THE NEW ATTACK ON ANTITRUST

by

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ANTITRUST IS UNDER AN UNPRECEDENTED ATTACK. ALTHOUGH SUPPORT FOR ANTITRUST HAS WAXED AND WANED SINCE PASSAGE OF THE SHERMAN ACT IN 1890, THE CURRENT ATTACK IS UNIQUE IN ITS BREADTH AND SUCCESS. NOT ONLY HAVE THE NEW ATTACKERS URGED DRASTIC "REFORMS," BUT THEY ALREADY HAVE ACCOMPLISHED MUCH OF THEIR AGENDA. THEY HAVE STAFFED THE ANTITRUST AGENCIES AND, TO AN INCREASING DEGREE, THE FEDERAL COURTS WITH THEIR ADHERENTS. AND UNLIKE PREVIOUS ATTACKERS, THEIR AGENDA IS BASED ON A BODY OF ECONOMIC IDEAS THAT ALLEGEDLY REPRESENTS A NEW ORTHODOXY AS TO HOW A CAPITALISTIC MARKET ECONOMY WORKS.

JUST HOW DID THIS ALL COME ABOUT? HOW MUCH HAVE THINGS REALLY CHANGED? HOW SOUND ARE THE ECONOMIC FOUNDATIONS UPON WHICH THE ATTACKERS BUILT THEIR CASE? WHAT DOES THE FUTURE HOLD? BEFORE TURNING TO THESE QUESTIONS, LET US REVIEW BRIEFLY THE STATUS OF ANTITRUST BEFORE THE RECENT ATTACK WAS LAUNCHED. (ALTHOUGH ANTITRUST IS CURRENTLY BEING ATTACKED BOTH FROM THE LEFT AND RIGHT OF THE POLITICAL AND ECONOMIC SPECTRUMS, THESE REMARKS ARE ADDRESSED TO THE ATTACK FROM THE RIGHT. I HAVE ADDRESSED ELSEWHERE (MUELLER 1983) THE ASSAULT BY SOME ON THE LEFT, WHO SOMETIMES HAVE BEEN UNWITTING HANDMAIDENS OF THE ATTACKERS FROM THE RIGHT.)

UNTIL THE 1980S, STUDENTS OF ANTITRUST GENERALLY ACCEPTED RICHARD HOFSTADTER'S (1966:116) OBSERVATION THAT, "ANTITRUST AS LEGAL-ADMINISTRATIVE ENTERPRISE HAS BEEN SOLIDLY INSTITUTIONALIZED IN THE PAST QUARTER OF A CENTURY." THIS EXPLAINED WHY, WHEREAS "ONCE THE UNITED STATES HAD AN ANTITRUST MOVEMENT WITHOUT PROSECUTIONS, IN OUR TIME THERE HAVE BEEN ANTITRUST PROSECUTIONS WITHOUT AN ANTITRUST MOVEMENT."

ALTHOUGH ANTITRUST HAS NEVER ACCOMPLISHED AS MUCH AS ITS STAUNCHEST ADVOCATES HAD HOPED FOR, IT CLEARLY HAS PERFORMED BETTER THAN ITS MOST

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ARDENT DETRACTORS HAVE CLAIMED. NOWHERE IS THIS MORE CLEAR THAN IN THE EXPERIENCE WITH ENFORCEMENT OF THE CELLER-KEFAUVER ACT OF 1950, WHICH AMENDED THE CLAYTON ACT'S PROHIBITION OF CERTAIN MERGERS. DURING THE 27 YEARS FOLLOWING 1950, THE DEPARTMENT OF JUSTICE (DOJ) AND THE FEDERAL TRADE COMMISSION (FTC) CHALLENGED 1,021 MERGERS AND ACQUISITIONS IN 289 COMPLAINTS (MUELLER, 1979). IN THE 1950S, THE AGENCIES CHALLENGED VIRTUALLY EVERY SIZABLE HORIZONTAL MERGER. FOR EXAMPLE, IN 1956, THE RECORD YEAR IN CHALLENGING SUCH MERGERS, THE AGENCIES CHALLENGED 48 PERCENT (MEASURED IN ASSETS) OF ALL LARGE (ASSETS EXCEEDING $10 MILLION) ACQUISITIONS OF MANUFACTURING AND MINING CORPORATIONS. THESE CASES CULMINATED IN LOWER COURT AND SUPREME COURT DECISIONS ESTABLISHING TOUGH LEGAL STANDARDS FOR HORIZONTAL MERGERS THAT HAD THE EFFECT OF STOPPING VIRTUALLY ALL SUCH ANTI-COMPETITIVE MERGERS FOR A TIME. STUDENTS OF PUBLIC POLICY GENERALLY AGREE THAT THIS ENFORCEMENT EFFORT SERVED AS A POWERFUL DETERRENT OF HORIZONTAL MERGERS (MUELLER 1965; STIGLER 1966; ANDRETSCH 1986). ABSENT THIS EFFORT, THERE IS LITTLE DOUBT BUT THAT TODAY HIGHLY CONCENTRATED INDUSTRIES WOULD BE THE RULE, NOT THE EXCEPTION.

DURING THE 1960S THE SUPREME COURT ALSO HANDED DOWN SEVERAL DECISIONS FINDING CONGLOMERATE MERGERS ILLEGAL. IN 1969, NIXON'S FIRST ANTITRUST CHIEF, RICHARD W. MCLAREN, INITIATED A VIGOROUS ENFORCEMENT EFFORT TO DISCOVER THE REACH OF THE LAW TOWARD CONGLOMERATE MERGERS (MUELLER 1973). DURING 1969-1970, THE ANTITRUST AGENCIES CHALLENGED NEARLY 30 PERCENT (MEASURED BY ASSETS) OF ALL LARGE MERGERS IN MANUFACTURING AND MINING (MUELLER 1979). BUT MCLAREN'S HEROIC EFFORT FOUNDERED, AS HENRY C. SIMONS MIGHT HAVE SAID, ON THE ORDERLY PROCESS OF DEMOCRATIC CORRUPTION. THE THREE ITT CASES, THE CENTERPIECE OF MCLAREN'S ASSAULT ON CONGLOMERATE MERGERS, WERE PREVENTED FROM REACHING THE SUPREME COURT WHEN PRESIDENT NIXON ORDERED THAT THEY BE SETTLED WITH A CONSENT DECREE FAVORABLE TO ITT (MUELLER 1983).

THE ITT CASES ASIDE, THE AGENCIES' MERGER EFFORT REPRESENTED AN ENORMOUS ENFORCEMENT PUSH AS JUDGED BY PAST ANTITRUST EFFORTS. ALTHOUGH ENFORCEMENT EFFORTS TOWARD CONGLOMERATES FLAGGED DURING THE 1970S BECAUSE OF WHAT JUSTICE WHITE (1974) CHARACTERIZED AS THE "NEW ANTITRUST MAJORITY" OF THE BURGER COURT, OTHER ANTITRUST ENFORCEMENT PROCEEDED PRETTY MUCH AS USUAL. INDEED, THE 1970S SAW A NUMBER OF INNOVATIVE EFFORTS, E.G., THE FTC'S SHARED MONOPOLY CASE IN THE CEREAL INDUSTRY, AS WELL AS VIGOROUS

ANTITRUST ENFORCEMENT BY PRIVATE PARTIES. BUT ALL OF THIS CHANGED RAPIDLY, DRASTICALLY, AND LARGELY UNEXPECTEDLY BEGINNING IN 1981.

UNLIKE PREVIOUS PRESIDENTS, DEMOCRATS AND REPUBLICANS ALIKE, PRESIDENT REAGAN ENTERED OFFICE WITH AN AGENDA AIMED AT ELIMINATING OR GREATLY REDUCING GOVERNMENT INTERFERENCE IN ALL AREAS OF BUSINESS AFFAIRS. ANTITRUST "REFORM" WAS NEAR THE TOP OF HIS AGENDA.

