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THE "WARREN COURT" AND THE ANTITRUST LAWS: OF ECONOMICS, POPULISM, AND CYNICISM

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No one could quarrel with the simple assertion that the so-called "Warren Court" has had a significant, if indeed not extraordinary, impact on the development of the antitrust laws. It could hardly have been otherwise. The fifteen years since 1953 represent virtually one-fourth of the total history of the Clayton and Federal Trade Commission Acts,[1] and one fifth of the time which has elapsed since passage of the Sherman Act.[2] Every Supreme Court decision under the 1950 amendments to section 7 of the Clayton Act,[3] the so-called antimerger law, has come after the accession of Chief Justice Warren to the bench.

Moreover, these fifteen years have been unlike any other consecutive fifteen years in the history of antitrust enforcement. Government and the public have remained committed to antitrust concepts—to a firm belief in the efficacy of the free market as a regulator of business behavior.[4] It has not always been so. Historically, there has been a questioning of the assumptions underlying antitrust and correlative lack of enforcement during periods of grave economic or military crisis.[5] But no such crises have existed since 1953.[6] The enforcement agencies remained reasonably well-funded and active during this period. Private litigants have brought more treble damage actions, with a higher degree of success, than ever before. An expanding economy, characterized by extraordinary technological development, has created an array of

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1. Clayton Act, 15 U.S.C. §§ 12-27 (1964); Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1964).

2. 15 U.S.C. §§ 1-7 (1964).

3. 15 U.S.C. § 18 (1964).

4. There are of course those who do not share this belief. *See, e.g.*, J. GALBRAITH, THE NEW INDUSTRIAL STATE (1967).

5. The NRA codes of the early thirties, and the use of wage and price controls and rationing of consumer goods during World War II are but two illustrations of this phenomenon.

6. The government's need to meet the demands of the Vietnam war and its desire to curb inflationary pressures have led to some deviations from market self-regulation, as demonstrated by the periodic confrontations between the White House and the steel industry over proposed price increases, and the government's attempts to secure voluntary compliance with its wage and price guidelines. But there has not been an extended, considered departure from basic antitrust concepts.

new problems. In such circumstances, it would be astonishing if the Court, with its peculiar responsibility for formulation of antitrust doctrine,[7] had not contributed much to its development.

Many of the Court's post-1953 antitrust decisions are simply reaffirmations of pre-existing doctrine. This has been particularly true of cases involving conspiratorial conduct, where the Court has continued zealously to condemn price-fixing, horizontal market division, and group boycotts as per se violations of section 1 of the Sherman Act.[8] But in other areas, new standards reflecting a strong enforcement philosophy have been applied. The most striking, most publicized, and most criticized decisions have been the extended series of decisions holding mergers in violation of section 7 of the Clayton Act. Beginning with the *Brown Shoe* case,[9] which perhaps remains the most radical of the antimerger rulings, the Court has moved to a virtual per se prohibition of horizontal mergers between firms with substantial market shares.[10] In dealing with conglomerate acquisitions, where structural effects cannot normally be measured by reference to market shares or changes in concentration ratios, the Court has proceeded with greater caution, but violations have been found in each case.[11]

Of at least equal significance has been the Court's treatment of a wide variety of vertical restraints. The Court has extended the long-standing ruling that vertical price-fixing is a per se violation of section 1 of the Sherman Act by closing a number of avenues previously used, with judicial blessing, to achieve the same end. The *Colgate*[12] doctrine—which in effect permitted a seller to implement a program of resale price maintenance by refusing to deal with buyers who failed to comply with the seller's pre-announced policy—has been severely curtailed, although it is too much to assert that it has been completely overruled. The Court's expansion of vertical conspiracy doctrine, together with its unwillingness to countenance reliance on *Colgate* if the

7. Under the Expediting Act, 15 U.S.C. § 29 (1964), appeals in civil antitrust actions brought by the Department of Justice must be taken directly to the Supreme Court.

8. *See, e.g.*, United States v. Sealy, Inc., 388 U.S. 350 (1967); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

9. Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

10. *See, e.g.*, United States v. Pabst Brewing Co., 384 U.S. 546 (1966); United States v. Von's Grocery Co., 384 U.S. 270 (1966); United States v. Aluminum Co. of America, 377 U.S. 271 (1964); United States v. Philadelphia Natl. Bank, 374 U.S. 321 (1963). *See also* United States v. Continental Can Co., 378 U.S. 441 (1964).

11. FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965); FTC v. Procter & Gamble Co., 386 U.S. 568 (1967). The merger condemned in United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964), is perhaps best described as a market extension conglomerate.

