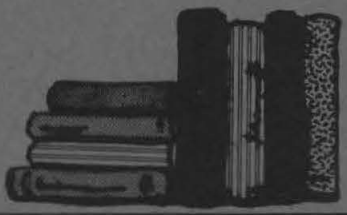
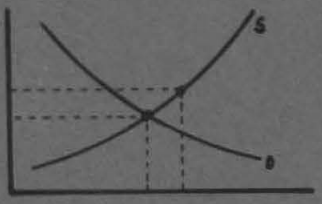
Miscellaneous Report 75 September 1966



# THE LAW AND THE MARKET

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Agricultural Experiment Station • University of Minnesota

## PREFACE

The Minnesota Agricultural Experiment Station is pleased to have the opportunity to cooperate with the NCR-20 Committee in publishing this report on "The Law and the Market."

William F. Hueg, Jr.
Director, Minnesota Agricultural Experiment Station

This report contains papers presented at a seminar on March 3, 1966, sponsored by the North Central Regional Committee NCR-20 (Economics of Marketing) and supported by the Farm Foundation.

The NCR-20 Committee was originally organized to help identify and conceptualize important marketing problems, aid in the development of theory and methodology, and promote research activities. This seminar was one of a number supported over the past several years, but bears closest relationship to a seminar held on April 15, 1965, entitled "Federal, State, and Local Laws Affecting Marketing." The papers presented at that earlier seminar were reproduced as Regional Research Bulletin No. 168 and published as Bulletin No. 455 by the North Dakota Agricultural Experiment Station.

The topic of the seminar reported on in this publication, "The Law and the Market," draws upon the varied professional experiences of economists and lawyers who have dealt with legal-economic problems arising out of the regulation of the marketing of agricultural products. The contributions of the participants in this seminar bear close study for their substantive content and unique individual perspective.

Elmer R. Kiehl
Administrative Advisor

## CONTENTS

## INTRODUCTION

The central purpose of the seminar was to bring together economists and lawyers with professional backgrounds that have forced them to deal with legal-economic problems related to the marketing of agricultural products. We hoped that they would focus their presentations on the identification of pressing legal-economic problems related to agricultural marketing that can or should be researched at the present time. They did this . . . and they did more than this. By their presentations and discussion they also considered the joined role of the economist and lawyer in dealing with social problems in a research, policy-making, and advisory context.

Breimyer provided an overall conceptual frame of reference interrelating economic, market, and legal concepts and problems. Greene provided insight to library tools unique to legal research in this area. Hack considered the roles of the economist and practicing lawyer as they pursue problems in respect to law and the market, and particularly tied his analysis to merger developments.

Brooks considered the kinds of research facts and assistance economists can give a lawyer serving as a federal litigator. He also was concerned with how a federal litigator and economist can join forces in studying and finding answers for macro-problems of performance (i.e., norms or equity concepts) for economic behavior. Hoffman treated the law and the market from the micro-view of the firm and its managers, and to some extent, at the macro-industry level. Can an economist contribute to the firm's operation within the market and market's legal context? How does present regulatory and facilitative law impinge upon the large food manufacturing firm?

Then in the afternoon, focusing more explicitly upon economists' roles per se, Mueller considered how economists can assist persons responsible for regulatory functions and stressed the importance of economics in "rule-making." What is the economist's role, and what are the economic facts and problems he should be researching relating to regulatory functions within markets? The second speaker, Engelman, had similar focus with greater emphasis upon agricultural markets. Last, Stout reconsidered the entire focus of the seminar in the perspective of where are we going and should we be going there?

Dale C. Dahl
Editor and Seminar Chairman

# THE LAW AND THE MARKET IN PERSPECTIVE

Harold F. Breimyer*

The title of this seminar is well chosen. I congratulate those who chose it.

It links terms that are not only compatible but mutually supporting. Law and the markets are like crumpets and tea, hammer and tongs, or even moonlight and roses.

The connection, however, has not been set to music. Among economists it has often not even been observed. Lawyers may be equally reticent on the subject.

Economists have a habit of getting their symbols mixed. For a talisman they have never chosen the balanced scales, the mace and gavel, or the chalk-white peruke. Look at the covers of their bulletins. Often they display a corn crib or a motor truck. Fortunately, abstract art and now pop art have provided some visual relief recently – and may be closer to legal symbolism.

It is hard to know why economics practices such isolationism with respect to the law. Perhaps the origin of our discipline gives a clue. Early economists conceived of themselves as counterparts of their brethren the physical scientists. Like the physicists, they were searching for positive, universal, and immutable truth. They wanted to find the economic equivalent of the law of gravity. They even lifted the word, law. Economic "law" is orthographically the same as the title of this seminar. But its meaning is virtually opposite. The idea of economic law, alien to the nature of economic knowledge, is a great handicap to its successful pursuit.

If economic forces were a part of natural law, requiring only their discovery, it would be easy to understand why economic thought has so frequently disregarded the institutional setting for economic affairs and, therefore, the role of law. Theoretical economics broke loose from the natural law idea a long time ago, yet the full transition was slow to come. For example, giants such as Marshall and Keynes, although far from indifferent to the institutional order of the economy, abstracted from the existing order rather freely.

Only John R. Commons (plus a few lesser lights) tried to remind partial – and general – equilibrium economists that there is something more under heaven and earth than is dreamt of in their economic models.

Any neglect of the institutional elements in the economy is particularly inexcusable when shown by marketing economists. Marketing is a

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term of dual meaning. One meaning is what may be called the production economics of marketing – the resource combination involved in moving product from farm to consumer. The second meaning relates to marketing as the abode of the regulatory – the direction-giving – function of the economy.

Surely the second of this unusual pair of meanings demands attention to the institutional forms of the economy. For my part, over the years I have dipped more into the field of inquiry known as market structure. This fall for the first time the course I teach at USDA Graduate School was billed as combining equilibrium and bargaining approaches to commodity price economics. I teach Marshall, Chamberlin, Nicholls, Hoffman, Aaron Sapiro, federal marketing orders, the Farm Bureau's American Agricultural Marketing Associations, and the National Farmers Organization.

Professor Kohls of Purdue gave sprightly denial to scientifically positive pricemaking in a talk before fruit and vegetable bargaining cooperative people in January 1966. His words were: "There is no special section of heaven where angels of supply and angels of demand get together to establish prices which are then sent down to the markets of Podunk, Fresno, or Indianapolis. Prices of commodities are made by men, using whatever information they have and trying to get the best possible deal at the moment in time and at the place they find themselves."

He could have added, and would not deny, that the mortal men negotiate within a framework of laws which are both facilitative and limiting. Further, the laws were enacted previously by other mortal men and are applied currently by still a third group.

One defense thrown up by my fellows, and by myself, is that law only formalizes the parameters of our marketing institutions. It can possibly be said, therefore, to require no separate attention. If law were that neutral, there would be no need for statute law; common law would be enough. Law is not that neutral.

The same argument could readily be turned against its advocates. If law formalizes market institutions, perhaps it is the better handhold for dealing with them. It may be a better pedagogical device than economists know.

My remaining remarks will largely build on the ideas that law is in no sense instrumentally passive and that an understanding of the law can be highly instructive to economists.

The process of enacting a law is in itself creative. Enactment is not a simple matter of verbalizing an acknowledged consensus. Rather, it is ordinarily an arduous undertaking that requires marshaling facts and crystallizing opinion. If vigorously pursued, it can create a momentum to carry the body politic a half step farther than it wants to go. And no law is ever half enacted. If enacted, it is wholly so; and it thereby commits all the public, including its opponents.

In my observation the bulk of good law is adopted in times of stress. At the end of a war is the best time for enlightened progress. The pit of a depression is next best. The height of a business boom is the worst.

The law-enactment process is an instrument of reconciliation. It puts opposing interests in confrontation, exposes them, and reconciles them. If the process works well, this is a most salutary service. It protects against the autocracy of any group or region and avoids the dominion of any one set of goals or values – including economic ones. The law making process can help society keep its values in proper rank order. Less often than economists know, economic values or objectives do not belong at the top.

Apropos of keeping our shared cultural and ethical values in proper line, law itself is hierarchical. I do not refer to the structure of the court system but to the wonderfully ingenious devices of giving some laws hierarchical standing over others and of graduating the gauntlet for enacting new laws. The former applies most notably to the principle of a constitution, which brilliantly builds on man's willingness to be noble in broadly nondefinitive terms, in contrast with his insistence on being grasping on particulars. The latter refers to varying terms of an enacting vote. Says Friedman, "... our willingness to resort to majority rule, and the size of the majority we require, themselves depend on the seriousness of the issue involved ... Our legal structure is full of ... distinctions among kinds of issues that require different kinds of majorities." [1]

As one further comment on the lawmaking procedure, that procedure has provided a valuable prototype for a great many quasi-legal, or quasi-judicial, actions by agencies of government. I have in mind the formal hearing procedure, or even carefully structured forums. If fluid milk and fruit and vegetable producers should be adjudged the most economically literate of farm groups, their long exposure to marketing order hearings would rate part of the credit.

The final reason an understanding of the law (more that, perhaps, than technical knowledge of it) has much to offer the economics of marketing lies in its reminding us of the conventional nature of our market institutions.

I have in mind two viewpoints that are sometimes encountered, although they are themselves partly contradictory. The first is the conservative attitude that the established system somehow represents the irrevocable joint wisdom of God and man and should not be tampered with by radical antagonists or an assertive government. The second is the parlous doctrine that the market structure is self-selecting and the selection process should not be disturbed by makers or minons of the law. In several papers I have declared this doctrine to be patently false. A farmer's, or a buyer's, selection of a particular market gives no assurance that his choice will contribute to the design of a well-balanced

[1] Milton Friedman, Capitalism and Freedom. Univ. of Chicago Press, Chicago, 1962, p. 24.

marketing system. It could be argued that if such a system is characterized by multiple options, to the extent any group of buyers or sellers shows favoritism for a particular outlet, it jeopardizes the retention of that kind of system. Much is to be said in favor of a multiple-choice system, but the system itself requires action through process of government if it is to be established and preserved.

It would be useful but time-consuming to enumerate the forces for change in agricultural markets that are certain to engage both economically trained lawyers and legally trained economists. One capsule summary is that farm product marketers are facing growing size and power among both processors and retailers and are encountering tremendous pressure to bring more dependable quality and timing to marketing. One solution is to transfer control over agriculture to market firms through integration. But if farmers are to retain substantial entrepreneurial status, the two routes open are to make the market system much more sensitive and precise than it now is or to shift to collective action in marketing. In any of these three cases, the legal structure of our markets will be modified significantly.

Moreover, in all three cases the role of law probably will be increased. Notably in contractual integration and in collective action in marketing legal instruments will be employed, and the economist will need to understand those instruments before he can assess their structural implications.

Having given a good deal of credence to the idea that a legal point of view and legal understanding have a lot to offer marketing economics, I want to insert a bid for reciprocity – and a caveat.

Although it is fine for marketing economists to understand relevant law, the "mutuality is reciprocal," to quote a malapropism. Lawyers who work in market regulation would do well to heed the messages sent out repeatedly from marketing economists: The impact, and the appropriateness, of a regulatory provision (statute or administrative) is in no sense divorced from the structure to which it applies. Rules to regulate trading in livestock on central markets may be singularly unsuited to direct selling. A rule drawn for a California citrus order may have no application to New York City fluid milk. [2]

Finally, a closing reminder to avoid substituting legalisms for economic analysis. More than a century ago Alexis de Tocqueville declared that "it is the ideas and passions of men, not the mechanism of the laws, which are the moving force in human affairs." Perhaps it is when economists know a little law, which like a little learning may be dangerous, that they become captivated by it. New forms of market structure, including various arrangements in integration, have sometimes

[2] A more telling illustration may be the federal laws regarding joint price negotiation. In railroads joint negotiation over rates is required, but in most other businesses any collusive pricing is forbidden. Farmers are allowed to get together over prices they ask, but food processors must respond singly. This diversity of rules is solidly grounded in differences in market structure. However, some vegetable growers would like to be permitted to deal with their processors as a group.

been misunderstood because they have been given legal names and judged accordingly. Contract marketing is one – a term coined in disregard of the fact that any transfer of title is a contract. What matters in market structure is not the legal form any structure takes but its decision-making and performance-influencing and future-structure-shaping significance.

Like the astronaut peering at planet Earth from his rocket, it is good for all of us sometimes to look at our economic world through the eyes of the law. The only caution is that we not see only Blackstone and Brandeis there.

