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### Recommended Citation

Low, Richard E. (1970) "Corporate Diversification, Economic Theory and the Antitrust Laws," *St. John's Law Review*: Vol. 44 : No. 5 , Article 31.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol44/iss5/31>

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# CORPORATE DIVERSIFICATION, ECONOMIC THEORY AND THE ANTITRUST LAWS

RICHARD E. LOW\*

*Anyone . . . who does not grasp the deep human resentment at having to grub around in data when we know the truth all along, cannot really understand the enforcement of any economic policy, including antitrust.<sup>1</sup>*

In Anatole France's satire of the Dreyfus case in *Penguin Island*, a character criticizes an anti-Dreyfusard attempt to forge some evidence against Captain Dreyfus with the remark that as long as no evidence — real or forged — existed, it would be impossible for the Captain's guilt to be disproved.<sup>2</sup> After all, as long as no evidence existed, the hypothesis of Captain Dreyfus' guilt was consistent with all the available evidence. Such was the original strength of the reciprocity doctrine in conglomerate antitrust law. And for those *who know the truth anyway*, the lack of data to "grub around in" can have both aesthetic and practical advantages. Unfortunately for the aesthetic approach to the conglomerate problem, we have had substantial, if unclear, data on predatory practices, limit pricing, entry conditions and scale economies for some time.

## THE NATURE OF THE PROBLEM

It is a major function of economics, in antitrust as elsewhere, to devise and test questionable hypotheses.<sup>3</sup> Even so, the historic concentration of neoclassical theory (and to a lesser degree its industrial organization counterpart) has been upon single-product firms operating outside of time and space. Thus, this particular function, insofar as it purports to explain the problems of diversified firms, is incipient at best.<sup>4</sup> Presumably, Mr.

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<sup>1</sup> Adelman, *Problems and Prospects in Antitrust Policy — II*, in PERSPECTIVES ON ANTI-TRUST POLICY 32, 35 n.5 (A. Phillips ed. 1965).

<sup>2</sup> A. FRANCE, PINGVIN ISLAND 157 (Bantam Books ed. 1958).

<sup>3</sup> The word "questionable" refers to an assertion that may be plausible but can only be verified by empirical investigation. In other words, a questionable assertion is one that can be questioned by the facts (and hence cannot be a tautology).

W. BAUMOL, BUSINESS BEHAVIOR, VALUE AND GROWTH 1 n.1 (1959). The profit maximization assumption, among various economic hypotheses, is a good example of how courts can turn a questionable hypothesis (and, in that instance, one that is not consistent with much of the available evidence) into revealed truth and into a conclusive presumption of law. See *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 583 (1967); R. LOW, MODERN ECONOMIC ORGANIZATION 243-53, 464 (1970) [hereinafter cited as Low]. It may well be desirable to treat certain questionable hypotheses, or tautologies, as conclusive presumptions. It would help to view them this way instead of as revealed truth.

<sup>4</sup> It is currently argued that: "Microeconomic theory is basically a theory of the

Justice Harlan's comment is still appropriate in 1970 both to the testable hypotheses and the data aspects of "economic knowledge":

It seems to me that there is a serious question whether the state of our economic knowledge is sufficiently advanced to enable a surefooted administrative or judicial determination to be made *a priori* of substantial anticompetitive effect in . . . conglomerate and product-extension mergers. . . .<sup>5</sup>

Fortunately, this is an aspect that need not divide lawyers and economists in antitrust. Indeed, there is just as serious a question as to the state of our administrative and judicial procedures for reaching any "determination" — "surefooted" or otherwise.

Perhaps such academic caveats would not matter if we were convinced of the reality, immediacy and dire nature of the conglomerate peril.<sup>6</sup> But it is difficult to see how we can dismiss qualifications as "merely academic" evidence to sustain its validity. Can we detect a certain parallel between some such warnings and the more commonly condemned techniques of Madison Avenue? The possibility that the best advertising need not necessarily be paid for by the advertisers has been mastered by very diverse groups. It was pointed out in a narrower context at the start of the 1960's by Professor Stigler: "the public sector has the valuable boon that its advertising is deemed to be news and hence escapes both the costs and measurement of other forms of advertising."<sup>7</sup> The past decade certainly offers a wealth of data for testing this particular hypothesis, and the present controversy on conglomerates may prove beneficial in providing even more data on such important, if not strictly legal or economic, problems.

