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Regulating the Economy in the Courts: Antitrust Today

George J. Alexander
Santa Clara University School of Law, gjalexander@scu.edu

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By George J. Alexander *
(Jamesville)

Antitrust law has long been a foggy area to both lawyers and businessmen. Professor Alexander's article is addressed to the unsophisticated in Antitrust. He offers it in the hope that it will serve as a guide to lawyers unfamiliar with this complex area of the law.

George J. Alexander

A HALLMARK of American society is its basic economic philosophy. Free enterprise is more than an economic theory; it is an ideology, a slogan to generalize about complex industrial organization, a shorthand notation which many think explains the affluence which we share. Its first commandment is, Thou shalt not interfere with business judgments made by businessmen; thou shalt not regulate.

Of late, with increasing tempo, we hear of mergers opposed by the Department of Justice, ordered dissolved by courts. We hear a Justice of the United States Supreme Court describe the success of the Justice Department:

"'The sole consistency that I can find is that in [merger] litigation, the Government always wins."

The process, of course, is regulation; the courts are the enforcement vehicle and antitrust law is the tool of regulation. Legislators have given to lawyers the job of tinkering with the general economy and, especially in the post World War II period, lawyers have engaged in the process with some vigor.

That lawyers should meddle, selectively, in business judgments has made many angry; others have condemned the fact that the courts have not basicly reorganized our national economy—that General Motors still exists and du Pont, too (although it no longer controls G.M. stock thanks to antitrust lawyers) when smaller corporations are what they envisaged. Some suggest that more of the process be given to administrators under new legislation. (Hardly anyone thinks that the present Federal Trade Commission is substantially different in approach

* Professor of Law, Syracuse University College of Law, author of numerous articles and several books, member of the New York Bar.

from the antitrust lawyers outside the agency.) Others are satisfied to leave the work to lawyers but want the legal standards modified in some dramatic way so that their own goals for the economy can be reached more quickly. Interestingly, though, there appears to be a high level of dissatisfaction with specifics, few urge the abandonment of the system in favor of greater direct regulation of prices, wages, and levels of production by government. For that we can probably thank the horrible example of utility regulation in our country.

Lawyers also disagree among themselves about antitrust. There is not even agreement about where antitrust is headed among the persons whose judgment finally sets the pattern: the Justices of the Supreme Court of the United States. That is true of the members of the present Court and has been true of the Court since it began to consider antitrust. The diversity of possible goals contributes greatly to the failure to focus on a single goal or on an accommodation of a small number of goals. A few examples may help to illustrate the point. Near the turn of the century the makers of sewer pipes formed an association which, among other things, worked out a very efficient way to help its members bid on contracts to be awarded. Each member first bid for the right to bid in the contract. The highest bidder won the right and all the other would overbid him in the public bidding. He would get the contract and they would get a share of the amount he bid to the association for their cooperation. There were many virtues in the arrangement; even some of the customers who were paying what must have been higher prices came to court to commend it but, at heart, it was a price fixing scheme pure and simple. The association members had, in concert, arrogated the power of a monopolist. They had started out to defeat the effects of competition among members and had succeeded. Therefore, the decision was relatively uncomplicated. The court had either to choose competition and its control over resource allocation or to opt for some form of management (either by business or by government) of such things. Since the antitrust laws were quite clear in their purpose to achieve a competitively oriented economy, the decision was equally clear: the association was found to have broken the law.

Cases like the pipe association case mentioned (Addyston Pipe and Steel) are decided the same way today. When people get together with their competitors to fix prices, they defeat the control of a competitive market. For that, as some found not too long ago, one can draw a jail sentence.

In the kind of arrangement mentioned all the factors fall nicely in place. Much harder problems are presented by industrial growth whether through contract, through merger, or by building additional capacity. While one can be concerned that competition among the auto makers is not all that it might be, it is not fair to assert that the degree of concentration was artificially created to allow manipulation of the market. The problem is far more complex; it may even be more efficient to produce cars in the present large corporations than it is to produce them in smaller companies. If that is true, the result of decimating the industry and thus making it more competitive may be to raise the cost of cars. That, you will recall, was not a problem in the pipe case because it was clear that there were no production or even distribution shortcuts involved. The association served only to control output and price. At this point, then, absent relative certainty as to what constitutes most efficient size (something we are far from having at the moment), one is forced to choose between industrial concentration which may be anticompetitive and diffusion of production which may be costly to the consumer as much as to the persons who have invested in the industry or who work in it.