REGULATORY POLICY CAN BE CHANGED IN THREE WAYS: (1) CHANGING ENFORCEMENT PERSONNEL AND POLICIES OF THE ANTITRUST AGENCIES; (2) APPOINTING JUDGES WITH A KNOWN ANTI-REGULATORY BIAS; AND (3) REPEALING OR AMENDING THE LAW THROUGH THE LEGISLATIVE PROCESS. TO DATE THE REAGAN ADMINISTRATION HAS NOT SUCCEEDED IN CHANGING THE LEGISLATIVE FOUNDATIONS OF ANTITRUST, ALTHOUGH IT RECENTLY LAID OUT ITS AGENDA IN THIS AREA AS WELL. YET, IT HAS BEEN SUCCESSFUL IN CHANGING ANTITRUST POLICY BEYOND THE FONDEST HOPES OF THE ENEMIES OF ANTITRUST AND THE GREATEST FEARS OF ITS FRIENDS.

CHANGES IN THE AGENCIES

REAGAN'S FIRST STEP IN "DEREGULATING" ANTITRUST WAS TO APPOINT AGENCY HEADS WITH KNOWN RECORDS OF HOSTILITY TO ANTITRUST AS ENFORCED BEFORE 1981. WILLIAM F. BAXTER, A BRILLIANT, LAISSEZ-FAIRE LAWYER-ECONOMIST WAS APPOINTED HEAD OF THE ANTITRUST DIVISION AND AN EQUALLY ZEALOUS LAISSEZ-FAIRE ECONOMIST, DR. JAMES MILLER III, WAS APPOINTED CHAIRMAN OF THE FTC.[1/] PRIOR TO HIS APPOINTMENT, MILLER HAD WORKED FOR OFFICE OF MANAGEMENT AND BUDGET HEAD DAVID STOCKMAN, WHO HAD LED THE ADMINISTRATION'S EFFORT TO WIPE OUT THE FTC'S ANTITRUST ENFORCEMENT ARM, THE BUREAU OF COMPETITION (WARNER 1981).

BOTH AGENCY HEADS WERE DOCTRINAIRE DISCIPLES OF THE CHICAGO SCHOOL OF ECONOMICS, WHICH HOLDS THAT THE GUIDING AND SOLE PRINCIPLE OF ANTITRUST IS, OR SHOULD BE, THE PURSUIT OF ECONOMIC EFFICIENCY. IN THIS VIEW, ALL BUSINESS CONDUCT SHOULD AND CAN BE EVALUATED IN TERMS OF ITS CONTRIBUTION TO ECONOMIC EFFICIENCY AS PREDICTED BY STATIC MICRO-ECONOMIC MODELS. THIS APPROACH TENDS TO RESOLVE ALL DISPUTES CONCERNING THE INTENT AND CONSEQUENCES OF PARTICULAR PRACTICES IN FAVOR OF THE BUSINESSMAN MAKING THEM, SINCE THE THEORY ASSUMES RATIONAL DECISION MAKERS ARE ALWAYS MOTIVATED BY A QUEST FOR GREATER ECONOMIC EFFICIENCY. THESE LATTER DAY DEVOTEES OF ADAM SMITH (MILLER ALWAYS WORE AN ADAM SMITH TIE WHILE HEAD OF THE FTC) HAVE EVEN GREATER FAITH IN THE BUSINESSMAN'S PROCLIVITY FOR COMPETITION THAN DID SMITH. INDEED, IN THE AREA OF VERTICAL PRICE FIXING, BAXTER AND MILLER

MIGHT HAVE REWRITTEN SMITH'S OFTEN-QUOTED ADMONITION CONCERNING BUSINESSMEN'S PROPENSITY TO CONSPIRE TO READ: "MANUFACTURERS AND RETAILERS SELDOM MEET TOGETHER, EVEN FOR MERRIMENT OR DIVERSION, BUT THE CONVERSATION ENDS IN A CONSPIRACY TO FIX RETAIL PRICES IN ORDER TO ENHANCE CONSUMERS' WELFARE."

THE REMARKABLE THING ABOUT BAXTER AND MILLER IS NOT THEIR VIEW OF THE WORLD; CHICAGO SCHOOL ECONOMISTS HAVE EXPRESSED THESE VIEWS FOR DECADES. BUT NEVER BEFORE HAD THEY RECEIVED SUCH A FELICITOUS RECEPTION BY PUBLIC POLICY MAKERS. FOR EXAMPLE, WHEREAS IN 1969 THE STIGLER WHITE HOUSE TASK FORCE ON PRODUCTIVITY AND COMPETITION MADE SEVERAL RATHER DRASTIC PROPOSALS TO CHANGE ANTITRUST, THEY WERE LARGELY IGNORED DURING THE NIXON-FORD YEARS. NIXON'S ANTITRUST CHIEF, RICHARD W. MCCLAREN, CONSIDERED STIGLER'S ARGUMENTS AS THEORETICAL NONSENSE NOT RELEVANT TO THE REAL WORLD. BUT BAXTER AND MILLER DID MORE THAN ADVOCATE THEORIES BEFORE ACADEMIC AUDIENCES. COMMANDING LARGE LEGAL AND ECONOMIC STAFFS, MANY OF WHOM HAD PASSED THE CHICAGO SCHOOL LITMUS TEST, BAXTER AND MILLER SET ABOUT CHANGING ENFORCEMENT STANDARDS AND COURT-MADE LAW. TIME PERMITS ONLY A BRIEF REVIEW OF THE BAXTER-MILLER ACCOMPLISHMENTS.

SINCE IN BAXTER AND MILLER'S VIEW BUSINESSMEN'S DECISIONS GENERALLY REFLECT THE PURSUIT OF GREATER EFFICIENCY, THEY PRESUME MERGERS SELDOM POSE A PUBLIC POLICY PROBLEM. THIS VIEW IS CONSISTENT WITH PRESIDENT REAGAN'S CAMPAIGN STATEMENTS IN WHICH HE SAID EFFORTS TO SLOW THE CONGLOMERATE MERGER TIDE WERE "ARBITRARY, UNNECESSARY AND ECONOMICALLY UNSOUND."[2/] BOTH ANTITRUST AGENCIES HAVE ADOPTED NEW MERGER GUIDELINES THAT ESSENTIALLY GIVE A GREEN LIGHT TO ALL MERGERS BUT HORIZONTAL MERGERS THAT RESULT IN VERY HIGH LEVELS OF CONCENTRATION. UNDER THESE GUIDELINES, MOST MERGERS FOUND ILLEGAL BY THE SUPREME COURT DURING THE 1960S WOULD NOT EVEN BE CHALLENGED TODAY. ALL THIS WITHOUT ANY CHANGE IN THE LAWS ENFORCED BY THE AGENCIES. THE RESULT HAS BEEN TO UNLEASH A NEW "MERGER MANIA" AMONG LARGE CORPORATIONS. SINCE THE CHICAGOANS HAVE GREAT FAITH IN THE "MARKET FOR CORPORATE CONTROL," THEY ARE PLEASED, NOT BOTHERED, BY THE LIKES OF BOONE PICKENS, IRV JACOBS, AND OTHER MERGER MAKERS WHO ARE RESTRUCTURING AMERICAN BUSINESS FOR THEIR OWN PRIVATE GAIN AND PERSONAL AGGRANDIZEMENT. MOST LARGE CONGLOMERATE MERGERS HAVE ABSOLUTELY NOTHING TO DO WITH INCREASING ECONOMIC EFFICIENCY (GREER 1986 AND D.C. MUELLER 1985), WHILE CARRYING A POTENTIAL FOR ANTICOMPETITIVE EFFECTS (MUELLER 1982). NONETHELESS, FTC CHAIRMAN MILLER

(1984) PROUDLY PROCLAIMED THAT DURING 1981-1984 THE FTC DID NOT OPEN AN INVESTIGATION INTO A SINGLE CONGLOMERATE MERGER. THE AGENCIES ALSO DID NOT CHALLENGE ANY VERTICAL MERGERS. ALTHOUGH THEY CHALLENGED A NUMBER OF HORIZONTAL MERGERS, THESE WERE LARGELY PAPER VICTORIES, ENDING WITH CONSENT DECREES PERMITTING THE MERGERS AFTER REQUIRING MODEST PARTIAL DIVESTITURE. RECENTLY THE AGENCIES HAVE EVEN FAILED TO CHALLENGE HORIZONTAL MERGERS THAT CLEARLY VIOLATE THEIR OWN MERGER GUIDELINES, E.G., PEPSI COLA'S ACQUISITION OF SEVEN UP AND COCA COLA'S ACQUISITION OF DR. PEPPER.3/