# THE LAW AND THE MARKET AS VIEWED BY A LEGAL LIBRARIAN

## "Legal Research Tools"

Bruno H. Greene*

In speaking to you within the framework of a seminar entitled "The Law and the Market." I feel like a man wearing only one shoe, because he has not got the other. While I know perhaps a little about law, I know absolutely nothing about marketing and, if that is possible, even less about the marketing of agricultural products.

Professor Dahl has explained to me that such expertise is unnecessary and that I may hide behind the comforting words on the program "As Viewed by a Legal Librarian."

Thus reassured, I shall proceed with my assigned task which is to enumerate some of the legal tools which are at the disposal of persons engaged in researching the legal aspects of marketing. To the lawyers present this will, of course, be "old hat", but might serve to refresh their memory which, I understand, becomes a little hazy once somewhat removed from law school.

Please keep in mind that it takes me twenty 50-minute lectures at the law school to discuss the tools of the legal profession, most of which would be useful for your special purposes as well. Therefore, my explanation here will have to be extremely condensed and merely serve to list rather than to explain the use of the various legal tools. The headings within those tools, under which the research will most usefully be conducted, are listed in an Appendix to the text distributed. They were prepared by Professor Dahl.

We might profitably classify the materials which will serve your research in the following categories:

I. Legislation
  A. In force
  B. In the making
II. Administrative Rules and Regulations
III. Decided Cases
  A. By Courts
  B. By Administrative Agencies
IV. Auxiliary Sources

Now, let me cite a few examples in each group:

I.A. Legislation in Force

1. Federal Legislation

a. U.S. Code Congressional and Administrative News. This is an excellent publication of the West Publishing Company issued semi-

* The author is professor of law and director of the Law Library, University of Minnesota.

monthly while Congress is in session and monthly when it is not. It contains, in addition to other materials, the latest congressional enactments as well as the highlights of the legislative history of such enactments. Published in pamphlet form, it contains a cumulative index as well as important reference tables in each issue. At the end of each congressional session the material is issued in one or more bound volumes. Note also that each pamphlet contains so-called Congressional and Administrative Highlights which serve as a quick survey of what is going on in Washington.

b. Most of the legislative enactments are incorporated in the U.S. Code and U.S. Code Annotated which consist of 50 titles divided into sections. The Code is supplemented by annual bound volumes, the Code Annotated by annual pocket parts and quarterly pamphlets. The Annotations are brief digests of court decisions and Attorney General's opinions interpreting the sections of the Code. Titles 7 (Agriculture) and 15 (Commerce and Trade) would probably be the ones of greatest interest to you. Comprehensive indexes and tables are part of the sets.

c. The Statutes at Large contain virtually the same material as incorporated in the Code, except that they are arranged chronologically, while the Code and Code Annotated are arranged by subject matter. Conversion from the Statutes at Large to Code citations can be done through special tables in the Code and Code Annotated.

2. State Legislation

The States publish their legislation in official form as Laws, Statutes, General Laws, etc. Moreover, most state legislation is published in sets of annotated volumes by various private law book publishers. In many cases those publishers also keep interested parties up to date by issuing supplementary pocket parts and pamphlets as well as a Legislative Service. The latter is published while the Legislature is in session, similar to the U.S. Code Congressional and Administrative News.

B. Legislation in the Making

Awareness of what happens to be in the "legislative hopper" at any given time in the area of your research, is, of course, of utmost importance. Your professional, nonlegal publications will keep you alerted to any proposed legislation that concerns you. To keep a close check on legislative developments, however, you will use one of two tools designed to give you only a brief digest of pending bills and information regarding their status.

1. Congressional Index. This is a publication put out by the Commerce Clearing House Publishing Company of Chicago, called CCH. It gives brief digests of House and Senate bills and resolutions, the date on which they were introduced, and the names of their sponsors, as well as information on the committees to which they have been referred, whether the committee has held hearings and has published reports, whether the bill has in the meantime become law, etc. This service is loose-leaf type, constantly brought up to date by releases mailed to the

subscribers. Several indexes (by subject, author, etc.) within the service are designed to make the information readily accessible. Unfortunately, the indexes, like most of their kind, are very deficient and require the exercise of considerable imagination in establishing the proper catchword. The index is also a useful tool for identifying congressional committees and their chairmen and members, for tracing voting records of Congressmen, etc.

2. Digest of General Public Bills. This is a publication of the Library of Congress in pamphlet form with cumulating pamphlet supplements. It serves the same function as the Congressional Index.

Neither of these tools contains the text of a bill. Such bill itself may be obtained either from the GPO (Government Printing Office) or in a depositary library.

3. Debates in Congress on bills of interest may be traced through the Congressional Record.

II. Administrative Rules and Regulations

A. CFR (Code of Federal Regulations). This is, in essence, a compilation of rules and regulations of Federal Government Agencies in force, arranged by subject matter in 50 titles, similar to the U.S. Code. The titles are subject to constant revision and are supplemented by pocket parts as well as special pamphlets. Each title has its own index, and there is a general index which, however, is extremely poor. As a result, work with the CFR is rather difficult, unless you know the exact area in which the regulation you are looking for belongs. In your area of interest titles 6, 7, and 9 will probably be the most important.

B. FR (Federal Register). What the Statutes at Large are to the U.S. Code, the Federal Register is to the Code of Federal Regulations. In other words, it is a chronological publication of administrative rules and regulations (as well as other materials), published daily (with certain exceptions), with monthly, quarterly, and annual indexes. To bring a regulation found in the CFR up to date, the FR must be consulted covering the period from the last available revision of the Code provision to the last issue of the FR.

C. As far as State Administrative Rules and Regulations are concerned, the availability of such materials depends on the resources of the individual state. Some states have Administrative Codes, others have only scattered materials, available with considerable difficulty or not available at all. Among the most ambitious undertakings of this kind are the Codes, Rules, and Regulations of the State of New York, a multivolume set, kept up to date.

III. Decided Cases

A. By ordinary Courts:

1. These cases are published officially by state and federal courts, but not by all courts. However, cases decided by the federal, highest state, and some lower state courts are published by the West Publishing Company in its various National Reporter Units, tied to-

gether through its ingenious Key Number System which would, unfortunately, take too long to explain. Access to the entire Reporter System can be gained through the American Digest covering all American reported cases from 1658 to the present time. Regional and local Digests also are available, as well as separate Digests covering the decisions of all federal courts in general and the U.S. Supreme Court in particular. The individual units of the Digest have descriptive word indexes, where the catchword can be established and directions obtained for finding the appropriate key number. A pamphlet entitled West's Law Finder has been distributed to you. It explains the methods to be applied in using West materials.

2. An excellent publication should be mentioned in this connection. Called U.S. Law Week and published by the Bureau of National Affairs in Washington, D.C., it carries brief summaries of the most recent court decisions, of developments in federal administrative agencies, and latest legislation of particular importance from all jurisdictions, in addition to full decisions of the U.S. Supreme Court as soon as handed down. The section entitled "Federal Agency Rulings" with its excerpts from decisions, orders, regulations, and "administrative interpretations" might be of particular interest to you.

B. By Administrative Agencies:

Administrative agencies discharge their so-called quasi-judicial functions by handing down decisions properly within their jurisdiction, as well as opinions, orders, etc. There are many published reports of such decisions as the FTC, ICC, FPC, and other similar reports available in continuing and ever growing sets.

IV. Auxiliary Sources

Under this catch-all title I shall briefly touch on a wide range of publications which undoubtedly constitute tools for your research activities.

A. Government Publications

As you know, the U.S. Government is one of the largest publishers in the world, covering every imaginable subject. These publications are available usually at nominal fees from the GPO or in depositary libraries. The same applies to reports of congressional committees and hearings conducted by them. Likewise, most states publish a wealth of materials, particularly in the area of your interest. The only difficulty lies in the access to those publications. How do you find out whether such publications exist and what they deal with? Two important tools are available:

1. For Federal Government publications: The Monthly Catalog of Government Publications. Each monthly issue has an index, and there is an annual index as well. The documents themselves, unless barred from distribution, can be obtained from the GPO or in a depositary library.

2. For State Government publications: The Monthly Checklist of State Publications, with an annual index.

B. Periodical Literature

The vast periodical literature offers an almost inexhaustible source of information in all areas concerned with the law. I shall merely point out some of the approaches through which that literature becomes accessible:

1. Index to Legal Periodicals. Published monthly (except September) it cumulates quarterly, semiannually, and annually, as well as every 3 years. It indexes not only a majority of American, but also a number of British, Canadian, Scottish, Irish, Australian, and other periodicals, as well as many yearbooks, annual institutes, etc. It is indispensable for any research in the area of legal periodicals.

2. An Index to Periodical Articles Related to Law indexes articles of legal interest in many nonlegal periodicals such as Fortune, New Yorker, and many others.

3. An Index to Foreign Legal Periodicals supplements Anglo-American indexes by an excellent analysis of periodicals outside the Anglo-American system.

C. Looseleaf Services.

Here I cannot even begin to enumerate the large variety of services which might be of interest to you. Each one of them, concentrating on an individual topic, attempts to bring together all statutes, court and administrative decisions, administrative regulations and individual rulings, periodical literature, etc., concerning the limited area chosen. The prominent publishers in this line, Commerce Clearing House, Prentice-Hall, and Bureau of National Affairs, each have their own services arranged according to their own system. The CCH Trade Regulation and Food and Drug Service may be mentioned as examples of that type of publication. Many users, including lawyers, shy away from using the services because they have somehow acquired the reputation of being hard to use. That is not quite true. Each contains exhaustive information on how best to use it. Five to 10 minutes spent studying those rules will make the use of each service quite easy.

D. Encyclopedias

A legal encyclopedia, just as a general one, serves to acquaint the reader with the entire area of his research in a long essay, presumably written by experts, with ample source material on which the writer relied. The user will be well served by such essays, provided he uses them for the purpose for which they are designed, i.e., as a general introduction to a topic. The sources cited are the authorities which should be consulted for verification of the statements made. Two outstanding encyclopedias are dominant in the field of law:

1. Corpus Juris Secundum, explained in the pamphlet of the West Publishing Company.

2. American Jurisprudence, First and Second Editions, the latter not as yet completed, published by the Lawyers Cooperative Publishing Company of Rochester, N. Y. The General Index will guide you to

the proper topics. Note, by the way, that American Jurisprudence, First Series, contains an elaborate treatment under the title Markets and Marketing.

E. Monographs

I am sure that you are far more familiar with the book literature in your area than I could ever hope to be. Bibliographies familiar to you will no doubt guide you to legal materials as well. To mention just a few examples of bibliographies: Dolson's Legal-economic Research and Publications, Law Books in Print by Pimsleur and Jacobstein, The Cumulative Book Index, the Publisher's Weekly, and the American Library Association Journal might be consulted with profit.

May I say in conclusion that I am keenly aware of the inadequacy of this presentation. As I pointed out before, this is a large area on which our freshmen law students have to spend many hours, in which they have to write three papers and pass an examination, and which I have tried to squeeze into the time allotted to me. However, my remarks may serve as an opening and an indication of the availability of a truly formidable array of tools, all of which can serve you well, each within its own defined aims. Your law librarian, if properly trained and sufficiently knowledgeable, will indicate which tool fits your individual need and will explain its use.

## APPENDIX

The following materials consist of subject titles, code titles and chapters, and bibliographical materials that topically illustrate the reference categories listed in this paper that would be useful to agricultural marketing researchers.

I. LEGISLATION

A. In Force

1. Federal Legislation

a. USCCAN (U.S. Code Congressional and Administration News) Includes public laws and USCA classifications, legislative histories, Senate and House bills enacted, administrative regulations, proclamations, executive orders, and major bills pending. Index titles of interest to agricultural marketing economists may include the following (as per the Nov. 5, 1965, issue):
Agricultural Act of 1949
Agricultural Adjustment Act of 1938
Agricultural Assessment Act of 1938
Antitrust Laws

Exports and Imports
Food for Peace
Food Marketing National Commission
Interstate Commerce
Labeling
Wheat

b. USCA (U.S. Code Annotated)
Contains 50 titles and numerous chapters for each title:
Title 7 Agriculture
Chp 1 Grain Futures Act
2 Cotton Standards Act
3 Grain Standards Act
4 Naval Stores Act
5 Importation of Adulterated Seed Act
6 Insecticides Act
7 Insect Pests Generally
8 Nursery Stock and Other Plants and Plant Products
9 Packers and Stockyards
10 Warehouses
11 Honeybees
12 Association of Producers of Agricultural Products
13 Agricultural and Mechanical Colleges
14 Agricultural Experiment Stations
15 Bureau of Animal Industry
16 Bureau of Dairying
17 Miscellaneous Matters
Title 12 Banks and Banking
Chp 4 National Agricultural Credit Corporations
Title 15 Commerce and Trade
Chp 1 Monopolies and Combinations in Restraint of Trade
2 Federal Trade Commission
3 Trade Marks
5 Bureau of Foreign and Domestic Commerce
6 Weights and Measures and Standards
Title 19 Customs Duties
Title 21 Foods and Drugs
Chp 1 Adulterated or Misbranded Foods or Drugs
2 Teas
3 Filled Milk
4 Animals, Meats, and Meat and Dairy Products
Title 26 Internal Revenue
Chp 5 Distilled Spirits, Wines, etc.
6 Fermented Liquors
7 Oleomargerine, Adulterated Butter, etc.