12. United States v. Colgate & Co., 250 U.S. 300 (1919).

seller goes in any way beyond a naked refusal to deal, makes the immunized path a narrow one indeed.[13] The immunity once conferred upon bona fide consignment relationships, where the seller dictated the price at which its agent sold, has met a similar fate. At least in those cases where a seller operates through a sizeable distribution network, such arrangements have been brought within the per se vertical price fixing rule.[14] Finally, the Court's hostility toward vertical price-fixing is manifest in its narrow construction of the McGuire Amendment,[15] which legislatively permits some sellers operating in so-called fair trade states to engage in resale price maintenance.[16]

Other vertical restrictions have been similarly treated. Tie-ins and compulsory package arrangements are now virtually per se illegal.[17] After some initial hesitation in *White Motor*,[18] the Court has apparently held that contractual restraints upon the ability of a purchasing dealer to resell the manufacturer's product where and to whom the dealer pleases are per se violations of the Sherman Act, although in a curious twist the Court has not applied a per se rule where such restrictions are placed upon a manufacturer's agents.[19] Indeed, virtually the only vertical arrangement between seller and purchaser other than outright merger to come before the Court during this period and escape per se or near per se condemnation has been the simple requirements contract.[20]

There have been other significant developments. Apparent conflicts between the patent and antitrust laws have been resolved in favor of the latter.[21] The patent misuse doctrine has been extended.[22] With its holding that a firm may violate the Sherman Act through the exercise of a patent procured through active

13. For examples of decisions which have narrowed the *Colgate* doctrine, *see* Albrecht v. Herald Co., 390 U.S. 145 (1968); United States v. Parke, Davis & Co., 362 U.S. 29 (1960). *Cf.* United States v. General Motors Corp., 384 U.S. 127 (1966).

14. Simpson v. Union Oil Co., 377 U.S. 13 (1964). *But cf.* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

15. 15 U.S.C. § 45 (1964).

16. *See* United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956).

17. United States v. Loew's, Inc., 371 U.S. 38 (1962); Northern Pacific Ry. Co. v. United States, 356 U.S. 1 (1958).

18. White Motor Co. v. United States, 372 U.S. 253 (1963).

19. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). *But see* Albrecht v. Herald Co., 390 U.S. 145, 154 (1968) (concurring opinion).

20. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961). The Court has not passed upon the validity of the simple exclusive franchise, *i.e.*, a promise by the seller not to sell to others in the franchisee's area. Such an arrangement was present in *White Motor*, but was not attacked by the government.

21. *See* United States v. Singer Mfg. Co., 374 U.S. 174 (1963).

22. Brulotte v. Thys Co., 379 U.S. 29 (1964).

fraud, the Court has brought the antitrust laws directly into the Patent Office itself.[23]

On still another front, the Court's fundamental faith in the efficacy of antitrust has been reflected in its continuing rejection of arguments for industry-wide exemption from the antitrust laws. Exempting legislation has been narrowly construed, except in the case of labor activities.[24] Doubts about the applicability of antitrust to professional sports other than baseball have been removed.[25] In a number of regulated industries, the fact of regulation has been held insufficient grounds for immunization from the antitrust laws.[26]

Finally, special note should be taken of the Court's willingness to defer to the discretion of the Federal Trade Commission, which surely had not been accustomed to such favored treatment. Despite a marked propensity for disagreeing with district court findings, the Court has shown little inclination to go behind the findings of the Commission. But deference to the Commission has not been limited to its factual determinations alone. In a series of decisions culminating in *FTC v. Brown Shoe Co.*,[27] the Court has recognized to an unprecedented extent a broad authority in the Commission to declare conduct conflicting with the policies of the Sherman and Clayton Acts unlawful without proof of actual or probable anticompetitive effects. So far as the Supreme Court is concerned, the Commission now stands at its high water mark.

The role played by Chief Justice Warren in these developments has not been highly visible. He has authored few Court opinions in leading antitrust cases, and has written even fewer dissents. (The latter is in part because he has generally been with the majority.) Best known of his opinions for the Court is the enigmatic opinion in the *Brown Shoe* merger case.[28] The result—holding unlawful the acquisition of a retailer with at most 1.2 per cent of national retail shoe sales by a manufacturer producing some 4

23. Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965).

24. *E.g.*, Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384 (1967), *rehearing denied*, 390 U.S. 930 (1968); Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966); Maryland & Virginia Milk Producers Assn. v. United States, 362 U.S. 458 (1960). *But see* Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co., 370 U.S. 19 (1962).

25. Radovich v. National Football League, 352 U.S. 445 (1957); United States v. International Boxing Club, Inc., 348 U.S. 236 (1955).

26. *E.g.*, United States v. Philadelphia Natl Bank, 374 U.S. 321 (1963); Silver v. New York Stock Exchange, 373 U.S. 341 (1963). *See* California v. FPC, 369 U.S. 482 (1962).

27. 384 U.S. 316 (1966). *See also* Atlantic Ref. Co. v. FTC, 381 U.S. 357, *rehearing denied*, 382 U.S. 873 (1965).