BAXTER AND MILLER ALSO CHANGED ENFORCEMENT POLICY IN THE AREA OF VERTICAL RESTRAINTS, INCLUDING VERTICAL PRICE FIXING, OR SO-CALLED RESALE PRICE MAINTENANCE (RPM). BOTH ANTITRUST AGENCIES HAVE SOUGHT TO REPEAL THE EXISTING LAW OF VERTICAL RESTRAINTS THROUGH ADMINISTRATIVE ACTIONS. NOT ONLY HAVE THE AGENCIES FAILED TO BRING ANY RPM CASES, BUT THEY HAVE URGED THE COURTS TO CHANGE THEIR INTERPRETATION OF THE LAW IN THIS AREA. TO ACCOMPLISH THIS, THE U.S. DEPARTMENT OF JUSTICE (1985) PROMULGATED VERTICAL RESTRAINT GUIDELINES THAT WOULD PERMIT MUCH CONDUCT THAT IS ILLEGAL UNDER EXISTING LAW. THE DEPARTMENT ALSO HAS FILED AMICUS BRIEFS IN BEHALF OF DEFENDANTS IN PRIVATE ANTITRUST SUITS INVOLVING RPM AND OTHER VERTICAL RESTRAINTS, A PRACTICE IT ALSO HAS FOLLOWED IN OTHER AREAS OF ANTITRUST.

BAXTER'S VIEWS HAVE MET WITH VARYING SUCCESS BEFORE THE FEDERAL COURTS. ONE FEDERAL JUDGE OBSERVED, "WHILE THERE MAY BE SOME MERIT TO THE OPINIONS OF [MR. BAXTER], HIS OPINIONS ARE NOT LAW. THE SAME IS TRUE OF ANALYSES PERFORMED BY ACADEMICS."4/ (THE REFERENCE TO "ACADEMICS" IS TO CHICAGO SCHOOL ECONOMISTS.) IN 1984, BAXTER WAS NOT SUCCESSFUL WHEN HE INTERVENED ON BEHALF OF THE MONSANTO COMPANY IN AN RPM CASE BEFORE THE SUPREME COURT.5/ ALTHOUGH MONSANTO HAD NOT EVEN RAISED A FREE RIDER DEFENSE, BAXTER URGED THE COURT TO DECLARE THAT IT WOULD CONSIDER SUCH DEFENSES IN FUTURE RPM CASES. THE COURT SAID THAT IN THE CIRCUMSTANCES IT WAS UNNECESSARY TO REACH THE ISSUE. DESPITE THIS, GIVEN THE CHANGING COMPOSITION OF THE LOWER COURTS AND PROSPECTIVE CHANGES IN THE SUPREME COURT, IF PRESENT TRENDS CONTINUE THE CHICAGO SCHOOL MAY YET CARRY THE DAY ON RPM.

THERE ARE MANY OTHER EXAMPLES THAT REFLECT THE REAGAN ADMINISTRATION'S ATTITUDE TOWARD ANTITRUST. UNDER MILLER, THE FEDERAL TRADE COMMISSION BROUGHT NO VERTICAL PRICE FIXING, PRICE DISCRIMINATION, OR MONOPOLIZATION CASES. MOREOVER, IT HAS DISMISSED IMPORTANT MONOPOLY AND MERGER CASES BROUGHT BY PRIOR REPUBLICAN AND DEMOCRATIC ADMINISTRATIONS. AMONG THE MOST

IMPORTANT OF THESE WAS A CASE CHALLENGING THREE COMPANIES WITH HAVING A "SHARED MONOPOLY" IN THE PREPARED BREAKFAST CEREAL INDUSTRY. THIS WAS A PIONEER CASE DESIGNED TO DETERMINE WHETHER THREE FIRMS DOMINATING AN INDUSTRY COULD BE FOUND GUILTY OF "MONOPOLIZING" UNDER THE LAW. ALTHOUGH THIS ADMITTEDLY WAS A NOVEL INTERPRETATION OF THE MONOPOLY LAW, WHICH HITHERTO HAD BEEN APPLIED ONLY TO SINGLE FIRM DOMINANCE, A MAJORITY OF THE MILLER COMMISSION TOOK THE UNPRECEDENTED STEP OF DISMISSING THE CASE WITHOUT REVIEWING THE RECORD.

IN AN IMPORTANT MONOPOLIZATION CASE, BORDEN, INC-REALEMON,[6] THE COMMISSION REQUESTED THE SUPREME COURT NOT TO HEAR THE CASE DESPITE THE FACT THAT IN 1978 THE COMMISSION HAD FOUND THE COMPANY GUILTY OF MONOPOLIZING AND AFTER THIS DECISION HAD BEEN APPROVED BY AN APPELLATE COURT.[7] THE COMMISSION THEN SETTLED THE CASE ON GROUNDS SATISFACTORY TO THE DEFENDANT.[8] COMMISSIONER PERTSCHUK, IN DISSENTING FROM THE PREDATION STANDARD SPELLED OUT IN THE CONSENT DECREE, SAID THAT WHILE THE RULE "MAY APPEAL TO SOME AS EMBODYING THE HEIGHT OF ECONOMIC RATIONALITY, AS A PRACTICAL MATTER, THE STANDARD IN THIS ORDER WOULD TAKE THE COMMISSION OUT OF THE BUSINESS OF POLICING PREDATION."[9]

LIKEWISE, IN 1984 THE COMMISSION DISMISSED AN ATTEMPT TO MONOPOLIZE CASE INVOLVING ITT-CONTINENTAL AFTER AN ADMINISTRATIVE LAW JUDGE HAD FOUND ITT GUILTY.[10] IN DISSENTING FROM THE DECISION, COMMISSIONER PATRICIA P. BAILEY STATED THAT THE FTC MAJORITY HAD SENT A SIGNAL TO THE BUSINESS COMMUNITY THAT, IN THE IMMORTAL WORDS OF COLE PORTER, "ANYTHING GOES." SHE ADDED, "IT WOULD BE SIMPLER, AND SURELY A GREAT SAVING OF EVERYBODY'S TIME IF THE COMMISSION TODAY HAD SIMPLY ANNOUNCED THAT IT DOES NOT BELIEVE PREDATORY PRICING EXISTS."[11]

THERE IS ONLY ONE NOTABLE EXCEPTION TO THE REAGAN ADMINISTRATION'S SOFT ANTITRUST POLICY, HORIZONTAL PRICE-FIXING AGREEMENTS. MR. BAXTER HAS AGGRESSIVELY PURSUED PRICE FIXERS. ALTHOUGH THE PRIOR ADMINISTRATION HAD BEGUN A PROBE OF HIGHWAY CONTRACTORS, BAXTER DEVOTED SUBSTANTIAL RESOURCES TO THIS EFFORT, RESULTING IN FINES OF $47 MILLION AND THE JAILING OF 127 BUSINESSMEN FOR A CUMULATIVE TOTAL OF 47 YEARS.[12] IN BAXTER'S VIEWS, "THIS IS GARDEN-VARIETY CRIMINAL ACTIVITY AND INCARCERATION OF THE OFFENDING EXECUTIVES IS ABSOLUTELY ESSENTIAL."[13] IN VIEW OF HIS GREAT AVERSION TO PRICE FIXING, IT IS INCONGRUOUS THAT MR. BAXTER IS UNCONCERNED WITH MERGERS AND OTHER CONDUCT THAT CAUSE HIGHLY CONCENTRATED MARKETS WHERE OVERT PRICE

FIXING MAY BE UNNECESSARY BECAUSE COMPETITORS RECOGNIZE THEIR COMMON INTERESTS AND IS VIRTUALLY IMPOSSIBLE TO DETECT WHEN PRACTICED. APPARANTLY, BAXTER COULD FIND LITTLE PRICE FIXING OUTSIDE THE CONSTRUCTION INDUSTRY SINCE HE BROUGHT FEW PRICE FIXING CASES IN OTHER INDUSTRIES.

