Compulsory Access to Network Joint Ventures
Under the Sherman Act: Rules or Roulette?

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The “network” idea and the “joint venture” idea intersect dramatically in this era of rapidly expanding technology and market opportunities. Although each idea alone has broad policy implications, the intersection of the two raises critical questions about the antitrust doctrines which we have inherited from our forefathers.

As used here, a “network” is a mixture of facilities and rules which allows “primary” market competitors to exchange or share transactions, physical traffic, energy, electronic impulses, or information. Market competitors seek such exchanges in order to offer their customers new, better, cheaper, or more valuable services. Dramatically declining costs of communication, transportation, transmission, and computation now make it possible to link distant or specialized competitors in new ways. These links create competitive network markets where monopoly has previously been assumed the norm, or where there has been no market at all. As The Economist of London has emphasized, “[t]he new networks provide magnificent opportunities for innovation . . . . The sheer diversity of the
networks now being developed makes it hard to see what the finished system will look like."

A "joint venture" is an organizational device by which a number of enterprises share the risks, opportunities, and costs of a particular economic activity. It may be a corporation, a partnership, or some other form of syndicate. Its size, scope, duration, and capital requirements may vary enormously depending on its function, its market circumstances, and the needs of its partners. The joint venture idea has gained support in an era of global competition and "big ticket" commercial undertakings: it is seen as a particularly attractive vehicle for developing new products closely related to the independent businesses of the joint venture partners.

Joint ventures have proven particularly attractive devices for creating new networks. A joint venture allows for risk (and opportunity) sharing among "primary" market competitors, who generally control potential network traffic and can foster enhanced demand for network services over a longer period. These competitors are often spurred to invest in a joint venture network because of hoped-for competitive advantages in their primary markets or by a desire to cut their own costs substantially. At the same time, each competitor takes a direct financial stake in the potential competitive success of the joint venture within the "network" market itself. Smaller "primary" market competitors may wish to invest and thereby gain an equity stake in a network far beyond anything they could hope to create by their own individual efforts.

Today's network opportunities do not always mesh well with yesterday's legal rules. Legal uncertainty can thwart new and uncertain business opportunities. This Article focuses on how an old, vague, and broad statutory concept—purporting to punish "every contract, combination... or conspiracy in restraint of trade"—should be applied to membership and access policies of the

1. The Fruitful, Tangled Trees of Knowledge, THE ECONOMIST (London), June 20, 1992, at 85 (hereinafter Trees of Knowledge). There are recurring disputes over whether compulsory access should be ordered under § 1 based on a "boycott" or "essential facilities" doctrine. A particularly notable example concerns the attempt by Sears, Roebuck & Co. and its Dean Witter affiliate to obtain access to the Visa credit card network. See SCFC LLC, Inc. v. VISA U.S.A., Inc., 819 F. Supp. 956 (D. Utah 1993) ("Sears/Visa case"), appeal docketed, No. 93-105 (10th Cir. Aug. 31, 1993). The plaintiff obtained a jury verdict that Visa's rule prohibiting membership for the issuers of the Discover, American Express, and other competitive credit cards "has a substantially harmful effect on competition in the relevant market" and "the harmful effect substantially outweighs any beneficial effect on competition in the relevant market." Id. at 967 (quoting jury instructions). The district court decision upholding the jury verdict has been appealed to the Tenth Cir-
modern joint venture networks so central to our information-intensive and interdependent entrepreneurial world.

Three key errors appear throughout antitrust history in this area. First, antitrust courts and government enforcers have generally failed to perceive the significance of competition in “network” markets as a spur to innovation, efficiency, and cost-based pricing. Second, these courts and enforcers have focused almost exclusively on competitive handicaps faced by individual firms in “primary” markets, rather than on competitive opportunities made available by “network” markets. The third key error is the historic tendency to treat joint ventures—and joint venture networks—with great hostility. Joint ventures all too often have been condemned to the status of “cartels” or “boycotts”—or, less pejoratively, to the status of “public utilities”—rather than being treated as “productive partnerships” and encouraged as competitive forces.

These errors have resulted in a set of efficiency-retarding rules concerning joint-venture access. Two broad considerations control here. First and foremost, judicial restructuring of a joint venture to include unwanted partners is a conceptually flawed idea, and should be used by an antitrust court only in the extreme case of a monopoly network with no present or likely competitors in performing an important network function. Second, the compulsory access doctrine, as it has evolved, is inherently vague. This doctrine has turned on after-the-fact determinations by randomly selected factfinders that a joint venture's refusal to admit additional partners is “unreasonable.”

