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THE GOALS OF ANTITRUST: A DIALOGUE ON POLICY

In 1890, Senator John Sherman described the act which now bears his name as a "bill of rights, a charter of liberty."† Today, although a broad consensus has developed in favor of at least some regulation, a debate continues over the purposes of antitrust legislation and over the implementation of antitrust policy. Concern about the direction of antitrust doctrine has been aroused by recent decisions in the Supreme Court on mergers, Robinson-Patman violations and business torts.

Professors Bork and Bowman of the Yale Law School fear that the Sherman and Clayton Acts are being enforced in a way that is "anticompetitive," and are particularly critical of decisions dealing with mergers and vertical integration; Columbia Professors Blake and Jones reject the economic postulates of "these new critics of antitrust," and argue substantially in favor of existing trends. Because of the fundamental importance of the issues involved, the Editors of the COLUMBIA LAW REVIEW have invited these eminent scholars to continue a dialogue, initiated in FORTUNE magazine,‡ on the purposes of our antitrust policy and the methods by which these purposes may be achieved.

THE CRISIS IN ANTITRUST

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Long-standing contradictions at the root of antitrust doctrine have today brought it to a crisis of policy. From its inception with the passage of the Sherman Act¹ in 1890, antitrust has vacillated between the policy of preserving competition and the policy of preserving competitors from their more energetic

† 21 CONG. REC. 2461 (1890).

‡ The dialogue will be presented in five parts: (1) a statement of position by Professors Bork and Bowman; (2) a critique by Professors Blake and Jones; (3) separate rebuttals to the Blake-Jones critique by Professor Bork and (4) then Professor Bowman; (5) a rebuttal by Professors Blake and Jones. Although based on articles that first appeared in the December 1963 and August 1964 issues of *Fortune* magazine, the first two segments of the dialogue have been expanded, revised, and documented.

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1. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1959).

and efficient rivals. It is the rapid acceleration of the latter "protectionist" trends in antitrust that has brought on the present crisis. Anti-free-market forces now have the upper hand and are steadily broadening and consolidating their victory. The continued acceptance and expansion of their doctrine, which today constitutes antitrust's growing edge, threaten within the foreseeable future to destroy the antitrust laws as guarantors of a competitive economy.

The situation would be sufficiently serious if antitrust were merely a set of economic prescriptions applicable to a sector of the economy. But it is much more than that; it is also an expression of a social philosophy, an educative force, and a political symbol of extraordinary potency. Its capture by the opponents of the free market is thus likely to have effects far beyond the confines of antitrust itself.

The very existence of this crisis—and the basic societal changes it portends—is not generally understood. Even the business community, which is most immediately affected, though it is conscious of hostility, appears to understand neither the nature nor the immediacy of the threat. To be sure, businessmen and their lawyers may frequently be heard inveighing against some particular action of the courts or of the governmental enforcement agencies. Calls from industry for mutual reasonableness and understanding between government and business are common. But such responses to the situation are dangerously beside the point. The problem is not created by a temporary aberration of the courts or the unreasonableness of a particular set of officials who can be jollied out of it or, if not, who will eventually be replaced with a more reasonable set. The danger arises from a fundamental and widespread misconception of the nature and virtues of the competitive process. This misconception, coupled occasionally with real hostility toward the free market, exists in varying degrees in the courts, in the governmental enforcement agencies, and in the Congress, with the result that in crucial areas the doctrines of antitrust are performing a 180-degree turn away from competition.

The nature of the present crisis in the law can be illustrated by comparing the law concerning price-fixing and the developing law of mergers. Their difference reflects the schizophrenia afflicting basic antitrust policy.

The rule that price-fixing and similar cartel arrangements are illegal *per se*, that is, incapable of legal justification, must be ranked one of the greatest accomplishments of antitrust. Though its wisdom may seem obvious now, it was not always apparent that this was the correct rule or that the courts would adopt it. The first price-fixing case to reach the Supreme Court was brought by the government under the Sherman Act against the Trans-Missouri Freight Association, an association of railroads that agreed upon rates to be charged shippers.² Both the trial court and the court of appeals

2. *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).