The choice is further complicated by the fact that one may choose one or the other alternative for completely opposite reasons. For example, one may choose to allow large size because of a persuasion that large corporations are relatively responsible and ought not to be interfered with until a gross abuse can be demonstrated—a viewpoint we might want to characterize as conservative—or from a recognition that to interfere with present organization may threaten the existence of numerous smaller business units and of labor which depend on the large corporations, probably a liberal philosophy.

Because of such complexities, we find conservative justices like the present Mr. Justice Harlan dissenting against interdicting the merger of the small Rome Cable company and Alcoa in a case written by the liberal Mr. Justice Douglas and Justice Douglas dissenting in a decision which ordered the Standard Oil Company of California to stop making exclusive dealing and tying contracts with its customers because small service stations can operate under the arrangement but might be driven out of business were Standard Oil to undertake the distributive operation itself.

When other variables are considered, the matter becomes even more clouded. During the depression, fuels were hard hit. In both the coal industry and the oil industry internal arrangements were made in an attempt to keep the supply of fuel from leading to a continuous downward spiraling of prices. While such a trend in prices might be called for by a competitive model as a means of reorganizing the industry, the immediate costs in labor displacement and in the confidence of investors was unacceptable, given the panic then at large. The Supreme Court heard cases involving both industries and allowed a scheme in coal while disapproving one in oil. It is difficult to state whether the court felt it should consider the general state of the economy or not.

Of course, it does not stop there. When producers cooperate in export, they may affect the balance of trade problem. An inefficient producer may be needed in the economy to pave the way for future military production. A form of business may appeal because it gives an opportunity to small investors to have their own store; one is reminded of the corner grocer for whom Congress expressed such concern and whom it sought, in vain, to protect with price discrimination legislation. The list of possible concerns is finite but very long.

If the courts attempted to accommodate all competing interests with only the sketchy guidance of the antitrust laws, they could properly be condemned for usurpation of a legislative function; they would also become so ensnarled in considerations that the cases would likely flounder. Recognizing their limitations, courts have attempted to reduce antitrust to more limited factors. A good deal of the apparent contradiction in the cases results from the effort to strike a balance not only between what is legitimately business judgment and what should be supervised by courts, but also between making judgments based on insufficient information and admitting an unmanageable amount of evidence to cloud the cases.

In order to examine how courts have dealt with cases in which competing considerations loom large, it is helpful to examine the courts' response to monopolization. A classic case concerns Alcoa's pre-World War II control of virgin aluminum. Although there were a number of plausible explanations which accounted for the fact that Alcoa had no significant competitors in aluminum production, Judge Learned Hand, announcing the final decision in the case, condemned Alcoa's market power and found it guilty of monopolization. The principal reason given for the conclusion was the fact that Alcoa had, throughout its history, actively sought to maintain its position in an expanding market. Whatever economic merit existed in a single firm's control, Judge Hand felt that the resultant lack of competition had to be condemned. He explained

> We conclude therefore that "Alcoa's" control over the ingot market must be reckoned at over ninety per cent; that being the proportion which its production bears to imported "virgin" ingot. If the fraction which it did not supply were the produce of domestic manufacture, there could be no doubt that this per centage gave it a monopoly lawful or unlawful, as the case might be. The producer of so large a proportion of the supply has complete control within certain limits. It is true that, if by raising the price he reduces the amount which can be marketed as always, or almost always, happens—he may invite the expansion of the small producers who will try to fill the place left open; nevertheless, not only is there an inevitable lag in this, but the large producer is in a strong position to check such competition; and, indeed, if he has retained his old plant and personnel, he can inevitably do so. There are indeed limits to his power; substitutes are available for almost all commodities, and to raise the price enough is to evoke them. Moreover, it is difficult and expensive to keep idle any part of a plant or of personnel; and any drastic contraction of the market will offer increasing temptation to the small producers to expand. But these limitations also exist when a single producer occupies the whole market: even then, his hold will depend upon his moderation in exerting his immediate power.
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> . . . Even though we disregarded all but economic considerations, it would by no means follow that such concentration of producing power is to be desired, when it has not been used extortionately. Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. Such people believe that competitors, versed in the craft as no consumer can be, will be quick to detect opportunities for saving and new shifts in production, and be eager to profit by them. In any event the mere fact that a producer, having command of the domestic market, has