8 Filled Cheese
9 Mixed Flour
13 Cotton Futures
14 Tobacco and Snuff
15 Cigars and Cigarettes

Title 49 Transportation

c. Statutes at Large

Agricultural Act of 1949
Agricultural Act of 1954
Agricultural Advisory Commission, National
Agricultural Marketing Act of 1946
Agricultural Organizations, etc.

2. State Legislation

The following Titles and Chapters of the MSA (Minnesota Statutes Annotated) are presented for illustration of the state legislative materials. Similar statutes exist for each state.

Minnesota Statutes Annotated

Department and Agencies of the State

Agriculture

Chp 17 Department of Agriculture, Dairy, and Food
18 Entomology, Nurseries, Insects, Diseases
19 Apiaries
20 Noxious Bushes and Weeds
21 Seeds and Potatoes
22 Cooperative Marketing
23 Cooperative Credit
24 Insecticides, Acids, Paints, and Canning Compounds
25 Animal Foods
26 Produce Warehouses
27 Wholesale Produce Dealers
28 Cold Storage
29 Eggs
30 Vegetables and Fruits
31 Foods and Frozen Vegetables
32 Butter, Cheese, Cream, and Milk
33 Butter Substitutes
34 Nonalcoholic Beverages
35 State Livestock Sanitary Board
36 Poultry Breeding and Inspection
37 State Agricultural Society
38 County Agricultural Societies, Fairs, and Farm Bureau
39 Stallions and Jacks

Commerce

45 Department of Commerce

Banking
54 Farm Mortgage Debentures . . . .
Railroads, Warehouses, Utilities, Grain, and Livestock
223 Commission Merchants
224 Livestock Dealers, Exchangers, and Commission Merchants
225 Public Stockyards
226 Packing House Certification
232 Public Local Grain Warehouses
233 Public Terminal Warehouses
234 Storage of Grain on Farms
235 General Provisions Relating to Grain
239 Weights and Measures
Corporations
308 Cooperative Associations
Regulations Relating to Trade
325 Regulation of Manufacturers and Sales
330 Auctioneers
333 Trade Names and Registration of Insignia

B. In the Making

1. Congressional Index

Designed to facilitate reference to all public bills and resolutions by subject matter classification:

| | |
|---|---|
| Advertising | Livestock |
| Agriculture | Meat and Meat Products |
| Animals | Poultry and Poultry Products |
| Carriers | Sugar |
| Containers and Packaging | Trade Practices |
| Cotton | Trade Marks |
| Dairies and Dairy Products | Transportation |
| Department of Agriculture | Weights and Measures |
| Economic Poisons | Wheat |
| Fruits and Vegetables | Wool and Wool Products |

2. Digest of General Public Bills

Furnishes, in the form of a brief synopsis, the essential features of public bills and resolutions and changes made during the legislative process. Numerous subject headings are listed in the following manner:

Agriculture
Agricultural Adjustment Act Repealed
Animal Disease
Commodity Credit Corporation
Conservation Programs

3. Congressional Record

Debates on bills in the making. Indexed by Readers Guide and Congressional Record Index Supplements.

II. ADMINISTRATIVE RULES AND REGULATIONS

A. CFR (Code of Federal Regulations)

Issues are classified by USC titles and chapters and contain all changes in federal regulations regarding the marketing of agricultural products. The titles and issues most relevant to this seminar group are:

Title 7 Agriculture
Title 12 Banks and Banking
Title 15 Commerce and Trade
Title 19 Customs Duties
Title 21 Food and Drugs
Title 26 Internal Revenue
Title 49 Transportation

B. FR (Federal Register)

Entries are carried primarily under the names of the issuing agency by subject; also cross-index to agency by subject:

Agriculture Department
Commerce Department
Commodity Credit Corporation
Commodity Exchange Authority
Federal Trade Commission
Food and Drug Administration
Interstate Commerce Commission
State Technical Services Office

III. DECIDED CASES

A. By Ordinary Courts

1. Reporter System

Refer to "WEST'S Law Finder" for descriptions. This system is ordered by legal categories and may be most fruitfully used after specific legal-economic issues have been identified. The many subject matter headings are listed on pp. 19-20 of the Law Finder.

2. U.S. Law Week

(See text of speech)

B. By Administrative Agencies

Of the several reports and decisions, those of the Food and Drug Administration, Federal Trade Commission, Interstate Commerce Commission, and Department of Agriculture are most relevant here. The publication of the USDA entitled "Agriculture Decisions" includes decisions of the Secretary of Agriculture under the regulatory laws administered by the departments:

Agricultural Marketing Act of 1937
Commodity Exchange Act

Grain Standards Act
Packers and Stockyards Act
Perishable Agricultural Commodities Act
U.S. Warehouse Act

The December issue of "Agriculture Decisions" carries an annual index by subject.

IV. AUXILIARY SOURCES

A. Government Publications

1. Monthly Catalog of Government Publications

Classified by Government Agency, the following are appropriate:

Agricultural Department
Agricultural Marketing Service
Agricultural Research Service
Economic Research Service
Farmer Cooperative Service
Foreign Agricultural Service
National Agricultural Library
Commerce Department
Business and Reference Services Adminis
International Business Operations Bureau
National Bureau of Standards
Patent Office
Congress
House of Representatives
Interstate and Foreign Commerce Committees
Merchant Marine and Fisheries Committee
Small Business Select Committee
Senate
Commerce Committee
Federal Trade Commission
Health, Education, and Welfare Department
Food and Drug Administration
Interstate Commerce Commission
Joint Publications Research Service
Small Business Administration

2. Monthly Checklist of State Publications

This reference is indexed annually by subject headings.

B. Periodical Literature

1. ILP (Index to Legal Periodicals)

Exhaustive indexing of law review articles. The following are sample subject headings:

Advertising
Agriculture
Animals

Antitrust Law
Auctions
Board of Trade
Brokers
Business
Collective Bargaining
Commerce
Commodity Future Trading
Common Market
Contracts
Cooperatives
Crops
Economics
Exports and Imports
Fair Trade
Farm Law
Farms and Farming
Food Drug Cosmetic Law
International Trade
Interstate Commerce
Livestock
Marketing
Products Liability
Public Utilities
Railroads
Rate Regulation
Trade
Trade Regulations
Warehouses
Weight and Measure

2. IFLP (Index to Foreign Legal Periodicals)

An index of non-U.S. legal articles. The following are some sample subject headings:

Advertising
Agriculture
Animals
Antitrust Law
Auctions
Bills of Exchange
Bills of Trading
Brokers
Commerce
Commercial Law
Commission Agents and Factors
Conditional Sales
Contracts

Cooperatives
Economic Activities and the State
Economics
Fair Trade, Restraint of Trade, and Unfair Competition
Farm Property
Food, Drug, Cosmetic Law
Joint Venture
Railroads
Trade Marks and Trade Names

C. Looseleaf Services

Many "special" looseleaf services exist and are subscribed to by trade association memberships. For example, services detailing changes in federal, state, and local law exist for the American Bakery Association, National Millers, Corn Industries Foundation, Margerine Manufacturers, Frozen Food Manufacturers, and the Grocery Manufacturers Association, to name a few. Others, more general "services" that deal with topics of interest to agricultural marketing researchers, include:

| Prentice-Hall Services | Sample Topics |
|---|---|
| Securities Regulation | Commodity Exchange Act |
| Labor Guide | Fair Trade Laws |
| | Price Discrimination |
| | Federal Trade Commission Act |
| | Robinson-Patman Act |

| Commerce Clearing House Series | Sample Topics |
|---|---|
| Trade Regulation Reports | Advertising |
| | Agricultural Adj. Act |
| Food Drug Cosmetics Law Reports | Agricultural Association Act |
| | Antitrust Laws |
| | Antiprice |
| | Additives |

D. Encyclopedias

Both major legal encyclopedias, Corpus Juris Secondum and American Jurisprudence, have exhaustive subject matter listings as well as legal issue listings. The general methods of search appropriate to encyclopedias are explained in the WEST Law Finder.

E. Monographs

Numerous articles, bulletins, and books have been published dealing with legal-economic issues arising out of the marketing of agricultural products. The following brief list is only illustrative of certain relevant materials:

1. Compilation of Statutes Relating to Marketing Activities . . . of the AMS, USDA, (Agricultural Handbook Number 130, USDA, January 1958).
2. Marketing Research Reports Number 188 (A Legislative and Judicial History) USDA, July 1957, and Number 352 (Developments in 1957-58) USDA, July 1959.
3. Comparative Charts of State Statutes Illustrating Barriers to Trade Between States, Marketing Laws Survey, WPA, May 1939.
4. Abridged List of Federal Laws Applicable to Agriculture. (Office of Information, Mimeograph Number 2, 1950).
5. Sosnick, Stephen A., "A Critic of Concepts of Workable Competition," QJE, August 1959, pp. 383-384.
6. Kuhrt, W. J., E. W. Braun, and J. F. Bennett, "Agricultural Marketing Order Programs in California," Bulletin Number 4, State of California, Department of Agriculture, 1963.
7. Papandreau, Andreas, G.X., and John T. Wheeler, Competition and its Regulation, Prentice-Hall, Inc., New York, 1954.
8. Massel, Mark S., Competition and Monopoly: Legal and Economic Issues, The Brookings Institution, Washington, D.C., 1962.
9. Clark, J. M., "Toward a Concept of Workable Competition," AER, June 1940.
10. Nicholls, W. H., "Federal Regulatory Agencies and the Courts," AER, March 1944.
11. Markham, J. W., "The Concept of Workable Competition," AER, June 1950.
12. Adams, Walter, "The Role of Competition in the Regulated Industries," AER, May 1958.
13. Olds, Leland, "The Economic Planning Function Under Public Regulation," AER, May 1958.
14. Caves, Richard E., "Direct Regulation and Market Performance in the American Economy," AER, May 1964.
15. Cramton, Roger C., "The Effectiveness of Economic Regulation: A Legal View," AER, May 1964.
16. Bain, Joe S., Industrial Organization, Wiley & Sons, New York, 1958.
17. Federal and State Laws and Regulations Applicable to Egg Product Plants in the North Central Region: Part I (Compilation) and Part II (Analysis and Comments), University of Nebraska Agricultural Experiment Station, DAE Report 346, 1960 and 1961.
18. A Summary of Administrative Rules and Regulations Relating to the Interstate Movement of Agricultural Products in the 11 Western States, University of Arizona Agricultural Extension Stat. Report No. 110, February 1953.

# THE LAW AND THE MARKET -- AS VIEWED BY A PRACTICING ATTORNEY

## "Judicial Consideration of Economic Factors"

Stanley F. Hack*

I. Introduction

It has often been suggested that the best cure for theory is a substantial dose of practice. This may be particularly true in connection with the use of economic theory to present evidence in antitrust cases. Although there has been substantial consideration of the interdisciplinary relationship between law and economics, very little attention has been paid to the nature and adequacy of judicial consideration of economic factors. In the long run the latter may be more significant. While this area has been the subject of unending discussion and criticism during the past few years, there has been too little concern with improvement.

This subject raises several basic questions:

A. How have economic factors been handled by the courts?

B. Does the legal process, particularly the judicial system, adequately deal with such problems?

C. Have the courts balanced antitrust considerations with other factors such as economic policy, congressional intent, etc.?