But the courts do have conglomerate cases before them that require

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one-product firm. It has little to offer us by way of testable hypotheses of how multi-industry firms behave." H. GRABOWSKI & D. MUELLER, *INDUSTRIAL ORGANIZATION AND THE ROLE AND CONTRIBUTION OF ECONOMETRICS*, 60 *AM. ECON. REV. SUPP.* (1970). Yet the same article reports contrary developments within industrial organizations, while managerial economics has long dealt with the problems of diversified firms. And some recent econometric work seems very relevant to the present anti-conglomerate campaign, as well as to more fundamental antitrust and industrial organization questions. If conglomerate growth does lead to higher market shares in specific markets, do such higher market shares lead to greater market power? An inverse correlation between market share and market power is found in Tsurumi, *An Econometric Study of Oligopolistic Competition Among American Automobile Firms, Together with a Forecast Exercise*, in 1 *ESSAYS IN INDUSTRIAL ECONOMETRICS* 31, 56-58 (L. Klein ed. 1969). (Product differentiation among different companies recognized; product differentiation within one company's product offerings within the same market not considered.)

<sup>5</sup> *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 587 (1967) (concurring opinion). I adopt here the customary antitrust use of the word conglomerate to stand for all inter-firm relationships except those among firms in the same geographic and product market (horizontal) or between buyers and sellers (vertical). See Whitney, *Mergers, Conglomerates, and Oligopolies: A Widening of Antitrust Targets*, 21 *RUTGERS L. REV.* 187, 187n.3 (1967).

<sup>6</sup> For moderate examples of these positions, see the FTC and AFL-CIO warnings of conglomerate peril reported in *BNA ANTITRUST & TRADE REG. REP. A-22-A-23* (Nov. 4, 1969).

<sup>7</sup> Stigler, *Private Vices and Public Virtue*, 4 *J. LAW & ECON.* 1, 6 (1961).

rulings and decisions. Can they take so patient a view? Perhaps it could be respectfully suggested that they could take a more skeptical view. One aspect of *Allis-Chalmers Manufacturing Co. v. White Consolidated Industries, Inc.*<sup>8</sup> illustrates several problems. "While each case, of course, must stand on its own feet, we should not be oblivious to the current trends in our economy and to the possible impact of this case on the movement towards further economic concentration by merger."<sup>9</sup> To support this statement, the court cited two Supreme Court cases — *United States v. Continental Can Co.*<sup>10</sup> and *United States v. Pabst Brewing Co.*<sup>11</sup> — and two recent writings by distinguished Federal Trade Commission (FTC) personnel, one by FTC economists and one by two FTC attorneys.<sup>12</sup>

This can be read to mean that *Continental Can* and *Pabst* show that, as a matter of law, courts in deciding antitrust cases "should not be oblivious" to those economic trends which are relevant and can be shown to be relevant to matters before them, and which exist to some measure of probability, or by some known standard. It can also be read to mean that the two non-case authorities cited are sufficient, as examples or by themselves, to show (or at least, illustrate) the necessary factual conclusions.

It is fine to be up-to-date. The use of such recent publications in a 1969 ruling would strike any reader of an economic journal as showing either remarkable efficiency or a misprint. But scholarship needs delay. To the degree that particular publications are scholarly in nature, the time needed for their evaluation by other scholars must be extended. To the degree that any source is a policy statement, its usefulness as a vehicle for demonstrating facts with respect to current economic trends is demanded. In either eventuality, this citation by the Third Circuit would not seem the strongest authority to establish current trends.

It can be argued that the FTC is not, under present circumstances, and, possibly, under any circumstances (since it is, after all, basically a policy group) the best source of such indications. The present controversy over how (or whether) government-supported economic research can be kept free of government control is too complex to be discussed further here. But while it is human to want one's cake and eat it too, it is difficult to see how FTC economists can win both scholarly immunity from Commissioner control and a prominent voice as policy spokesmen.

While the FTC was not a direct, adversary party in the *Allis-Chalmers* ruling, very interesting questions arise as to the degree to which an agency should be allowed to contribute to future case authority on current economic trends. Will this aspect of *Allis-Chalmers* serve as authority for

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<sup>8</sup> 414 F.2d 506 (3d Cir. 1969), cert. denied, — U.S. — (1970), rev'g 294 F. Supp. 1263 (D. Del. 1969).