The core conceptual problem with compulsory access orders is obvious: mandating cooperation among business partners is almost as futile as ordering an opera singer to sing well. A compulsory access order is highly “regulatory” and necessarily thrusts the antitrust court into an ongoing supervisory role. “Free riding” by new partners is also a problem, unless the court has the ability to determine the full value of the costs, efforts, and risks incurred or undertaken by the founding partners, and is willing to charge the late-arriving partner for them. Furthermore, a compulsory access order cannot eliminate the basic conflicts between an outsider and its new partners. At best, it simply shifts the conflicts from the courthouse to the governing bodies of the joint venture. For this reason, com-

3. See Lumley v. Wagner, 42 Eng. Rep. 687, 693 (1852) (classic decision in which the chancellor declined to enter a specific performance order against a defaulting opera singer).
Compulsory access is an invitation to future antitrust (and fiduciary) litigation when the newly admitted member believes that it is being victimized competitively by the majority of the joint venture's directors, members, or shareholders. The prospect of such battles no doubt tends to discourage would-be partners from forming new joint ventures.

This Article focuses sharply on past judicial decisions and government enforcement actions, and on the vague compulsory access rules they have generated. The Article asks whether the substantive antitrust rules and legal processes governing compulsory access to network joint ventures can be made sufficiently rational, definite, and predictable to encourage tomorrow's joint venture partners to go forward. Participants in potential joint ventures must be confident that rational commercial risks are worth taking, and that their ultimate success is not likely to be randomly punished, diluted, or confiscated through antitrust litigation.

We do not start with a clean slate. Other countries, struggling with the "joint venture" concept under their own anti-cartel laws, may have some advantages because their experience is limited and entirely modern. Unfortunately, American courts—and the Supreme Court in particular—have not always exhibited a sophisticated sensitivity to competition at the "network" level or to the incentives to create networks. The cause is not hopeless: we just have to emphasize the "efficiency" themes of our modern antitrust history, while leaving some older, populist baggage at the side of the road.

To this end, the critical issues are (1) how the specific substantive rules under Sherman Act section 1 can be more clearly articulated, and (2) how burdens of proof, jury instructions, and summary judgment standards should be applied in joint venture compulsory access cases. These "technical legal issues" affect how cases come out and, if consistently applied, may ultimately affect how prospective joint venture partners appraise potential risks. These issues arise regardless of whether the compulsory access case is framed under the "boycott" or "essential facilities" doctrine, since in the joint venture context they are essentially two sides of the same page, written in slightly different words. There is a pressing need for clarity, economic rationality, and order in assessing claims for

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compulsory access. In the end, competition among networks, rather than judicial compulsion, should be the preferred option.

I. NETWORKS AND THE MARKETS FOR NETWORK SERVICES

The modern network is a mirror of our times. It reflects the breakdown of localism, the enormous decline in long-distance transportation and transmission costs, the ever-growing efficiencies of computers, and the opportunity to achieve economies of scale, scope, or specialization by linking together activities that formerly had been separate (or even non-existent).

A. Networks Old and New

The network concept focused on in this Article has been the area of the greatest difficulty in antitrust. As explained above, a network is a combination of facilities and rules by which participants in an underlying market (the "primary" market) may interchange traffic, electronic impulses, "buy" and "sell" orders, and energy information, among other transactions. This definition does not reach network end-users (such as university computer networks), nor does it reach broad alliances of the type now emerging in the health care sector.

The traditional nineteenth-century network was a securities or commodities exchange. It was a physical location at which traders and brokers agreed to consummate transactions during certain hours in certain ways. The location might have been a coffee house, a street corner, or just a big room. By the end of the nineteenth century, railroads were creating network facilities at which traffic could be interchanged in classification yards. City banks were also creating some modest network facilities to exchange checks and drafts.

The twentieth century has witnessed an explosion of networks. The long-distance network created by American Telephone and Telegraph Company ("AT&T") to connect local telephone companies and electric power pools connecting different local utilities are familiar and well-established examples. NASDAQ (National Associa-

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5. For a discussion of the Internet network of university users, see Trees of Knowledge, supra note 1, at 85–86. See also Mary Lou Carnevale & John J. Keller, Cable Company Plans to Connect to the Internet, WALL ST. J., Aug. 24, 1993, at B1 (discussing cable television's connection with Internet).


