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THE SUPREME COURT AND THE ANTITRUST LAWS: A CRITICISM OF THE CRITICS

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Until a few weeks ago, I had supposed that I was morally obliged to present a spirited defense of the Supreme Court's antitrust jurisprudence. After all, in his dissent in the Von's case, Mr. Justice Stewart observed that "in litigation under Section 7, the Government always wins." And in Grinnell, Justice Fortas accused his brethren of aiding and abetting the Department of Justice to the point of approving a market definition of the "strange, red-haired, bearded, one-eyed-man-with-a-limp" variety. I thought such favors deserved a little lawful reciprocity.

But a few weeks ago El Paso came down and by the conclusion of the verbal thrashing administered by the majority opinion, it was the Government, not the market, that resembled a "strange, red-haired, bearded, one-eyed-man-with-a-limp." For good measure, the Supreme Court earlier this week summarily and unanimously affirmed the Atlantic Coast Line merger decision, and ignored the Government's suggestion that plenary review was needed. Although Procter & Gamble helped dry my tears, I no longer sense a moral imperative to be an apologist for the Court. But this does not bar me from taking a critical look at the critics of the Court.

I will confine myself largely to the efforts of the Supreme Court in the merger area. The performance of the Court is most dramatically visible here--in the number of cases, the opportunity to develop doctrine, and the importance of the issues. There is no area in which the winds of criticism swirl with greater force.

No doubt I greatly oversimplify when I refer to four schools of antitrust criticism: the schools clearly overlap and my description does each some injustice. But with that confession, I advance the following categories as workable ones:

One, critics such as Professor Galbraith, who doubt the relevance of the marketplace and, therefore, of antitrust to the modern economy, and, in any event, belabor the Supreme Court for barring efficiency-producing mergers.

Second, the thinking, represented by the Fortune Magazine and Wall Street Journal editorial pages, that the marketplace is indeed the regulator and so sacrosanct that the Supreme Court errs in permitting the Government to tamper with the structure of the market.

A third group--comprised principally of the antitrust bar and a chorus of multiple voices of Milton Handler which echo and re-echo in the bar association journals and sundry law reviews--is convinced the Supreme Court lost its virtue once it abandoned the tried and true rule of reason, and in other respects has been unlawyerlike in its behavior in the merger field.

A fourth source of criticism are the economists or the economically-oriented, who, newly elevated to a position of respectability in antitrust, keep raising embarrassing questions.

Let me review the criticism in greater detail in order to identify the major issues raised. I begin with Galbraith, whose basic predicate is that modern technology requires a stability and planning that is inconsistent with the dictates of a competitive marketplace. I shall leave for other forums the ultimate question of the validity of the Galbraithian thesis; I think it enough here to suggest that the factual bases for his most underlying assumptions are fragile. One thrust that Galbraith makes is, however, pertinent to today's discussion: to buttress his claim that we in antitrust are engaged in a merely symbolic exercise--a charade--he notes that antitrust does nothing about existent monopolies--so long as they do not use their power in a predatory or abusive way--but steps in smartly to bar smaller corporations from combining to enable them to achieve economies needed to compete effectively with giants. This criticism of the Supreme Court's antitrust jurisprudence reappears in slightly different guises in the other schools of antitrust criticism. We shall have to consider it.

What I call the Fortune-Wall Street Journal criticism has in common with the Galbraith thesis the notion that the antitrust laws are impeding the rational organization of business by preventing the attainment of the size needed to be efficient. But the emphasis here is on the sanctity of the market as regulator, not on its irrelevance. A basic theme is that the Government should not tamper with what the market dictates, including the merger market. The Government should

have no concern with market structure but has a role only as a policeman, to step in if there has been a crime committed and to enjoin the perpetrator. If one asks whether this restricted role for antitrust is enough, he is told that the forces of competition are legion and are to be trusted--in particular, the competition afforded by substitute products. I am quoting Fortune when I say: "the beer competes with the candy; the trip to Miami competes with violin lessons for Junior." It has elsewhere been suggested that thirsty golfers may not appreciate a chocolate bar. But if not elegantly made, there are two points implicitly made in this criticism which reappear elsewhere and deserve attention: one, the Supreme Court has placed an unwarranted emphasis on the economic doctrine that the structure of a market may affect its performance; two, the Supreme Court has gerrymandered product definitions in an economically unrealistic manner in its merger cases.