<sup>9</sup> *Id.* at 525 n.30.

<sup>10</sup> 378 U.S. 441, 484 (1964).

<sup>11</sup> 384 U.S. 546, 552 (1966).

<sup>12</sup> See 414 F.2d at 525 n.30.

economic trends ("as was known as early as 1969") in some future FTC case?

#### SOME ADDITIONAL HYPOTHESES ON THE ANTI-CONGLOMERATE CAMPAIGN

It is customary to divide the arguments constructed to demonstrate that certain actions by diversified firms may have the legally necessary anti-competitive effects in some specific, relevant market and line of commerce into three general categories: (1) deep pockets, rich aunts or other accommodating assets or relatives; (2) reciprocity; and (3) changes in entry conditions.<sup>13</sup> Reciprocity is today in fashion; the deep pocket is out of fashion and entry conditions are maintaining their glamour in government and judicial minds. A strong case can be made that the only arguments now being advanced that have more than a rhetorical significance are those concerning entry problems; that to the degree that reciprocity and deep pocket arguments have more than a rhetorical significance, they are, in effect, entry arguments. But in my view, an even stronger case can be made that the basic arguments against diversified firms raised by the Government belong far more to political science than to economics. To treat them as the only significant hypotheses we can formulate or test in the conglomerate area may be simply to fall into a trap. At least, we should not permit government (or private litigants) to set the limits of argument. Since this *Symposium* unfortunately does not possess a political science section, I have devised some economic hypothesis with, perhaps, some political implications.

1. The Anti-Conglomerate Campaign (ACC) represents an example of the use of government by extant firms to raise the level of entry barriers around their existing markets; adopting the limit-pricing approach presented by Mr. Justice Harlan,<sup>14</sup> they are able to raise prices and restrict output further than they could in the absence of the campaign.

To forbid a marginal entrant to enter a market through the merger of its choice may: (1) remove that firm as the marginal (most likely) entrant, thus increasing the (assumed) cost advantage of extant firms, and substituting as the marginal entrant, a firm with a greater (assumed) cost disadvantage; (2) cause entry by that conglomerate firm through another

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<sup>13</sup> See Low 413-15. I decided to discuss in depth neither these three lines of argument nor the concentration trend controversy in this article because: (1) they are sure to be discussed at great length in other contributions to this *Symposium*, and (2) I have an uneasy suspicion that such government-engendered disputes may be serving as red herrings to distract attention from other aspects of the present anti-conglomerate campaign.

<sup>14</sup> See J. BAIN, BARRIERS TO NEW COMPETITION (1956), cited in *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 586 n.4 (1967) (concurring opinion). The fact that Mr. Justice Harlan concurred rather than dissented in that case may prove fortunate in encouraging lower courts to follow his opinion rather than the majority's. "[Mr. Justice Harlan's] view strikes this Court as more logical [than the majority's] . . ." *United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543, 566 n.38 (N.D. Ill. 1968).

merger (if such is permitted) not having the same advantage to the conglomerate firm as its original choice, and increasing the assumed cost advantage of extant firms; or (3) lead to, or revive, entry consideration by the conglomerate firm through internal growth which may (indeed, under the prevalent judicial approach, presumably would) be at greater cost, thus increasing the effective shield behind which extant firms theoretically can carry out the implications of the short-run, profit maximizing, price-output approach favored by our courts.

I do not personally accept the analytical usefulness of most of the stated and unstated assumptions of the above paragraph. Tax and accounting considerations can certainly distort the alternatives even for those who do. But the courts generally do follow this sort of reasoning, and, accordingly, should consider these possible results. Tax and accounting reform, not antitrust suits, would seem the proper answer to whatever distortions tax and accounting factors may cause.

I do accept, however, the analytical need to consider more fully the implications in entry and limit-pricing theory of the use of government by extant firms to raise entry barriers. There is, indeed, a wealth of data on this method of raising entry barriers,<sup>15</sup> perhaps more than there is on reciprocity, predatory practices or limit pricing itself.<sup>16</sup>

2. The ACC represents a variety of predatory practices aimed by extant firms against potential entrants, and possibly others as well, a technique for preventing entry lying beyond the narrow original limits of limit-pricing theory as first devised in economics and still followed by our courts.