agreed that the government's bill should be dismissed because the agreement provided for "reasonable" rates and the new Sherman Act only struck down unreasonable restraints of trade.³ The Supreme Court, by a five-to-four vote, rejected this view. If one vote had been cast the other way the "reasonableness" of the price agreed upon would have determined legality and the Sherman Act might easily have become not the symbol of the free market but a judicial version of the NRA. To many observers at the time, the Supreme Court's decision in *Trans-Missouri* seemed disastrous. Were businessmen to be helpless to defend themselves by reasonable agreement from "ruinous competition"? Would not the small and perhaps less efficient producer be at the mercy of the more efficient? The Supreme Court majority rejected such arguments for judicially supervised cartels. A year later William Howard Taft, writing for the Circuit Court of Appeals, rejected a similar defense in the *Addyston Pipe & Steel* case, warning that to adopt such a standard was to "set sail on a sea of doubt" and that courts that had done it had "assumed the power to say . . . how much restraint of competition is in the public interest, and how much is not."⁴ Since then, with very few exceptions, the Supreme Court has hewed to the rule of per se illegality for cartel agreements.

The reason behind the characterization of this rule as one of the supreme achievements of antitrust goes straight to fundamentals. Why should we want to preserve competition anyway? The answer is simply that competition provides society with the maximum output that can be achieved at any given time with the resources at its command. Under a competitive regime, productive resources are combined and separated, shuffled and reshuffled in search for greater profits through greater efficiency. Each productive resource moves to that employment where the value of its marginal product, and hence the return paid to it, is greatest. Output is maximized because there is no possible rearrangement of resources that could increase the value to consumers of total output. Competition is desirable, therefore, because it assists in achieving a prosperous society and permits individual consumers to determine by their actions what goods and services they want most.

Price-fixing is antisocial precisely because it lessens the total output of society. When competitors agree on higher prices and put them into effect, they necessarily restrict output and so reduce total wealth. Some of the resources in the industry are then unused or are necessarily transferred to other employment where the value placed on them by consumers is not as high. Over time, of course, such resources will move back into the industry as new firms are attracted by the higher rate of return there and move in. Usually the only way for the cartels to prevent this result is to persuade the govern-

3. *United States v. Trans-Missouri Freight Ass'n*, 53 Fed. 440 (C.C.D. Kan. 1892), *aff'd*, 58 Fed. 58 (8th Cir. 1893), *rev'd*, 166 U.S. 290 (1897).

4. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 284 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

ment to impose legal barriers on entry into the industry, but that is not always possible. The tendency of competition to erode cartels does not, however, disprove the value of the rule against price-fixing. Though its life is limited, the cartel may last long enough to cause a substantial loss in output.

The per se rule fashioned by the Supreme Court is thus a model antitrust law. It is at once a relatively clear, workable rule and the expression of sound social policy.

In dismal contrast has been the record of the courts in the field of mergers and of practices that are thought to injure competition by injuring competitors. Such practices as exclusive dealing and price discrimination fall within this latter category. It is here that antitrust has gone awry and that the immediate cause of its crisis lies. In order to understand the crisis, it is essential to understand the doctrines that underlie the courts' performance. These consist primarily of the theories of: (1) monopoly-gaining or exclusionary practices; (2) incipency; and (3) the "social" purposes of the antitrust law. Though they enjoy nearly universal acceptance and provide the impetus and intellectual support for the law's current growth, these doctrines in their present form are inadequate theoretically and seriously disruptive when applied to practical business relationships.

QUESTIONABLE DOCTRINES OF ANTITRUST

A. *Exclusionary Practices*

Economic theory indicates that present notions of the exclusionary practices are fallacious. This was first perceived by Professor Aaron Director, of the University of Chicago Law School,⁵ who noted that practices conventionally labeled "exclusionary"—notably, price discrimination, vertical mergers, exclusive dealing contracts, and the like—appeared to be either competitive tactics equally available to all firms or means of maximizing the returns from a market position already held.⁶ Director's analysis indicates that, absent special factors that have not been shown to exist, so-called exclusionary practices are not means of injuring the competitive process. The example of requirements contracts illustrates the point. The theory of exclusionary tactics underlying the law appears to be that firm *X*, which already has ten percent of the market, can sign up more than ten percent of the retailers, perhaps twenty percent, and, by thus "foreclosing" rivals from retail outlets, obtain a larger share of the market. But one must then ask why so many retailers are willing to limit themselves to selling *X*'s product. Why do not ninety percent of them turn to *X*'s rivals? Because *X* has greater market

5. The authors are indebted to Professor Director by whom they were introduced to the general economic approach to antitrust problems represented in this article. He, of course, bears no responsibility for the specific analysis here.