> not been able to make more than a "fair" profit, is no evidence that a "fair" profit could not have been made at lower prices. True, it might have been thought adequate to condemn only those monopolies which could not show that they had exercised the highest possible ingenuity, had adopted every possible economy, had anticipated every conceivable improvement, stimulated every possible demand. No doubt, that would be one way of dealing with the matter, although it would imply constant scrutiny and constant supervision, such as courts are unable to provide. Be that as it may, that was not the way that Congress chose; it did not condone "good trusts" and condemn "'bad" ones; it forbad all.

The concern with concentration that was evidenced by Judge Hand in the Alcoa case remains important as well in the present state of merger cases. Indeed, the 1950 Congressional amendment of the antimerger provision in the Clayton Act has been interpreted by the Supreme Court as a mandate to supply more of the same, to increase the sanctions against size and to nip the problem of industrial concentration effectively, long before the antimonopoly provisions used in Alcoa would demand the same results.

While Congress cannot be taken as having spoken to the question of the limits of scale efficiencies in national industries generally, and while the Alcoa decision must also be read as a decision premised on a desire to prevent concentration despite efficiencies if that was necessary, a word must be said about efficiencies and the present level of antimerger enforcement. It has remained true, throughout the period from Alcoa on, that courts have realistically abandoned the idea they were competent to make judgments about optimum industrial organization. Judge Hand in Alcoa spoke to the competing goals of antitrust when he mentioned that we were a country dedicated to economic pluralism.

> It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependant for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. These considerations, which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purposes.

The same kind of language finds itself, probably for the same reason, in the merger cases. It is difficult to isolate, from the cases themselves, an approach radically different from the approach used by Judge Hand in Alcoa, though one should say in fairness that the cases are a trifle more disengenuous than was Judge Hand in eschewing the costs involved. A passage sometimes pointed to by such critics of present antitrust policy as Professor Bork of Yale is the passage in the Brown Shoe case:

> Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.

The paragraph seems to indicate an unwillingness on the part of the court to choose between the goals of an economy made efficient by competition and an economy consciously made more pluralistic but which is not as efficient as it might become at the next level of concentration. It is delightful to eschew simultaneously an antitrust law designed to preserve competitors rather than competition and an antitrust law that allows greater concentration—but one cannot have it both ways. If, in Brown Shoe, one was attempting to preserve small independent units for fear that their elimination would ultimately make it more difficult for other independents, that is one thing, but it is not the same thing as asking whether one can more efficiently sell shoes through vertically integrated firms. Despite the broad language in the opinion, the Chief Justice appears to recognize this paradox when he lists as one of the vices of the Brown-Kinney merger the fact that the newly integrated retail stores may be enabled by cost savings adversely to affect the nonintegrated firms. If that's not preserving competitors, what is?

This is not to say, of course, that the antimerger policy of the government has been, in the main, misguided. It does illustrate, however, the fact that a concern with industrial concentration must of necessity either relate to the efficiencies involved (which is probably beyond the capacity of courts) or must expect to pay a price in economic distortion for a far more complex pluralistic goal.

