fixing was addressed to a market failure problem: where medical service is exigently required, the consumer may be unwilling to "bargain" and, if insured, may have little incentive to do so. *See generally* S. BREYER, REGULATION AND ITS REFORM 33 (1982).

94. 457 U.S. at 363-66.

95. 390 U.S. 145 (1968).

96. 457 U.S. at 347.

distributors. Since maximum vertical price fixing may be designed to hold prices down and output up to competitive levels, it is hard to justify automatic condemnation. It is even harder to do so while the Court continues to approve territorial restraints that not only affect prices but do so by holding those prices up.[97]

One may well ask what persuades the Supreme Court to continue so rigid an approach to price fixing agreements. The anomaly is not readily explained by a concern with minimum price fixing,[98] or consumer welfare,[99] or even a preference for rules that can be easily administered.[100] Surely one contributing factor remains the Court's conviction that pricing is the most sensitive of all economic relationships and any interference with the setting of prices by free competition is uniquely dangerous. This conviction, of course, is exactly the one fostered by the metaphor of competitive pricing as the "central nervous system of the economy."

"Every metaphor," it has been said, "is the tip of a submerged model."[101] The metaphor of the central nervous system succeeds in persuading because, in some mysterious mind's eye, a resemblance is discerned between two models, the central nervous system and the regime of competitive pricing. It may not be farfetched to compare this step with the process by which two cases are said by the judge or lawyer to be "alike" even before an attempt is made to explain or understand this judgment. Ultimately, the "following and distinguishing" of cases also depends upon "the recognition of similarity and dissimilarity" between them.[102]

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97. *See, e.g.*, Continental TV v. GTE Sylvania, 433 U.S. 36 (1977). *See generally* Easterbrook, *Maximum Price Fixing*, 68 U. CHI. L. REV. 866 (1981) (arguing that maximum price fixing is almost always beneficial to consumers and that per se rules against maximum price fixing should be abandoned).

98. The argument that the maximum may be a signal for minimum price fixing is quite weak in a vertical context where the manufacturer is allowed to suggest minimum prices and may be able to enforce them anyway through dealer cutoffs, so long as "agreement" is avoided. *See* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) (reaffirming lawfulness of unilateral manufacturer action against price-cutting dealer).

99. From the standpoint of protecting consumers, the use of maximum price fixing in a vertical context to hold down price may be easier to justify than the use of territorial or other nonprice restraints that tend to increase price to consumers in exchange for nonprice services, services that may not be furnished or, if furnished, may not be highly valued.

100. The suggestion that a per se rule is easier to administer than a balancing test is sound but it does not explain why this concern should control in the case of vertical price restraints but not in the case of nonprice vertical restraints.

101. Black, *More About Metaphor*, in METAPHOR AND THOUGHT, *supra* note 3, at 31. The term model is usually used to refer to a "simplified, abstract version of the real world." Habakkuk, *Economic History and Economic Theory*, 100 DAEDALUS 305 (1971). Models can of course be normative as well: "Legal rulings . . . do not present a model *of* the world, they present a model *for* it." N. MACCORMICK, LEGAL REASONING AND LEGAL THEORY 103-04 (1978).

102. Simpson, *The Ratio Decidendis of a Case and the Doctrine of Binding Precedent*, in OXFORD ESSAYS IN JURISPRUDENCE, *supra* note 73, at 171.

Once the resemblance is discerned between the central nervous system and competitive pricing, then other properties of the first may be attributed to the second. Which ones are attributed, and how this occurs, is an even deeper mystery than the original sense of resemblance because the process of attribution is a selective one: seen through the lens of the metaphor, the pricing system may appear delicate and vulnerable, but no one supposes that the economy is a biological entity.[103] The problem is that the properties that are ultimately conveyed by the metaphor may not accurately describe the subject. And when the attribution is mistaken, the metaphor's concealed reasoning misleads.