THE NEW LEARNING BECOMES THE NEW ORTHODOXY

THE INTELLECTUAL FOUNDATIONS OF THE POLICIES PURSUED BY BAXTER, MILLER, AND THEIR SUCCESSORS ARE FOUND IN THE SO-CALLED CHICAGO SCHOOL OF INDUSTRIAL ORGANIZATION ECONOMICS. WHILE THE IDEAS ARE NOT NEW, THEY DID NOT ACHIEVE MUCH CREDIBILITY IN ANTITRUST POLICY UNTIL THE 1980S. REAGAN'S FIRST FTC CHAIRMAN, JAMES C. MILLER III, CREDITS THEIR CURRENT PROMINENCE TO SUPERIOR THEORY AND EMPIRICAL ANALYSIS. AS A RESULT HE SAYS, "THE ASCENDANCY OF THE CHICAGO SCHOOL NOW SEEMS ALL BUT INEVITABLE." (MILLER 1984:8) IN HIS VIEW, A "NEW LEARNING" ABOUT HOW MARKETS WORK HAS MADE CHICAGO SCHOOL IDEAS THE NEW ORTHODOXY.

JUST WHAT IS THIS "NEW LEARNING" WE HEAR SO MUCH ABOUT THESE DAYS? HOW DOES THE CHICAGO SCHOOL OF INDUSTRIAL ORGANIZATION DIFFER FROM THE MAJORITY OF ECONOMISTS IN THIS FIELD? HAROLD DEMSETZ, HIMSELF A LEADER IN THE CHICAGO SCHOOL, IDENTIFIED THE DISTINCTION NEATLY IN HIS PAPER, "TWO SYSTEMS OF BELIEF ABOUT MONOPOLY." AS HE EXPRESSED IT (DEMSETZ 1974:164) AT THE 1974 ARLIE HOUSE, VIRGINIA, CONFERENCE ON "INDUSTRIAL CONCENTRATION: THE NEW LEARNING,"[14/] THERE EXISTED TWO COMPETING THEORIES ABOUT MONOPOLY AND THEY WERE "HEADING FOR A SHOWDOWN." THE THEN ORTHODOX THEORY OF THE DAY, WHICH DEMSETZ CALLED THE "SELF-SUFFICIENCY THEORY," HELD THAT MONOPOLY POWER COULD DEVELOP AND SURVIVE "WITHOUT ANY SUBSTANTIAL AID FROM THE GOVERNMENT." (THIS IS NOT TO SAY THE THEORY REJECTED THE NOTION THAT GOVERNMENT MAY BE A SIGNIFICANT SOURCE OF MARKET POWER.) THE OTHER THEORY, WHICH DEMSETZ LABELED THE "INTERVENTIONISM THEORY," SAW MONOPOLY POWER AS "DERIVATIVE OF GOVERNMENT INTERVENTIONS" (164-165). THE CHICAGO SCHOOL INTERVENTIONISM THEORY BELIEVES THAT THE ONLY THING WE HAVE TO FEAR, WITH MINOR EXCEPTIONS, IS GOVERNMENT POLICY THAT PURPOSELY OR UNWITTINGLY CONFERS MONOPOLY POWER ON FIRMS. THIS IS IN CONTRAST TO THE "SELF-SUFFICIENCY THEORY" THAT BELIEVES PUBLIC POLICY SHOULD BE CONCERNED WITH ANTICOMPETITIVE INDUSTRIAL STRUCTURES AND COMPETITIVE TACTICS.

SOME CRITICS OF THE CHICAGO SCHOOL ASSERT ITS BELIEFS REST MORE ON HOPE THAN ON SOUND THEORY AND EMPIRICAL RESEARCH. BUT DESPITE SUCH CASUAL

CRITICISM, THE SIMPLE TRUTH IS THAT CURRENTLY THESE THEORIES ARE USED TO DIRECT OR RATIONALIZE THE PUBLIC POLICY ACTIONS OF THE ANTITRUST AGENCIES, AND INCREASINGLY ARE FINDING THEIR WAY INTO COURT DECISIONS. MILLER PROCLAIMED IN 1985, A DECADE AFTER DEMSETZ'S PAPER, THAT THE NEW LEARNING OF THE CHICAGO SCHOOL HAD TRIUMPHED. IT HAD BECOME THE NEW ORTHODOXY; THE OLD INDUSTRIAL ORGANIZATION THEORY WAS DEAD (BARNETT 1984:8-10).

I SUGGEST THAT IT IS PREMATURE TO MAKE FUNERAL ARRANGEMENTS FOR WHAT HAD BEEN THE MAINSTREAM OF INDUSTRIAL ORGANIZATION FOR AT LEAST THREE DECADES. LET US FIRST EXAMINE THE NEW EVIDENCE. DO DEVELOPMENTS IN ECONOMIC THOUGHT AND RESEARCH OVER THE PAST DECADE SUPPORT MILLER'S VICTORY PRONOUNCEMENT?

WHAT I PROPOSE DOING TODAY IS TO REVIEW THE THEORETICAL AND EMPIRICAL WORK IN THE TWO AREAS WHERE CHICAGO SCHOOL "BELIEFS" ABOUT ECONOMIC AFFAIRS HAVE HAD THEIR GREATEST IMPACT: MARKET STRUCTURE-PERFORMANCE RELATIONSHIPS AND THE TREATMENT OF VERTICAL RESTRAINTS. SIMPLY PUT, THE CHICAGO SCHOOL BELIEVES THAT (1) OLIGOPOLISTIC MARKET STRUCTURES ARE UNLIKELY TO AFFECT ADVERSELY MARKET PERFORMANCE AND (2) VERTICAL RESTRAINTS, WITH FEW EXCEPTIONS, IMPROVE ECONOMIC WELFARE.

I CAUTION READERS THAT WHAT FOLLOWS IS NOT INTENDED TO IMPLY THAT CHICAGO SCHOOL ECONOMISTS HAVE MADE NO SIGNIFICANT CONTRIBUTIONS TO INDUSTRIAL ORGANIZATION RESEARCH. THEY HAVE. BUT NOT SURPRISINGLY, SINCE CHICAGO SCHOOL ECONOMISTS BELIEVE GOVERNMENT IS THE PREDOMINANT SOURCE OF MONOPOLY, MUCH OF THEIR RESEARCH FOCUSES ON TESTING HYPOTHESES OF THE EFFECTS OF STATE AND FEDERAL REGULATIONS ON COMPETITION. THESE STUDIES GENERALLY COMMAND HIGH RESPECT AMONG MAINSTREAM INDUSTRIAL ORGANIZATION ECONOMISTS. A PROMINENT EXAMPLE OF SUCH WORK IS A STUDY OF THE EFFECTS OF REGULATION IN THE AIRLINE INDUSTRY BY FORMER FTC CHAIRMAN MILLER AND HIS COLLEAGUE, COMMISSIONER DOUGLAS (MILLER AND DOUGLAS 1974).

THE NEW LEARNING: OLIGOPOLY DOES NOT CONFER MARKET POWER

SINCE AUGUSTINE COURNOT EXPLORED THE SUBJECT ABOUT 150 YEARS AGO, ECONOMISTS HAVE SPUN A VARIETY OF THEORIES TO EXPLAIN THE CONDUCT AND PERFORMANCE OF OLIGOPOLISTS. THE PROBLEM HAS NOT BEEN AN ABSENCE OF THEORIES BUT THE PAUCITY OF RELIABLE DATA TO TEST THE THEORIES. NOT SURPRISINGLY, BAIN'S (1951) EARLY EMPIRICAL TESTS, RELYING ON CRUDE DATA AND STATISTICAL TECHNIQUES, WERE QUICKLY CHALLENGED. BUT DESPITE DATA PROBLEMS,

BY THE 1960S A CONSENSUS SEEMED TO HAVE EMERGED THAT MARKET POWER, ESPECIALLY AS MEASURED BY MARKET CONCENTRATION AND BARRIERS TO ENTRY, ADVERSELY AFFECTED INDUSTRY PERFORMANCE (WEISS 1971). IN HIS EXHAUSTIVE REVIEW OF THE LITERATURE IN 1974, WEISS (1974:231) CONCLUDED, "BY AND LARGE THE RELATIONSHIP HOLDS UP FOR BRITAIN, CANADA AND JAPAN, AS WELL AS IN THE UNITED STATES. IN GENERAL THE DATA HAVE CONFIRMED THE RELATIONSHIP PREDICTED BY THEORY, EVEN THOUGH THE DATA ARE VERY IMPERFECT AND ALMOST CERTAINLY BIASED TOWARD A ZERO RELATIONSHIP."