In effect, it has become quite clear in recent years that a company must be prepared in an industry which is already concentrated or in an industry in which that firm has a large percentage share to accomplish growth without buying a competitive firm and probably without buying firms which are suppliers or customers as well. At some point, it may also be prohibited from bringing under corporate rule essentially unrelated firms because of the possibility of the use of its own economic power to distort either its own or its acquired firms' competitive markets. The price exacted is not necessarily cheap. It means, to take the recent Korvette-Spartan merger as an illustration, that firms may have to alter basically their own structure or, as has been true in so many of the mergers that have been prohibited, that the Company must build new facilities in which to accomplish what might have been accomplished otherwise by acquisition. But while this is true, several other things must be said as well. In the first place, the antimerger law does not place an upper limit on individual growth. It is still the antimonopoly provision which ultimately is relied on to prevent a firm from growth unaccompanied by acquisitional or contractual expansion. Secondly, although the government has been amazingly successful in its prosecution, it has certainly not universally prosecuted large merging firms. In the selection process in which decisions to bring suit or not to bring suit is made, one must assume responsible governmental officials have attempted to select cases by the overall perceived impact of the merger (an admittedly vague concept) even if the courts have not been asked to participate in the evaluation of the political decisions that have been made.

The courts have retained a function that they are capable of handling. They have left to themselves the resolution of a set of issues far less sophisticated than the broad issue of whether a merger is in the public interest. The courts have, in other words, reduced antitrust merger cases to the kind of evidence which can conceivably be introduced and weighed in a finite trial, albeit usually a protracted one.

Another product of the concern for handling complex economic matters expeditiously is the area of per se illegal conduct. When Judge Taft wrote in Addyston Pipe and Steel about the conduct of the sewer pipe trade association, he condemned it out of hand irrespective on any noneconomic virtue it might have for consumers and irrespective of the stabilizing effect it might have on the industry. When Mr. Justice Stone later in Trenton Potteries condemned another price-fixing arrangement, he also condemned it as a per se violation, refusing to concern himself with any possible justification for the price-fixing endeavor. Into the category of per se conduct fall such other offenses as horizontal market division and boycott.

Judge Taft was willing without further examination to write off price fixers because he perceived the probability of control of production as a necessity to the effective working of such an arrangement. It is not possible, presumably, artificially to set a price in a competitive market. If a price is effectively set, then, it seems quite likely that the price setters have demonstrated that in the aggregate they have control over price (and therefore presumably the level of production). Market division by competitors again implies individual control of the areas in which competition is foreclosed. A seller who is apt to lose his customers to other competitors if he raises his price seems unlikely to agree to give up the right to sell his product elsewhere for the privilege of keeping other signatories out of his market. Again, unless another explanation is given, the fact that the arrangement has been entered into suggests a level of market control which might properly be interdicted under the restraint of trade provisions in the antitrust law.

Cases of trade restraint falling outside the per se group are governed by the rule of reason. It is popularly believed that, under that standard, judicial inquiry is broad in scope and that almost unlimited evidence may be introduced to persuade a court to approve or condemn. In point of fact, the inquiry is far more limited. Discussing an exclusive dealing and typing arrangement, Mr. Justice Frankfurter commented:

> Yet serious difficulties would attend the attempt to apply [economic] tests. We may assume, as did the court below, that no improvement of Standard's competitive position has coincided with the period during which the requirements-contract system of distribution has been in effect. We may assume further that the duration of the contracts is not excessive and that Standard does not by itself dominate the market. But Standard was a major competitor when the present system was adopted, and it is possible that its position would have deteriorated but for the adoption of that system. When it is remembered that all the other major suppliers have also been using requirements contracts, and when it is noted that the relative share of the business which fell to each has remained about the same during the period of their use, it would not be farfetched to infer that their effect has been to enable the established suppliers individually to maintain their own standing and at the same time collectively, even though not collusively, to prevent a late arrival from wresting away more

than an insignificant portion of the market. If, indeed, this were a result of the system, it would seem unimportant that a short-run by-product of stability may have been greater efficiency and lower costs, for it is the theory of the antitrust laws that the long-run advantage of the community depends upon the removal of restraints upon competition.