28. 370 U.S. 294 (1962). The best-known dissent by the Chief Justice is in the *DuPont Cellophane* case. United States v. E. I. duPont de Nemours & Co., 351 U.S. 377, 414 (1956).

per cent of national footwear—is startling indeed. But the outcome is obscured by an opinion which, seemingly by design, contains something for everyone. The call for a broad economic inquiry, the recognition of the failing-company doctrine, and several other statements, suggested moderation in the Court's approach. At the same time, the Court expressed fears about increasing concentration, emphasized the need for halting merger trends in their "incipiency," and stressed the desirability of protecting small business. Each of these emphases gave comfort to those calling for a strict antimerger policy and, as it turned out, set the tenor for decisions which followed. The *Brown Shoe* opinion is perhaps less reflective of the Chief Justice's substantive views than of his capacity as a judicial statesman. Since *Brown Shoe* was the first major decision under the amended section 7, its widespread acceptance by the bar and the business community was essential to the antimerger movement. In achieving this acceptance, it seems to me, the Chief Justice succeeded. But like all successes, this one had its price. In later cases, critics would accuse the Court of departing from the moderate standards of *Brown Shoe*.

The Chief Justice has had a considerable impact simply as one of nine voting members of the Court. His voting record, in terms of result, is remarkably consistent: he has voted "for liability" more than any other member of the Court during his fifteen year tenure.[29] But any suggestion that the Chief Justice has had an impact *beyond* the weight of his vote would be sheer speculation at this point. It seems more likely that he has followed the views of others, particularly Justices Black and Douglas, than that they have followed him. The antitrust work of the Warren Court, like its work in other areas, is the work of a Court over which a given Chief Justice has happened to preside. The doctrines developed by the majority may be identified with him, for he has generally been part of the majority, but he is neither solely nor, apparently, primarily responsible for them.

Substantively, the antitrust opinions of the Warren Court have reflected a peculiar blend of modern economic theory and Populism. The increasing use of economic theory as a basis for, or at least an explanation of, decisions in merger cases has been particularly apparent; opinions in merger cases now speak the language and rely upon the writings of economists. The antitrust lawyer in a merger case finds himself talking about concentration ratios, barriers to entry, elasticity of supply and demand, and po-

29. *See* Arnold, *The Supreme Court and the Antitrust Laws 1953-1967*, 34 A.B.A. ANTITRUST L.J. 2, 7 (1967).

tential competition. The Court's fear of increased concentration, and the rules enunciated to prevent it, do reflect increasing sophistication in the use of oligopoly theory.[30] Yet even here the Court has continued on occasion to express a concern for particular competitors, small businesses, and consumer choice—a concern beyond that justified by economic theory.

Continued reliance on the knowledge of economists is essential to the antitrust practitioner, and lawyers who continually assert that they cannot understand economics or economists must go back and learn. It is foolhardy to ignore an extremely significant part of human knowledge because it seems difficult to comprehend. But, while the Court's recognition of such knowledge is a healthy development in the abstract, it also presents a number of questions. First, and most obvious, is whether the Court has simply used economic doctrine to support decisions arrived at upon other grounds. This is not an easy question to answer. There is often no single applicable economic theory; economists disagree about the results in particular cases just as frequently as lawyers do. Hence, as a necessary by-product of any reliance on economic doctrine, the Court has recited the views of some economists in preference to the views of others. In its first section 7 cases, and particularly in the *Philadelphia Bank* case, the Court did rely upon oligopoly theory as a basis for formulating broad general rules to deal with the effects of increased concentration in particular markets.[31] The rules created could be justified by reference to the theory relied upon. But the Court has not purported to rest its decision in every case upon the dictates of such economic analysis. Subsequent cases have interjected other values; for example, the emphasis on the protection of small business as an end in itself in the *Brown Shoe*[32] and *Von's Grocery*[33] cases. At other times, the Court has stressed the need for simple rules which can be understood and easily applied. These cases represent less a misuse of economic doctrine than an unwillingness to make results dependent upon it. One can quarrel with such divergence from the dictates of strict economic reasoning; perhaps the teachings of economic theory should be conclusive. But this is a question to be confronted head on, and not by accusing the Court of misusing doctrine it has not purported to apply.

30. *See generally* Brodley, *Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy*, 19 STAN. L. REV. 285 (1967).

31. United States v. Philadelphia Natl. Bank, 374 U.S. 321 (1963). *See also* United States v. Continental Can Co., 378 U.S. 441 (1964); United States v. Aluminum Co. of America, 377 U.S. 271 (1964).

32. Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).

33. United States v. Von's Grocery Co., 384 U.S. 270 (1966).

If there has been a real abuse of economic analysis—a conscious or unconscious manipulation of economic concepts to fit an apparently pre-ordained result—it has been in the process of market definition. More will be said of this subsequently. But whatever the defects in the Court's process of market definition, the blame cannot be placed entirely with the Justices. Economists have labored to develop theories which are ultimately dependent upon market definition, but they have furnished far less guidance in outlining the definitional process itself.[34]

The use of economic analysis by the Court raises a number of additional questions: How is the Court to "know" such theory? Is it, or can it be, sufficiently sophisticated in economic principles to apply them at all? Half a theory, when the balance is not comprehended, may be more dangerous than none at all. Moreover, the interjection of noneconomic values into a structured system of economic analysis, unless done with great skill, may make the analysis meaningless. And economic theory must be applied consistently; it cannot be used today and forgotten tomorrow. Otherwise distortions will appear.