7. Apparently, AT&T had used its control of the long distance network to co-
tion of Securities Dealers Automated Quotations) and local real estate multiple listing services are still other, newer examples of the type of network discussed in this Article.

A "network" is concerned with both facilities and rules. The facilities side is easily envisioned: stock exchanges and railroad classification yards are familiar examples. The rules side is more subtle, but perhaps more important. For a network to operate efficiently, its participants must agree to accept technical and operational standards for "network" transactions, including nondiscrimination rules, interface arrangements, and perhaps predetermined compensation. Such rules should be designed to avoid opportunism or uncertainty, and thereby to improve the network's efficiency.

B. The "Primary" and "Network" Levels

The "network" market for interchanging transactions, traffic, or information must be contrasted with the "primary" market, where competitors deal directly with consumers and users. Thus, in a "primary" market, a utility sells electricity to retail customers; a bank offers checking accounts and credit cards to consumers; a railroad solicits traffic from shippers; and a retail broker solicits stock exchange or real estate multiple-listing service transactions from potential buyers and sellers.

The relationship between "network" market providers and the "primary" market participants may vary substantially. Thus, the "network" service may be provided by:

1. An independent third party contracting with "primary" market competitors;
2. A joint venture of "primary" market competitors (perhaps the leading example);

8. The examples are legion. Electronic Data Services ("EDS") and Affiliated Graphic Systems ("ACS") are two especially prominent data processors that have created networks to serve "primary" market participants in both banking and retail merchant industries.

9. The traditional exchange markets fall within this category (e.g., the Chicago Board of Trade, New York Stock Exchange), as do the local bank clearinghouses and joint rail terminal facilities. Local real estate multiple listing services are an important recent example.
3. A single leading “primary” market competitor offering its services to other “primary” market participants;¹⁰
4. A fully integrated competitor using the network only on a “captive” basis in support of its own “primary” market offerings;¹¹
5. An independent third party offering the “network” service directly to end-users using links provided by the “primary” market entities;¹² or
6. A governmental entity providing a “network” service, usually on a subsidized basis, for the benefit of “primary” market participants and their customers.¹³

¹⁰ The traditional AT&T Long Lines Division is a familiar example. The “shared proprietary” bank ATM networks (e.g., the MAC network in two middle Atlantic states run by Philadelphia National Bank) are also examples.
¹¹ The American Express credit card network would be a familiar example in this category. The modern airlines “hub” operations (Delta at Atlanta, USAir at Pittsburgh, etc.) and the Federal Express “hub” at Memphis offer additional examples.
¹² The modern telephone system is one outstanding example of this category. The system may depend heavily on the intervention of the Federal Communications Commission and the antitrust court to compel the “primary” market participants (the local telephone companies) to grant equal access. In any event, MCI, AT&T, and other long distance networks compete directly for long distance “network” services in a way that would have offended our fathers’ generation.
¹³ The pre-1986 Federal Reserve System is the obvious example. It was erected to deal with a clear market failure in the “network” market for check interchanges:

Before 1914, the private sector had no system for clearing checks and other paper instruments. Rather, there was a complex maze of ad hoc private arrangements between various city and rural institutions that had different clearance charges and circuitous routing. Each bank generally sought to collect exchange for collecting another bank’s checks, while trying to avoid having to pay exchange itself. Correspondent banking arrangements were used to collect checks, but city correspondents were often considered by country banks to impose excessive exchange charges. Therefore, checks were sent on circuitous routings to avoid payments of exchange.