> [W]hether we are dealing with simile or metaphor, it has to be remembered that every image is true and helpful only at its relevant point. God is, in a manner, light: but He is not a succession of wave-lengths in the prime matter. . . . [N]early all heresies arise from the pressing of a metaphor beyond the point where the image ceases to be relevant.[104]

The power of metaphorical reasoning to persuade is aided by yet another characteristic: the dialogue it compels between the user of the metaphor and anyone who solves the riddle of the concealed analogy.[105] Because the metaphor asserts a resemblance but does not usually explain it, it is only suggestive. One commentator recalled "what Heracleitus said of the Delphic oracle: 'It does not say and it does not hide, it intimates.' "[106] For some, it may seem to stretch a point to think of metaphor as a trigger for free association or call it "the dreamwork of language," as the same commentator did,[107] but who can doubt his conclusion that a metaphor's "interpretation reflects as much on the interpreter as on the originator"?[108]

Law school teachers know that the Socratic method has unusual power to educate by engaging the student in the process of learning. Metaphor, so far as it invites a search for unspoken similarities, is no less a dialogue between the author and the reader. The metaphor in a decision poses the questions what similarities are intimated and what is their significance. Silently the reader supplies the answer or answers out of his own experience and intui-

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103. One impressive attempt to explain the selection process is Searle, *Metaphor*, in METAPHOR AND THOUGHT, *supra* note 3, at 92. Searle suggests that a number of rules and strategies are at work so that, for example, the likelihood of property being attributed increases when it is a salient characteristic of the metaphor and a plausible characteristic of the subject. Plausible, of course, does not mean true.

104. D. SAYERS, THE POETRY OF SEARCH AND THE POETRY OF STATEMENT 284 (1963).

105. H. READ, ENGLISH PROSE STYLE 31 (1952) ("Riddles are primitive metaphors, roundabout descriptions or stories designed to convey their subject as a sudden and vivid revelation in the mind of the reader.") (footnote omitted).

106. Davidson, *What Metaphors Mean*, in PHILOSOPHICAL PERSPECTIVES ON METAPHOR, *supra* note 3, at 217.

107. *Id.* at 200.

108. *Id.*

tion. The reader becomes an accomplice in the argument. Surely, then, he is less likely to question the worth of resemblances that he himself has uncovered.[109]

III. SEEING NEW CONNECTIONS

"Half the wrong conclusions at which mankind arrive," said Palmerston, "are reached by the abuse of metaphors, and by mistaking general resemblance or imaginary similarity for real identity."[110] Palmerston's dictum does not stand alone. This fear of metaphor as a vehicle for false analogy is widely shared.[111] As we have seen, the fear is not without foundation. Yet to dwell narrowly on metaphor as a reasoning device is to ignore its greatest strength: its almost magical capacity to unleash creative thought.

One may justly believe "that analogy—likeness between dissimilar things—which is the fact underlying the possibility and reality of metaphor, holds within itself the very secret of the universe."[112]

> The bare fact that germinating seeds or falling leaves are actually another expression of the processes we see at work in human life and death, thrills me, as it must others, with a sense of being here in presence of a great mystery, which, could we only understand it, would explain life and death itself.[113]

Writers of great imagination have held similar views,[114] for metaphor is the epitome of the poetic sensibility.[115] Indeed, metaphor is a source of creative insight in many fields: "The language of scientific pioneers like Faraday,

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109. *Cf.* E. LEVI, *supra* note 74, at 5: "Reasoning by example in the law is key to many things. It indicates in part the hold which the law process has over the litigants. They have participated in the law-making. They are bound by something they helped to make."

110. P. GUEDELLA, PALMERSTON 226 (1927).

111. All figurative uses, said Locke, are "perfect cheats" serving only "to insinuate wrong ideas, move the passions, and thereby mislead the judgment." J. LOCKE, ESSAY CONCERNING HUMAN UNDERSTANDING, bk. III, ch. X, *quoted in* Johnson, *Introduction*, in PHILOSOPHICAL PERSPECTIVES ON METAPHOR, *supra* note 3, at 13. Hobbes ranked metaphors with "senseless and ambiguous words" and held that "reasoning upon them is wandering amongst innumerable absurdities." T. HOBBES, LEVIATHAN, pt. I, ch. 5, *quoted in* Johnson, *Introduction*, in PHILOSOPHICAL PERSPECTIVES ON METAPHOR, *supra* note 3, at 11.

112. C. SPURGEON, SHAKESPEARE'S IMAGERY 6 (1935).

113. *Id.*

114. *See* Johnson, *Introduction*, in PHILOSOPHICAL PERSPECTIVES ON METAPHOR, *supra* note 3, at 15-16 (quoting Rousseau and Nietzsche, *e.g.*, "What therefore is truth? A mobile army of metaphors . . . .").

115. "The ability to invent new metaphor is the sign of a poetical mind; and the main use of metaphors is always poetical." H. READ, *supra* note 105, at 23. Even in prose, the most resonant metaphors often import a sense of poetry. For example, "a word is not a crystal transparent and unchanged, it is the skin of a living thought . . . ." Towne v. Eisner, 245 U.S. 418, 425 (1918) (Holmes, J.).