6. See Director & Levi, *Law and the Future: Trade Regulation*, 51 Nw. U. L. REV. 281 (1956).

acceptance? But then *X*'s share of the market would grow for that reason and the requirements contracts have nothing to do with it. Because *X* offers them some extra inducement? But that sounds like competition. It is equivalent to a price cut, and surely *X*'s competitors can be relied upon to meet competition.

The theory of exclusionary practices, here exemplified in the use of requirements contracts, is in need of one of two additional assumptions to be theoretically plausible. One is the assumption that there are practices by which a competitor can impose greater costs upon his rivals than upon himself. That would mean that *X* could somehow make it more expensive for his rivals to sign retailers to requirements contracts than it is for *X* to do so. It would be as though *X* could offer a retailer a one dollar price reduction and it would cost any rival two dollars to match the offer. It is difficult to imagine that such a mechanism exists in the case of requirements contracts, price cutting, or the usual examples of predatory or exclusionary practices, but it is perhaps conceivable.

The other assumption upon which the theory of exclusionary practices might rest is that there are imperfections in or difficulties of access to the capital market that enable *X* to offer a one dollar inducement (it has a bankroll) and prevent its rivals from responding (they have no bankroll and, though the offering of the inducement is a responsible business tactic, for some reason cannot borrow the money). But it has yet to be demonstrated that imperfections of this type exist in the capital market.

Professor Director's reasoning applies to all practices thought to be exclusionary or monopoly gaining. A moment's thought indicates, moreover, that the notion of exclusionary practices is not merely theoretically weak but is, for such a widely accepted idea, remarkably lacking in factual support. Has anybody ever seen a firm gain a monopoly or anything like one through the use of requirements contracts? Or through price discrimination? One may begin to suspect that antitrust is less a science than an elaborate mythology, that it has operated for years on hearsay and legends rather than on reality. The few supposedly verified cases of the successful use of exclusionary tactics to achieve monopoly are primarily in the early history of antitrust. The story of the old Standard Oil trust is probably the classic example. The Supreme Court's 1911 *Standard Oil* opinion⁷ is pivotal not merely because it is thought to have launched the famous "rule of reason," nor because it decreed a dissolution that made the oil industry more competitive. Its greatest significance is that it gave substance and seeming historical veracity to the whole theory of exclusionary and monopoly-gaining techniques. It thus provided much of the impetus for the passage of the Clayton⁸ and Federal Trade

7. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

8. 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1959), as amended, 15 U.S.C. §§ 13, 21 (Supp. V, 1964).

Commission⁹ Acts in 1914. Such intellectual support as can be mustered for the law against price discrimination derives from the lessons supposedly taught by that case.

The factual accuracy of the *Standard Oil* legend is under attack and is coming to seem as dubious as the theory that it is thought to support. Professor John McGee has reviewed the entire case record of the *Standard Oil* litigation and reported that there is not one clear episode of the successful use by Standard Oil of local price cutting or other predatory practices.¹⁰ The other supposed instances of monopolies gained through such tactics deserve similar investigation.

It would be claiming too much to assert that there is no merit to the theory of exclusionary practices, but it is fair to say that that theory has been seriously challenged at both the theoretical and the empirical levels. Perhaps a sound theoretical base can be constructed. The law could then be directed at those practices that in particular settings may be exclusionary. So far as is known, however, this task has not been undertaken or even recognized by the Antitrust Division, the Federal Trade Commission, or any court.

B. *Incipency*

The incipency theory starts from the idea that it is possible to nip restraints of trade and monopolies in the bud before they blossom to Sherman Act proportions. It underlies the Clayton Act, the Robinson-Patman Act,¹¹ and the Federal Trade Commission Act. Though the idea initially sounds plausible, its consequences have proved calamitous. The courts have used the incipency notion as a license for almost unlimited extrapolation, reasoning from any trend toward concentration in an industry that there is an incipient lessening of competition. The difficulty with stopping a trend toward a more concentrated condition at a very early stage is that the existence of the trend is *prima facie* evidence that greater concentration is socially desirable. The trend indicates that there are emerging efficiencies or economies of scale—whether due to engineering and production developments or to new control and management techniques—which make larger size more efficient. This increased efficiency is valuable to society at large, for it means that fewer of our available resources are being used to accomplish the same amount of production and distribution. By inducing courts to strike at such trends in their very earliest stages, the concept of incipency prevents the realization of those very efficiencies that competition is supposed to encourage. But it is when the incipency concept works in tandem with the unsophisticated, but

9. 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-51 (1959), as amended, 15 U.S.C. §§ 41, 45 (Supp. V, 1964).