Few of these questions arise in connection with the Court's opinions involving vertical restraints; here economic theory is conspicuous by its absence. The growing body of economic knowledge concerning the effects of vertical integration, resale price maintenance, territorial and other restrictions on distributors, and tying arrangements have been virtually ignored.[35] The Court has generally dealt with such vertical restraints in a manner more familiar to common-law lawyers. Decisions in this area often rest upon grounds whose antecedents trace far back into the history of the antitrust laws. The Court's per se condemnation of the territorial and customer restrictions imposed by Arnold Schwinn & Co. upon its purchaser-dealers rested on the common-law rule against restraints on alienation,[36] employed as far back as the *Dr. Miles Medical* case[37] in connection with vertical price-fixing. Other essentially vertical restraints have been held unlawful through expanded concepts of vertical conspiracy, thereby obviating, at least

34. One notable exception is Lozowick, Steiner, & Miller, *Law and Quantitative Multivariate Analysis: An Encounter*, 66 MICH. L. REV. 1641 (1968). *See generally* Steiner, *Markets and Industries*, in 9 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 575 (1968).

35. *See, e.g.*, Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II*, 75 YALE L.J. 373 (1966); Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957); Burstein, *A Theory of Full-Line Forcing*, 55 NW. U. L. REV. 62 (1960). These works have a similar, highly controversial outlook, and I do not mean to suggest that the courts should necessarily adopt their analysis. But they should at least be confronted.

36. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 377-79 (1967).

37. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

in the Court's judgment, any necessity for determining the actual impact of the restraint and the legality of similar restraints unilaterally imposed.[38] The legality of vertical acquisitions, requirements contracts, and, to a lesser degree, tying arrangements, depends in large measure upon the percentage of the market foreclosed to competitors of the seller by the arrangement.[39] This standard was further simplified by the assumption in *Brown Shoe* that competitors of the seller would as the result of a vertical acquisition necessarily be foreclosed from *all* sales to the acquired customer. The mere fact of substantial foreclosure is not always conclusive of illegality. Economies created by the arrangement *may* be taken into account.[40] New firms, or firms with other peculiar problems, may be treated differently. But substantial foreclosure, rather than an increase in concentration or horizontal market power, has become the measure of the injury to competition called for by the Clayton Act.

Why this should be so has not been made altogether clear. One cannot assume that substantial foreclosure necessarily reflects or results in increased concentration or market power at the seller level. Foreclosure through various forms of vertical integration may create unduly high barriers to entry, but this is not so in every case and may not be particularly relevant if the industry is highly competitive anyway. Some of these arrangements, particularly tie-ins, may be used by a seller with market power to obtain additional monopoly profit, but such an effect can hardly be measured by reference to degree of market foreclosure. Apparently uncertain about the effect of such vertical arrangements upon concentration in the market and not confident that in all cases such effects can be determined on a case-by-case basis, the Court has proceeded with a method of analysis placing primary emphasis on equality of opportunity, free access to markets by competing sellers, and complete freedom of choice by buyers. If it can be proved that the challenged practice is likely to increase concentration or create high barriers to entry, so much the better. But in any event, the practice may be condemned as an unwarranted limitation on buyer and/or seller opportunities.

Preservation of free and unrestricted markets comprised of a large number of buyers and sellers is of course perfectly consistent with the economic goal of workable competition. But the

38. *See* United States v. General Motors Corp., 384 U.S. 127 (1966).

39. *Compare* Brown Shoe Co. v. United States, 370 U.S. 294 (1962) (vertical merger) *with* United States v. Loew's, Inc., 371 U.S. 38 (1962) (tying arrangement) *and* Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961) (requirements contract).

40. *Compare* Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962), *with* Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

Court has often seemed less concerned with the economically necessary level of rivalry within the market than with what may be described as the "rights" of the individual firms which comprise the market: their independence and right to be treated as other firms are treated have become values to be protected as ends in themselves. This necessarily shifts the focus away from the market to the allegedly injured firm or group of firms.

The preoccupation in *Von's Grocery*,[41] a horizontal merger case, with the dual need to preserve a large number of competitors and to protect small business indicates that such concerns have found expression in cases other than those involving vertical restraints. But it is in cases challenging vertical restraints that these themes have been most persistent and most determinative of the outcome. The "foreclosure" standard so frequently used in vertical restraint cases partially reflects this emphasis on the preservation of numerous competitors and protection of small businessmen. This concern is also evident, in a somewhat different dimension, in the Court's frequent assertions that unlawful restraints have been "imposed" on buyers (usually distributors) as the result of inequality of bargaining power between buyer and seller. One of the commonly stated vices of tying arrangements is that they "coerce" the buyer into purchasing a product he does not want.[42] In *Brown Shoe,* the Court noted that the acquired firm would be "forced" to buy Brown's shoes.[43] Similar findings of "coercion," "compulsion," or other economic pressure appear regularly in cases involving contractual arrangements between manufacturers and distributors with respect to prices, territories, and customers. This suggests that it is the manner in which the restraint is imposed, rather than the effect of the arrangement upon the market, which is the reason for its condemnation.[44] "Coercion" is a slippery concept, and the Court has used the word rather loosely. In some cases, it appears to mean that the buyer is peculiarly dependent upon a given seller as a source of supply and may simply be a shorthand expression denoting market power in the seller. But at other times, the word seems to mean little more than the seller is somehow "bigger" than the buyer, a condition which generally prevails when the buyer is an independent distributor. However unrealistically, the distributor is viewed as an independent economic unit whose very independence is itself

