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SYMPOSIUM: THE MEANING AND IMPACT OF BROWN SHOE CO. v. UNITED STATES

INTRODUCTION

BROWN SHOE CASE AND THE IDEAL ECONOMIC ORDER

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The judicial process is one of winnowing out undesirable from desired ideal forms of order. Each mode of action which it condemns represents an undesired distortion of an ideal form of action. It is the purpose of this introductory comment to indicate, in a series of propositions, at least some of the principal aspects of the ideal economic order which the *Brown Shoe* case¹ would preserve when the issue is judicial control of the merger process under Section 7 of the Clayton Act, as amended.

1. *Economic change manifested in vertical integration through merger is not to be condemned even if a substantial share of a market is thereby affected and foreclosed from competition.* Once again, *Yellow Cab*² is not to be construed to make vertical integration illegal per se wherever an appreciable segment of the market is affected. Enterprises are still allowed through merger to supersede a market and perform within the enterprise the function, formerly performed by the market, of transferring the control of goods from one stage of production or distribution to the next stage. Merger may still be utilized to achieve the economies in cost which such a mode of transfer provides.

In the range between mergers of *de minimis* proportions and of monopoly proportion, the Court rules that "the percentage of the

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

2. *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947).

market foreclosed by the vertical arrangement cannot itself be decisive."³ A variety of factors, economic as well as historical, must be examined in order to determine whether the merger is unlawful.

2. *Economic change manifested in horizontal integration through merger is not to be condemned even if a substantial competitor in the market is thereby eliminated.* This proposition, as well as the preceding one, must be strictly limited to its terms and must be read in conjunction with the remaining propositions outlined below. The Court did not condemn the merger merely because the merged company was a significant competitor in the relevant market. It did so because the merger took place in a historical setting of a trend toward concentration in the industry and the adverse affect upon competitors in the market which the merger would produce.⁴

3. *Vertical integration through merger is not saved from condemnation by the fact that the resulting enterprise occupies but a small share of the market.* Brown, the acquiring company and predominantly a manufacturing concern, made shoes of various types ranging from 4.9 per cent to 6.5 per cent of the national market.⁵ Kinney, the merged company and predominantly a selling company, sold shoes of various categories in amounts ranging from 1.5 per cent to 3.1 per cent of the national market.⁶ Brown was estimated to control only 4 per cent of national production and Kinney only 1.6 per cent of all shoes sold at the retail level.⁷ The combination of Brown and Kinney's retail shoe store represented only 7.2 per cent of the nation's retail "shoe stores" as defined by the Census Bureau and 2.3 per cent of the nation's total retail shoe outlets.⁸ Competing firms were of a size to provide fully effective competition. The top 4 firms in the industry produced 23 per cent of the nation's shoes and the top 24 firms produced about 35 per cent of the nation's shoes.⁹ It seems evident, therefore, that the new enterprise would remain subject to effective competition and that nothing approaching dominance in the market would result. Yet the merger was not excused from condemnation by these facts.

4. *Vertical integration through merger is not saved from condemnation even though the resulting enterprise may be more efficient and shares its increased economies of operation with consumers through*

3. *Brown Shoe Co. v. United States* 370 U.S. 294, 329 (1962).

4. *Id.* at 341-45.

5. *Id.* at 327.

6. *Ibid.*

7. Handler, *Fifteenth Annual Review of Antitrust Developments*, 17 RECORD OF N.Y.C.B.A. 411, 437 (1962).

8. *Brown Shoe Co. v. United States*, 370 U.S. 294, 345-46 (1962).

9. *Id.* at 300.

reduced prices. The fact that merger may create the large, publicly held, publicly oriented, professionally managed corporate enterprise which Richard Eells terms the "metrocorporation,"¹⁰ and of which Adolf A. Berle, Jr., also spoke,¹¹ was irrelevant. The fact that the new enterprise might be better fitted for research and consequent innovation in production and operation was irrelevant. The fact that consumers might be benefited through lower prices and otherwise was irrelevant.¹² The question whether substantial competition existed subsequent to the merger was irrelevant.