The possible use of the FTC complaint procedure as a costless (to the complainant) technique for harassing actual or potential rivals has recently been pointed out again by Professor Posner.<sup>17</sup> The use of patent suits to harass other firms, the threat of patent suits, and the "possibility" of patent suits, although not costless to the plaintiff, are widely noted features of our economy, with some evidence to support predatory hypotheses based on this technique.<sup>18</sup> The predatory possibilities of conglomerate anti-

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<sup>15</sup> See W. ADAMS & H. GREY, *MONOPOLY IN AMERICA: THE GOVERNMENT AS PROMOTER* (1955); see also Low 185-92.

<sup>16</sup> "[T]he limit price hypothesis remains neither proved nor disproved." Mann, *Concentration, Barriers to Entry and Rates of Return in Thirty Industries: 1950-1960*, 48 *REV. ECON. & STATS.* 296, 300 (1966). Professor Mann's approach cannot be considered hostile to that hypothesis; he merely considers it, as does Professor Bain, a questionable hypothesis rather than revealed truth.

<sup>17</sup> REPORT OF THE ABA COMMISSION TO STUDY THE FTC 92, 108-09 (1969) (separate statement of Richard A. Posner).

<sup>18</sup> See W. BAUMOL, *WELFARE ECONOMICS AND THE THEORY OF THE STATE* 115-17 (2d ed. 1967); C. EDWARDS, *MAINTAINING COMPETITION* 216-35 (1949); see also Low 199-201. It is sometimes stated, especially in opposition to the deep pocket approach of *Reynolds Metals Co. v. FTC*, 309 F.2d 223, 229-30 (D.C. Cir. 1962), that one excellent case study, *McGee, Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 *J. LAW & ECON.* 137 (1958),

trust suits — whether government or private, whether actual, threatened or “possible” — would seem to be at least a source of testable hypothesis.

3. The ACC represents an attempt by the Government to shift attention away from the need to rethink the widely condemned “standards” now applied in horizontal and vertical cases, especially in merger law, which evolved during the recent close association of the Antitrust Division and the Warren Court.<sup>19</sup>

The use of market share criteria in vertical and horizontal merger cases (as in monopolization and foreclosure), when combined with the absence of known standards for defining the relevant markets and lines of commerce within which such market shares can be computed, means that there is, in effect, no law in this area. If legality depends on market share, and if market share in turn depends on the market definition position taken by the Antitrust Division or the FTC, then government approval, not legal standards, determines the legality of the actions concerned.<sup>20</sup> This brings us to our next hypothesis.

4. The ACC represents an attempt by government to extend its discretionary power from vertical and horizontal cases to conglomerate ones.

Possible career benefits to FTC and Antitrust Division personnel can be hypothesized as follows: (1) For professional personnel who wish to make government their career, the power of their agencies, and, thus, of themselves, is greatly expanded. It is, to some degree, a testable hypothesis

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has shown the dubious nature of rational predatory pricing. See Posner, *supra* note 17, at 113 n.40. Perhaps, but we should not define the problem away. See D. DEWEY, *THE THEORY OF IMPERFECT COMPETITION* 127-30 (1969), on the assumptions involved. And predatory pricing, of course, is only one of many possible aspects of predatory practices.

<sup>19</sup> It is true, as David Riesman has observed, that the fact that a legal opinion is a myth, a rationalization or a fiction does not mean it is irrational. D. RIESMAN, *INDIVIDUALISM RECONSIDERED* 443 (1954). But some degree of internal consistency is necessary to turn myths, rationalizations and fictions into law. What internal consistency is there in present horizontal and vertical cases? The protection of small business? “The Supreme Court, in effect, has said to the small corporation which wants out: ‘You keep plugging along because you’re just the kind of enterprise that our economy needs more of.’” Robinson, *Antitrust—Horizontal and Vertical Mergers*, 36 U. Mo. K.C.L. Rev. 75, 80 (1968); see also Low, *The Failing Company Doctrine Revisited*, 38 *FORDHAM L. REV.* 23, 25-26, 31 (1969). Protection of small business as part of “equality of opportunity” is suggested in Kauper, *The “Warren Court” and the Antitrust Laws: Of Economics, Populism, and Cynicism*, 67 *MICH. L. REV.* 325, 334 (1968). But the monotony of recent government victories (that is, the substitution of government discretion for case law) in horizontal and vertical matters has, up to now, seemed the real internal consistency.