41. United States v. Von's Grocery Co., 384 U.S. 270 (1966).

42. *See, e.g.,* United States v. Loew's, Inc., 371 U.S. 38, 48 n.6 (1962).

43. Brown Shoe Co. v. United States, 370 U.S. 294, 332 (1962).

44. Simpson v. Union Oil Co., 377 U.S. 13, 21 (1964); United States v. Parke, Davis & Co., 362 U.S. 29, 42 (1960). *Cf.* Atlantic Ref. Co. v. FTC, 381 U.S. 357, 368 (1964).

a value to be protected. The antitrust laws have become the vehicle for redressing the imbalance of bargaining power which threatens the exercise of his independent judgment.

The Court's increasing emphasis on the preservation of equal individual opportunity and on uncoerced, fully independent decision-making can hardly be said to be alien to the history and tradition of the antitrust laws. The values reflected are more social and political than economic, but this is in itself no basis for condemnation of the Court, particularly at a time when similar values have become increasingly important in other areas. Equality of opportunity—the right of every man to make his own decisions and to go as far as his talents will take him—has been the dominant concern of our time. It has also been the primary concern of the Warren Court. These values cannot be left behind when the Court proceeds from a civil rights or criminal case to an antitrust case. On the other hand, such values cannot simply be transposed from controversies pitting blacks against whites to those between "big" business and "small" business; obviously the values may be qualitatively different and more important in one setting than in the other. Moreover, even in civil rights some have argued that the Court has gone too far—that it has created more than equality between black and white, poor and rich, and that it has failed to give proper weight to other societal values. This does not mean that equality as a social and political value is unimportant. It merely suggests that in a given case its cost may come too high.

The question of cost—of the proper weighing of competing values—is now the critical one for antitrust. The teachings of economic theory may not be determinative of the outcome, but they are not irrelevant. Through the use of economic analysis, the costs of competing antitrust values can be identified with considerable accuracy. If protection of independent judgment, individual initiative, and equality of opportunity is achieved at the cost of economic efficiency, the price may be too great. Society may value small business, for example, but not to the point of subsidizing it. It is in the proper weighing of these values, it seems to me, that the Court has often failed. It has too often been intolerant of arguments predicated upon the efficiency-creating nature of the conduct before it.[45] While perhaps not all conduct resulting in economic efficiency should be approved, the Court must accurately appraise the cost of prohibiting a practice before condemning it.

45. The clearest example is Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).

Apart from what the Court has said and done in specific cases, what has been the practical effect of its antitrust work? To a considerable degree, the answer must await the passage of time. It is surely too early to determine whether there has been any restructuring of American industry in a manner more likely to assure competitive results. We might assume, for example, that horizontal mergers have been significantly impeded and still conclude that alternative means of expansion have brought about just as much, if not more, concentration in the market. But some noneconomic effects are already apparent, and worth noting.

First, both directly and through its encouragement of public and private enforcement, the Court has made the business community more aware of antitrust than ever before. No major American corporation would consider a merger today without first consulting antitrust counsel. Businessmen now commonly talk about antitrust; internal compliance programs have been initiated and carried out. One cynical friend suggests that antitrust is now the second most talked about subject among businessmen, the favorite still being prices!

Second, the broad prohibitory rules established by the Court, particularly in merger cases, have gradually but perceptibly worked significant institutional changes in the Antitrust Division of the Department of Justice. Prosecutors always have some degree of discretion in deciding whether to prosecute. But under the standards of recent horizontal merger cases, the decision by the Department to proceed in a given case is viewed as virtually determinative of the outcome. As a result, attention has focused on this initial decision. Formally or informally, hearing procedures are developing; argument by counsel may be heard before a complaint is issued. Recent months have also seen the announcement of Department guidelines for enforcement of section 7 of the Clayton Act.[46] What all this suggests is that the decision-making forum is shifting and that the Department is acting increasingly like an administrative agency—a development which warrants more attention than it has so far received.