BUT IN DEMSETZ'S VIEW, ALL THESE STUDIES SUFFERED A FATAL FLAW. VIRTUALLY ALL OF THE STUDIES HAD MEASURED THE RELATIONSHIP BETWEEN MARKET STRUCTURE AND PROFITS. AND WHEREAS THOSE CONDUCTING THE STUDIES BELIEVED THEY HAD VERIFIED A POSITIVE RELATIONSHIP BETWEEN MARKET STRUCTURE AND PROFITS, DEMSETZ ASSERTED THEY HAD UNWITTINGLY DISCOVERED A POSITIVE RELATIONSHIP BETWEEN CONCENTRATION AND EFFICIENCY: THE LARGEST FIRMS IN AN INDUSTRY HAD HIGHER PROFITS BECAUSE THEY WERE MORE EFFICIENT, NOT BECAUSE THEY ELEVATED PRICES.

DEMSETZ'S CONCLUSIONS, IF TRUE, OVERTURNED SEVERAL DECADES OF EMPIRICAL WORK AND INFLICTED A DEADLY BLOW TO WHAT HAD BECOME THE ORTHODOX VIEW OF THE RELATIONSHIP BETWEEN INDUSTRIAL STRUCTURE AND PERFORMANCE. THE IMMEDIATE INFLUENCE OF DEMSETZ'S ASSERTIONS WAS SURPRISING IN VIEW OF THEIR FRAGILE EMPIRICAL FOUNDATIONS. VERY BRIEFLY, DEMSETZ HAD CORRELATED THE WEIGHTED AVERAGE CONCENTRATION RATIOS OF VARIOUS INTERNAL REVENUE SERVICE (IRS) INDUSTRIES WITH THE PROFIT RATES OF VARIOUS SIZE GROUPINGS OF FIRMS WITHIN THE INDUSTRIES. ANYONE FAMILIAR WITH IRS DATA REALIZE THAT THEY ARE FRAUGHT WITH PROBLEMS. THE PROBLEMS INHERENT IN DEMSETZ'S USE OF THESE DATA CLEARLY BIASED HIS ANALYSIS TOWARD FINDING A ZERO RELATIONSHIP BETWEEN CONCENTRATION AND PROFITS (APPENDIX A).[15/]

IN VIEW OF THE DEFICIENCIES IN DEMSETZ'S DATA, HIS RESULTS ARE NOT SURPRISING. HE FOUND THAT THE STRONGEST POSITIVE CORRELATIONS TEND TO BE FOUND IN THE LARGEST CLASS SIZE AND NEGATIVE CORRELATIONS IN THE SMALLEST CLASS SIZE. THESE FINDINGS, DEMSETZ BELIEVED, SUPPORTED THE HYPOTHESIS THAT, "LARGER FIRMS IN CONCENTRATED INDUSTRIES HAVE LOWER COST BECAUSE THERE ARE SCALE ECONOMICS IN THESE INDUSTRIES OR BECAUSE OF SOME INHERENT SUPERIORITY OF THE LARGER FIRMS IN THESE INDUSTRIES" (DEMSETZ 1974:178).[16/]

THOUGH NOT RECOGNIZED AS SUCH AT THE TIME, DEMSETZ'S 1974 PIECE MARKED THE OFFICIAL BIRTHDATE OF THE NEW LEARNING THAT CONCENTRATION PROMOTED EFFICIENCY, NOT MARKET POWER.[17] INTERESTINGLY, SERIOUS EMPIRICAL RESEARCHERS ATTENDING THE AIRLIE HOUSE CONFERENCE GENERALLY DID NOT TAKE DEMSETZ'S STUDY SERIOUSLY.[18]

IN 1977, PELTZMAN UNDERTOOK AN AMBITIOUS TEST OF THE DEMSETZ HYPOTHESIS, USING A MORE COMPREHENSIVE DATA SET AND MORE SOPHISTICATED ANALYSIS. PELTZMAN (1977:251) CONCLUDED THAT "LONG PERIOD CHANGES IN MARKET STRUCTURES ARE ACCOMPANIED BY INCREASED EFFICIENCY. THIS EFFICIENCY GAIN IS MOST PRONOUNCED WHERE CONCENTRATION IS HIGH AND RISING AND WHERE DEMAND IS GROWING." THIS IS PERHAPS THE MOST OFTEN-CITED EMPIRICAL WORK SUPPORTING THE CONCENTRATION-EFFICIENCY HYPOTHESIS. BUT AS SCHERER (1980:289) HAS OBSERVED, PELTZMAN'S "INTERPRETATION OF THE RESULTS SUFFERS FROM SERIOUS FLAWS, MOSTLY RELATED TO HIS FAILURE TO LOOK BEHIND THE NUMBERS AND ASCERTAIN HOW THINGS WERE DERIVED AND WHAT WAS ACTUALLY HAPPENING IN THE INDUSTRIES ANALYZED." SCHERER PREDICTED THAT HAD PELTZMAN EXAMINED THE INDUSTRIES EXPERIENCING RAPID CONCENTRATION INCREASES, HE WOULD HAVE FOUND THEM TO BE PRIMARILY CONSUMER GOODS INDUSTRIES.

SCHERER'S EXPECTATIONS THAT PELTZMAN'S MODEL WAS DRIVEN BY THE CONSUMER GOODS INDUSTRIES IN HIS SAMPLE MAY BE TESTED BY REDOING THE ANALYSIS SEPARATELY FOR CONSUMER AND PRODUCER GOODS. VITA (1984) RECENTLY DID JUST THAT. THE ANALYSIS USED SUPERIOR DATA AND A SLIGHTLY IMPROVED PELTZMAN MODEL. VITA'S INITIAL ANALYSIS, BASED ON A LARGE SAMPLE OF CONSUMER AND PRODUCER GOODS INDUSTRIES, SEEMED TO CONFIRM THE DEMSETZ-PELTZMAN THESIS. BUT WHEN VITA RE-RAN HIS MODEL SEPARATELY FOR CONSUMER GOODS AND PRODUCER GOODS, THE CONFIRMATION EVAPORATED. THE ANALYSIS BASED ON PRODUCER GOODS DID NOT SUPPORT PELTZMAN'S FINDINGS, DESPITE THE FACT THAT, A PRIORI, PRODUCER GOODS PROVIDE THE MOST UNEQUIVOCAL TEST OF THE HYPOTHESIS.[19] ON THE OTHER HAND, THE ANALYSIS INVOLVING CONSUMER GOODS INDUSTRIES YIELDED RESULTS SIMILAR TO PELTZMAN'S. THUS VITA CONFIRMED SCHERER'S EXPECTATION THAT PELTZMAN'S RESULTS DEPENDED ON HIS CONSUMER GOODS OBSERVATIONS.