<sup>20</sup> It seems widely acknowledged that “[i]f there has been a real abuse of economic analysis . . . it has been held in the process of market definition.” Kauper, *supra* note 19, at 331. The strongest attacks on these abuses have occurred in regard to *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); see H. EINHORN & W. SMITH, *ECONOMIC ASPECTS OF ANTITRUST* 404-21 (1968), on *Pabst* and similar cases involving judicial market definition peculiarities. Yet, as is natural, *Pabst* is the Government favorite now when it comes to questions of market definition. See the lament in Post-Trial Brief of Defendant at 9, *United States v. Northwest Indus., Inc.*, 301 F. Supp. 1066 (N.D. Ill. 1969). Such government favoritism is acceptable when the Government is viewed as just another adversary. It is less acceptable when its claims are given special weight by the courts.

that men who choose government over private careers are more power-oriented and less financially-oriented in their life goals than men who prefer private careers. David Riesman has suggested the hypothesis that the hunger for power is far more dangerous to a democratic government than the hunger for "gold."<sup>21</sup> But we cannot as lawyers or economists blame individual men for wishing to "concentrate" "power" in Washington when that is where they happen to be. We can, however, as citizens, resist the tendency. (2) For the many professional government antitrust personnel to whom their positions are but footstools to more lucrative private positions or practices, any increase in the discretionary power of their agencies may raise the value of their knowledge of, and influence in, such agencies when they return to private careers. (3) For the group in (2) above, the present ACC gives its members a chance to acquire experience at a higher level than would additional horizontal and vertical cases now that case law has been largely removed from those areas.

One may observe a certain conflict of interest between present and future professional personnel wishing to return to private careers. Government success in the present conglomerate cases may greatly benefit present personnel, but, should the present substitution of government discretion for recognizable case law be extended from horizontal and vertical cases to conglomerate ones, may greatly reduce the change of future personnel to participate in important litigation. Another hypothesis, therefore, suggests itself. Success by the Government in its present pursuit of discretionary power may result in a continuing search by future personnel for ever more areas of private economic activity which can yield meaningful litigation. The role of antitrust as a tool for government control of private markets, rather than as an alternative to such control, may thus continue to provide interesting hypotheses.<sup>22</sup>

#### ECONOMICS AND THE PRESENT ANTI-CONGLOMERATE CAMPAIGN

Milton Handler has remarked that economic theory in government briefs and in judicial opinions has been increasingly used as a substitute for the facts themselves, and that such use raises due process questions.<sup>23</sup> Is this tendency reflected in current effort?

There is certainly evidence that questionable hypotheses are presently being used in this way and with little or no effort to determine whether

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<sup>21</sup> D. RIESMAN, *supra* note 19, at 403. One would never know, from much of the present debate over conglomerates, that the hypothesis that government is capable of mass murder is consistent with much recent history, while the hypothesis that larger corporations tend to support such governments more than smaller corporations is, at best, questionable.

<sup>22</sup> See generally Low 76-77, 358-59, 441-42; Posner, *supra* note 17, at 114-18.

<sup>23</sup> Address delivered to the Association of the Bar of the City of New York, Twenty-first Annual Review of Antitrust Developments, Oct. 9, 1968. A more formal discussion appears in Handler, *Through the Antitrust Looking Glass*, 57 CALIF. L. REV. 182, 202-07 (1969).



such hypotheses have ever been tested or to determine the results of such testing.

1. The courts seem unaware that it is increasingly possible to check recent theoretical discussions and empirical testing in the same way that recent legal developments in the case law can be checked, that is, by "Shephardizing" them. One might say that this is the duty of the parties. But the courts should at least be more aware than when an authority of economic theory is invoked by a party; the existence of such authority is not revealed truth but a matter capable of verification. A revealed truth approach to economic theory presented in briefs should be dismissed with the judicial yawn that a revealed truth approach to the case law would, or at least should, receive.<sup>24</sup>