D. If the courts have had difficulty, should economic factors be accorded different treatment?

E. And if different judicial treatment is warranted, what are some alternatives to present treatment?

This paper seeks to modestly explore certain aspects of this subject within the context of several merger cases decided by the United States Supreme Court during the past few years. It should be noted, however, that the same kinds of problems exist elsewhere in the law governing the market such as under the Sherman Act, the Clayton Act, the Robinson-Patman Act, and other laws. It should also be noted that this examination is limited to decisions of the Supreme Court (which only reviews questions presented, and this paper is not concerned with lower court treatment except as noted), that these cases were adversary in nature (which means that each side probably limited its evidentuary presentation to data supporting its position and did not necessarily use all relevant data), and that this review is not concerned with the use of economic factors in the selection of cases, the preparation of cases, or the development of public policy.

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## II. Significance of Merger Law to Food Marketing

Merger law is becoming of increasing importance to food marketing because of the general national merger trend which has included a substantial number of mergers between food firms. It is therefore likely that such food mergers will come under increasing challenge and will, accordingly, be subject to more frequent judicial review.

The Federal Trade Commission has reported, for example, that there were a total, in all categories, of 1,893 mergers in 1965, as compared to 1,797 in 1964.[1] The Commission also reported that since the early 1950's the total number of mergers in manufacturing and mining has risen from between 200 and 300 per year to over 600 per year in 1955 and to approximately 1,000 per year in 1965.[2] It appears that the frequency of large asset mergers (as defined by the Commission) is also increasing. In 1965, for example, the number of so-called large asset mergers increased 38 percent over 1964.[3] Food firms constitute one of the principal merger categories. This category accounts for nearly 10 percent of all mining and manufacturing mergers over the past decade and is almost tied for second place among all manufacturing and mining mergers.

## III. Judicial Review

The trend towards more mergers appears to have resulted in an increasing tendency on the part of the courts to simplify consideration of economic factors in merger cases. This may be due to a variety of factors including the possibility that economic evidence has simply become too complex for the courts to deal with.

A brief examination of several merger cases presents an interesting illustration of the development of simplified, and perhaps inadequate, judicial treatment of economic factors. Mergers are governed by Section 7 of the Clayton Act.[4] This provision was amended in 1950 to plug several important loopholes that had prevented earlier effective use. These changes included an expansion of the law to cover asset acquisitions as well as stock purchases and to consider effect on relevant competition rather than merely competition between the subject firms. Congress was clearly concerned with increasing economic concentration, but it also wanted to preserve some of the earlier judicial interpretation of the prior law. In this connection both Senator Kefauver and Congressman Celler took the position that earlier law should be preserved, such as enunciated in the *International Shoe* case,[5] and that the proposed law prohibited only those mergers that would result in reducing competition to a substantial degree.

Although Congress was concerned with concentration, this term was not used as a standard in the law. The 1950 amendment prohibited only

[1] Release, Federal Trade Commission, February 11, 1966.

[2] Ibid.

[3] Ibid.

[4] 15 U.S.C. Sec. 18.

[5] International Shoe Co. v. Federal Trade Commission, 280 U.S. 291 (1930).

those mergers where the "effect of such acquisition may be substantially to lessen competition or tend to create a monoply."[6] Nothing in the legislative history equates an increase in concentration with the standards set forth in the law. This is not to say, however, that concentration is not relevant, but it is not conclusive.

The first substantial consideration of amended Section 7 by the United States Supreme Court was in *Brown Shoe Co. v. United States.*[7] This involved a merger between Brown Shoe and Kinney. The Court took a very broad empirical approach in terms of the factors that should be considered in deciding such a case because "Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry."[8]

It was clear in this case that the Court did not adopt a percentage test. Chief Justice Warren, for example, stressed:

> The relevance and importance of economic data that places any given merger under consideration within an industry framework is almost inevitably unique in every case. Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but (unless market share is either of monopoly or insignificant size) only a further examination of the particular market – its structure, history, and probable future – can provide the appropriate setting for judging the probable anticompetitive effect of the merger.[9]

The Court laid down certain guides for making such judgments as defining the relevant market and submarkets. These factors included product interchangeability, cross-elasticity, peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. All such practical indicia were to be weighed. The Government won. Economic factors were controlling, and the Court did not resort to mathematical or formula tests.

The next important case, *Philadelphia National Bank.*[10] appears to be the beginning of a retreat from the broad empirical approach towards a more limited test – percentage of concentration. The merging banks were second and third largest in Philadelphia with the largest bank controlling 23 percent of the market. The two largest controlled 44 percent, which would have been increased by about one-third after the merger, to approximately 59 percent. The top four, after the merger, would control 78 percent.

The Court recognized that it must take a broad look which was "not merely an appraisal of the immediate impact of the merger but a predic-

[6] 15 U.S.C. Sec. 18.
[7] 370 U.S. 294 (1962).
[8] Id. at 321-22.
[9] Id. at 322.
[10] United States v. Philadelphia National Bank, 374 U.S. 321 (1963).

tion of its impact upon competitive conditions in the future." [11] Such a prediction "is sound only if it is based upon a firm understanding of the structure of the relevant market." [12] However, the Court inserted an important but "...yet the relevant economic data are both complex and elusive...and unless the businessman can assess the legal consequences of a merger with some confidence, sound business planning is retarded...so also, we must be alert to the danger of subverting congressional intent by permitting a too broad economic investigation." [13]

The Court states a somewhat simpler test which was that:

> ...A merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effect. [14]

The foregoing in itself did not undermine *Brown Shoe* because: (1) it related only to horizontal mergers; (2) the prohibited merger had to produce a firm having an undue share of the market (not merely that one of the firms be large before the merger but that the increment added by the merger must be large); and (3) that where the increment was significant, then the merger was presumptively bad but not conclusively bad. Thus, a defendant had an opportunity to rebut the presumption.

An important part of the case was reserved for a statement in a footnote in which the Court said:

> If concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great. [15]

A year later the Supreme Court raised the foregoing footnote into the texts of the *Alcoa* [16] and *Continental Can Company* [17] decisions. In both cases the Supreme Court redesigned the relevant market contrary to lower court findings, reversed the lower court, and found the challenged mergers unlawful.

In *Alcoa,* its share of the primary aluminum market had been decreasing over a period of years. In the field of bare and insulated aluminum conductors, the subject of the merger, it had 32.5 percent and 11.6 percent, respectively, of the markets. While it led the industry in bare conductors, it was behind Kaiser in insulated conductors. It did not manufacture any copper products. Alcoa sought to acquire Rome Cable

[11] Id. at 322.
[12] Ibid.
[13] Ibid.
[14] Id. at 363.
[15] Id. at 365.
[16] United States v. Aluminum Co. of America, 377, U.S. 271 (1964).
[17] United States v. Continental Can Co., 378, U.S. 441 (1964).

to obtain copper "know-how" and to establish a market foothold. Rome at this time manufactured 4.7 percent of bare aluminum conductors and 0.3 percent of insulated aluminum conductors. Although the District Court refused to combine both aluminum conductor markets, the Supreme Court did so finding Alcoa in first place with 27.8 percent and Rome in ninth place with 1.3 percent of the market. The Court ignored copper. In aluminum conductors, the Court found the top four firms with 76 percent of the market and the top nine firms with 96 percent of the market. In finding the merger unlawful the Court ignored several interesting facts: (1) in 1961, several years after the merger, Alcoa's market share, including that of Rome, had dropped to 24.8 percent (vs. 29.1 percent at the time of the merger); (2) there was no testimony by competitors to indicate any adverse competitive effects; (3) there was ease of entry; and (4) there was active competition including important price cutting.

*Continental Can* was a merger between the second largest can firm and the third largest glass container manufacturer, Hazel-Atlas. This case was dismissed by the trial court upon failure of proof after the judge carefully applied the pragmatic criteria enunciated in *Brown Shoe*. The Supreme Court in determining the relevant market combined metal and glass containers even though there was no evidence of interchangeability or cross-elasticity. The Court decided that there was no need for complete product overlap, although here there was hardly any.

Justice Harlan in a dissent said that the majority:

> choose ... to invent a line of commerce the existence of which no one, not even the Government, has imagined; for which businessmen and economists will look in vain; a line of commerce which sprang into existence only when the merger took place and will cease to exist when the merger is undone.[18]

Thus, once the market was drawn, the result was obtained through statistics. The Court found that the top six firms controlled 70.1 percent with Continental Can in second place with 21.9 percent of the market and Hazel-Atlas in third place with 3.1 percent. After the merger, Continental, with 25 percent of the market, was still behind American Can, but its share of the market approached the presumptively bad 30 percent of the *Philadelphia Bank* case. In addition, the 3.1 percent increment in size was larger than the 1.3 percent increment which had been found illegal in *Alcoa*. Justice Harlan referred to this as a "mock-statistical analysis."

The majority, however, concluded:

> the case falls squarely within the principal that there is a history of tendency towards concentration in the industry, tendencies towards further concentration are to be curbed in their incipiency ... where concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great.[19]

[18] Id. at 476-77.
[19] Id. at 461-62.

The Supreme Court rejected the trial court's findings because "where a merger is of such size as to be inherently suspect, elaborate proof of market structure, market behavior, and probable anticompetitive effects may be dispensed with in view of Section 7's design to prevent undue concentration." [20]

The foregoing cases seem to support a theory that the Supreme Court is developing and applying simple rules to highly complex problems.[20a] This may be symptomatic of the Court's general approach to difficult areas. In essence, substantial relevant economic evidence is being discarded even if it has the effect of rebutting the Government's case. More important, the Court does not seem to be paying attention to significant policy considerations which may require the balancing of antitrust with other considerations and policies. Agricultural policy presents such a balancing area as does the stimulation of invention and innovation and the diffusion of technology. In agriculture, for example, there are conflicting national goals sought by such laws as the Capper-Volstead cooperative law and the antitrust laws. If the Court decides only to pay attention to antitrust and ignore the policies behind Capper-Volstead, a significant element of public policy may be unintentionally defeated. The problems of balancing are very difficult and raise many questions. Perhaps this means that we must rethink the approach that is being taken in these areas.

One should keep in mind that the courts are faced with many difficulties, particularly in dealing with complicated problems. These difficulties include heavy workloads, a general policy of attempting to simplify issues and cases, the adversary system which sometimes results in the presentation of something less than all relevant evidence, the normal difficulty in understanding and digesting data outside of one's regular discipline, and the lack of formal procedure to deal with weighing and examining economic data.

IV. Possible Modifications in Present System

There are several possible modifications in the present system that might be considered. These could aid in bringing together all significant evidence, facilitating consideration of such evidence, and assisting the judiciary in the decision-making process.

A. Assist judges with trained economist "law clerks." This might provide impartial expert advice on complex problems. It should be noted, however, that this approach has been tried in the *United Shoe Machinery* [21] case by Judge Wyzanski. The Judge retained

[20] Id. at 458.

[20a] The tendency to simplify consideration of difficult statistics is continuing. In United States v. Von's Grocery Co. (volume and page numbers not identified) 16 L.Ed. (2d) 555 (1966), the Supreme Court held unlawful a merger between two small food retailers in the Los Angeles market. The defendants had a combined market share of 7.5 percent of the relevant market. The Court said that it was seeking to arrest a rising trend of concentration.

[21] United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. (1953).

Carl Kaysen and came away with some apparent concern about whether the procedure worked.

B. Broaden the use of special masters. The Federal Rules of Civil Procedure limit the use of special masters to highly complicated cases. [22] Thus, such use is limited, and there is no assurance that we could obtain experts to hear cases or that if we did, they would do the kind of job desired. In addition, their decisions are subject to review by the trial court which might still go its own way.

C. Establish a new expert court or body to deal with economic problems. This could be along the lines of a court such as the Tax Court, or an economic court (as proposed by Assistant Attorney General in charge of antitrust, Donald Turner) or an administrative agency such as the Federal Trade Commission. [23] This raises numerous questions including whether such an idea is politically feasible. In addition there are problems relating to jurisdiction, public and private use, and long-range practicality.

D. Allow existing government agencies to formally advise the courts or act as "friends of the court" in significant cases. This approach would probably require formalizing because the courts are frequently unwilling to hear government agencies even as "friends of the court."

E. Amend existing laws to require consideration of economic factors as a matter of law. This also raises many problems especially with respect to the difficulties of attempting to outline every possible contingency within the context of law.

F. Establish a new rule-making body to develop and review all factors relating to trade regulation and develop guides that could be used by the courts. This approach seems to make most sense. While the Department of Justice and Federal Trade Commission have started to develop rules governing mergers, it would seem to be better policy to establish a new agency to undertake such a task. Such an agency, not connected with enforcement, might continually review trade regulation problems considering both antitrust and other relevant policies such as agriculture, technology, foreign relations, defense, labor, economic stability, and other areas of important national concern. Such studies would be available for judicial use and might provide useful guides so that everyone concerned would know what was expected in the great majority of cases.