THESE FINDINGS ARE CONSISTENT WITH OTHER EMPIRICAL WORK. AS MUELLER AND ROGERS (1980 AND 1984) HAVE DEMONSTRATED, SINCE WORLD WAR II CONSUMER GOODS INDUSTRIES HAVE EXPERIENCED PERSISTENT INCREASES IN CONCENTRATION (WHEREAS PRODUCER GOODS INDUSTRIES HAVE EXPERIENCED NO UPWARD TREND), WITH THE MAIN CAUSE FOR THE INCREASES RELATED TO ADVANTAGES OF LARGE SCALE IN

TELEVISION ADVERTISING. AND AS WILLS (1983) HAS SHOWN, THE LEADING FIRMS IN CONSUMER GOODS INDUSTRIES HAVE SUBSTANTIALLY HIGHER PRICES THAN DO SMALLER SELLERS IN THESE INDUSTRIES. MOREOVER, KELTON (1980) FOUND THAT CONSUMER INDUSTRIES WITH THE GREATEST ADVERTISING EXPERIENCED THE GREATEST INCREASES IN PRICES. NOR DID KELTON (1983) FIND A SIGNIFICANT RELATIONSHIP BETWEEN CONCENTRATION AND CHANGE IN PRODUCTIVITY.

THE ABOVE EVIDENCE REFUTES THE DEMSETZ HYPOTHESIS. HIGH PROFITS OF CONCENTRATED INDUSTRIES ARE DUE IN LARGE PART TO HIGHER PRICES, NOT LOWER COSTS. AND IF, AS I BELIEVE TO BE TRUE, THE PRICE DIFFERENCES BETWEEN CONCENTRATED INDUSTRIES AND LESS CONCENTRATED INDUSTRIES OFTEN ARE GREATER THAN THE DIFFERENCES IN THEIR RESPECTIVE PROFIT RATES, MANY CONCENTRATED INDUSTRIES HAVE HIGHER COSTS AS WELL AS HIGHER PRICES.

SOMETIMES THE VARIOUS STRUCTURE-PROFIT STUDIES BASED ON FTC LINE-OF-BUSINESS (LOB) DATA ARE CITED AS SUPPORT FOR THE NEW LEARNING. THESE STUDIES HAVE CONTRIBUTED MUCH TO OUR LEARNING AND THE PROFESSION IS INDEBTED TO THE FTC FOR COLLECTING THESE DATA FOR SEVERAL YEARS. IT IS A MISTAKE, HOWEVER, TO INFER THAT THESE STUDIES SUPPORT THE CHICAGO SCHOOL THESIS MERELY BECAUSE THE FINDINGS DIFFER IN SOME RESPECTS FROM EARLIER STUDIES. ONE OF THE UNIQUE FINDINGS OF THESE STUDIES IS THE IMPORTANT ROLE PLAYED BY INDIVIDUAL FIRM MARKET SHARES, A PHENOMENON IDENTIFIED AS BEING SIGNIFICANT IN AN EARLIER FTC (1969) STUDY AND BY OTHERS (IMEL, BLAKE AND HELMBERGER 1971; SHEPARD 1972; MARION, ET AL. 1979). SOME MAKE MUCH OF THE FINDING THAT SOMETIMES WHEN MARKET SHARE IS INCLUDED IN THE MODEL USING FTC LOB DATA, THE RELATIONSHIP BETWEEN MARKET CONCENTRATION AND PROFITS IS NOT A STATISTICALLY SIGNIFICANT, AND THAT SOMETIMES THE RELATIONSHIP IS NEGATIVE (RAVENSCRAFT 1983). BUT THESE FINDINGS ARE BY NO MEANS AT ODDS WITH EARLIER WORK. AS WEISS (1971) POINTED OUT 15 YEARS AGO, THE CONCENTRATION-PROFIT RELATIONSHIP TENDS TO BREAK DOWN DURING PERIODS OF INFLATION. SELDOM MENTIONED IS THE FACT THAT ALL OF THE LOB DATA WERE COLLECTED FOR YEARS OF SUBSTANTIAL INFLATION, 1974-1977. SIGNIFICANTLY, AN ANALYSIS (RAVENSCRAFT 1983) USING LOB DATA FOR THE FOOD MANUFACTURING INDUSTRIES FOUND A SIGNIFICANT POSITIVE RELATIONSHIP BETWEEN PROFITS AND CONCENTRATION AS WELL AS BETWEEN PROFITS AND MARKET SHARES, WHICH IS CONSISTENT WITH OTHER STRUCTURE PROFIT STUDIES IN THESE INDUSTRIES (CONNOR, ET AL., 1985 AND ROGERS, 1979 AND 1985). THIS IS AS ONE WOULD EXPECT: THESE INDUSTRIES ARE LESS SUSCEPTIBLE TO INFLATION SINCE THE DEMAND FOR FOOD SHIFTS MUCH LESS

OVER A BUSINESS CYCLE THAN DOES DEMAND IN MOST OTHER MANUFACTURING INDUSTRIES. THUS, THE JURY IS STILL OUT AS TO WHAT LOB DATA WOULD SHOW DURING NON-INFLATIONARY YEARS. ADDITIONALLY, THESE ANALYSES SUFFER BECAUSE OF THE HIGH CORRELATION BETWEEN MARKET SHARE AND CONCENTRATION RATIOS, WHICH PRESENTS A SPECIAL PROBLEM IN THE LOB DATA SET BECAUSE IT CONSISTS ONLY OF LARGE FIRMS, WHICH TYPICALLY HOLD THE LEADING POSITIONS IN THEIR INDUSTRIES (CONNOR, ET AL).

ALTHOUGH THE PRECEDING DEMONSTRATES THAT THE DEMSETZ CONCENTRATION-EFFICIENCY HYPOTHESIS HAS SCANT EMPIRICAL SUPPORT, THERE IS A GROWING BODY OF RELIABLE EVIDENCE DISPROVING ENTIRELY THE HYPOTHESIS. I AM ALLUDING TO STUDIES THAT MAKE A DIRECT TEST OF THE HYPOTHESIS THAT MARKET CONCENTRATION, AFTER ADJUSTING FOR BARRIERS TO ENTRY AND OTHER VARIABLES, ELEVATES PRICES ABOVE COSTS. CONCENTRATION-PRICE STUDIES ARE ESPECIALLY RELEVANT BECAUSE, AS WEISS (1985) EMPHASIZES, "FOR THE MOST PART OLIGOPOLGY THEORY MAKES PREDICTIONS ABOUT PRICES RATHER THAN PROFITS. [THEREFORE] THE PROPER TEST OF OLIGOPOLY THEORY IS ONE WHERE PRICE IS THE DEPENDENT VARIABLE." ALMOST WITHOUT EXCEPTION, THESE STUDIES HAVE FOUND THAT CONCENTRATION IS POSITIVELY ASSOCIATED WITH PRICE LEVELS. NOT ONLY DO THESE STUDIES REFUTE CHICAGO SCHOOL "BELIEFS" ABOUT THE RELEVANCE OF CONCENTRATION, BUT THEY FLY IN THE FACE OF ANOTHER REVISIONIST "BELIEF," THE THEORY OF "CONTESTABLE MARKETS." PROPONENTS OF THIS THEORY ARGUE THAT MARKET CONCENTRATION DOES NOT CONFER MARKET POWER AS LONG AS A MARKET IS "CONTESTABLE," I.E. THAT THERE ARE NO SIGNIFICANT BARRIERS TO ENTRY OR EXIT (BAUMOL 1982). IF REAL WORLD MARKETS WERE AS READILY CONTESTABLE AS BAUMOL BELIEVES, THE LEVEL OF CONCENTRATION WOULD NOT BE POSITIVELY RELATED TO PRICES IN A MARKET. THE PRICE STUDIES, THEREFORE, CONFIRM SHEPHERD'S (1984:585) OBSERVATION REGARDING CONTESTABLE MARKET THEORY: "THE 'NEW' ANALYSIS GIVES NO PERSUASIVE REASON TO SHIFT ATTENTION AWAY FROM COMPETITION WITHIN THE MARKET."

BECAUSE THE CONCENTRATION-PRICE STUDIES USUALLY EXAMINE THE RELATIONSHIP BETWEEN CONCENTRATION AND PRICES ACROSS GEOGRAPHIC MARKETS FOR A PARTICULAR PRODUCT OR SERVICE, THEY ARE NOT PLAGUED WITH PROBLEMS COMMON TO ALL CROSS-INDUSTRY STUDIES.[20/] INDEED, THE PRICE STUDIES USE DATA THAT ARE SUPERIOR TO EVEN THE MOST RELIABLE DATA, SUCH AS FTC LOB DATA, USED IN CROSS-INDUSTRY STUDIES.