See DONALD I. BAKER & ROLAND BRANDEL, THE LAW OF ELECTRONIC FUNDS TRANSFER SYSTEMS ¶ 22.01[1] (1988) (citing BENJAMIN H. BECKHART, FEDERAL RESERVE SYSTEM 23 (1972); Hal S. Scott, The Risk Fixers, 91 HARV. L. REV. 737, 741 (1978)). After 1914, the Federal Reserve System then provided “network” services (including check clearing and wire transfers), without additional charge, to Federal Reserve System member banks, and became a virtual monopolist in intercity check and draft clearing. Id. Congress ultimately required full-cost pricing of Federal Reserve “network” services in 1980 because the prior “free services” philosophy was at odds with a competitive “network” market. Id. ¶ 22.01[3] (“The legislative history of the full-cost pricing provision . . . does indicate that Congress intended that pricing was to be set at competitive levels, so that the Federal Reserve banks would be on a par with private businesses and that the private-sector alternatives would be able to compete effectively with the Federal Reserve System.”). Today, a variety of private alternatives are available in the markets for clearing checks, drafts, and wire transfers. See id. ¶ 11.03.
Any network may face competition in performing the “network” market function. Competition may come from another similar entity operating in the same way (e.g., another stock exchange or rail yard in another city). Competition may also come from a network entrepreneur, or from a “primary” market participant that is so large and dispersed it can internalize the “network” market function. Finally, a network may face “bypass competition” from some large members that choose to deal directly outside the facility. Bypass competition is illustrated by “direct sends” in banking, “run-through trains” or “alternative gateways” in railroading, or the “upstairs market” in securities.

With the emergence of highly efficient computer and communications systems, the modern network need not be tied to a particular physical location. Instead, its central function is the interchange of information over a (virtually) distance-insensitive set of electronic links, based on established rules and sophisticated, expensive-to-create computer programs. As a result of modern electronics, some of the most famous network facilities are technologically obsolete. What is done in the pork bellies pit at the Chicago Board of Trade or on the floor of the New York Stock Exchange could be, and often is, done more effectively over a computer network such as NASDAQ. Even a big rail classification yard, such as the Potomac Yard across the river from Washington, D.C., is increasingly obsolete, as computers enable participants to organize “run-through” trains.

With the emergence of networks based on information-processing capability, rather than physical location, has come increased competitive opportunity and concomitant risk for the network entrepreneur or joint venture. This increased competitive opportunity and risk is sometimes combined with increased ability for network participants to differentiate themselves as “primary” market competitors. One computer/communications network may differ from another in terms of how it is configured and programmed, how fast and fail-safe it is, and other technical details, but what really differentiates between these two is the information they transmit and the users they reach.

Moreover, the decline in a physical site as the central arena of network activity and the rise in network differentiation creates greater opportunity for competition at the “network” level. Whether this competition ultimately will occur depends on a variety of factors, including the willingness of network owners to accept the risks and opportunities inherent in competition at the “network” level. A key question here is whether the particular “network” function requires universal interchange among all “primary” market partic-
ipants and, if so, whether this dictates a single facility, be it a joint
venture or a proprietary facility, to route the "network" traffic.
Standardized "network" rules for interchange and settlement may
in fact obviate the need for a monopoly "network" facility for effi-
cient interchange, as has been seen frequently in fields as diverse
as telephones, banking, and railroads.

Competition within "network" functions has many of the same
benefits associated with competition generally: "network" competi-
tion puts continuous cost pressure on network operators (including
joint ventures); it drives prices down toward costs; and it encour-
ges innovation and improvements in reliability. In addition, "net-
work" competition can pressure the network operator (including a
joint venture) to include features that differentiate it from other
networks, thereby offering comparative advantages to "primary"
market participants.

In fact, "primary" market competition usually drives service
design and differentiation at the "network" level. If the "primary"
market is competitive, aggressive participants may see a competi-
tive advantage in being able to offer a differentiated "network" ser-
vice on an exclusive, or at least quasi-exclusive, basis in its local
area. If this perception is shared by others, it may in turn encour-
age the creation of an alternative network—either as a joint venture
or as a proprietary network—to meet this opportunity.

C. The Rationale for Different Network Types

The efficiency reasons for networks are diverse, overlapping,
and often quite compelling. These reasons include economies of
scale, scope, and specialization; pure interchange; market creation;
risk sharing; and product creation.

1. Economies of Scale

By combining the traffic of numerous users in communications
and pipelines, networks tend to decrease per-unit transmission costs
very sharply as the throughput increases. Similarly, electric power
pools enable the pool participants to operate larger and, hence,
more efficient generators with less backup than if they did not
share generation facilities through the network. Computers are also
subject to very large economies of scale. Many information networks
seek to achieve economies by pooling their traffic at a large switch.