10. See McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J. L. & ECONOMICS 137 (1958).

11. 49 Stat. 1526 (1936), as amended, 15 U.S.C. §§ 13, 21(a) (Supp. V, 1964).

currently ascendant, theory of exclusionary practices that its results are most anticompetitive. Where a court or the Federal Trade Commission lacks the means to distinguish between tactics that impose greater costs on rivals and those that are normal means of competing, what evidence can it look to in its effort to discern an incipient lessening of competition? The obvious resort is to evidence that a competitor has been injured, for it is through the infliction of injury upon competitors that the exclusionary devices are thought ultimately to injure the competitive process itself. There seems no way to tell that a competitor has been "injured," however, except that he has lost business. And this is precisely the meaning that the statutory test of incipient lessening of competition or tendency toward monopoly is coming to have. In case after case the FTC, for example, nails down its finding that competition is injured with the testimony of competitors of the defendant that his activities and aggressiveness may or have cost them sales. The conduct that threatens such "injury" is then prohibited. That this result is itself profoundly anticompetitive seems never to occur to the Commission or to most courts.

C. *Social Purpose and Antitrust Law*

When the anti-efficiency impact of the law is occasionally perceived, the third theory—the social purpose of the antitrust laws—is called upon to provide a rationalization. Judge Learned Hand's opinion in *Alcoa*¹² contains the most famous exposition of this view. Hand suggested that Congress, in passing the Sherman Act, had not necessarily been actuated by economic motives alone. "[I]t is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent 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."¹³ He went on to say: "Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other."¹⁴

Hand's rhetoric has commended itself to most commentators on the topic, but it seems clear upon reflection that it is a position which is questionable as a description of congressional intent, dubious as social policy, and impossible as antitrust doctrine. It is simply not accurate to say that Congress ever squarely decided to prefer the preservation of small business to the preservation of a free market in which the forces of competition were dominant. There was much oratory in Congress about the virtues of small business but no clear indication that antitrust should create shelters for the inefficient. Moreover,

12. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

13. *Id.* at 427.

14. *Id.* at 429.

the statutory language of all the major antitrust laws after the Sherman Act explicitly requires the preservation of *competition*.¹⁵ That places an enormous burden of persuasion upon those who purport to find in the legislative history a direction to value small business above competition.

Hand's notion, moreover, is dubious, and indeed radical, social policy. It would be hard to demonstrate that the independent druggist or groceryman is any more solid and virtuous a citizen than the local manager of a chain operation. The notion that such persons are entitled to special consideration by the state is an ugly demand for class privilege. It hardly seems suited to the United States, whose dominant ideal, though doubtless too often flouted in legislative practice, has been that each business should survive only by serving consumers as they want to be served. If that ideal is to be departed from here, if antitrust is to turn from its role as the maintainer of free markets to become the industrial and commercial equivalent of the farm price-support program, then we are entitled to an unequivocal policy choice by Congress and not to vague philosophizing by courts that lack the qualifications and the mandate to behave as philosopher kings.

It is clear, in addition, that the "social purpose" concept is impossible as antitrust doctrine. It runs into head-on conflict with the per se rules against cartel agreements. Those rules leave it entirely to the play of competitive forces to determine which competitors shall grow and which shall shrink and disappear. If the social-policy argument makes sense, then we had better drop the per se rule in favor of one permitting the defense that cartels benefit small businessmen. Coexistence of the social-policy argument with the pro-competitive rules would introduce so vague a factor that prediction of the courts' behavior would become little more than a guessing game. How could one know in a particular case whether the court would apply a rigorously pro-competitive rule or the social policy of preserving small business units from aggressive behavior? When the person whose conduct is to be judged is in doubt concerning which of two completely contradictory policies will be applied, the system hardly deserves the name of law.