BECAUSE OF THE AVAILABILITY OF DATA, AND THE INTEREST OF FEDERAL RESERVE ECONOMISTS SUCH AS STEPHEN A. RHOADES, MANY OF THE CONCENTRATION-

PRICE STUDIES HAVE EXAMINED FINANCIAL MARKETS. A PARTIAL LIST INCLUDES SLATER (1956), EDWARDS (1964), BELL AND MURPHY (1969), ASPINWALL (1970), JACOBS (1971), KESSEL (1971), GREER AND SHAY (1973), HEGGESTAD AND MINGO (1976), RHOADES (1977), GRADDY AND KYLE (1979), HESTER (1979), MARLOW (1982). ALL OF THE STUDIES CITED ABOVE FOUND A POSITIVE NET RELATIONSHIP BETWEEN CONCENTRATION AND VARIOUS FORMS OF PRICE, E.G., CHECKING SERVICE CHARGES, MORTGAGE INTEREST RATES, AND BOND UNDERWRITER'S SPREADS.

THERE HAVE BEEN AT LEAST SIX STUDIES OF AIR FARES SINCE AIRLINE DEREGULATION IN 1978 (GRAHAM, KAPLAN AND SIBLEY 1983; MILLIMAN AND WEISS 1983; BAILEY, GRAHAM AND KAPLAN 1984; CALL AND KEELER 1985; MOORE 1985; AND STRASSMAN 1986). THE AIRLINES ARE PARTICULARLY RELEVANT TO THE CONTESTABILITY HYPOTHESIS. SINCE ENTRY INTO ANOTHER MARKET WOULD SEEM TO BE QUITE EASY, MANY CONSIDER AIRLINES ONE OF THE CLOSEST APPROXIMATIONS TO CONTESTABLE MARKETS IN THE REAL WORLD. YET, AS ALFRED E. KAHN, FORMER CHAIRMAN OF THE CIVIL AERONAUTICS BOARD, SAYS OF THE CONCENTRATION-PRICE STUDIES, "EVERY ONE OF THEM CONCLUDES THAT HOW MANY CARRIERS YOU HAVE IN A MARKET MAKES A DIFFERENCE. IF ENTRY WERE A SUFFICIENT DISCIPLINE, YOU WOULDN'T SEE DIFFERENT FARES WHETHER THERE IS ONE CARRIER IN THE MARKET OR FIVE" (VISE AND BEHR 1986).

IN FOOD RETAILING, FOUR STUDIES USING DIFFERENT METHODS, DATA, AND TIME PERIODS FOUND A POSITIVE RELATIONSHIP BETWEEN CONCENTRATION AND PRICE LEVELS (MARION, MUELLER ET AL. 1979; LAMM 1981; MEYER 1983; COTTERILL 1986). EXCEPT FOR LAMM, THESE STUDIES EXAMINED FIRM PRICES AND FOUND PRICES POSITIVELY ASSOCIATED WITH BOTH MARKET SHARE AND CONCENTRATION. MOREOVER, MARION, ET AL., WHO EXAMINED BOTH THE LEVEL OF PROFITS AND PRICES, FOUND THAT IN HIGHLY CONCENTRATED MARKETS PRICE OVERCHARGES AS A PERCENT OF SALES WERE GREATER THAN PROFITS AS A PERCENT OF SALES, SUGGESTING THAT CONCENTRATION INCREASED COSTS AS WELL AS PRICES AND PROFITS. THE RESULTS OF THIS STUDY ARE CITED BY LEIBENSTEIN (1979) AS AN EXAMPLE OF X-INEFFICIENCY DUE TO MARKET POWER.

VIRTUALLY ALL AUCTION MARKET THEORY POINTS TO HIGHER BUYING PRICES AND LOWER SELLING PRICES AS THE NUMBER OF BIDDERS GROW. THE THEORY IS SUPPORTED BY EMPIRICAL STUDIES IN MUNICIPAL BOND UNDERWRITING, BIDDING FOR OFFSHORE OIL, AND BIDDING FOR NATIONAL FOREST TIMBER (BRANMAN, KLEIN AND WEISS 1986).

OTHER CONCENTRATION-PRICE STUDIES HAVE BEEN MADE IN SUCH DIVERSE INDUSTRIES AS LIFE INSURANCE (CUMMINS, DENENBERG, AND SCHEEL 1972),

NEWSPAPER AND TELEVISION ADVERTISING (LANDON 1971; OWEN 1973; THOMPSON 1984), GASOLINE RETAILING (MARVEL 1980); PRESCRIPTION DRUGS (FTC 1975); CEMENT (KOLLER AND WEISS 1985); AND MICROFILM (BARTON AND SHERMAN 1984). ALL OF THESE STUDIES FOUND A POSITIVE RELATIONSHIP BETWEEN MARKET CONCENTRATION AND PRICES. FINALLY, A STUDY BY WILLS (1983), USING EXCEPTIONALLY HIGH QUALITY DATA, EXAMINED THE RELATIONSHIP BETWEEN PRICES AND BOTH ADVERTISING AND MARKET SHARE OF THE BRANDS OF 145 FOOD PRODUCTS. THE RESULTS DEMONSTRATED THAT PRICES OF THE LEADING BRANDS WERE SUBSTANTIALLY HIGHER THAN EVEN THE SECOND TO FOURTH LARGEST BRANDS AND GREATER STILL THAN PRICES OF MINOR BRANDS AND RETAILERS' PRIVATE BRANDS. THIS EVIDENCE LIKELY EXPLAINS WHY STUDIES SUCH AS PELTZMAN'S THAT COMBINE CONSUMER GOODS INDUSTRIES AND PRODUCER GOODS INDUSTRIES RESULT IN FALSE CONCLUSIONS. THEIR EMPIRICAL RESULTS ARE DRIVEN BY THE CONSUMER GOODS INDUSTRIES IN THEIR SAMPLES. THE MARKET-SHARE-PROFIT RELATIONSHIP IN THOSE CONSUMER INDUSTRIES IS GENERATED BY THE IMPACT OF ADVERTISING ON PRICE, NOT THE EFFICIENCIES THAT DEMSETZ AND COMPANY SUPPOSED.

THE CONSISTENCY OF THE PRICE STUDIES CITED ABOVE IS QUITE AMAZING. THEY CLEARLY ARE AT ODDS WITH THE DEMSETZ HYPOTHESIS AND THE FINDINGS OF PELTZMAN, AS WELL THE BELIEFS OF PROPONENTS OF THE THEORY OF CONTESTABLE MARKETS. MOREOVER, IT CANNOT BE OVEREMPHASIZED IN EVALUATING THESE FINDINGS THAT THE DATA USED IN MOST OF THE PRICE STUDIES ARE FAR SUPERIOR TO DEMSETZ'S STUDY AND VIRTUALLY ALL PROFIT STUDIES, INCLUDING THOSE BASED ON FTC LINE-OF-BUSINESS DATA. THE SUPERIOR SCIENTIFIC QUALITY OF THE PRICE STUDIES IS OFTEN NEGLECTED BY LITERATURE REVIEWERS WHO ARE ENAMORED WITH ECONOMETRIC TECHNIQUE TO THE NEGLECT OF DATA QUALITY.

THE NEW LEARNING: VERTICAL RESTRAINTS PROMOTE CONSUMER WELFARE

CHICAGO SCHOOL MODELS HAVE REACHED THEIR FULLEST FLOWER IN THE AREA OF VERTICAL RESTRAINTS, INCLUDING VERTICAL PRICE FIXING, I.E., RESALE PRICE MAINTENANCE (RPM). SINCE 1911, THE SUPREME COURT HAS HELD IT PER SE ILLEGAL FOR A MANUFACTURER TO ENTER INTO PRICE FIXING AGREEMENTS WITH THE DISTRIBUTORS OF ITS PRODUCTS. FOR SOME YEARS, RPM WAS MADE AN EXCEPTION TO THE ANTITRUST LAWS BY A FEDERAL LAW PERMITTING STATES TO AUTHORIZE RPM. BUT IN 1975, DURING THE FORD ADMINISTRATION, THESE SO-CALLED "FAIR TRADE" LAWS WERE PROHIBITED IN FAVOR OF THE HISTORIC ANTITRUST TREATMENT OF RPM.