The third group of critics stress methodology. They protest the Supreme Court's abandonment of the rule of reason used to such good purposes, I assume, in the Brown Shoe case. They complain that the Court has instead evidenced a simplistic concern with concentration and has swallowed oligopoly theory in one great indiscriminate gulp. They also believe the Court is behaving unwisely, if not unjudiciously, in making overly broad pronouncements and in improvising market definitions to fit the Government's theory of illegality. The questions of the rule of reason and of judicial behavior deserve comment.

The economists, the final group of critics, observe that there may be trade-offs in economic welfare between the increased economies that may come with size resulting from a merger and the decreased pressure to compete that may come with an increase in concentration. They argue that merger law should not be impervious to the question whether more is gained by the first factor than is lost by the second. The question raised is serious and deserves consideration.

I think I can fairly compress the pertinent issues that have been raised by these critics of the Supreme Court's antitrust policy, as exemplified by its merger decisions, into these three questions:

- (1) Is the Court's analytical methodology fundamentally defective because of its failure to adhere to a rule of reason and its undue commitment to the theoretical implications of market structure?
- (2) Is the substance of the Court's doctrine fundamentally erroneous because countervailing efficiencies are ignored in a manner which in the long run will cost the public and the economy dearly?
- (3) Is the Court relaxing its standards so that market definitions are tailored to the Government's needs and sweeping decisions are rendered without need for them?

I shall begin by considering the argument over the basic methodology employed by the Supreme Court in its merger cases. The rule of reason is proposed as one of the great achievements of Supreme Court jurisprudence and it is argued that it is the failure of the Supreme Court

to consider all the facts and the imprudent commitment to simple rules of presumptive illegality based on economic theory that has led it astray.

The terms of this debate have by now been spelled out time and time again. The proposal is that the rule of reason approach would encompass all vital considerations and lead to greater justice. The counter-arguments are that to effectuate the Congressional intent it is essential that understandable and manageable rules be set forth for the guidance of the lower courts, the bar, and the businessman. It is also argued, with good reason, in my judgment, that reliance on two or three key factors, indicated by economic theory to be important, is more apt to provide correct predictions of future anticompetitive effects than arguments based on a dozen different factors, the economic relevance of several of which may be doubtful or self-cancelling.

Let me make my point by considering the case to which the defense bar points with a poignant affection as indicating the path to which the Supreme Court should have confined itself in deciding cases under Section 7: United States v. Brown Shoe. I have always been astonished to hear Brown Shoe revered by such unlikely worshippers. In some respects Brown Shoe represents a more radical merger decision even than such much belabored opinions as Pabst-Blatz and Von's. In Brown Shoe, a situation where the industry was relatively unconcentrated, the Court held unlawful the merger of competing shoe retailer chains holding as little as 5% of a market and the vertical acquisition of a retailer representing less than 2% of the national market. Yet though Brown Shoe was extraordinarily stern in result, it served in only a

limited way to guide the conduct of the courts, the bar, and the business community. I doubt that two or three Brown Shoe decisions a year--all in favor of the Government and on whatever slim evidence--would have any significant impact on the executive with a gambler's instinct, hopeful that on his turn around he could find the factor which, in the mysterious alchemy of a full-fledged rule of reason, would transmute a base defense to gold.

I suggest that the Court's evolution of a relatively simple presumptive rule on horizontal mergers, in reliance on the fundamentals of oligopoly theory, represents a substantial judicial achievement. It is not a departure from the rule of reason. It is a development of it, reflecting both the increased insight made available by economic doctrine and the practical needs for predictability and guidance. The Court is beginning, with the El Paso, Penn-Olin, and Procter & Gamble opinions, to sketch in the appropriate factors in the rules on conglomerate mergers.