2. Economies of Scope

Some networks are driven by the perceived need to have joint
service widely (or even universally) available. This is clearly true of
many consumer payment networks: the value to the consumer of a plastic card increases if the card is widely useable. However, a perceived need for broad or universal access to "primary" market participants does not necessarily dictate a single monopoly network. Separate networks can agree to interchange certain types of traffic without giving up competition with other businesses.

3. **Economies of Specialization**

A network may enable different participants to perform particular functions, while relying on other network participants for complementary functions. Thus, for example, a bank may participate in an automated teller machine ("ATM") network by (1) only issuing cards, but not deploying ATMs; or (2) deploying ATMs without establishing a strong card-base. In this respect, a network may be of special value to the smaller participant which seeks a specialized niche.

4. **Pure Interchange**

Pure interchange has been perhaps the most classic function of network joint ventures. The network simply provides whatever rules and facilities are necessary to allow its members to interchange traffic or transactions with each other on stable and efficient terms. Terminal railroads and bank clearing houses are classic examples: each member pushes its traffic into a physical facility, where it is "sorted," if necessary, and then sent out to other members. An electric power pool is another example where there may be multiple interchange points and all the facilities may be owned by individual members.

5. **Market Creation**

The typical stock exchange floor or real estate multiple-listing system is a very specialized form of network joint venture. Economic theory and common sense point to the same result: a market in which the maximum number of "buy" and "sell" orders are matched, with full information, is a market which will tend to be highly efficient. This type of market will have the narrowest spread between bids and offers, and, in the absence of changed information, the

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least amount of fluctuation. Old-fashioned stock exchanges and modern computer markets do the same thing: they concentrate transactions in one "place" so that all participants can buy and sell based on their own market judgments.

6. Risk Sharing

Risk sharing is a common application of the idea of economies of scale. A network can provide each member with some protection against, for example, an outage at its own facilities, as well as alternative routing in the event that part of the network itself goes down. Risk sharing is particularly evident in electric power pools, where reinsurance against a member's own generation facility is a key factor. It is also very important in communications networks, where backup against partial network outage or overload is essential.

7. Product Creation

Where the network creates something valuable and distinctive that depends on consumer usage, the network will have to create a brand identity so that individual consumers can know when, where, and how the network offering is available. AT&T and MCI are highly visible examples of telephone "networks." Visa and MasterCard also clearly show how a joint venture offering may come to be a powerful trademark in the eyes of the public.

D. Network Visibility and Invisibility

The ultimate customer often does not know or care what happens in the "network" market. The retail electric customer will not know whether his power was generated by the local utility or bought through the pool. The bank customer is also surely indifferent to whether her checks are cleared through the local clearing house, the Federal Reserve System, or by a "direct send." The rail shipper will often be indifferent to whether its transcontinental traffic is interchanged at Chicago, St. Louis, or Memphis (absent a disproportionate delay or cost increase). Similarly, the typical securities customer does not know or care whether his transaction is done on NASDAQ, the New York Stock Exchange floor, or the Pacific Exchange, so long as his broker gets him a good price.

But there is another kind of network: the modern consumer network. This network could be called a "product-creating" network, as opposed to the traditional "invisible back office" network. A "product-creating" network combines facilities for communication, storage, and sorting; key rules for guaranteed acceptance and inter-
change of network transactions; and a trademark to tell the public where the network service is available (a mark which may have to be supported by a lot of advertising and promotion by the network or its participants).

These "product-creating" networks are frequently joint ventures, and are most familiar in the financial services area. In these networks, the "primary" market competitor may use network participation to provide its customers with access to services of other primary market participants far away. The network offering is frequently a "value-added service" designed to differentiate the local "primary" market participant from its competitors. Used this way, the network service enables smaller, more localized (or more specialized) competitors to compete more efficiently with larger, more fully-integrated, or geographically dispersed enterprises.

Numerous long-distance, differentiated networks have been created over the years. Nearly all have long histories of antitrust litigation. Flowers by wire, one-way truck and trailer rentals, and long distance household moving offer illustrative joint ventures going back to the 1950s. The Visa and MasterCard credit card systems are more recent, and now more ubiquitous, examples of long-distance, differentiated networks.