5. *The trend toward concentration of corporate enterprise and oligopolistic competition is to be stopped when it is manifested in the merger process.* The Court made it quite clear that the lawfulness of merger under Section 7 of the Clayton Act was to be considered in the light of the historical and present characteristics of the relevant markets, the trend toward concentration in an industry and toward oligopolistic competition which they manifested and the impact of the merger upon any such trend. While market share of the merging companies was not conclusive, it was an important factor and particularly so when it was seen in a setting of such a trend.¹³ Whether the trend toward concentration in an industry was a product of the elimination of marginal producers was irrelevant.

6. *The foregoing principles are a consequence of a flexible, rather than a per se illegality, approach to the problem of merger.* The Court indicated that a rule of reason—though a strongly circumscribed one—still remained the approach to determining legality of merger under Section 7 of the Clayton Act.¹⁴

10. EELLS, *THE MEANING OF MODERN BUSINESS: AN INTRODUCTION TO THE PHILOSOPHY OF LARGE CORPORATE ENTERPRISE* (1960).

11. BERLE, *THE 20TH CENTURY CAPITALIST REVOLUTION* (1954).

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

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

13. *Id.* at 333-34, 343-44, 346.

14. *Id.* at 321-22:

Seventh, while providing no definite quantitative or qualitative tests by which enforcement agencies could gauge the effects of a given merger to

Despite the temperate manner in which the Court approached the problem of vertical integration, in the light of the language and Congressional intent of Section 7 of the Clayton Act, the decision stands out as a crucial turning point in the philosophy of control of business enterprise under the antitrust laws. The overriding value that a business organization exists to serve the publics participating in it, namely, customers, stockholders, labor and management, on the basis of its efficiency under conditions of competition, is now lost. A business corporation now has an independent right to exist, even though it is a marginal producer, if its obsolescence would be a product of concentration within the industry, through Merger. The model of a free enterprise system based on efficiency, promoted and safeguarded by competitive rivalry, is now in part abandoned. At one more point, soft competition supplants hard competition. These are the obdurate facts which the *Brown Shoe* decision presents.

A central aspect of the American society is that it became the Affluent Society as a consequence of becoming the Achieving Society.¹⁵ The technology of pure and applied science, the technology of production and the technology of distribution carried out their respective functions on the basis of the principle of maximization. The result was constantly sought that a given input of energy should steadily expand its output in whatever field it was used. Adherence to this principle created American leadership and power in the world. Erosion of this principle in any field, for example, labor costs or distribution costs, will undermine the foundation of American leadership and power.

The United States is faced with the competition of a rapidly growing center of power in free Europe and the Common Market. It is faced with the steadily growing political, economic and social pressure of the Communist world. It is faced with Africa, Latin America and Asia in ferment and growth. It is faced with depleting mineral resources with which to meet the increased demands of the future. Unless it adheres to the principle of maximization of knowledge, tech-

determine whether it may "substantially" lessen competition or tend toward monopoly, Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry. That is, whether the consolidation was to take place in an industry that was fragmented rather than concentrated, that had seen a recent trend toward domination by a few leaders or had remained fairly consistent in its distribution of market shares among the participating companies, that had experienced easy access to markets by suppliers and easy access to suppliers by buyers or had witnessed foreclosure of business, that had witnessed the ready entry of new competition or the erection of barriers to prospective entrants, all were aspects, varying in importance with the merger under consideration, which would properly be taken into account.

15. GALBRAITH, *THE AFFLUENT SOCIETY* (1958); MCCLELLAND, *THE ACHIEVING SOCIETY* (1961).

nique and efficiency, it will assume tomorrow the position of the Great Britain of today. It will be a state that failed to respond to the demands of change until it was too late.

These are some of the thoughts which we must ponder whenever we choose the path of ease in a world of massive change, pressures and rivalry.