I doubt the appropriate question is whether the Court should use rules that are more precise and lead to more predictable results than an open-ended rule of reason. The real question is whether the more precise rules are properly framed. It is this inquiry which leads us to the next major issue--is the Court, in its heavy reliance on concentration and market shares for disposition of horizontal mergers, in effect hurting the economy because of the adverse effects of such a rule on the efficiencies which may be otherwise achieved by merger?

The economist critics of the Supreme Court have, by and large, applauded its use of economic theory as the predicate for a relatively simple rule in horizontal mergers between very substantial market factors. In such a case, they assume that the probable loss in competition is so considerable as to outweigh any probable gains in efficiency. But they argue that the offsetting efficiencies that may result from horizontal mergers must be considered when the merging competitors are not both very substantial market factors. Galbraith, too, raises this theme when he wryly observes that the antitrust laws do little or nothing about the existent monopolists but bar small firms from merging to achieve efficiencies to enable them to compete with the existing giants. The argument comes to bear particularly on cases such as Von's and Pabst-Blatz where the combined shares were far smaller than those in Philadelphia National Bank and Alcoa-Rome.

Ideally, it would be valuable to know at what point the net contribution to economic welfare arising out of increased efficiency that comes with size outweighs the loss to economic welfare due to the probable anticompetitive consequence of increased concentration. But the economists who are astute enough to point to the conundrum also admit that there is no way of establishing the precise point at which the trade-off requires that the merger not be interfered with, no easy way of making even a rough guess, and no possible way of making a guess that is good for several different markets or for the same market under different conditions.

Even if the state of the art of measuring trade-offs were better, it is by no means clear the effort is worthwhile. For one, efficiencies barred by a tough merger rule may be achievable internally or by mergers that are not barred by the Clayton Act. Secondly, there are a host of reasons which impel mergers and the achievement of efficiencies is neither always intended nor always likely. Thirdly, to the extent that the economies of scale bode so large in an industry as to make a merger essential for survival one might expect the failing company defense to be available--the inefficiently structured firm would be in serious trouble. Finally, the suggestion of an urgent need for a modified rule which includes an economies defense probably overstates the economic necessity for size above a certain scale. The fact that companies possess a relatively small percentage of a market does not mean that they have not achieved most pertinent efficiencies. There was, for example, little indication in the Von's case that Von's or Shopping Bag were not each large enough to achieve all available efficiencies in grocery retailing.

For all these reasons, I doubt the Supreme Court's refusal to recognize an efficiency defense--and the Supreme Court's decision in Procter & Gamble appears to be specific on the point--is a costly mistake.

Two other points are worth noting in commenting on the economic criticism. There are aspects of merger policy which simply cannot be tested solely by economic standards. For example, the economists may question the basis for a rule such as that in Von's or such as

that concerning the national market in Pabst-Blatz. In both cases the Government had established that the markets were becoming more concentrated at a significant rate. In both cases the Court's determination was a prophylactic one--to bar the concentration before it developed to a point where the impact of any given merger was direct and serious. From an economist's point of view, economic theory might not compel the conclusion that either merger itself threatened to lessen competition. But the possible insensitivity of theory in detecting the precise point at which the nature of the market changed from a competitive one does not force us to condone a series of mergers until the adverse effect is established concretely--until the prophylactic purpose of Section 7 is frustrated. In view of the pattern of increased concentration in both industries, and the relatively significant roles of the parties, economic doctrine indicates that sooner or later the change will occur and, considering the risks, it is hard to say that the Court was wrong in calling a halt sooner rather than later.