D. *Application of the Doctrines to Mergers*

The three theories discussed are active in many areas of antitrust, but perhaps they may be best illustrated in the law that is now developing under the provisions governing mergers. Collaboration of the theories produced the crash of antitrust merger policy in Chief Justice Warren's opinion for the Supreme Court in *Brown Shoe Co. v. United States*.¹⁶ The Court there held illegal the merger of Brown, primarily a shoe manufacturer, with the G. R. Kinney Co., primarily a retailer. Their respective shares of the nation's shoe

15. See, e.g., Clayton Act §§ 2, 3, 7, 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 14, 18 (1959), as amended, 15 U.S.C. § 13 (Supp. V, 1964).

16. 370 U.S. 294 (1962).

output were four percent and one-half of one percent. Kinney had 1.2 percent of total national retail shoe sales by dollar volume (no figure was given for Brown), and together the companies had 2.3 percent of total retail shoe outlets. With over 800 shoe manufacturers, the industry was as close to pure competition as is possible outside a classroom model. Yet the seven Justices participating in the case purported—by application of the three theories—to find a threat to competition at both the manufacturing and the retailing levels.

The Court held the merger illegal in both its vertical and its horizontal aspects. The Court generally views vertical integration as a form of exclusionary practice, on the ground that it is always possible that the manufacturing level will sell to the retail level of the same firm and thereby “foreclose” a share of the retail market otherwise open to competing manufacturers. In *Brown Shoe*, the Court said the share of the market foreclosed was not enough by itself to make the merger illegal, but that it became illegal when two other factors were examined: “[T]he trend toward vertical integration in the shoe industry, [and] . . . Brown’s avowed policy of forcing its own shoes upon its retail subsidiaries.”¹⁷ It is instructive to examine the facts upon which that conclusion rests. The “trend toward vertical integration” was seen in the fact that a number of manufacturers had acquired retailing chains. The district court found that the thirteen largest shoe manufacturers, for example, operated twenty-one percent of the census shoe stores. Accepting that figure for the moment, it is impossible to see any harm to competition. On a straight extrapolation, there would be room for over sixty manufacturers of equal size to integrate to the same extent, and that would result in as pure competition as is conceivable. In fact, since these were the largest shoe manufacturers, there would be room for many more manufacturers. But that is by no means all. The category of census shoe stores includes only those that make at least half their income from selling shoes. It thus leaves out about two-thirds of the outlets that actually sell shoes, including such key ones as department and clothing stores. Even if, as there was no reason to expect, complete vertical integration took place in the industry, there would obviously be room for hundreds of shoe manufacturers and, given the ease of entry into shoe retailing, no basis for imagining that any new manufacturer could not find or create outlets any time he chose. The Court’s cited “trend toward vertical integration” was thus impossible to visualize as a threat to competition.

Brown’s “avowed policy of forcing its own shoes upon its retail subsidiaries” turns out, upon inspection of the Court’s footnotes, to spring from the testimony of its president that Brown’s motive in making the deal was to get distribution in a range of prices it was not covering, and also, as Kinney moved into stores in higher income neighborhoods and needed to upgrade and add new lines, “it would give us an opportunity . . . to be able to sell them in

17. *Id.* at 334.

that category.”¹⁸ The empirical evidence of coercion was no more impressive than this “avowal.” At the time of the merger, Kinney bought no shoes from Brown, but two years later Brown was supplying 7.9 percent of Kinney’s needs. (Brown’s sales to its other outlets apparently had risen no higher than thirty-three percent of requirements, except in one case in which Brown supplied over fifty percent.) The “trend toward vertical integration” and the “avowed policy of forcing its own shoes upon its retail subsidiaries” were thus almost entirely imaginary. But even if they were accepted at face value, it ought to be noted that, since Kinney supplied about twenty percent of its own retail requirements, less than one percent of the nation’s total retail shoe sales was open to “foreclosure” by Brown through this merger and it had actually “foreclosed” slightly less than one-tenth of one percent. The idea of vertical integration as an exclusionary device had to be coupled with almost unlimited extrapolation in the name of incipency to reach the incredible result that the Court achieved on the vertical aspect of the case.