Citation services through which more recent material on earlier theoretical and empirical work can be traced are available in many libraries and the comprehensive nature of the material they cover is constantly growing. Is there any reason for the use of economic hypotheses in judicial opinions which ignore both subsequent efforts to test them empirically and alternate hypotheses? Mr. Justice Harlan's discussion of some aspects of Professor Bain's limit-pricing hypotheses is perhaps the fairest and most conscientious discussion of economic hypotheses yet to appear in a judicial antitrust opinion; his evident hesitancy in concurring indicates that Mr. Justice Harlan was well aware of these problems.<sup>25</sup> But what judicial attempts have been made subsequently to require parties to show the subsequent (and previous) results of the empirical checking of these hypotheses, and of alternate or contrary hypotheses?<sup>26</sup> If such requirements were invoked more often, the extremely tentative nature of limit-pricing hypotheses to date would certainly have been exposed. As it is, some hypotheses on limit pricing, unchecked and unverified, are often, like companion hypotheses on the nature, causes and results of product differentiation, being treated as revealed truth.<sup>27</sup>

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<sup>24</sup> See, e.g., the unsupported and narrowly supported assertions as to the effects of information and the implications of profits, in Brief for Appellant, *United States v. Container Corp.*, 393 U.S. 323 (1969). Some of these assertions are supportable, but all are questionable hypotheses. It seems that the only statement the Antitrust Division thought to be in need of verification from an economic authority was the complex and controversial one concerning the effects of price information on conduct and performance. That work (an excellent one, certainly) had been published ten years earlier. The Antitrust Division was the plaintiff, seeking (successfully) to have the district court reversed. Whatever this represents, it does not represent either the usual view of the appellate function or strict appellate requirements for establishing the authority of economic theory.

<sup>25</sup> See note 14 and accompanying text *supra*.

<sup>26</sup> The Mann quotation and study, *supra* note 16, appeared a year before the Procter & Gamble opinions. On other aspects which have yet to win much judicial attention, see Low 192-95, 203-09.

<sup>27</sup> See *United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543, 551 (N.D. Ill. 1968), where a district court struggled with trying to use higher judicial views on limit pricing and product differentiation in a way a district court might balance the

Such usage of questionable hypotheses has about as much to do with the proper role of economics in antitrust as Captain Dreyfus' court martial had to do with the proper application of the Napoleonic Code. Whether or not such usage raises serious due process questions, it ought not to be blamed on economics.

2. The proper role of economic theoretical or empirical work done subsequently to a judicial antitrust decision presents closer questions. It has been argued that: "The Supreme Court is supreme because it is final, not because it is infallible."<sup>28</sup> No one, of course, would argue that any human being or agency is infallible. But whether it is, can be, or should be final (except for its own reversals or modifications) are open questions. Professor Kurland has recently presented some interesting hypotheses on the innate weakness of the Supreme Court in contesting the power of executive or legislative influences. He argues that

in making new law [the Warren Court] has come closer to emulating the legislative *process* than any of its predecessors. . . . [T]he Warren Court . . . has paid less heed to *stare decisis*—one of the features that Cardozo pointed out as distinguishing legislative legislation from judicial legislation—than any Supreme Court in history.<sup>29</sup>

This movement may have left the Court in an even weaker position to withstand pressures based on the popularity of the legislative process, for, as Professor Kurland further points out, "[t]he legislature represents that combination of groups and individuals that make a majority on any issue; the courts' primary obligations are to discrete minorities."<sup>30</sup>

It can be argued that inconsistent opinions provide no guide—final or otherwise—on any problem; that decisions without reasons provide no guide either; indeed, that such observations may be thrown back to anyone who makes them as being self-evident. But they raise the additional problem of the degree of respect for *stare decisis*—or the rate of change in judicial law—that is desirable. It is a possibly useful hypothesis that claims based on the concept of *stare decisis* may, if adopted too quickly in any reaction against some of the drawbacks of the Warren Court decisions in antitrust, result in the incorporation of much that will be harmful in the future into "settled precedent" of antitrust. It is hoped that the courts will be very careful in balancing the claims of both *stare decisis* and alleged parallels between horizontal and vertical precedents and conglomerate situations with demands for convincing demonstrations that such are valid precedents and parallel situations.

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factors which influence its findings on the price of watermelons. This is not an encouraging precedent despite the evident thoughtfulness that went into the attempt.

<sup>28</sup> Loevinger, *Antitrust Issues as Subjects for Arbitration*, 44 N.Y.U.L. REV. 1085, 1093 (1969).

<sup>29</sup> Kurland, *Toward a Political Supreme Court*, 37 U. CHI. L. REV. 19, 22, 31 (1969) (emphasis added).