To the extent that the economists point out the irony of the stringency of the anti-merger rules and the apparent leniency of antitrust toward existing monopoly power, I think they have a point. It is, of course, hoped that the prevention of further market concentration through mergers may lead to deconcentration through the maximum preservation of opportunities for new entrants. But it may also be pertinent to argue that the Court should continue to close the gap between the economist's concept of market power and the legal concept of monopoly power. And perhaps we should ask, more searchingly than

we do, under what circumstances the attainment of monopoly power really represents the kind of achievement of competitive excellence that deserves immunity from attack.

The third major school of criticism is that of members of the antitrust bar. It suggests the Supreme Court has such a deep commitment to the prevention of mergers that it has departed from appropriate standards of judicial procedure. The most frequent criticism is that the Court gerrymanders market definitions for the purpose of finding violations of the law. This criticism, when thus phrased, bristles with unpleasant overtones and suggests that more is at issue than an honest dispute over a question of policy.

I would not wish to relitigate the excruciatingly difficult questions that have arisen in the area of product and geographic market definitions. Nor am I particularly interested in conducting a step-by-step defense of the conclusions reached by the Supreme Court in the difficult cases or even of the Court's articulation of standards. The point I wish to make, rather, is that I think there is an honest dispute over policy here.

I believe that the Court has been approaching the product or geographic market definition in a manner that is more consonant with common sense and sound economics than are the suggestions of its critics. It is only a superficial irony that the Court in Hazel-Atlas-Continental Can could find a violation of Section 7 despite the physical disparity between cans and bottles, whereas the Court in Grinnell found the

market to be accredited central service protection. The irony would continue to exist--and continue to be superficial--if the critics had their way, since they would argue that a merger of a can firm and a bottle firm is not a merger of competitors whereas the acquisitions of central service station systems are unimportant since the competition afforded by night watchmen and other protective devices must be considered. Neither the approach taken by the Court nor the approach proposed by the critics is to be considered demolished because of these ironies. The ultimate question which the Court is asking when it attempts to delineate a market is whether the merger may afford the parties a discernible power over price free from the restraints that competition would be ordinarily expected to apply. The fact that some substitutes are ultimately available if the price is pushed too high does not mean that a merger is economically insignificant. The fact that products of the merged companies are physically dissimilar does not mean that the merger is economically insignificant if, in fact, each product places significant restraints upon the price which could be charged for the other. I would argue that, by and large, the Court's treatment of the market issue is evidence of a growing economic sophistication on the part of the Court, a developing accommodation of legal and economic notions of market power, and a probably desirable movement away from talismanic phrases and tests.

As to the claim that the Court is evolving unnecessarily broad rules too quickly and without adequate basis, I confess to a sense of bemusement. The merger area is evidently an area in which business

guidance is greatly needed. Criminal sanctions are not involved and the merger law does not threaten to become so restrictive as to limit the abilities of ingenious companies to seek other routes once they know which routes are barred. Secondly, the merger statute is, in terms, a statute based on a prediction of a result and cannot await empirical demonstrations that particular mergers indeed proved, after the fact, anticompetitive. The evil to be averted would have occurred; the difficulties in unscrambling on a major scale are enormous; and probative value of any experimental result in any particular case or group of cases is limited. I would have thought that the Court's guidelines were wanted, as quickly as they could be soundly devised, for the benefit of the bar and to set boundaries to the activity of the enforcement agencies. A series of decisions whose implications are carefully limited to the bare minimum required by the particular facts would not represent good jurisprudence in this area. The fact that the Court has been attempting to limn out the applicable rules is to be applauded. More than that, the attempt has been effective--the number of substantial horizontal mergers has declined precipitously with the clarification of horizontal merger doctrine.

I have, I fear, ended up after all as an apologist for the Court. Perhaps I am reflecting a bureaucrat's prudent instinct not to bite the hand that, hopefully, will feed him from time to time. I believe, however, I am also reflecting my appreciation for the fact that we sporadically serve up to the Supreme Court in the form of antitrust

cases some of the most complex and baffling policy questions in the economy today. The fact that the Supreme Court does not always hit home runs should not, therefore, surprise. And for what it is worth, the critics aren't hitting many either.