Moreover, to demand that bare inference be supported by evidence as to what would have happened but for the adoption of the practice that was in fact adopted or to require firm prediction of an increase of competition as a probable result of ordering the abandonment of the practice, would be a standard of proof if not virtually impossible to meet, at least most ill-suited for ascertainment by courts. Before the system of require ments contracts was instituted, Standard sold gasoline through independent service-station operators as its agents, and it might revert to this system if the judgment below were sustained. Or it might, as opportunity presented itself, add service stations now operated independently to the number managed by its subsidiary, Standard Stations, Inc. From the point of view of maintaining or extending competitive advantage, either of these alternatives would be just as effective as the use of require ments contracts, although of course insofar as they resulted in a tendency to monopoly they might encounter the anti-monopoly provisions of the Sherman Act. As appellant points out. dealers might order petroleum products in quantities sufficient to meet their estimated needs for the period during which requirements contracts are now effective, and even that would foreclose competition to some degree. So long as these diverse ways of restricting competition remain open, therefore, there can be no conclusive proof that the use of requirements contracts has actually reduced competition below the level which it would otherwise have reached or maintained.

While it is true that Justice Frankfurter was interpreting the requirements of a specific antitrust provision concerning the practice in question, his observations apply with equal force to other practices. On the whole, one can find courts responding to this type of concern. They attempt to discover what the central purpose of the arrangement in question is and then to condemn or approve it by relating the discovered purpose to a competitive model. If, like price fixing, the model suggests that the arrangement is anticompetitive, it is condemned. If, on the other hand, the agreement merely allows the parties to accomplish something that seems legitimate when viewed from the perspective of the model, it escapes censure. Thus, for example, when the Chicago Board of Trade adopted a rule which required the members to pay for grain which arrived in Chicago after the market closed at the closing price, the agreement was held legal since it was thought to facilitate the running of the exchange. If it is essential in franchises of some sorts to require the franchisees to limit their sales to assigned territories or to buy their supplies from certain suppliers, such restrictions also escape censure.

Also, it seems quite well settled that in the rule of reason cases the courts will not attempt to weigh collateral benefits arising from otherwise anticompetitive schemes. Even if a price fixing conspiracy might improve international trade, stabilize production and resist labor displacements, the cases seem agreed that such matters are not for courts to consider. The embarrassment of courts in citing the depression coal case in which the Supreme Court applied antitrust less harshly, suggests that no new attempt at broader inquiry is likely soon to succeed.

Still, it is true of the trade restraint cases, as it was of the concentration cases, that often the price to be paid for enforcement is high. Some cases, like the Addyston Pipe and Steel case, are clearly restraint cases in which no efficiencies are involved. Some restraints are equally clearly so necessary to a valid objective as not to be subject to challenge: Judge Taft suggested the illustration of a contract by business partners not to compete with each other outside of the partnership. In between, courts are forced to decide whether an agreement falls more into the first or into the second group. Many agreements share with many mergers the disconcerting fact that efficiencies and restraints may be intermingled. Whether the courts have found the right place at which to draw the line is controversial.

What makes the courts a preferable agency for economic regulation, despite the uncertainties and the mistakes is the fact that courts are probably better equipped to accomplish the relatively delicate adjustments which we will tolerate in our economic philosophy. Courts need not generalize as legislatures must. They need not try to place each case into a fixed scheme for an entire industry which may still be beyond administrative competence. Much of the selection of cases is not random but predetermined by decisions made by the Attorney General and so partakes of some of the virtue of administrative selection. Finally, and most significantly, the adjustment is essentially pragmatic and overall much less substantial in effect than any alternative pervasive scheme of regulation known to the author. This is a rather dismal defense of eighty years of antitrust. It does seem clear, though, that the laws have not immaculated the economy and one cannot be as sure of other regulatory schemes that abound. While it is short of ringing praise, one might be satisfied if he concurred that the courts have proven themselves less incompetent than other agencies that have tried to improve on the free market.

[End]

Mr. Justice Marshall

Attorney General Ramsey Clark said Marshall's elevation to the Supreme Court would add "a wealth of legal experience rarely equalled in the history of the court.

"He has been a distinguished leader of the American Bar since finishing at the top of his class at Howard Law School in 1933—as one of the few attorneys in history to appear before the court more than 50 times, as a member of the nation's second highest court, and as solicitor general of the United States.

"I have no doubt that his future contributions will add even more prominence to his already well-established place in American history."

—Quoted in Binghamton *Press,* June 13, 1967, page 9-A.