A new network "product" may also be created on a local or regional basis. The best example may be bank ATM networks. In such a network, a single leader (or a joint venture) groups together a set of banks under a single logo according to prescribed interchange rules. Each network member accepts each other member's

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16. See, e.g., National Bancard Corp. (NaBANCO) v. VISA USA, Inc., 779 F.2d 592, 597-605 (11th Cir.) (applying Sherman Act § 1 to credit card industry), cert. denied, 479 U.S. 923 (1986); Worthen Bank & Trust Co. v. National Bank Americard, Inc., 485 F.2d 119, 125-30 (8th Cir. 1973) (same), cert. denied, 415 U.S. 918 (1974); see also infra part III.B.1 (discussing antitrust disputes in credit card area).
ATM card at its own ATMs in return for a network-set fee. This network service may be offered on a competitive (or “differentiated”) basis to some banks on the local market, or on a universal (or “utility”) basis to all primary market participants.17

E. Incentives to Create a Joint Venture Network

In the “network” context, a joint venture may have very practical advantages, particularly for a start-up effort. A network joint venture (“NJV”) provides a way of allocating initial costs and risks. In particular, it gives those with potential “network” traffic a direct economic stake in the success of the “network” enterprise. A joint venture may also offer a significant psychological advantage: it provides its members an opportunity for direct participation in the ongoing governance of the organization. By contrast, a “shared proprietary network,” run by a single enterprise, is governed by a series of vertical supply and licensing contracts which may have to be renegotiated in rapidly changing circumstances.

Initially, potential network partners must ask whether there is sufficient demand for their potential “network” service to justify the capital and operating costs necessary to create the network. By joining together “primary” market competitors likely to be the substantial sources of potential “network” traffic, the NJV format offers an opportunity to create mutual obligations that reduce risks and thereby increase commercial viability. Overall viability, however, is still likely to depend on how much the new “network” service improves existing or potential alternatives, and how costly the network is to create and operate.

The rationale for some NJVs is obvious. For example, local bank clearinghouses and regional electric power pools are much more efficient than bilateral interchanges of traffic, and do not necessarily require significant investment in “network” facilities. Other NJVs, while perhaps equally attractive, may be very capital-intensive and may impose heavy “penalties” on participants if the venture proves missized. Pipelines and large-scale railroad terminal facilities are two clear examples. Still other NJVs may be risky in that their success will depend on their ability to generate substantial demand for their network offering among “primary-market” participants and customers. This is particularly true of “product-creat-

ing" types of banking interchange networks. Thus, credit card joint ventures, especially Visa and MasterCard, have proven to be great successes and integral parts of a great many consumers' lives. ATM networks, however, while attracting a substantial following, have generally not created the kind of universal brand recognition associated with credit cards. Finally, electronic point-of-sale debit networks have ranged from marginally visible to nonexistent in this country.

In sum, the creation of a new network, especially a consumer-oriented NJV, typically involves genuine uncertainties and real risks. Consequently, new NJVs are often foregone or curtailed because decision-makers perceive compulsory access orders as a potential "tax on success" to be collected by late arrivers or free riders.

F. Competitive "Network" Markets and Their Importance

Competition in "network" markets generally produces the same economic benefits generated by competition elsewhere: it drives prices down toward costs, encourages innovation, and rewards successful anticipation of user demand. By the same token, network monopolies can have the same detriments associated with monopolies generally: poor service, discrimination, lack of innovation, and high prices. There are, of course, some exceptions: economies of scope and scale may dictate natural monopoly as the only operationally efficient mode in a particular "network" market, and may force regulation as a decidedly second-best solution.

"Network" competition is, in fact, a thoroughly familiar idea. Long distance telephone service is a highly visible example with significant antitrust history,\(^{18}\) and bank credit card services are not

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18. A long distance network connects local telephone systems (the "primary" market participants) which are, in turn, directly connected with the ultimate customers. Historically, AT&T provided the long distance "network" service on a monopoly basis, which was hardly surprising since its local operating companies had acquired control over at least 70% of the local telephones in the "primary" markets. See, e.g., MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1092-100 (7th Cir. 1983); In re Competition in the Interstate Interexchange Marketplace, 5 F.C.C.R. 5880, 5881-85 (Interstate Competition), reconsidered, 5 F.C.C.R. 7569 (1991), further reconsidered, 7 F.C.C.R. 2677 (1992). Eventually, however, as a result of government antitrust enforcement or regulatory action, AT&T was separated from the local telephone monopolies, and competition was opened up in the long distance "network" market—with the local monopoly telephone companies being required to reprogram their switches to allow consumer choice among competing long-distance networks. See MCI, 708 F.2d at 1096-97, 1131-53, Interstate Competition, 5 F.C.C.R. at 5886-97. Obviously, the long distance "network" market is very large, both in revenues and dollars spent by competitors for advertising. Making it competitive was a major antitrust and "public interest" goal of the Department of Justice and the Fed-
far behind. Almost any network enterprise faced with competitors has an incentive to compete vigorously for the traffic in the “network” market, as additional traffic will tend to drive down unit costs per transaction or improve the scope of the network’s coverage. In other words, competition will tend to improve the economic efficiency of the network, whether calculated in terms of economies of scale, scope, or both. This is true of competition for traffic on a pure transaction basis or in an NJV for new members.