Finally, the Court's work has resulted in an increasing cynicism about its methods and results which threatens to foreclose realistic assessment of its accomplishments and ultimately to jeopardize acceptance of its commands. This is admittedly a harsh statement. Hopefully I overstate the problem. I would be delighted to be wrong. But anyone dealing daily with antitrust knows that a growing attitude exists among antitrust lawyers that no purpose

[illegible] Justice, Merger Guidelines, May 30, 1968.

is served either by analyzing opinions or by preparing factual records and arguments. There is, in short, a far too common belief that whatever the language of previous Court opinions, the findings of the district court, or the merits of the case in general, the result is preordained. Defense lawyers expect to lose, and are likely to view the litigation as a useless gesture. I have heard government lawyers express similar views, except that they expect to win. Combatting this same attitude in law students is, in my judgment, the most difficult part of teaching antitrust. As an immediate matter, the effectiveness of the litigation process may be impaired. Such an attitude may also lead to an increasing assumption of decision-making responsibility by the Congress, thereby further impairing the credibility of the judicial process.[47]

The attitude with which I am concerned is something more than fundamental disagreement with the results reached by the Court; there is obviously a difference between good faith criticism and cynicism. The cynicism of which I speak concerns the Court's methods—the decision-making process itself. This is not to suggest that it is an attitude wholly unconcerned with the result of cases, or that, indeed, it does not reflect some good faith disagreement with the policies being applied. But for the most part, cynicism has developed because of the one-sidedness of the decisions, not because of their merits.

The tendency of many critics to focus on the manner in which the Court has decided cases, rather than upon the ultimate merits of the decisions, seemed deplorable to me when I began teaching antitrust three years ago. Obviously some opinions were less than clear and seemed lacking in candor. There were occasions when the Court ignored or abused precedent to reach a particular result. But the same was true in many earlier opinions, and there have often been sound reasons for these deficiencies. It was equally true that the Court had formulated broad prohibitory rules in cases where such rules were not necessary to the outcome. But in my view it seemed clear that the interests of antitrust policy could not always best be served by deciding particular cases on the narrowest possible grounds. Broader rules which are stated with some certainty afford needed guidance to the business community. I was even willing to concede that the Court was result-oriented. After all, the antitrust laws virtually direct the Court to formulate economic policy; to suggest that a Court so charged by the statute was result-oriented was virtually a truism. If in a

47. *Cf.* Bank Merger Act of 1966, 12 U.S.C. § 1828(c) (Supp. II, 1967).

particular case the result happened to favor the Government, it was simply because the Government's position was in accord with the policies being applied by the Court. I still have considerable faith in these answers, but every year they are less satisfying. I now find myself being infected with the same cynicism, hopefully to a lesser degree, that has infected my students. I do not think the explanation is as simple as contagion. Whatever the explanation, it is disturbing that those of us who should know better are catching the disease.

The explanation for this cynical attitude is complex. It begins with statistics. During the 1953 through 1967 terms, the Court wrote full opinions in forty-five antitrust cases in which the Government was plaintiff. Forty-two cases were decided in the Government's favor. Of twenty-five cases decided with full opinion involving the Federal Trade Commission, twenty-three decisions have been in favor of the Commission. Private plaintiffs in treble damage suits have not fared quite as well; they obtained favorable results in only twenty of thirty-one cases decided with full opinion during this same period.[48] To be sure, there have been landmark decisions in favor of defendants. *Tampa Electric,*[49] upholding a long-term requirements contract, and *Noerr,*[50] virtually immunizing what may be loosely described as lobbying practices from the antitrust laws, may be cited as examples. But these decisions came in treble damage suits to which the Government was not a party. There have been but two major decisions in government cases favorable to defendants. One, the *DuPont Cellophane* case,[51] came early in the history of the Warren Court, and the other, *White Motor,*[52] apparently has been superseded.

Among many laymen, and indeed many lawyers, the basic concept of evenhanded justice has come to be reflected in the view that some kind of score—a measure of justice if you like—can be kept in won-lost columns. When the columns get too far out of balance in either direction, something is wrong. The columns in antitrust are now hopelessly out of balance. But such a won-lost

48. These figures are based upon those in Arnold, *supra* note 29, at 18, which cover the Court's 1953 through 1965 terms. To these I have added figures for the 1966 term, as set out in *The Supreme Court, 1966 Term,* 81 HARV. L. REV. 69, 128-29 (1967), and figures for the 1967 term based on my own count. There may of course be disagreement over who "won" a particular case. The *Schwinn* case, for example, is identified as a Government victory, a debatable conclusion. But such disagreements can extend to very few cases.

49. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

50. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

51. United States v. E. I. duPont de Nemours & Co., 351 U.S. 377 (1956).

52. White Motor Co. v. United States, 372 U.S. 253 (1963).

analysis has little utility, for it says nothing about why the imbalance has occurred. The figures may whet one's curiosity—may even raise doubts—but doubts can be erased by adequate explanation. Some explanation may be found in the high selectivity exercised by the Solicitor General over cases carried by the Government to the Supreme Court. But ultimately, explanation of the Court's actions must come from the Court itself. The observer who is dissatisfied with the Court's own explanations of its actions is left to speculate for himself.