The horizontal aspect—the putting together of Brown’s and Kinney’s retail outlets—was held illegal on similar reasoning. The Court found illegal the creation of market shares of as low as five percent of shoe retailing in any city. “If a merger achieving 5% control were now approved,” it asserted, “we might be required to approve future merger efforts by Brown’s competitors seeking similar market shares. The oligopoly Congress sought to avoid would then be furthered.”¹⁹ On this reasoning every merger “furthers” oligopoly no matter how small a share of the market is taken over. To imagine that every firm would then merge up to five percent is to indulge in sheer conjecture, and in any event the result would be competition. Twenty firms in an industry is far too many for oligopolist behavior to occur. Given additional factors of the ease and rapidity of entry into shoe retailing, the Supreme Court’s fear of oligopoly where the merger created five percent control is incomprehensible.

Then, apparently without realizing the inconsistency with its earlier prediction that Brown would “force” its shoes upon Kinney, the Court suggested that another anticompetitive aspect of Kinney’s new ability to get Brown’s shoes more cheaply would give it an advantage over other retailers. “The retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers.”²⁰ The merger was bad both because Brown might “force” Kinney and because Kinney wanted to be “forced.” This fascinating holding creates an antitrust analogue to the crime of statutory rape.

Apparently concerned that the achievement of efficiency and low prices

18. *Id.* at 304 n.8.

19. *Id.* at 343-44.

20. *Id.* at 344.

through merger seemed to be illegal under this formulation, the Court then stated:

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.²¹

No matter how many times you read it, that passage states: Although mergers are not rendered unlawful by the mere fact that small independent stores may be adversely affected, we must recognize that mergers are unlawful when small independent stores may be adversely affected.

The *Brown Shoe* case employed the theory of exclusionary practices to outlaw vertical integration that promised lower prices, the theory of incipency to foresee danger in a presumably desirable trend that was barely started, and the theory of "social purpose" to justify the fact that the decision prevented the realization of efficiencies by a merger which, realistically viewed, did not even remotely threaten competition.

The FTC and some of the lower federal courts are now pushing these doctrines to their logical conclusion—an attack on efficiency itself as anticompetitive. This is seen most clearly in the rash of suits challenging conglomerate mergers. A conglomerate merger is one between parties that are neither competitors nor related as supplier and customer, an example being the acquisition by a locomotive manufacturer of an underwear maker. It neither increases any firm's share of a market nor forecloses anybody from a market or source of supply. The government's attack on such mergers, therefore, has had to be on the theory that they create a "competitive advantage" which may enable the new firm to injure rivals. The competitive advantage, upon inspection, turns out to be efficiency. Thus, a district court entered a preliminary injunction at the government's request restraining Ingersoll-Rand Co. from acquiring three manufacturers of underground coal-mining machinery and equipment.²² Though the opinion rested in part upon the competing status of the acquired companies, it stressed the conglomerate aspects of the merger. One of the court's explicit fears was that the merger would create "economies of scale" (efficiencies due to size) which would put other companies at a competitive disadvantage.²³ The court of appeals affirmed, noting as anticompetitive the

21. *Ibid.*

22. *United States v. Ingersoll-Rand Co.*, 218 F. Supp. 530 (W.D. Pa.), *aff'd*, 320 F.2d 509 (3d Cir. 1963).

23. *Id.* at 554.

fact that Ingersoll-Rand would be able "to offer a complete line of equipment to its consumers and to further enhance its position and dominance in the market by extending consumer financing to prospective purchasers through its wholly owned subsidiary finance company."²⁴ This is a decision that illegality attaches when the merger enables better service to consumers.

The Federal Trade Commission expressed a similar philosophy in holding illegal Procter & Gamble's acquisition of the Clorox Chemical Co., primarily because the advantages which Clorox might derive from the union were thought likely to hurt the sales of other liquid bleach manufacturers.²⁵ The opinion met head on the obvious objection that the Commission was condemning efficiencies:

In stressing as we have the importance of advantages of scale as a factor heightening the barriers to new entry into the liquid bleach industry, and so impairing competitive conditions in that industry, we reject, as specious in law and unfounded in fact, the argument that the Commission ought not, for the sake of protecting the "inefficient" small firms in the industry, proscribe a merger so productive of "efficiencies." The short answer to this argument is that, in a proceeding under Section 7, economic efficiency or any other social benefit resulting from a merger is pertinent only insofar as it may tend to promote or retard the vigor of competition.²⁶

This passage applies not simply to advertising advantages but to all efficiency. It turns the normal order of policy around. Instead of desiring competition as a means to efficiency, the Commission here makes "the vigor of competition" an end in itself, defines it by ease of entry into the market, and expresses willingness to sacrifice societal wealth through efficiency to the maintenance of competition as so defined. The result is simply to label efficiency as anticompetitive whenever it may cause injury to competitors or make it more difficult for new firms to enter the market. All efficiency, however, is likely to have just such effects. The Commission's rationale, consistently applied, would thus favor inefficient producers at the expense of the consuming public over enormous ranges of economic activity.