Darwin and Huxley abounds in illuminative metaphors."[116] In the end, "creativity in judicial thinking may not be radically different from that in science; both depend on seeing new connections . . . ."[117]

Whether for good or ill, the role of metaphor in antitrust law is usually a modest one. No one would claim that the influence of metaphor compares with the impact of economic theory, statutory language, discerned intent of Congress, or even a sense of what is fair practice under the standards of the day. Tightly confined by another discipline—economics—antitrust does not give metaphor the same scope that it may have in other fields of law. Even in antitrust law, however, the effects of metaphor are felt. The result may often be to darken or distort, but metaphor can illuminate as well and even open an entirely new vista.

An apt illustration is furnished by Justice Black's opinion for the Court in *Fashion Originators Guild of America v. FTC*[118] *(FOGA)*, and its metaphor of the trade association as a kind of outlaw "government."[119] The illustration serves a double purpose. It exhibits not only the power of metaphor to establish new connections but its ability, Janus-faced, to lead and mislead at the same time. Both the critics and supporters of metaphor turn out to be right.

In *FOGA*, the Federal Trade Commission examined and condemned an organization of garment and textile manufacturers seeking to suppress "style piracy"[120] of fabric and clothing design not protected under the copyright or patent statutes.[121] The garment manufacturers agreed to sell only to retailers who declined to carry garments supplied by pirating manufacturers. Textile manufacturers also enlisted in the campaign, promising not to sell textiles to garment manufacturers who supplied such retailers. The Guild retained a registration bureau for garments, investigators to visit stores, and "an elaborate system of trial and appellate tribunals" to determine whether a garment was in fact copied from a member's design.[122]

After condemning the arrangement on a number of grounds, Justice Black concluded the affirmative case against the arrangement in metaphorical terms:

> In addition to all this, the combination is in reality an extra-governmental

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116. H. READ, *supra* note 105, at 26; *see also* Kuhn, *Metaphor in Science*, in METAPHOR AND THOUGHT, *supra* note 3, at 409.

117. P. FREUND, ON LAW AND JUSTICE 72 (1968).

118. 312 U.S. 457 (1941).

119. *Id.* at 465.

120. *Id.* at 461.

121. *Id.* The offense charged in *FOGA* was a violation of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (current version at 15 U.S.C. § 45 (1982)), prohibiting unfair methods of competition, but the Court's analysis expressly adopted the policies of the Sherman and Clayton Acts in judging the arrangement. *Id.*

122. *Id.* at 462-63.

> agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus "trenches upon the power of the national legislature and violates the statute."[123]

Justice Black was calling the trade association an outlaw government in disguise and using the suggested resemblance to condemn the organization for usurping legitimate authority. Apparently pleased with the image, he used it again in the next great boycott case, *Associated Press v. United States*.[124]

The activities of the trade association in *FOGA* did mimic government regulation. So far as metaphors depend on resemblance, Justice Black's image meets the condition. The difficulty lay in the use to which Justice Black then put the resemblance. At bottom, the objection to the defendants' activity in *FOGA* was not their use of "rules" and "tribunals," which were the factual elements that reinforce the resemblance. On the contrary, some years later the Court in *Silver v. New York Stock Exchange*[125] emphasized the *lack* of rules and tribunals in holding unlawful the refusal of the stock exchange membership to maintain telephone connections with a nonmember; the Court condemned the severance because it was ordered "without giving the nonmember notice, assigning him any reason for the action, or affording him an opportunity to be heard."[126]

At first blush, *Silver* appears to condemn the defendants for omitting the very kind of procedural apparatus that the defendants in *FOGA* were criticized for providing. The answer, of course, is that Justice Black was not hostile to the defendants' activities in *FOGA* because they employed trappings that might be identified with an exercise of government power. Instead, he objected to the substantive purpose and effect of the scheme—suppression of competition in designs that Congress had not chosen to protect from copying—and the basic means by which the defendants did so, namely, by collective refusal to deal.

Yet the insight offered by Justice Black's metaphor is a valid one and could have been turned to good account in *Silver* itself. The collective action of the stock exchange members does resemble the regulation of a third party's conduct that we normally associate with the exercise of power by government. That analogy does not mean that the conduct is automatically an unlawful usurpation, because there is no functional dividing line between the conduct permitted to government and the conduct permitted to private businesses.[127]

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123. *Id.* at 465.

124. 326 U.S. 1, 19 (1945).