Others have catalogued in detail the deficiencies in many of the Court's opinions, and I do not intend to repeat that here.[53] The cases about to be discussed are simply illustrative; they are ones which have particularly troubled my students as well as myself. They do not typify all of the Court's antitrust opinions (for some have been outstanding), but they are illustrative in the sense that other cases could be substituted to make the same points. Nor, it should be understood, do I intend to be critical for the sake of criticism. But the reasons for a widely prevalent attitude must be understood if it is to be corrected. What follows is in a sense a plea for the Court to give its defenders more help than it has given them in the past.

The Court's merger decisions have contributed disproportionately to the growing concern with the Court's methodology. *Brown Shoe* was well received, primarily because of the moderate tenor of the opinion. And there was an appealing practical candor to the opinion in *Philadelphia Bank* (at least that portion of the opinion dealing with the merits of the section 7 violation). But subsequent decisions, particularly those in which market definition has been critical, have caused many to concur with Justice Stewart's observation that the only consistent pattern discernible in the Court's merger decisions is that "the Government always wins."[54] This attitude rests in part on the fact that the Government *has* always won, and in part on the Court's ability to place increasing emphasis on the preservation of small business and a wide range of buyer choice as the market shares in the cases before it have grown smaller.

The *Brown Shoe* opinion itself has been a contributing factor to the growing sense of cynicism. For as the Court has moved closer to a per se prohibition of horizontal mergers, its apparent departure from the approach suggested in *Brown Shoe* has led some to conclude that the Court did not mean what it initially said. This

53. *See, e.g.*, Handler, *The Supreme Court and the Antitrust Laws (From the Viewpoint of the Critic)*, 34 A.B.A. ANTITRUST L.J. 21 (1967).
54. United States v. Von's Grocery, 384 U.S. 270, 301 (1966) (dissenting opinion).

is the kind of self-perpetuating suspicion which is easily carried over to other cases. It is not inconceivable that the Court *has* had a more severe prohibition in mind all along, or at least that it has concluded that the antimerger movement desired by Congress would be substantially impeded by a single pro-merger decision. If so, *Brown Shoe* may be explained as a tactical effort to achieve initial maximum acceptance. Any subsequent open announcement of a harsher rule would have been too much of a departure from *Brown Shoe,* particularly since the same message could be communicated on a case-by-case basis. Moreover, adopting a harsher rule might have placed undue pressure to prosecute on the Department of Justice. If the Court *has* reasoned in such a manner, one might simply suggest that the cost in terms of impairment of its credibility has been too great. But while some members of the Court may have had such a preconceived plan, the more plausible explanation is that the Court meant what it said in *Brown Shoe* and that its position has changed, if at all, only as it gained experience with subsequent cases. Indeed, I do not agree that there has been a substantial departure from *Brown Shoe.*

The most common specific attack on the Court's methodology in merger cases has been directed at its definitions of markets. On the whole, given the complexity of market definition and the lack of adequate expert guidance furnished to the Court, it has handled the process as well as can be expected. But market definitions *can* be manipulated to reach a particular result. Each party in merger litigation has a tactical reason for preferring one market definition over another. The Court has persistently accepted the market definitions proposed by or favorable to the Government, often setting aside district court findings to do so. In such circumstances, it takes only one or two cases in which the Court's reasoning is clearly inadequate to cast doubt on the entire definitional process. *Alcoa-Rome Cable*[55] is such a case. The Supreme Court, having concluded contrary to the findings of the district court that insulated aluminum conductor was in a market apart from its copper counterpart, went on to define the relevant market to include both bare and insulated aluminum cable. The inclusion of these two products in a single market is particularly astonishing. While noting that both bare and insulated aluminum cable are used to carry electricity, the Court's primary justification for this curious result was that it was simply "a logical extension of the District Court's findings."[56] But it clearly is not. It hardly follows that because aluminum in-

55. United States v. Aluminum Co. of America, 377 U.S. 271 (1964).
56. 377 U.S. at 277 n.4 (1964).

sulated conductor and copper insulated conductor do not compete that bare and insulated aluminum conductor do. With what explanation is the reader left?

The Court's treatment of precedent has often lacked candor and interjected confusion concerning the meaning of its rulings. In *Simpson v. Union Oil Co.*,[57] for instance, the Court held unlawful a series of consignment contracts pursuant to which Union Oil fixed the price to be charged by its dealer-consignees. The Court's opinion is clouded with unnecessary uncertainty: although proceeding on the assumption that there was a valid consignment, the Court emphasized the "coercion" of dealers, and its constant use of quotation marks around the word "agency" suggests that it doubted the good faith of the arrangement. Holding the arrangement unlawful seems to conflict with the old *G.E.* case,[58] which permitted a manufacturer to control its consignees' prices. *Simpson* distinguished *G.E.* on the ground that a patented article was involved in the latter,[59] a distinction far too transparent. The rationale of *G.E.* in no way relied upon the presence of a patent. In asserting that it did, the Court quoted portions of the *G.E.* opinion dealing with a completely different issue—the right of a patent holder to set the price at which its manufacturing licensees sell (a fact pointed out by the dissent).