V. Conclusion

Judicial consideration of economic factors is a very complex area and is in need of further study. It is impossible to reach any firm conclusions in a limited review such as this, but further examination in terms

[22] Federal Rules of Civil Procedure, Rule 53.
[23] Kaysen and Turner, Antitrust Policy (1959).

of issues raised at the beginning of this paper would be highly useful. It would seem that research in this direction would be very significant both in terms of assisting economists in developing economic evidence that will be acceptable and helpful to the courts and in terms of developing improvement in judicial treatment and appreciation of such evidence.

# THE LAW AND THE MARKET -- AS VIEWED BY A FEDERAL LITIGATOR

**Neil Brooks***

Forty-five years ago it was said by Judge Cardozo[1] that:

> Courts know today that statutes are to be viewed, not in isolation or in vacuo, as pronouncements of abstract principles for the guidance of an ideal community, but in the setting and the framework of present-day conditions, as revealed by the labors of economists and students of the social sciences . . .[2]

Economic considerations are in some instances the generative source of the law. A notable example is that:

> When Lord Mansfield [an English jurist in the 1700's] was engaged in his great work of adapting a feudal common law to the requirements of a commercial England, his studies of the practices of merchants as a basis for an enlightened expansion of the law were regarded as a daring judicial innovation. The innovation was, in truth, no more and no less than the application of all the resources of the creative mind to the perpetual problem of attuning the law to the world in which it is to function.[3]

Numerous statutory measures have been enacted in recent decades in the Congressional effort to bring the law into accord or just correspondence with the world in which it is to function. These measures, it goes without saying, have been enacted in response to the felt necessity of the times. "Back of the answers," in some instances in the law, "is a measurement of interests, a balancing of values, an appeal to the experience and sentiments and moral and economic judgments of the community, the group, the trade."[4]

The Supreme Court has recognized "the relevance of the economic effects in the application of the Commerce Clause" in the Constitution.[5] In a case involving the validity of legislation designed "to rationalize the mischievous fluctuations of a free sugar market by the familiar device of a quota system,"[6] the Court said that it is "confined to passing on the right of Congress and the Secretary [of Agriculture] to act on the basis of entertainable economic judgments."[7]

* The author is assistant general counsel, U.S. Department of Agriculture. The views herein expressed are not intended to be inconsistent with the official views of the Department of Agriculture, but nothing herein is to be construed as expressing any official views of the Department.

[1] Later a member of the U.S. Supreme Court.

[2] Cardozo, The Nature of the Judicial Process (1921 ed.), p. 81.

[3] Chief Justice Stone, Proceeding in Memory of Mr. Justice Brandeis, 317 U.S. XLIII-XLIV.

[4] Cardozo, Paradoxes of Legal Science, p. 75.

[5] Wickard v. Filburn, 317 U. S. 111, 123-124. In this case involving the validity of wheat marketing quotas under the Agricultural Adjustment Act of 1938, the parties "stipulated a summary of the economics of the wheat industry." Id. at 125.

[6] Secretary of Agriculture v. Central Roig Co., 338 U. S. 604, 606.

[7] Id. at 606, fn. 1.

Terms of wide and general import are frequently used in statutory measures with regard to business practices. Broad statutory standards for administrative use in diversified circumstances are a reflection of the necessities of modern legislation dealing with complex economic and social problems.[8] For example, unfair practices in different areas of business are outlawed by a variety of statutory provisions.[9] The draftsman of a regulatory statute cannot, "as a practical and realistic matter," consider "every evil sought to be corrected."[10] No "great acquaintance with practical affairs is required to know that such prescience, either in fact or in the minds of Congress, does not exist."[11] It is, therefore, for the courts to decide whether "in a given case particular acts come within a generic statutory provision," e.g., the rule against "unreasonable" restraints of trade.[12] This practice, the Supreme Court has said, is not unusual.[13] "Take for instance the familiar cases where the judiciary is called upon to determine whether a particular act or acts are within a given prohibition, depending upon wrongful intent. Take questions of fraud. Consider the power which must be exercised in every case where the courts are called upon to determine whether particular acts are invalid which are, abstractly speaking, in and of themselves valid, but which are asserted to be invalid because of their direct effect upon interstate commerce."[14]

Inquiries that seem at first glance to be simple and unitary, under broad and flexible statutory criteria, may in view of economic considerations turn out to be multiple and complex. For example, in cases relative to ratemaking for public utilities, cases involving the evils of monopoly, and cases with respect to wages and hours of labor, it is necessary to search for the relevant social and economic factors involved. In some instances Congress has created an agency "with the avowed purpose of lodging the administrative functions committed to it in 'a body specially competent to deal with them by reason of information, experience, and careful study of the business and economic conditions of the industry affected'. . . ."[15]

Time does not permit and my aim does not require that I catalog the wide range of cases or issues with respect to which economic con-

[8] See, e.g., Federal Trade Comm. v. Anheuser-Busch, Inc., 363 U. S. 536, 542; American Trucking Assns. v. United States, 344 U. S. 298, 302-310; Federal Trade Comm. v. Motion Picture Adv. Co., 344 U. S. 392, 396-397; Phelps Dodge Corp. v. Labor Board, 313 U. S. 177, 185; Sunshine Coal Co. v. Adkins, 310 U. S. 381, 398; Federal Trade Comm. v. Keppel & Bros., 291 U. S. 304, 312; Wilson & Company v. Benson, 286 F. 2d 891, 892, 895-896 (C. A. 7).

[9] See, e.g., § 2 of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b);§§ 6(b) and 9 of the Commodity Exchange Act (7 U.S.C. §§ 9 and 13); § 8c(7) (A) of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. § 608c(7) (A));§§ 202(a) and (b) of the Packers and Stockyards Act (7 U.S.C. §§ 192(a) and 192(b));and § 5 of the Federal Trade Commission Act (15 U.S.C. § 45).

[10] American Trucking Assns. v. United States, 344 U.S. 298, 309-310.

[11] Ibid.

[12] Standard Oil Co. v. United States, 221 U.S. 1, 69.

[13] Id. at 69-70.

[14] Id. at 70. See also, Patterson, Jurisprudence — Man and Ideas of the Law (1953 ed.), pp. 22-23.

[15] Federal Trade Commission v. Keppel & Bros., 291 U.S. 304, 314.

siderations, in judicial proceedings, are of pivotal importance. A notable case, however, may serve as an illustration. The case is that of *Grant v. Benson*,[16] with respect to certain provisions in the New York milk marketing order whereby dealers or handlers are required to pay a minimum price to producers for their milk. The contested provisions in the *Grant* case relate to certain deductions – from the producer-settlement fund – for payments to certain cooperative associations of producers for marketwide services in connection with the program. The Act of Congress specifies the economic goal, sets forth the criteria for the provisions in an order, and provides also for auxiliatory provisions which are "incidental" and "necessary" but which must not be inconsistent with the specific criteria in the Act. The important issue as to whether certain deductions should be made for payments to the cooperative associations was referred to a committee of economists[17] for research and study. After the completion of their work the economists testified at a public hearing with regard to proposed amendments to the order.

The members of the committee in *Grant v. Benson,* supra, were economists and marketing specialists who were familiar with milk marketing and its various problems throughout the milkshed.[18] The committee made an independent study of the entire subject.[19] The conclusions and recommendations of the committee were submitted in evidence at the public hearing, and members of the committee testified at the hearing.[20] A large part of the record in the case in court consisted of the testimony and supporting data submitted by the committee.[21] It was said in the Government's brief in the Court of Appeals that:

> The testimony, in the record of the administrative hearing, by the committee of experts is so voluminous that no more than a general reference or abbreviature may be given within the limits of this brief, and we believe that the evidence in the record as a whole is reflected, in significant respects, in the Secretary's elaborate findings which manifestly are wrought in detail and with care ... We believe that the findings as a whole present a lucid, complete, and convincing explanation of the entire subject matter.[22]

In upholding the validity of the contested provisions it was said by the Court of Appeals in an elaborate opinion that the contested provi-

[16] 229 F. 2d 765 (C.A.D.C.), certiorari denied, 350 U.S. 1015.

[17] 18 F.R. 6458-59. The members of the committee were G. W. Hedlund, professor of business management and acting head of the Department of Agricultural Economics, New York State College of Agriculture; Thurston M. Adams, acting associate dean and director, University of Vermont and State Agricultural College; C. A. Becker, professor of agricultural business management, Pennsylvania State College; L. C. Cunningham, professor of farm management, New York State College of Agriculture; Stewart Johnson, professor of agricultural economics, University of Connecticut; C. W. Pierce, professor of agricultural economics, Pennsylvania State College; Leland Spencer, professor of marketing, New York State College of Agriculture; Herbert G. Spindler, assistant research professor, University of Massachusetts; R. P. Story, assistant professor of marketing, New York State College of Agriculture; and Allen G. Waller, chairman, Department of Agricultural Economics, Rutgers University and Agricultural College.

[18] 18 F.R. 6458-6459.

[19] Ibid.

[20] Id. at 6459.

[21] Ibid.

[22] Brief, p. 20, for the Secretary of Agriculture in Grant v. Benson, in the U.S. Court of Appeals for the District of Columbia Circuit, No. 12478.

sions of the order "are shown by massive evidence which we cannot ignore, followed by findings which we have no authority, rightfully exercised, to overturn, to be reasonably necessary to accomplish the purposes of the statute through the method adopted."[23]

"Each of the regulatory statutes" administered by the Secretary of Agriculture has been said to be "specialized in design because of the infinite variations which exist in agriculture and in the marketing of agricultural commodities and products."[24] With respect to a particular program, recent legislation by Congress affords another instance in which economic factors are of central importance. The statutory authority of the Secretary with regard to the issuance of Federal milk marketing orders is amended by the Food and Agriculture Act of 1965[25] to provide for what is generally referred to as "Class I base plans." The Food and Agriculture Act of 1965 provides for the inclusion of provisions in a Federal milk marketing order for the equitable apportionment of "the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk, which may be adjusted to reflect sales of such milk by any handler or by all handlers in any use classification or classifications, during a representative period of time which need not be limited to one year. In the event a producer holding a base allocated under this clause (d) shall reduce his marketings, such reduction shall not adversely affect his history of production and marketing for the determination of future bases. Allocations to producers under this clause (d) may be transferable under an order on such terms and conditions as may be prescribed if the Secretary of Agriculture determines that transferability will be in the best interest of the public, existing producers, and prospective new producers. Any increase in class one base resulting from enlarged or increased consumption and any producer class one bases forfeited or surrendered shall first be made available to new producers and to the alleviation of hardship and inequity among producers. In the case of any producer who during any accounting period delivers a portion of his milk to persons not fully regulated by the order, provision may be made for reducing the allocation of, or payments to be received by, any such producer under this clause (d) to compensate for any marketings of milk to such other persons for such period or periods as necessary to insure equitable participation in marketings among all producers (underscoring supplied)."[26]

An economist who has had a great deal of experience in this area of Federal regulation has said that § 101 of the Food and Agriculture Act of 1965 constitutes "by far the most important change" that has been

[23] Grant v. Benson, 229 F. 2d 765, 770 (C.A.D.C.), certiorari denied, 350 U.S. 1015.
[24] Farrington, The Wide Range of the Programs Administered by the U.S. Department of Agriculture, 26 Geo. Wash. L. Rev. 127, 129.
[25] Public Law 89-321, 89th Congress, approved November 3, 1965 (79 Stat. 1187).
[26] Section 101 of the Food and Agriculture Act of 1965, Public Law 89-321, 89th Congress, approved November 3, 1965 (79 Stat. 1187)

made since 1937 in the statutory authorization for Federal milk marketing orders.[27] It seems that under this measure there is to be, in some respects, a balancing of economic interest, an appraisal of variant and perhaps divergent considerations. Since the resolution of the matter is to be on the basis of the evidence adduced at a public hearing, it cannot be gainsaid that the data and viewpoints submitted by economists constitute a relevant and important part of the proceeding in its totality.

Although the criterional factors in a regulatory statute may be set forth in terms of general import, it may be appropriate to keep in mind the observation by Judge Cardozo that in some areas "empirical solutions will be saner and sounder if in the background of the empiricism there is the study and the knowledge of what men have thought and written in the anxious search and groping for a coordinating principle."[28]

[27] Spencer, Class I Base Plans Under Federal Milk Orders, Department of Agricultural Economics, Cornell University Agricultural Experiment Station, New York College of Agriculture, Cornell University, January 1966, p. 13.
[28] Cardozo, The Paradoxes of Legal Science, pp. 96-97.