125. 373 U.S. 341, 343 (1963).

126. *Id.*

127. A considerable number of functions sometimes performed by government—setting prices, allocating resources, exchanging information, setting standards—are also performed lawfully in various contexts by private groups or individual companies.

The resemblance does suggest, however, the possibility that such businesses ought to be wielding collective power in a manner more akin to the way government would wield it. That is as much to say that perhaps some form of procedural due process ought to be afforded.

An analogy, after all, is an invitation to consider possibilities. At best, it opens lines of inquiry that may be useful. One line may prove barren and another fruitful even though both proceed from the same source. Thirty years after *FOGA*, Justice Black's metaphor recently reappeared in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*[128] This time the metaphor yielded a quite different message.

In *Hydrolevel*, the Supreme Court was concerned with an association of professional engineers setting standards for mechanical devices.[129] The standards were so widely adopted by government codes that many businesses had to make their products conform to the standards in order to survive.[130] The plaintiff in *Hyrdolevel* showed that the association's technical standard, interpreted to exclude his product, could not be justified by engineering criteria but resulted from secret influence by a competitor of the plaintiff.[131] Quoting Justice Black,[132] the Court described the professional association as "in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce."[133]

The Court did not suggest that this function, analogous to government, made standard setting an unlawful usurpation wherever it worked coercively. Instead, the Court went on to sustain liability of the association on the ground that it had failed to take care to prevent the competitor of the plaintiff from dishonestly influencing the standard setting process.[134] In effect, the Court drew from the metaphor an obligation to assure procedural fairness. Under due process requirements, a judge with a substantial stake in the outcome cannot decide a case. It completed the implied analogy by treating what would be a denial of due process for government as antitrust misconduct by the trade association.[135]

As *FOGA* and *Hydrolevel* show, the metaphor may be a way of connecting to the problem at hand (for example, the treatment of trade associations) not a single idea (government) but a vast body of experience and information organized around that concept (for example, usurpation, due process). These possibilities do not even begin to suggest how fruitful the "trade-association-

128. 456 U.S. 556 (1982).
129. *Id.* at 559.
130. *Id.*
131. *Id.* at 571-72.
132. *See supra* text accompanying note 123 (quoting language of Justice Black).
133. *Id.* at 570.
134. *Id.* at 572.
135. *Id.* at 577.

as-government" metaphor can be. It could, for example, suggest that the failure of a powerful trade association or other organization to protect competitors should be remedied, by analogy to representation in government, by giving those excluded a right to participate in the group[136] or, in the alternative, a right fairly to be represented by those in charge of the group.[137] The metaphor, in other words, provides access to a vast "stock of analogical material."[138]

Needless to say, the metaphor cannot dictate an answer. The judge who conceives of a trade association as a government still has to decide whether to use that image to resolve the lawfulness of the activity, to create procedural constraints, or for other purposes. Just as usually there are competing analogies available to a judge, so usually there are competing metaphors. Even after a single metaphor is chosen, one may find that "there is no limit to what a metaphor calls to our attention . . . ."[139] But, for a judge seeking not to decide too much, this open-ended quality of metaphor is a strength, not a weakness. A metaphor can never decide too much because, strictly speaking, it decides nothing.

In enlisting metaphor as an aid to discovery, it has been taken for granted that the thought conveyed by the metaphor could also be achieved with a literal paraphrase.[140] Where a vital nuance can be caught only by a fresh metaphor, the metaphor is an even more precious event because for the time being there is no other way to convey the exact thought. It would be hard to find metaphors in antitrust law that provide insights impossible to express by some literal paraphrase. In other fields of law, there may be metaphors for which no literal substitute would serve.[141]

In the end, it seems likely that both the hazards and rewards of metaphor—and indeed its power over us—derive from a fundamental trait in our character, an "obstinate craving for unity and symmetry [even] at the ex-

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136. *Terminal Railroad*, in an antitrust context, can be described as having followed this course when it required that an equity interest in the commonly owned company be made available to other railroads for an appropriate price. *See supra* note 29 and accompanying text.

137. Antitrust law furnishes no obvious example of this remedy, but it has been employed in defining the obligations of unions. Steele v. Louisville & N.R.R., 323 U.S. 192 (1944) (union must represent interests of bargaining unit members barred from union).

138. C. PERELMAN & L. OLBRECHTS-TYTECA, *supra* note 71, at 405.

139. Davidson, *supra* note 106, at 218.

140. Theorists disagree about the ability of literal language to reflect exactly what it is that a metaphor suggests. For present purposes, it is enough to say that a close literal paraphrase is possible in some cases and in others it is very difficult.