<sup>30</sup> *Id.* at 22.

This problem is made more difficult by the important role played by judicial opinions, and assumed facts from antitrust case records, in antitrust as a source of "facts." Since antitrust records are far too long for Supreme Court justices to have any real familiarity with factual problems in such cases,<sup>31</sup> this would be true irrespective of any question as to the judicial desire for an impartial comprehension of the facts.<sup>32</sup> Yet the use of judicial antitrust opinions as a source of "facts" not only by the Government but also by defendants eager to distinguish the facts in their cases from the assumed ones in decided litigation, is rampant.<sup>33</sup> Careful and scholarly studies appear in case records indicating such possible errors as to fact that seem to place judicial opinions in an *Alice-in-Wonderland* context; they are usually ignored.<sup>34</sup> What, if anything, should be their influence on subsequent litigation and judicial decisions?

At the very least, lower courts should not decide questions of fact on the basis of Supreme Court opinions. For example, a Supreme Court statement that concentration is increasing or that television rates favor larger advertisers should not be decisive on those factual questions—certainly not in any subsequent cases.<sup>35</sup> Correctly, such (in effect) findings of fact by

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<sup>31</sup> I admit I have not counted the number of pages in *Utah Comm'n v. El Paso Natural Gas Co.*, 395 U.S. 464 (1969). But since a few thousand pages, one way or the other, does not affect the main point, and considering the customary care shown by the source, I will accept Mr. Justice Harlan's statement that it amounted to 14,000 pages. *Id.* at 472 (dissenting opinion). If anyone can prove it was 7,000, or 17,000 pages, I admire his industry but do not retract the statement.

<sup>32</sup> Considering Mr. Justice Harlan's customary care in the use of language, his observation that "the majority asserts the power to dispose of this case according to its own notions" despite the facts that "(1) we have heard no oral arguments directed at this question and (2) we have not ordered the interested parties to file full briefs on this issue" and that the Antitrust Division was among "all the parties participating in the lower court proceedings" who did not appeal the district court findings in *Utah Comm'n*, 395 U.S. at 472, 473, 472, may indicate both serious due process problems and a shift in the public positions of the Antitrust Division under President Nixon and the hitherto dominant Supreme Court view in antitrust.

<sup>33</sup> See, e.g., Memorandum of Defendant at 10, *United States v. International Tel. & Tel. Corp.*, 306 F. Supp. 766 (D. Conn. 1969), attempting to distinguish the facts of its case from the "facts" of *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965).

<sup>34</sup> Professor Dewey concluded that

the tying contract in [*International Salt Co. v. United States*, 332 U.S. 392 (1947)] . . . does not really deserve this name. . . . [s]ince testimony was not taken in this case (intent is unclear) . . . . [But] the protection afforded to the lessor was so weak . . . that consequences of the decision for the marketing of industrial salt were most likely negligible. . . .

D. DEWEY, *MONOPOLY IN LAW AND ECONOMICS* 206 n.28 (1959). Dewey further indicated that such a conclusion does not seem to have influenced the subsequent use of that case in showing the dire consequences of tying agreements and, now, of reciprocity. *Id.* It will be interesting to see whether the examination of the *Procter & Gamble* case record in Peterman, *The Clorox Case and the Television Rate Structure*, 11 J. LAW & ECON. 321 (1968), will have any effect on the "facts" now being taken from that judicial source. Professor Peterman's analysis may be inaccurate, in whole or in part; ignoring it will not show it to be so.

<sup>35</sup> Supreme Court findings (right or wrong) as to such legal questions as congressional intent in 1950 concerning the relationship of mergers, concentration trends and competition should be distinguished from Supreme Court factual conclusions on concentration trends in specific markets, as in *Brown Shoe Co. v. United States*,

the Supreme Court should not even be controlling in remanded cases, but perhaps such a standard and such Supreme Court restraint could not be expected in these instances.<sup>36</sup>