# THE LAW AND THE MARKET -- AS VIEWED BY AN INDUSTRY OFFICIAL

A. C. Hoffman*

My assignment is to discuss the law and the market from the standpoint of business – and to do it in 20 minutes.

For purposes of this discussion, I shall divide the legislation affecting business firms into three broad categories.

The first category relates to the various types of regulatory legislation such as prevention of fraud, protection of the public health, conditions for the employment of labor, rules governing the commodity changes, etc. While businessmen may disagree as to the need for and the propriety of some of these regulatory measures, no responsible business firm will knowingly and willfully violate such laws once they are on the statute books, if for no other reason than that the risks of getting caught are far greater to a reputable firm than any possible gain.

The main concern of the businessman is that regulatory legislation be enforced even-handedly throughout his market and on all competitors, large and small. One of the main sources of inequity is that small firms, engaged solely in intrastate commerce, are not always covered by federal regulatory laws, but this is not very important in the mainstream of business and industry. By and large, I do not believe businessmen generally are as concerned about most regulatory legislation of the type described here as the more vociferous members of the business community sometimes indicate.

The second category of laws affecting business firms are those which provide for the expenditures of public funds paid directly to business firms for their products or services. Defense expenditures are of course the most important, but by no means the only, example of this. For the business firms involved, there are two simple objectives: how to get a defense contract for themselves, and how to expand the total market by increasing total government funds expended. Quite obviously the modus vivendi for achieving these objectives in a market created by government funds is a good deal different from operating in commercial markets. One difference is that government and corporate bureaucrats, usually arrayed against each other in the framing or enforcement of laws affecting business, are in this situation allied together against the taxpayer – which is precisely what led President Eisenhower in the closing paragraphs of his farewell address to warn against the military-industrial complex.

Although it has not received much attention from agricultural economists, the expenditure of federal funds under the farm price support legislation has had a rather significant effect on agricultural marketing

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agencies in certain product areas. As is well known, quite a few people and quite a few firms (both corporate and cooperative) came to have a vested interest in the perpetuation of these support programs apart from the farmer beneficiaries for whom the programs were intended. What is not so well known is that these support programs inadvertantly and unintentionally tended in the long run to penalize the small firms who sold their output to the government as compared with large firms who usually concentrated their efforts on the regular commercial market.

The current difficulties of the small butter-powder plants in Minnesota and elsewhere are an example of this. For years most of their skim powder and a considerable part of their butter were sold to the government under the dairy support price program. When prices of manufactured dairy products moved above support levels several months ago, these plants no longer had a favorable market outlet for their products, and they had trouble paying farmers the going price for milk. I do not mean to exaggerate the importance of this kind of thing generally in agricultural marketing, but it is inherent in any situation where business firms become deeply involved in selling to the government.

The third category of laws affecting business firms are those intended for the preservation of competition and the small businessman. Specifically involved here are the Sherman Act, the Clayton Act, and the Robinson-Patman Act. The philosophy underlying all this legislation is that the intensity and the effectiveness (in terms of price and output) of competition is measured by numbers of competitors, that a high degree of concentration of control is a bad thing, and that the public interest is served by attempting to preserve a domain for the independent enterpriser against the encroachment of the big corporation. Our purpose here is not to argue whether this underlying philosophy is right or wrong, but rather how businessmen may be expected to react to the antitrust laws which confront them.

The first thing to be understood about this legislation is that there are no clear-cut guideposts or criteria by which the business firm may know whether it is, or is not, violating one of these laws. Applied to a particular situation, and in the first instance, these laws mean what the Federal Trade Commission or the Justice Department say they mean. If a business firm doesn't like the interpretation by the enforcement agency, it may appeal to a lower court and maybe win, and the loser may appeal to a higher court, and so on until the matter reaches the Supreme Court, where the learned justices will probably disagree among themselves and come up with a split decision which reverses an earlier split decision, all judicial hands having applied what the Supreme Court once called "the rule of reason," which I suppose means the application of common sense within a particular set of judicial predilections. Don't misunderstand me -- I'm not criticizing this "due process of befuddlement," and in a world of changing technologies and institutions and value judgments, this is probably the best of all possible ways to ad-

minister and adjudicate the antitrust laws. Certainly a worse way would be to turn the matter over to the economists with their mathematical models, which of course the legal profession could not afford to permit in any case.

Faced with the vagaries and uncertainties of the antitrust laws, some business firms take a chance by going ahead full steam with mergers and acquisitions; others pursue the more cautious course of internal growth. It is a moot question as to which is the most advantageous method of growth for the firm itself, apart from legal considerations. Internal growth requires good technical research and engineering resources and ample capital for plants and market promotion – in all of which large companies are greatly advantaged over smaller ones. I think quite probably the general effect of the antitrust laws may have been to strengthen big companies and to enhance their technological self-reliance as a result of causing them to grow by internal methods rather than by merger and acquisition.

Certainly the antitrust laws have been an important factor toward encouraging product diversification and the conglomerate-type operations which have come increasingly to characterize big business in recent decades. From the standpoint of the business firm the reason is simple enough: If it is to grow and has the necessary capital, management skills, and corporate overhead, then it has a greater chance of avoiding citation by the FTC and the Justice Department by going into new product fields rather than by increasing its share of market in its old lines.

In much the same way the Robinson-Patman Act is having a reverse effect from that intended by encouraging vertical integration on the part of large farms, which tends to eliminate the small farms this Act was set up to protect.

I'm sure that the microeconomics of vertical integration are well known to all of you and need no extended discussion here. Quite obviously the business firm is out to sell its products and obtain its supplies and raw materials as efficiently as it can, and at the lowest costs possible. Frequently these ends are best served for the large firm by vertical integration, both forward and backward, and these reasons for vertical integration exist apart from the Robinson-Patman Act. But when this Act prevents (as it frequently does) a firm from selling a large industrial customer at a price consistent with the lower costs to such a large customer, then this customer has an added incentive to integrate vertically by manufacturing the item for itself.

I really don't know what can or should be done about this whole matter of vertical integration and the Robinson-Patman Act. If any of you have the answer, I'm sure "Fritz" Mueller of the FTC and every corporate director of purchases (including this one) would like to know what it is.

The role of the economist in the field of antitrust legislation and jurisprudence has been a busy but, I think, a rather futile one. It has

recently become the fashion and indeed the custom of antitrust lawyers to buttress their arguments pro and con with voluminous economic data and complicated economic analyses. But, in all candor, I think it must be admitted that economists have been no more successful than lawyers in establishing objective and quantitative guideposts for use in connection with antitrust matters.

Like their predecessors of the 19th century, modern neoclassical economists are stuck with the basic proposition of Adam Smith that any departure from an atomistic structure is bad. Now clearly this is not a valid proposition in today's economic world, so economists have been forced to come up with a concept which they call "workable competition." No two economists seem quite agreed on what "workable competition" is, or how it is to be applied to a particular situation. But at least it serves one very useful purpose: it is a fluid concept, vague, changing, and indefinite, and it serves economists in much the same way as the "rule of reason" has served the Supreme Court – namely, that it can be used for just about anything by anybody to come up with a conclusion which will fit nearly any set of preconceptions and value judgments. In today's fast changing world it is perhaps best that nobody – neither lawyer, nor economist, nor businessman – goes charging around intellectually armed with a set of what he regards as eternal verities, because maybe there aren't any.

# THE LAW AND THE MARKET AS VIEWED BY A FTC ECONOMIST

## "The Role of Economics in Developing Rules of Law in the Enforcement of the Antitrust Laws"

Willard F. Mueller*

The basic purpose of the antitrust laws is to maintain sufficiently competitive market structures and market behavior to insure that American industry performs in an acceptable manner without direct government interference in the affairs of business. This is a tall order. By definition the antitrust approach is different from other forms of business "regulation." It does not involve telling businessmen what or how much to produce or at what price to sell their products. Rather, the antitrust approach assumes that by maintaining sufficient competition in the marketplace competitive pressures will "compel" desirable economic performance.

Much of the job of antitrust enforcement involves formulating rules which govern the ways in which the competitive game is played. This immediately raises the question of how economic facts and analysis may be used in formulating such rules of law.

Rather than attempt a theoretical discussion of this process, I shall illustrate the process by the Federal Trade Commission's recent merger actions in the dairy industry. Time permits only the briefest summary of the Commission's actions in this area.[1]

### The Legal Framework

The relevant framework for interpreting the legality of mergers is Section 7 of the Clayton Act, as amended by the Celler-Kefauver Act of 1950. This Act is aimed only at those mergers which, in the language of the Act, may substantially lessen competition or tend to create a monopoly. I emphasize the words "may" and "tend" because the Act is designed to strike at monopoly in its incipiency, not at full blown monopoly. I fear that some persons interpreting recent merger policy have failed to appreciate the fundamental distinction between the Celler-Kefauver Act and the Sherman Act. They appear to have the mis-impression that the merger act does not come into play until competition has actually and demonstrably been injured to the extent that a merger has conferred substantial market power on an acquiring firm. It is impera-

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[1] The author presented a more extensive discussion of these actions in a paper entitled, Merger Policy in the Dairy Industry, Midwest Milk Marketing Conference, April 27, 1966, Michigan State University, East Lansing, Michigan.

tive to keep in mind that the basic objective of Section 7 is to strike at incipient monopoly, for this is the general legal framework within which we must analyze the competitive impact of mergers.

### Economic Analysis of Dairy Mergers

The Federal Trade Commission in 1956 issued four complaints charging that the country's four largest dairies violated Section 7 of the Clayton Act.[2] These companies had acquired over 1,000 dairies between 1920 and 1956.

In interpreting the competitive significance of these mergers the Commission began by analyzing the economic environment within which these mergers occurred. After a fairly extensive inquiry into this question the Commission made the following findings:

> These are the cardinal facts which emerge from a review of the economic structure and dynamics of the dairy industry: (1) Concentration has already reached formidable proportions in local areas, which are the economically relevant markets in which to measure competition in this industry. (2) The prospects of survival for small firms, and the conditions for entry of new small-business competitors into the industry and its markets have worsened. There are relatively few firms outside of the leading eight which can be rated as really strong competitors under present market conditions. (3) The leading firms have been embarked on an extensive and far-reaching program of acquisitions, the result of which has been to increase concentration still further and speed the exit of the independents. (4) No showing has been made that these acquisitions (at least those that have taken place since 1950) were necessary for the leading dairies to achieve the economies of scale made possible by the industry's technological revolution or that the acquired companies could not have achieved such economies through merger with firms much less powerful, well entrenched, and geographically far-flung than the big eight.

The Commission next turned to the question of how particular mergers might affect competition. This involved an economic analysis in which particular mergers were viewed against their industrial context.

The Commission used the economic framework provided by industrial organization theory in evaluating the competitive impact of particular mergers. Specifically, in evaluating the significance of these mergers it considered such factors as market concentration, barriers to entry, and the significance of potential as well as actual competition. After making this evaluation the Commission found that a number of acquisitions violated Section 7 because there was a reasonable probability that their effect was substantially to lessen competition or tend toward monopoly. The Commission further concluded that on the basis of the cumulative effect of these numerous acquisitions the four leading dairies should be prohibited from making any additional dairy acquisitions for a period

[2] The following discussion is based on the Commission decisions In the Matter of Foremost Dairies, Docket No. 6495, April 30, 1962, and In the Matter of Beatrice Foods, Docket No. 6653, April 26, 1965. Borden Co. and National Dairy Products were settled by consent decrees, supra, p. 26, n. 1.

of 10 years without the prior approval of the Commission.

In addition to finding certain mergers illegal, the Commission developed general guidelines designed to provide guidance concerning future mergers. The Commission formulated the following standard with respect to future mergers by very large concerns: ". . . we conclude that any acquisition of a not insubstantial dairy company by one of the industry's giants (roughly, a company having annual sales of more than $200 million) is highly suspect."[3]

The Commission formulated the following standards for future mergers by medium-sized dairies. First, it indicated that it would not "sit idly by while firms now in, say, the $40 million to $60 million range engaged in acquisition programs calculated or likely to make them as large as *(Beatrice)."*[4] It added, however, that not all mergers by medium-sized companies were suspect, particularly when they were not a part of an extensive merger program. It concluded that competition apparently would not be adversely affected when medium-sized dairies make small mergers, except when such mergers are a part of an extensive merger program.