Where the network creates a new product, the competitive considerations are somewhat different. The network operator (or joint venture) has to think about the comparative value of “volume” and “differentiation.” In other words, the network operator wants to make the offering more attractive to network users and consumers when compared to alternatives in the “network” market. This may be reflected in the relative cost of performing the network function, or in the relative extent of coverage. It also may be heavily influenced by existing or potential members’ perception of value. With a product-creating NJV, value may be enhanced by exclusivity associated with the NJV’s trademark. The net result is that competitive considerations related to attracting and retaining critical members are very important to the network’s survival and success in marketing a differentiated network product.

There are a variety of ways in which a network may make itself more attractive to potential members and users. Almost any NJV (even an “invisible back office” NJV) will compete for members and transactions on the basis of the relative speed, efficiency, and reliability with which it performs the network function. It will also compete on the basis of the fee charged for use of its facilities (in the context of a banking network, a “switch fee”).

Product-creating NJVs have a variety of additional factors to consider. The first factor is design. How operationally efficient is the product? How attractive is it likely to be to ultimate users in the primary market? This aspect of competition includes the procedures for prompt authorization of transactions, reversal of errors, and allocation of losses and fees.


19. See infra part III.B.1 (discussing antitrust history of bank credit card systems).

20. See infra part III.C (discussing history of Canadian credit card systems).
Product-creating NJVs may vary the terms of participation in order to compete for new members or transactions. Many such NJVs, for example, have network-set interchange fees to induce individual participants to take the kind of action desired by the network.21 For example, in the ATM context, the interchange fee is used to induce participants to accept the other network members’ cards at their ATMs, and to encourage ATM deployment. Thus, the interchange fee is a charge set by the network to provide compensation for access, and paid by the card-issuing bank to the ATM-owning bank. If the NJV partners felt that an inadequate number of network cards were being issued, they might reduce the interchange fee to make the network more attractive to incremental card issuers. Conversely, if it felt that there were an inadequate number of network ATMs deployed, either generally or in certain locations or types of locations, the network might adjust the interchange fee upward to induce those kinds of deployment.22 The NJV may also compete in the “network” market by offering lower prices for switching transactions than network alternatives provide.23 Finally, a product-creating NJV may compete in the old-fashioned way, by creating advertising directed at consumers in the “primary” market to convince them of the superiority of the network’s offering. Visa and MasterCard have offered many familiar examples of this, including advertising directed at their “network” rivals (such as American Express and the Sears “Discover” card).

G. Competition in the “Network” Market Between the NJV and Individual Members

At times, some NJV members may compete directly with the NJV itself. For example, two high-volume participants may enter into a “direct send” arrangement that bypasses the NJV interchange facility, regardless of whether the NJV is a bank clearinghouse, a


22. Having at various points advised ATM networks on interchange fees, I am quite certain that this is exactly the kind of calculation that goes on in many instances. See BAKER & BRANDEL, supra note 13, ¶ 23.07[5] (discussing “interchange fees” generally).