141. Examples may be the concepts of "chilling effect" and "breathing space" in first amendment parlance. *See, e.g.*, Calder v. Jones, 465 U.S. 783, 786 (1984) (lower court concerned with "chilling effect" on reporters and editors); NAACP v. Button, 371 U.S. 415, 433 (1963) ("First Amendment freedoms need breathing space to survive"). Of course, the notion that advances in thinking depend in some measure on deriving new vocabulary is not limited to metaphor.

pense of experience."[142] Responding to this drive, metaphor serves as a "means by which the less familiar is assimilated to the more familiar, the unknown to the known," for "a good metaphor implies the intuitive perception of the similarities in dissimilars."[143] If this intuitive process sometimes may mislead lawyers and judges, as surely it can, it also has the power to reveal useful truths, in law as elsewhere. It does so in a way well suited to the incremental role judges play in making law.

Judicial progress in the law is usually a matter of coping with new situations by adapting older experience. The challenge courts face day after day is to respond to change without losing touch with the past, forgoing the benefits of its lessons, or creating a sense of discontinuity. Analogy is one way of connecting "the unknown to the known"; the creation of legal fictions is another way; the use of metaphor is yet another.[144] Each proceeds by a different device to assimilate "the less familiar" to the familiar. It would be foolish to imagine that the straightforward argument of an explicit analogy is always more suitable than the fairy tale of legal fiction or the poetry of metaphor.

Because metaphor is capable of use and abuse, and can be powerful in both roles, it remains to consider how to cope with it. The fundamental problem is that lawyers have no settled protocol for answering a metaphor. If the opposing lawyer or the judge proposes an explicit rule of law, the conventions for rebutting it are well settled. The advocate might, for example, point to cases stating a contrary rule or cite a more authoritative source (for example, a constitutional provision) or offer equitable objections to the result. These rebuttals may or may not be persuasive in a given case, but the advocate knows what types of answers are acceptable.

For metaphor, the ground rules for rebuttal are still to be devised.[145] Often enough, an adversary may not even discern the concealed reasoning of a metaphor launched against him. Even where the metaphor is recognized as an argument by analogy, the lawyer confronted with a metaphor may recall words once addressed to John Marshall's opinions: " 'All wrong, all wrong,' lamented John Randolph of Roanoke, 'but no man in the United States can

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142. I. BERLIN, HISTORICAL INEVITABILITY 5 (1954). Berlin was not speaking of metaphor in particular, but the connection between the craving for unity and metaphorical language has been repeatedly noted. *See, e.g.*, O. BARFIELD, *supra* note 64, at 25 ("the perception of resemblance, the demand for unity, is at all levels the proper activity of the imagination . . . .").

143. The first quotation is from John Middleton Murray and the second is Murray's own quotation from Aristotle. J. MURRY, JOHN CLARE AND OTHER STUDIES 85-86 (1950).

144. All three devices draw on what Lon Fuller described as "as if" reasoning, borrowing the concept from the title of the philosophical work quoted often in L. FULLER, LEGAL FICTIONS (1967). The analogy, the legal fiction, and the metaphor all commonly ask the reader to think of one thing "as if" it were another.

145. Logicians do have conventions for evaluating arguments based on analogy but they do not seem to furnish easy answers in legal argument. *E.g.*, W. KILGORE, *supra* note 73, at 299-301.

tell why or wherein.' "[146] Nonetheless, lessons can be learned in how misleading metaphors can be identified and disarmed.

In most cases, the weak joints of the metaphor are likely to be found at one of several points.[147] The first source of weakness is easily overlooked. The properties that are commonly associated with a metaphor may be false to fact. The central nervous system, for example, may not be notably vulnerable to harm, whatever the common impression may be, or certain kinds of interference with it may be safe and salutary. Where the premise is false, the success of the metaphor serves only to perpetuate the falsehood. Unmasking a false but popular premise may be no easy task.

Next, even if the metaphor has the properties supposed, the implied claim of resemblance between the metaphor and its subject may be wrong or overstated. Merely as an example, this seemingly present resemblance is actually lacking when one describes a potential entrant in an antitrust context as someone "waiting in the wings."[148] By suggesting an actor offstage, waiting to enter but unseen by the audience, the metaphor has the substantive law exactly backwards.[149] Confronted head-on, the falsity of the comparison may be shown, undermining the metaphor.