Finally, the Commission concluded that, on balance, mergers among smaller concerns were unlikely to impair competition. In fact they might have the opposite effect: "Certainly mergers between firms too small to achieve the economies of scale made possible by the technological revolution in the dairy industry or to function as strong effective competitors and penetrate into new markets are lawful."[5]

## Conclusions

The Commission's actions in the dairy industry illustrate how economic facts and analyses may be used in developing rules of law in the antitrust field. Some may not agree with the factual findings, the economic analyses,or the public policy standards adopted by the Commission. Still others may disagree with the Commission's result because they disagree with the basic premises of the Celler-Kefauver Act.

I am not pleading for new converts to the Commission's actions in this area. But I do believe the Commission's policy meets the fundamental requirements of a "good" rule of law, namely, that its economic and legal foundations be made explicit, and that it can be quite readily applied to new situations. As Justice Holmes said, "The tendency of

[3] Id., 44. It added, "While a small acquisition, considered in isolation, may not appear to enhance the size or market strength of a giant acquiring firm, the history of merger activity in the dairy industry shows that such acquisitions have in the aggregate contributed to the giant firms' obtaining a position of such strength throughout their marketing areas as to raise substantial barriers to the entry of smaller firms. Such acquisitions, moreover, have tended to retard the emergence of a strong and healthy middle tier of medium-sized dairy companies capable of offering vigorous competition to the giant firms. Engrossing small firms by the thousands, as the industry leaders have done, has prevented the creation of strong, viable competitors through merger between small firms, as opposed to mergers between small firms and large."

[4] Beatrice, op. cit., 45. It added, "...the result would be the rapid transformation of the industry into one completely dominated by a handful of giant firms and far less competitive than at present. Accordingly, just as the Commission, in the Foremost case, challenged a series of acquisitions which transformed the respondent from a medium-sized to a very large dairy company, so any similar program of acquisitions undertaken by a medium-sized member of the industry should receive close scrutiny by the Commission."

[5] Id., 46.

the law must always be to narrow the field of uncertainty.''

Although complete certainty can never be attained, nor would it be necessarily desirable, economic factfinding and analysis are indispensible ingredients in the process of reducing and identifying areas of uncertainty. This is why I selected the Commission's policy formulation process in the dairy industry to illustrate how rules of law may be developed. Those not agreeing with Commission policy in this area should have little difficulty defining the area of disagreement. This is of central importance in the rule-making process.

# THE LAW AND THE MARKET AS VIEWED BY THE REGULATORY ECONOMIST

Gerald Engelman*

A few weeks ago, on the occasion of Professor Eckstein's return to Harvard from the Council of Economic Advisers and Professor Duesenberry's migration from Harvard to the Council, President Johnson had the following to say about economists:

> We are here this morning to engage in a bit of barter with Harvard University. Harvard made us give them back Otto Eckstein. We wouldn't do it until they gave us Jim Duesenberry.
>
> Dr. Duesenberry, as we all know, is one of the nation's leading economists. When I was growing up, that didn't seem to mean very much, but since I grew up we have learned the error of our ways.
>
> In fact, it occurs to me that the legal profession had itself better be on guard. I haven't had any head count, but it wouldn't surprise me a bit to find today that the economists in government already outnumber the lawyers.
>
> Someone once defined an economist as a person who says that we move in cycles instead of running around in circles. The new breed of economists that we have on our Council of Economic Advisers are busy proving that we don't even have to put up with the cycles any more . . .
>
> We are now in the 60th month of record-breaking prosperity, I read this morning, and the Council of Economic Advisers has a lot to do with that amazing achievement.
>
> Abraham Lincoln once described the problem of government in these words: 'If we would first know where we are and whither we are tending, we could better judge what to do and how to do it.' That is what we think Gardner Ackley and his brilliant associates are trying to do for this economy of ours.
>
> We believe that they have taken some of the guesswork out of the job of trying to steer this ship of state.[1]

That was quite an accolade for economists. I found this rather striking because a few weeks earlier I attended an interagency workshop for government economists with regulatory agencies sponsored by the Brookings Institution. There it was generally agreed that the academic economist makes little contribution to policy formation in the government regulation of business, both in the fields of antitrust and public utility regulation. The academic journals were held to be of little use to government economists. So many writers are preoccupied with the abstruse and the obscure. In some instances from their level of sophistication it would appear that they place a premium on communicating their ideas

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[1] The Washington Post, February 6, 1966, p. L 1.

with as few of their academic colleagues as possible. One lecturer, incidentally now an academic professor, suggested that a new academic journal was needed dealing almost exclusively with the problems of government economists.

There appears to be quite a discrepancy between the President's views on the importance of the economist and the views of some of the government economists themselves. There is an explanation, however. The Council of Economic Advisers deals primarily with macroeconomics and with aggregate data. Econometric methods and computer systems cooperate to make for very powerful analyses of the Gross National Product. Microeconomics, however, does not lend itself as well to quantification, and useable answers are not as readily forthcoming from econometric analyses. Econometric models may well be fun, but they have yet to make a real contribution to market structure economics. Market structure research is, therefore, still primarily a matter of description, and whatever theory is connected with it deals largely in tentative probabilities rather than in certainties.

A few years ago I made a statement at a meeting of academic economists that while I found the market structure and market conduct norms somewhat useful in my work, I found the market performance norms to be of little relevance. And I was severely taken to task for the latter. In enforcing regulatory statutes, our job is to prove that certain acts of corporations violate the statutes by virtue of their adverse, anticompetitive effects. The performance norms do not give us much help in this job. The antitrust economist may not be immediately concerned with whether industry has high output and reasonable profits, is fairly progressive and innovative, has excellent labor relations, or goes over its quota for the annual Community Chest drive.

An emerging anticompetitive practice remains an anticompetitive practice, regardless of the public image of the industry in which it appears. If permitted to continue, it will probably have the same effects, fewer competitors, higher barriers to entry, etc., whether industry performance levels are presently high or low. [2]

In the meat packing industry, for example, a high level of output depends primarily on the farm production of slaughter livestock. And stability depends on the flow of this livestock from farm to market.

The performance norms fail the antitrust economist because of their seeming detachment. They don't appear to be concerned about the central issue that must concern him – the exercise of power: market power, economic power, financial power – past or potential. It involves the power to impose handicaps on other firms – rivals, customers, or suppliers – handicaps that have nothing to do with their relative efficiency

[2] This is not to say that performance norms are without value. They may be very instructive in appraising how much the economic results of an industry's market behavior deviate from the maximum contribution it could make to the economy, the gap between its actual and its potential.

or the quality of their product, but handicaps that impede their growth or threaten their survival.

Economic power is the primary antitrust problem. The problem for the economist is to determine the devices, the techniques, and the trade practices through which market power is exercised. And he should be concerned with the appropriate remedial actions which can be undertaken to limit or frustrate the use of this power. This is the problem on which the antitrust economist has great need for research. But as a research problem it is most difficult to cast in a framework of quantitative analysis, which probably explains why most writing in this area is of a descriptive nature.

The antitrust economist is really trying to avoid performance goals in his efforts to maintain the competitive sector of the economy. He wants to avoid the question of how low prices should be or how costs should be determined. His effort is to preserve a well functioning marketplace in which the interaction of supply and demand will impersonally make these determinations. Although this notion may seem odd to some businessmen, the antitrust goal is really a minimum of government interference in the marketplace.

The more we are able to preserve a well functioning marketplace, the less occasion will there be for government intervention in pricemaking, such as we've experienced in the steel and aluminum industries within the past 5 years. On the other hand, the less successful we are, the greater the likelihood of more government intervention in pricemaking in more industries. This is a continuing characteristic of the Western European economies where oligopolistic industrial organization is much more pervasive and influential.

A word about the structure of the meat industry which is under the jurisdiction of the Packers and Stockyards Division. It is one of the industries characterized by declining concentration ratios in recent decades. In 1920, the date which is important for the Consent Decree, the four largest packers accounted for about one-half of the total slaughter in the country. In recent years they have accounted for a little more than one-fourth of total slaughter. I think this change to be especially significant, inasmuch as some economists have viewed the Consent Decree of 1920 to be a "telling blow for soft competition." [3]

In 1947 the 10 largest packers accounted for 44 percent of the cattle slaughter, 45 percent of the calf slaughter, 55 percent of the hog slaughter, and 76 percent of the sheep and lamb slaughter. A weighted average would indicate that the 10 major packers accounted for 50 percent of the total slaughter in 1947, the same component that the four largest packers

[3] See Donald Dewey, Monopoly in Economics and Law. Rand McNally and Company, p. 190 and following.
The Consent Decree of 1920 has a recent parallel in a Federal Trade Commission Consent Decree with Consolidated Foods (FTC Docket No. C-1024, December 21, 1965). In this decree an important food wholesaler was ordered to divest itself of recently acquired retail grocery store companies.

accounted for in 1920. In 1964 the 10 major packers accounted for about 30 percent of the cattle slaughter, 31 percent of the calf slaughter, 54 percent of the hog slaughter, and 62 percent of the sheep and lamb slaughter. The comparable figure for all livestock would be about 40 percent.

The striking change, of course, has been in cattle, which has accounted for almost all of the declining concentration. Ease of entry into a national franchise market, with U.S. Choice being the most popular "brand" nationally known and widely accepted, is a most significant factor for beef operations.

Although there have been significant changes in relative importance and rank order within the top 10 firms, concentration in hog slaughter at the 10 firm level has declined scarcely at all since World War II. Pork processors, however, sell a differentiated product in a private brand market. Small pork processors are usually limited to local markets where their brands are generally well known and accepted. They have more growth problems and are much more vulnerable to a sudden loss of customers if larger packers engage in oppressive trade practices.

It is easy to overstress, however, the importance of relative size or market share in market structure analysis, particularly when the comparing industries have a customer-supplier relationship to each other. The food retailing industry is much less concentrated than the meat packing industry. Yet it is generally agreed that the center of market power in the meat industry has shifted to chainstores quite decisively. The control of shelf space allocated to various brands and selection of items to be "specialed" give the retail sector important power advantages.

A word about the relation between economists and lawyers in government regulation, which Harold Breimyer called a liaison that has been shushed because it is a common law affair. How many times we have heard this statement from economists: "If those antitrust lawyers would only learn something about economics." In my experience as a regulatory economist, however, I have found lawyers to be hungry for all economic information, both fact and logic, that economists can give them and much more. The lawyer simply wants to know why the given trade practice under attack is bad. The economist can tell him why it may be anticompetitive.

To be sure, there are occasions when there are some tensions between economists and lawyers. There is an apocryphal story to the effect that Ken Galbraith threw an inkwell at a lawyer during his OPA days of World War II. He missed him, even as Martin Luther missed the devil. On both occasions, the momento was a splatter of ink on the wall.

These differences between economists and lawyers can and should be productive ones, for it is out of full discussion that sensible public policy answers are more likely to emerge. An important byproduct is the fact that economists learn a smattering of law and lawyers learn something about economics. The problems of the market with which we deal

basically may be economic problems. But the remedies necessarily have to be applied through the rule of law. Our society gives judicial review to regulatory activity, and this is what gives lawyers power. It is their guardianship over the law. The rulings made for the Secretary of Agriculture and the decisions of the Federal Trade Commission may be appealed to the U.S. Court of Appeals, and finally to the Supreme Court. At both levels the burden of argument and the responsibility of decision is again exclusively in the hands of the legal profession.

This guardianship of the law affects the antitrust economist in several ways. Ours is a system of common law. Essential elements of that system are the importance it attaches to (1) relevance of evidence and (2) precedents from previous decisions.

The economist may experience a feeling of wonderment when he finds the relevance of his testimony challenged, defended, and ruled on – all by members of another discipline, law, with no particular training or competence in his own. This underlines the importance to the economist of communicating his ideas, without jargon, and with no particular professional pride in his own level of erudition. After such challenge, an economist sometimes has occasion to become impatient with what appears to him to be contentious record building, for lawyers like to surround their case with procedural safeguards. It is their job to prepare for every eventuality which may arise.

Economists often are surprised to learn that the bulk of growth in our body of law comes out of cases rather than statutes. This emphasizes the importance of precedence. Precedence is fostered by (1) equal treatment under the law, a highly valued legal prerogative, and (2) the need for as much speed as possible in what is almost always a protracted proceeding. The economist's role here may be to interpret the economic implications of several previous cases, to advise as to which alternative legal theory of the particular case has the greatest economic meaning in light of the more important precedents before him.

Economists have other contributions to make to the legal process. They have a responsibility to give some awareness of the limitations of economic or statistical techniques. They can help avoid contradictory goals and indicate that some of the hallowed goals of the past are really functionless in today's world. The economist's analysis may hopefully offer alternative lines of attack. Generally, the economist should try to strike for the critical issue, rather than to get all the economics into the case that he can.