23. The interchange fees offered by MasterCard in Canada are significantly lower than those offered there by Visa. See infra text accompanying notes 276–78 (discussing fees charged by MasterCard and Visa).
terminal railway, or something else. In addition, where the NJV creates a consumer product, it may compete with (i) other enterprises and NJVs offering similar products, and (ii) a very large member offering a proprietary competitive product. Moreover, in the payments area, any joint-venture-created product must also compete with traditional forms of payment—cash and checks—for the loyalty of consumers, merchants, and banks. In other words, an NJV is not exactly similar to a unitary enterprise, nor to a classic cartel. “Free rider” problems are also most common in product-creating NJVs, although “bypass competition” may occur even in “invisible back office” NJVs.25


25. “Network” competition between the NJV and a member is very nicely illustrated in two much-discussed cases involving product-creating NJVs that imposed compulsory routing rules for transactions based on the “network” logo. In American Floral Services, Inc. v. Florists’ Transworld Delivery Ass’n, 633 F. Supp. 201 (N.D. Ill. 1986), a leading floral service network (FTD), published catalogs with floral displays. These flowers could be ordered by wire. Its rules required that an FTD catalog order received by a member had to be transmitted and filled by FTD’s wire service and clearinghouse. The other leading floral service network, Teleflora, had a similar rule. The plaintiff was what florists called a “pirate”: a member who received an FTD order and used an alternative arrangement to transmit and fill the order. The court concluded in a well-reasoned opinion that “the Pirate Order Rules are not impermissible restrictions on interbrand free riding. Instead, they are legitimate agreements ancillary to the cooperative agreements between florists and FTD or Teleflora.” Id. at 219–20.

Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987), involved a roughly analogous situation created in the household moving business by federal trucking deregulation. Defendant Atlas Van Lines was a cooperative venture between the network operator, Atlas, and the individual local moving companies that participated in the Atlas program. It was something less than a full “joint venture” in form, but the local moving companies were heavily represented on the Atlas board. Accordingly, the court treated the challenged rule as a horizontal agreement. Rothery Storage, 792 F.2d at 215. After trucking deregulation, a local moving company could obtain its own authority to operate trucks and no longer had to use Atlas’ operating rights. This meant that the local moving company could take an “Atlas” order, ship it on its own truck using its own operating authority, and pay Atlas nothing. Atlas then adopted a rule requiring that “Atlas” orders received by the local mover be transported under the operating authority of Atlas. This rule was upheld in a D.C. Circuit opinion in which Judge Robert Bork explained:

To the degree that a carrier agent uses Atlas’ reputation, equipment, facilities, and services in conducting business for its own profit (under its own operating authority), the agent enjoys a free ride at Atlas’ expense. The problem is that the van line’s incentive to spend for reputation, equipment, facilities, and services declines as it receives less of the benefits from them.

Id. at 221.

Judge Bork then concluded that the Atlas-imposed routing restraints were “ancillary to the contract integration of the joint venture that constitutes the Atlas
All of this simply illustrates the tension which can develop in the “network” environment between a single member and its NJV partners who must share the costs and burdens of the “network” operation.

II. THE SUPREME COURT AS A SOURCE OF CONFUSION, CONFLICT, AND HOPE

The framers of the Sherman Act did not concern themselves much with small details. Even had they been willing to do so, they would have had a nearly impossible task in trying to imagine the modern network joint venture, in which often competitive firms participate as interdependent partners in creating a network service. Instead, Congress left the details to the federal courts. The courts, consequently, have had to wrestle with and define both the substantive concepts and the processes of network services. The primary job of a court, however, is to decide each case through even-handed consideration of the evidence and arguments presented by the parties. Even appellate judges have a difficult time worrying much about the incentives and deterrents to private risk taking that legal rules or judicial processes might create.

The United States Supreme Court had at least three chances to deal with an NJV during the first half of the twentieth century: the St. Louis Terminal case decided in 1912,\textsuperscript{26} the Chicago Board of Trade case decided in 1918,\textsuperscript{27} and the Associated Press case decided in 1945.\textsuperscript{28} Each is discussed extensively below. The latter two are major sources of the legal confusion and uncertainty that has so clearly affected the second half of the century.

In St. Louis Terminal, the Court confronted a practical monopoly at the “network” level, based on an NJV’s control of a physical site that could not be bypassed or duplicated. It ordered that equal access be granted to all “primary” market competitors.\textsuperscript{29} In Chicago Board of Trade, the Court confronted a powerful NJV commodities exchange that was trying to prevent a form of “bypass competition” to the exchange floor from some members who traded at night. In a classic opinion by Justice Brandeis, the Court ignored the mar-

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\textsuperscript{26} United States v. Terminal R.R. Ass'n, 224 U.S. 333 (1912).
\textsuperscript{27} Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).
\textsuperscript{29} St. Louis Terminal, 224 U.S. at 411–12.