Simpson, in turn, was treated in an almost inexplicable manner in *Schwinn*,[60] as was the Court's earlier decision in *White Motor*.[61] At issue in *Schwinn* were (1) agreements preventing distributors from selling bicycles purchased from Schwinn to anyone other than retailers franchised by Schwinn; (2) agreements preventing franchised retailers from selling bicycles purchased from Schwinn to nonfranchised retailers; (3) a series of similar restrictions, including territorial restrictions, imposed on distributors who did not purchase but acted as Schwinn's agents or consignees. Agreements confining resale by purchasing distributors to specific territories had been held unlawful by the district court, and no review of this holding was sought. Schwinn's restraints upon purchasing distributors and retailers were similar to those before the Court in *White Motor*. In that case, which came on motion for summary judgment, the Court refused to apply a per se rule to the restraints, explaining that it did "not know enough of the economic

57. 377 U.S. 13 (1964).
58. United States v. General Elec. Co., 272 U.S. 476 (1926).
59. 377 U.S. at 23.
60. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).
61. White Motor Co. v. United States, 372 U.S. 253 (1963).

and business stuff out of which these arrangements emerge to be certain of their purpose and effect."[62] Yet in *Schwinn*, the Court seemed to hold that all agreements placing customer or territorial limitations upon purchasing retailers are per se violations of the Sherman Act. What then became of *White Motor*? *White Motor* was cited *in support* of the Court's per se rule. Perhaps by the time *Schwinn* was decided the Court did know more of the purpose and effect of such arrangements, but this was not demonstrated. The Court's holding rested on the common-law rule against restraints on alienation, a rule without necessary relationship to anticompetitive effect and as much available in *White Motor* as in *Schwinn*. Recognizing that this common-law rule afforded no basis for condemnation of Schwinn's contractual arrangements placing similar restraints on consignees or agents, the Court next concluded that these restraints were not only not per se violations, but were entirely lawful on the record before it. The Court's distinction between agency and sale brought *Schwinn* into apparent conflict with *Simpson*, where the Court seemed to say that the application of antitrust rules is in no way dependent upon such a distinction. To be sure, *Simpson* emphasized that dealers had been "coerced" into the consignment; such coercion was apparently lacking in *Schwinn*. The dealers in *Simpson* handled no competing products; Schwinn's dealers did sell other bicycles. And, *Simpson* involved price-fixing. But the Court in *Schwinn* made virtually no effort to distinguish *Simpson*. The result in *Schwinn* may well be sound, but the Court's own explanation, together with its treatment of *White Motor* and *Simpson*, puts the matter in doubt.

Finally, note should be taken of a number of cases in which the Court has adopted strained statutory constructions thought justified by broad antitrust policy considerations. The constructions of the jurisdictional provisions of section 7 in *Philadelphia Bank*[63] and the interpretation of the All Writs Act[64] in *Dean Foods*[65] may be cited as examples. Most disturbing, however, has been the Court's holding that under section 5(b) of the Clayton Act the pendency of Federal Trade Commission proceedings will toll the statute of limitations on treble damage actions involving the same matter.[66] Dealing with statutory language which was on its face quite clearly

62. 372 U.S. at 263 (1963).
63. United States v. Philadelphia Natl. Bank, 374 U.S. 321, 335-49 (1963).
64. 28 U.S.C. § 1651(a) (1964).
65. FTC v. Dean Foods Co., 384 U.S. 597 (1966).
66. New Jersey Wood Finishing Co. v. Minnesota Mining and Mfg. Co., 381 U.S. 311 (1965).

inapplicable, the Court's only specific reference to the language was a statement that it "does not clearly encompass Commission proceedings."[67] Such decisions, whether right or wrong in terms of antitrust policy, are particularly disturbing to lawyers who may feel uneasy in criticizing substantive decisions because they do not fully comprehend economic doctrine, but who regard statutory interpretation as their own domain.

Alcoa-Rome Cable, *Simpson*, *Schwinn*, and the other cases just discussed are of course but single cases. Each decision may be explained, and its inadequacies may be justified. But it is the impression and attitude derived from a series of such cases that is troublesome. Too often the burden of explanation has been left to those of us who would defend the Court. The task grows increasingly difficult.

The antitrust accomplishments of the Warren Court have been many. As in other substantive areas it has led, not followed. It has led reluctant lower courts and, on occasion, a reluctant Department of Justice. But methodology is an important aspect of leadership, even for those in positions of power. A leader with a just cause may fail not because his cause is unacceptable but because his methods are wrong. This is the dilemma the Court now faces. Faced with increasing cynicism and distrust among many of those it seeks to lead, there is at least some danger that it may become a Pied Piper with an unheeded tune.

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67. New Jersey Wood Finishing Co. v. Minnesota Mining and Mfg. Co., 381 U.S. 311, 321 (1965). *See* P. AREEDA, ANTITRUST ANALYSIS 42 n.97 (1967).