3. A most fundamental abuse of economics in the present anti-conglomerate movement is, probably, an aspect that in all likelihood is discussed in many of the other articles in this *Symposium* as well — the very narrow meaning given economic theory by the Government and the courts. We industrial organization economists are very well treated by the courts; I can safely leave to specialists in other areas of our discipline the discussion of their many contributions to problems of diversified firms that the courts persistently ignore. And perhaps we ourselves have been slow to apply some of the newer developments in economic theory as more narrowly defined; certainly, “[i]t is curious that while we economists never formulate our analysis on the basis of . . . costless production, we have postulated costless information as a formal ideal for analysis. Why?”<sup>37</sup> Why indeed; but after all, newer developments in economic theory on information costs, product differentiation, intertemporal choice, and so forth, are not so new that some judicial consideration of their implications concerning reciprocity, scale economies, the meaning of product differentiation and other matters should not be expected.<sup>38</sup>

#### CONCLUSIONS

It is certainly a scholarly characteristic to quibble over precedents and terminology while someone is walking off with the kitchen sink. But it is also a scholarly characteristic to wonder whether the kitchen sink is detachable or salable before rushing for a shotgun — especially if the sink is insured and the possible liabilities which might arise from shooting off the shotgun may not be.

For a number of years now, one of the social benefits of antitrust has been a stream of scholarly analyses which have amused and enlightened

370 U.S. 294 (1962) and *United States v. Von's Grocery Co.*, 284 U.S. 270 (1966). See also Adelman, *supra* note 1, at 36-37.

<sup>36</sup> It is certainly difficult to distinguish between the legal and factual aspects of the interrelationships among scale economy changes, demand changes, mergers as contributing to concentration trends and mergers as resulting from scale economy changes, demand changes and so forth. Although the decision on remand in *United States v. Pabst Brewing Co.*, 296 F. Supp. 994 (E.D. Wis. 1969), reads as if the district court, of necessity, accepted Supreme Court findings of fact, such confused relationships also have elements of findings of law.

<sup>37</sup> Alchain, *Theory of Employment, Exchange and Price Stability*, in *MICROECONOMIC FOUNDATIONS OF EMPLOYMENT AND INFLATION THEORY* 23, 30 n.5 (E. Phelps *et al.* ed. 1970).

<sup>38</sup> The results of such seminal articles as Becker, *A Theory of the Allocation of Time*, 75 *ECON. J.* 493 (1965); Lancaster, *A New Approach to Consumer Theory*, 74 *J. POL. ECON.* 132 (1966); and Stigler, *The Economics of Information*, 69 *J. POL. ECON.* 213 (1961), should certainly start finding their way into judicial consideration. The unsupported and unreportable statement in the *Merger Guidelines* (1 *TRADE REG. REP.* ¶ 4430 (1968)) that reciprocal buying serves no useful purpose could hardly survive any judicial thought on efficiency in information inputs and the nature of intertemporal choice.

scholars while at least creating a presumption that our past antitrust law is not so well constructed as to require extension before rebuilding. Perhaps this scholarly benefit in some general welfare functions outweighs whatever harm may be done by the deterioration of antitrust standards and the danger of crying "last chance!" too often. In the newer common currency of political discussion nowadays, claims of terrible dangers are probably translated by the hearers into the older phrase "I think that probably this would interest you." If there really are terrible dangers (and each of us no doubt has his own one in mind), we seem to be left without any phrases by which to express them. Thus, this terminological pebble I am now concluding may contribute a little to moderating the absolutes of some of the present discussions on corporate diversification. I certainly hope that something moderates the more political aspects of the discussion.

Meanwhile, all economists can take pleasure from the deep respect with which the highest administrative and judicial authorities of our land repeat, as eternal verities, the educationally necessary classroom simplifications of our introductory microtheory and industrial organization courses.<sup>39</sup> And, of course, we should not forget that there are much stronger arguments against diversified firms than the Government has so far offered. After all, when Captain Dreyfus was finally vindicated, he turned out to be very much the same narrow-minded, bigoted, middle-class Frenchman as were most of his persecutors. But, that fact was not relevant to his right to a fair trial.

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<sup>39</sup> Similar flattery by the authorities of his own country is reported by the British economist Sir Eric Roll:

Like other closed systems (neoclassical economics) chief danger lies in the fact that it provides deceptively simple ready-made answers. . . . There are some in every generation who fall in love with them; like all love affairs this can be particularly virulent in the case of those who succumb at a mature age, after a blameless life spent not in the study of Economics but, say, in that of Herodotus or Nietzsche.

Roll, *The Uses and Abuses of Economics*, 20 OXFORD ECON. PAPERS 23, 28 (1968).