The task of rebuttal is hardest when a general resemblance must be conceded between the metaphor and the subject. Unless there is an equally attractive competing metaphor, rebuttal is likely to require unraveling the analogy and challenging directly the false inference of fact or unsound norm it suggests.[150] In unwrapping the concealed analogy, the advocate is using his own precious time to tell his opponent's story. Worse still, by taking a figure of speech so seriously—though serious it is—the lawyer may look fool-

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146. Quoted in B. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 11 (1931).

147. What is *not* a weakness is the literal falsity of most metaphorical sentences. Instead, like a *repoussoir* figure in a painting, that falsity deflects attention past the literal meaning to the figurative content beyond.

148. *E.g.*, BOC Int'l, Ltd. v. FTC, 557 F.2d 24, 26 (2d Cir. 1979).

149. Under the doctrine of potential competition, a defendant can be classed as a potential competitor if it is *perceived* by the business community as a likely entrant. The Supreme Court has thus far not applied the doctrine when the defendant *actually* intends to enter but is not so perceived. *See* United States v. Marine Bancorporation, 418 U.S. 602, 625, 639 (1974) (reaffirming "perceived" potential competition doctrine and continuing to reserve decision on whether "actual" potential competition is a basis for relief).

150. As an example, consider the epithet "deep pocket" used to describe a defendant in a merger or predatory pricing case. The resemblance is there, for a large and rich corporation can be described as someone with a deep pocket. *See, e.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 490-91 (1977). The inference is false, if the defendant's spending capacity is taken to suggest that it has an inevitable incentive to engage in below-cost pricing. Once the false inference is identified, a defendant can argue that there are absent from the case other necessary conditions needed to make predatory pricing a rational strategy (*e.g.*, entry barriers). *See* P. AREEDA, ANTITRUST ANALYSIS ¶ 214 (3d ed. 1981) (greater staying power than rivals and prospect of monopoly gains after competitors exit are two possible prerequisites to predatory pricing).

ish. He will look even more foolish if, after the analogy is unwrapped, the metaphor proves sound and conveys an insight that strengthens the opponent's case.

In the end, the general presciption for judges and lawyers alike is vigilance, coupled with an understanding of the ways of metaphor in legal argument. At the heart of metaphor is a permanent paradox: metaphor enlightens by revealing common properties and by showing new connections; but because it equates two things that are not identical, the opportunity for distortion is always present. To quote a famous but misunderstood phrase, "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they often end by enslaving it."[151] Narrowly watched, there is much to be said for them.

IV. CONCLUSION

Montaigne said the games of children are to be taken seriously.[152] So, too, are the metaphors of judges. They cannot alter the physical world of aluminum plants and electrical distribution networks, but they can and do shape the intellectual world within which the governing antitrust rules for such facilities are framed. On any occasion, a child's game may be frolic and judge's metaphor mere embellishment. But often enough, when a judge invokes a figure, there will be a deeper meaning that repays study.

As one observes the same metaphors surface and resurface in antitrust opinions, their endurance and protean nature become even more apparent. Metaphors are useful, as we have seen, to prescribe or describe, to illuminate or enshadow, to discover or justify; and in antitrust law they have not only shaped doctrine but embodied it. Nor is their hold likely to be weakened by the growing influence of economics in antitrust analysis. As that analysis becomes more deeply and technically economic, judges and lawyers will resort to metaphor in order to simplify new abstractions and even to insinuate other values that can no longer be openly acknowledged.

The study of metaphor in legal doctrine surely ought not be confined to antitrust law. Antitrust is a difficult but narrow subject; its truths, such as they are, can in most cases be approached directly. It is safe to speculate that the impact of metaphor in legal decisions is more pronounced in fields of law that embrace a wider range of human conduct and seek to reconcile a greater

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151. Berkey v. Third Ave. Ry., 224 N.Y. 84, 94, 155 N.E. 58, 61 (1926) (Cardozo, J.). Judge (later Justice) Cardozo, as skilled in metaphor as any judge in our history, was surely advising caution and not abstinence. For, as Justice Frankfurter replied, "all instruments of thought should be narrowly watched lest they be abused . . . ." United States v. Scophony Corp., 333 U.S. 795, 820 (1948) (Frankfurter, J., concurring).

152. "[T]he games of children are not games, but rather to be regarded as their most serious actions." 1 M. DE MONTAIGNE, ESSAYS 105 (E. Trechman trans. 1935).

diversity of values. Whether a study of metaphor's influence in such fields—criminal law, torts, and constitutional law are obvious examples—bears out this prophesy remains to be seen.