Finally, the economist never should forget that this is a lawyers' game. They know the rules. The economist must provide the expertise in appraising the facts or the consequences of alternative policy. Nevertheless, the lawyer is always boss. The ultimate decision as to procedure is always his. Regulatory case work is inevitably legal. The question always is where, how, what kinds, and how much economic evidence and economic reasoning can be most effectively fitted into the legal process.

# THE LAW AND THE MARKET AS VIEWED BY A UNIVERSITY ECONOMIST

## "The Emissaries of Conflicting Interests"

Thomas T. Stout*

As negotiators for opposing armies approach neutral ground with mutual apprehension, so the law and the market are emissaries of conflicting interests as the forces of society and economy look on.

Unlike physics or chemistry, economics does not enjoy the luxury of defining its own existence. It cannot operate in an independent vacuum but finds relevance only within an environment prescribed by the existing social structure and the stated social goals.

The role of the economist is one of fostering operational efficiency and pricing accuracy to achieve economic goals consistent with prescribed social goals. It is not the concern of the economist to question, per se, the worth or validity of social goals; to the extent that he does so he is functioning as a citizen, an entrepreneur, a scholar, perhaps as a professional in some other capacity, but not as an economist.

So that individuals might live together in meaningful interdependency, society requires the mainspring of an effective economy. Lacking such a mainspring, social ideologies drift in the limbo of idle dreams. But as the mainspring is merely instrumental to the watch, with equal necessity is economy subservient to society.

In order that the economy not be inconsistent with the social environment in which it exists, it is essential that it display those characteristics of equity which are consistent with paramount social values. In an exchange economy such equity is identified in the equality of price and value, wherein value is represented by total cost (including opportunity cost) of production. The prescribed set of circumstances which assures the existence of such equity at all times, permitting by definition no disturbing disequilibrium as exception, is of course the ideology of perfect competition, with perfection being given a social rather than an economic interpretation.

This leads me in passing to express concern on three counts for the overweening condemnation of perfect competition indulged in economists today. First, does the profession contain so many with the credentials of economists who are so uninformed they fail to recognize that

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perfect competition is a social and not an economic model? Second, has the drive for quantification of economic phenomena so obsessed us who are called economists with problems of measurement that the board vision of one of the few disciplines of perspective is buried under the technician's narrow concerns? Third, have we concluded that economic performance is indeed irretrievably inconsistent with principles of social equity? If so, have we decided that an indulgent society so prefers opulence as to relinquish such idle notions, or have we adopted the opposite stance and made the shoulder-shrugging admission that we are 100 years behind the times in understanding the proper management of socioeconomic relationships? Whatever the case, let us be careful in forming our thoughts and voicing our conclusions. The rapid rise in our salaries over the last 10 years reflects neither inflation nor our profound value to the profession so much as it reflects the fact that we have entered an age of acceptance of the egghead. People are listening. They will listen to almost anyone who displays a confident attitude and exhibits impressive credentials they don't understand. We never had a better opportunity to perform either service or disservice.

Perfect competition – utopian, impossible, and economically irrelevant, but entrenched along with other enlightened legal, moral, ethical, and aesthetic standards against which we measure our social imperfections and which provide the attractive horizons toward which we can purposefully and meaningfully continue our slogging through the mud.

Economy – the essential mainspring for meaningful social organization, the necessary creation of society, brought into being and blessed with the customary hopes and aspirations for the newborn and accompanied by a standard of perfection against which to measure its imperfections.

But what a monster it invariably proves to be: recalcitrant, truculent, and rebellious in pursuit of its own goals; evidencing no morals, ethics, aesthetic tastes; displaying only those virtues which meet its own designs or are brought to it either voluntarily or out of fear of consequences by the social creatures that man its machinery or are imposed upon it by the social will; reinterpreting economic perfection to identify its own needs and evolving from Dr. Jekyll to Mr. Hyde in perfecting the pursuit of its satisfaction – the quest for pure profit. After all, the incentive to compete, the desire to undertake uncertain ventures, the willingness to innovate, the quest for wealth – none of these is inspired by the concept of perfect competition, but rather by the expectation of pure profit, which by definition can be attained only under the several forms of imperfect competition. And as competitive forms become progressively more imperfect in a social frame of reference, they become progressively more perfect in their capacity to guarantee pure profit.

How paradoxical. How fortunate. The goals of society and economy are diametrically opposed, for the mere existence of pure profit dis-

misses the possibility of the equality of price and value. Yet strict adherence to this concept of equity denies opportunity, for in the quest for pure profit lies the very essence of entrepreneurial effort.

In an effort to formulate a model for this entrepreneurial role, one might suggest that the first step the entrepreneur makes is to take a critical look at the conditions of perfect competition – that is, the aggregate conditions which deny him the opportunity he seeks – and to determine which of these restrictive circumstances could most easily be damaged, thus making the total concept untrue. Obviously, neither perfect factor mobility nor perfect knowledge occur in economic action. The absence of these conditions alone is sufficient to permit short-run disequilibrium under pure competition, the most benign of all forms of imperfect competition, thus permitting the possibility of short-term pure profit through cost efficiency and innovation. No attempt to alter industry structure is required. This strategy is, of course, the one employed by enterprising farmers in the simplest and most straightforward sectors of the agricultural economy.

The more critical and ambitious entrepreneur might go on to recognize that since knowledge is not perfect and there are real doubts about the economic rationality of people, there is no real reason why products could not be effectively differentiated, at least in the mind if not in fact. This further impairment of the perfect concept yields the more complex imperfections of monopolistic competition, wherein short-run disequilibrium can be achieved through some degree of control over the demand curve as well as the cost curve. The wealth of small-product advertising we encounter daily testifies to the success of this minor-league nonprice competition and does more to characterize monopolistic competition as the mainstay for the bulk of our productive effort than any other single factor.

While we expect in both the above cases that such short-term benefits as are attained will dissolve in time, sometimes soon and sometimes not, the focus of all entrepreneurial strategy and tactics remains that of creating a continuing succession of disequilibriums. Characteristically they arise from alertness, enterprise, skill, imagination, cunning, bluff, or other managerial traits but seldom from strength, for structural power is lacking.

Further and more sophisticated impairments yield the various forms of oligopoly, essentially through limiting the freedom of entry and exit. The interesting aspect of this is that whereas simple expedients like collusion and discrimination once sufficed, such structural forms now tend to evolve naturally and without artificial restraint through the limitations imposed by the growing complexity of innovation. Extreme requirements in terms of capital, technology, and technical and managerial skills permit only a small fraction of the economy to qualify as potential competitors.

This process of natural economic evolution has posed a disturbing

threat to the principles of social equity. Yet certain obvious advantages have fallen to society, such as the advantages of economies of scale, the subsidization of communication through advertising expenditures, and material wealth. Compromises for mutual benefit are devised which seek to improve the socioeconomic relationship while striving to preserve the paramount social values.

I believe it is safe to say that the law is concerned with nothing so much as it is concerned with equity and that within this concern the law attempts to set no ethical or moral standards; it seeks to establish only minimums. Everyone is free to entertain any standards he desires as long as he does not trespass beyond the prescribed minimums. When the law as a spokesman for society confronts the market, all that it strives to do is to present the appropriate set of minimums which define the limits to opportunities that are available to the entrepreneur. Let me suggest that these limiting minimums take essentially three forms:

The first is regulatory legislation with the dual objective of (a) restricting or prohibiting the development of the most malignant structural form and (b) defining the minimum standards of conduct that entrepreneurs may employ within the structural arrangements that are permitted or encouraged. The structural aspect of the first objective is approached through such classic keystones as the Sherman, Clayton, Federal Trade Commission, and, perhaps, Robinson-Patman Acts, and interprets trade practices in terms of their capacity to restrict competition. But within this structural category I believe it would also be correct to include such discriminatory techniques as consent decrees, and licensing methods such as chainstore taxes, both of which have the net effect of limiting the opportunities or making life substantially more distasteful for the dominant firms relative to their low-horsepower competition within an industry. The second aspect of the regulatory role, that of viewing trade practices in the context of conduct, encompasses a multitude of more specific limitations. For example, deceptions of buyers or sellers in terms of weight, measure, content, or functional value are precluded; harmful ingredients, substandard health and sanitation practices, are denied as opportunities for lowering unit costs; minimum wage laws and organized labor legislation serve essentially to deny cost-saving through exploitation of a factor of production; and elementary forms of discrimination such as differential pricing through cumulative discounts, promotion allowances, and rebates are carefully scrutinized.

The second form which these definitions of the dimensions of opportunity take is encompassed in what is customarily called the facilitating role of government, wherein an effort is made to strengthen the basic conditions of perfect competition. While the regulatory role itself serves to strengthen these conditions as a byproduct, such facilitation is here the primary objective. As specialists in agriculture, a recipient of many of these benefits, we are well aware of the facilitating impact

of the land-grant college system, the extension service, federal-state research programs, the several federally-sponsored agricultural credit institutions, antitrust exemptions and tax benefits to cooperatives, the agricultural exemption to the Motor Carrier Act and the Transportation Act, the federal market news services, and the various voluntary and mandatory grading systems, not to mention price support programs and other subsidy alternatives. But we are less thoroughly aware of tariff protections, both in agriculture and elsewhere, which frequently fall disappointingly short of achieving desired goals; direct subsidies to the Merchant Marine, components of the journalism profession, and others; and even the facilitating impact of fair trade laws which serve not so much to protect the entrenched and dominant firms as to shield the smaller firm from the massive price competition potential of industry leaders.

The third form which social action may take, and one in which I anticipate substantial expansion in the future, is that of dealing with the redistribution of pure profits once they have been achieved. The obvious techniques that occur to us most readily of course are progressive taxation schemes and related selective taxation, and the permissive legislation which enables labor to negotiate with management for the division of profit, the outcome of which is left to the relative bargaining strengths of the participants.

I think it is safe to capsulize the social role by saying that constructive patterns of action concerning equity in the marketplace stem from the recognition of different types of pure profit. We attempt to prohibit monopoly profit. We try to minimize the unnecessary social costs related to risk profit; we employ techniques for the redistribution of windfall profit; and we place all our bets on innovative profit as the best route to both economic and social progress.

## Some General Observations

I suspect that the greatest concern we will have in the future will prove to have had its origin in the natural evolution of oligopolistic structure arising chiefly from the growing cost and complexity of technological change. This tendency leads us continually closer to fundamental reappraisals of the socioeconomic relationship, and I am not sure that either side has adequate tools to approach effectively the basic issues that magnify steadily. What program other than reallocation of profit might we use, and are the long-range implications of that technique any more attractive because they begin to seem more necessary? Will we turn to broader subsidization of the costs of innovation as we now do in the aircraft industry? Are alternative systems of obtaining patents and copyrights a realistic possibility? We need some plans.

A related problem we will face is the matter of dealing with what has been called "conglomerate merger." Interpreting antitrust legislation to be quite industry-oriented, I think I appreciate a rather smooth

end-run by enterprising management in its acquisition of firms in unrelated industries. But the problem of industrial concentration remains, and a social program for dealing specifically with conglomerate merger does not seem to have solidified.

In the area of facilitating functions I think we have discovered that programs to protect the lack of competitive strength have proven to be much less effective than programs to encourage the vitality of small firms or less powerfully endowed sectors of the economy. But we generate a new social problem by encouraging innovative talents to be directed solely to the cost aspect of generating short-term disequilibrium, and in essence we encourage economies of scale and further concentration. In 10 years, for example, approximately 1 or 2 percent of the population, many of them absentee owners, will own about half the land in the United States – that which is called "land in farms." Certainly we can anticipate many interesting suggestions for new social programs here, and some of them are going to require the uprooting of some long-held social attitudes.

Ten years ago we prematurely hit a high-water mark in our concern for vertical integration. I think that only now are we on the threshold of its real growth, both in agriculture and in industry, and I believe I would agree that the principal chore we will encounter here again will be the protection of equity, and we will concern ourselves with the matter of contracts somewhat unilaterally imposed.

And, finally, there remain the everyday problems of maintaining the social-economic interrelationship that is fundamental to our existence. These problems are to be the subject matter of the discussion in which we are about to participate. On matters of facilitating functions in the agricultural marketplace, I am sure that we will be striving to improve our communication on matters of grades and grading, market supervision at the grassroots, improvements in marketing information, and aspects of taxation and contracts which increasingly affect the future of agriculture.