Neither the *Ingersoll-Rand* case nor the *Procter & Gamble* decision considers that the creation of efficiencies is the main benefit competition has to offer society. If it now takes fewer salesmen and distribution personnel to move a product from the factory to the consumer than it used to or if advertising or promotion can be accomplished less expensively, that is a net gain to society. We are all richer to that extent. Multiplying such additions to social wealth by hundreds and thousands of transactions and an enormously important social phenomenon is perceived. And law that makes the creation of efficiency the touchstone of illegality can only tend to impoverish us as a nation.

24. *United States v. Ingersoll-Rand Co.*, 320 F.2d 509, 524 (3d Cir. 1963).

25. *Procter & Gamble Co.*, 3 TRADE REG. REP. ¶ 16673 (FTC 1963).

26. *Id.* at p. 21585.

To inhibit the creation of efficiency in order to make life easier for other producers or for would-be entrants is to impose a tax upon efficiency for the purpose of subsidizing the inept. It is precisely analogous to a tariff designed to shield a high-cost domestic industry from more efficient foreign industry, or to a law requiring manufacturers to practice resale price maintenance in order to ease entry into retailing. The anticompetitive impact of such laws is recognized by almost all students of antitrust. It is surprising that so many of them fail to perceive the same principle in operation when the antitrust law protects competitors in the name of protecting competition.

Too few people understand that it is the essential mechanism of competition and its prime virtue that more efficient firms take business away from the less efficient. Some businesses will shrink and some will disappear. Competition is an evolutionary process. Evolution requires the extinction of some species as well as the survival of others. The business equivalents of the dodoes, the dinosaurs, and the great ground sloths are in for a bad time—and they should be. It is fortunate for all of us that there was no Federal Biological Commission around when the first small furry mammals appeared and began eating dinosaur eggs. The commission would undoubtedly have perceived a “competitive advantage,” labeled it an “unfair method of evolution,” and stopped the whole process right there.

In trying to understand the development of this anticompetitive strain in antitrust, it would be wrong to underestimate the role of the Supreme Court. Though compelled by neither the wording nor the legislative history of the laws, the Court has with increasing frequency taken extreme anticompetitive positions. In many cases the Court has materially changed the law as it had previously been understood. This means that the Court is making major social policy, and the policy it chooses to make today is predominantly anticompetitive. It is naive to imagine that Congress can always correct the Court when it legislates in this fashion. When the Court, consciously or unconsciously, changes the meaning of a statute or the direction of a body of law, it may very well accomplish a change that Congress was politically incapable of making, but is equally incapable of reversing. In fact, the prestige of the Court is so high that by taking the lead in formulating new policy, it may make further legislative change in the same direction much easier. The propriety of this process and of the Court's rather unrestrained use of its power and influence depends of course upon one's view of the correct roles and relationships of the judiciary and the legislature. It seems at least highly doubtful that it is appropriate for major policy shifts to come through the judicial process when they could not initially have been arrived at by the political process.

Policy is thus made by the Supreme Court to a far more significant degree than by the Antitrust Division and the Federal Trade Commission. It is a policy that is also forwarded by Congress and that is, of course, acquiesced

in by the electorate. The crisis in antitrust, therefore, seems finally traceable to widespread economic misconceptions that create the opportunity for groups with political power to extract rewards from consumers that they cannot command in the market place. This gives antitrust a high political assay and greatly strengthens its protectionist bias. Scolding the enforcement agencies, while it is highly diverting sport at bar association meetings—a sort of sedentary version of bullbaiting suitable for middle-aged lawyers—is ultimately rather beside the point. Even if they wished to, they could hardly be expected to withstand the continual pressure from Congress. Basic education about the role and functioning of the market, therefore, may be the only long run hope there is for the survival of antitrust as rational social policy.