DESPITE THIS LEGISLATIVE MANDATE, THE REAGAN ANTITRUST AGENCIES HAVE SOUGHT MORE PERMISSIVE TREATMENT OF ALL TYPES OF VERTICAL RESTRAINTS. FTC CHAIRMAN MILLER (1983) SAID HIS "AIM IS TO PERSUADE YOU THAT RPM DESERVES TO BE JUDGED BY A RULE OF REASON." BUT LET THERE BE NOT MISTAKE ABOUT THE ULTIMATE OBJECTIVE OF CHICAGO SCHOOL POLICYMAKERS. VERY SIMPLY, THEY HOPE TO ELIMINATE THE PER SE PROHIBITIONS AGAINST RPM AS WELL AS THE CURRENT RULE OF REASON STANDARDS APPLIED TO NON-PRICE VERTICAL RESTRAINTS. RICHARD POSNER (1981), FORMERLY OF THE UNIVERSITY OF CHICAGO LAW SCHOOL AND CURRENTLY A FEDERAL JUDGE, STATES IT MOST PLAINLY. HE ASSERTS THAT THE APPROPRIATE LEGAL RULE FOR ALL VERTICAL RESTRAINTS IN DISTRIBUTION IS ONE WHICH DECLARES THEM PER SE LEGAL. BORK EARLIER HAD MADE A SIMILAR ARGUMENT.

THE ADVOCATES OF THE NEW LEARNING ABOUT VERTICAL RESTRAINTS BASE THEIR CASE ON THE CHICAGO SCHOOL THEORY THAT A MANUFACTURER GENERALLY WOULD NOT SET THE RETAIL PRICE OF HIS PRODUCTS UNLESS HE WERE MOTIVATED BY EFFICIENCY CONSIDERATIONS.21/ THIS THEORY HAS ITS ORIGINS IN THE WRITINGS OF BOWMAN (1955), TELSER (1960), AND BORK (1966). THESE SCHOLARS ARGUE THAT A MANUFACTURER CAN ONLY INDUCE ITS DISTRIBUTORS TO FURNISH THE IDEAL MIX OF SERVICES TO CUSTOMERS IF THE MANUFACTURER GUARANTEES DISTRIBUTORS AN ABOVE COMPETITIVE PRICE USING RPM OR OTHER VERTICAL RESTRAINTS PROHIBITING INTRABRAND COMPETITION. ABSENT SUCH INCENTIVES, SOME DISTRIBUTORS WOULD GET A FREE RIDE BY NOT PROVIDING THE NEEDED SERVICES, THEREBY DISCOURAGING OTHERS FROM DOING SO AS WELL.

THE CHICAGO SCHOOL ACKNOWLEDGES THAT VERTICAL RESTRAINTS GENERALLY RESULT IN HIGHER PRICES, BUT THEY ARGUE THE INCREASED SERVICES SHIFT THE DEMAND CURVE TO THE RIGHT SUFFICIENTLY TO INCREASE THE MANUFACTURER'S TOTAL SALES. THE TEST OF WHETHER VERTICAL RESTRAINTS IMPROVE ECONOMIC EFFICIENCY IS NOT THE PRICE PAID BY CONSUMERS, SAYS THE CHICAGO SCHOOL, BUT WHETHER THE RESTRAINT RESTRICTS OR INCREASES OUTPUT, WITH THE FORMER BEING ANTICOMPETITIVE AND THE LATTER PROCOMPETITIVE (BORK 1966:375-76).

BUT THE PROBLEM IS MORE COMPLEX THAN THIS. ONE RELEVANT QUESTION IS WHETHER THE INCREASED PRICES PAID BY CONSUMERS ARE WORTH THE INCREASED SERVICES RECEIVED. F.M. SCHERER (1983) AND WILLIAM COMANOR (1985) HAVE RECENTLY DEMONSTRATED THAT MERELY BECAUSE INCREASED SERVICES SHIFT RETAIL DEMAND TO THE RIGHT DOES NOT PROVE THAT ECONOMIC EFFICIENCY HAS IMPROVED. AS COMANOR (1985:991-92) PUTS IT, "[S]OCIETAL GAINS OR LOSSES FROM CHANGES IN THE PRODUCT DEPEND ON THE PREFERENCE OF ALL CONSUMERS, NOT MERELY THOSE

AT THE MARGIN....IF MARGINAL CONSUMERS VALUE DEALER-PROVIDED SERVICE LESS THAN INFRA-MARGINAL CONSUMERS DO, THE LEVEL OF SUCH SERVICES WILL BE TOO LOW. BY CONTRAST, IF MARGINAL CONSUMERS VALUE THOSE SERVICES MORE HIGHLY, THE LEVEL OF DISTRIBUTION SERVICES WILL BE EXCESSIVE, AND THE IMPOSITION OF VERTICAL RESTRAINTS TO PROMOTE SUCH SERVICES WOULD BE INEFFICIENT."

TIME PREVENTS A FULL TREATMENT OF THE THEORETICAL ARGUMENT. BUT WHAT THESE AUTHORS HAVE DONE IS DEMONSTRATE THEORETICALLY WHAT MANY OBSERVERS LONG HAD FELT INTUITIVELY WAS WRONG WITH THE CHICAGO SCHOOL ARGUMENTS: WITH RESTRICTED DISTRIBUTION, MANY CONSUMERS ARE FORCED TO PAY FOR SERVICES THEY DO NOT WANT. THUS, IT IS WRONG TO ASSUME THAT MERELY BECAUSE VERTICAL RESTRAINTS BENEFIT A MANUFACTURER THEY ALSO MUST BENEFIT SOCIETY AS A WHOLE.

SCHERER ALSO HAS DEMONSTRATED THAT WHEN OLIGOPOLISTS ENGAGE IN RPM, THEY MAY MERELY PUSH UP PRICES ALL AROUND WITHOUT SHIFTING ANYONE'S DEMAND CURVE TO THE RIGHT.

NOT ONLY DOES THE CHICAGO SCHOOL'S NEW LEARNING CONCERNING VERTICAL RESTRAINTS REST ON A FLAWED ECONOMIC THEORY, BUT IT LACKS EMPIRICAL SUPPORT. THEIR ARGUMENT RESTS HEAVILY ON THE ILLUSIVE CONCEPT OF FREE RIDING. YET THERE IS SCANT EVIDENCE THAT A SERIOUS FREE RIDER PROBLEM EXISTS WHERE RPM AND OTHER VERTICAL RESTRAINTS ARE PRACTICED. ALTHOUGH FREE RIDING MAY OCCUR IN SOME CASES, MOST CLAIMS OF FREE RIDING ARE EXAGGERTED OR FALSE. AS SOMEONE HAS SAID, FREE RIDING IS LIKE THE LOCH NESS MONSTER, MUCH TALKED ABOUT BUT NEVER SEEN.

ALTHOUGH TIME PREVENTS ELABORATION HERE, A RICH BODY OF EMPIRICAL EVIDENCE DEMONSTRATES THAT CONSUMERS ARE INJURED BY RPM AND OTHER VERTICAL RESTRAINTS. STUDENTS OF DISTRIBUTION HAVE LONG BEEN IMPRESSED WITH THE BROAD SPECTRUM OF PRODUCT-SERVICE MIXES PROVIDED BY DIFFERENT DISTRIBUTORS IN THE ABSENCE OF VERTICAL RESTRAINTS. FOOD RETAILING PROVIDES AN OBVIOUS EXAMPLE: STORE FORMATS RANGE FROM HIGH MARGINS, HIGH SERVICE CONVENIENCE STORES TO LOW-MARGIN, LOW SERVICE WAREHOUSE STORES. SIMILAR DIVERSITY EMERGES WHENEVER RETAILERS ARE FREE TO ADOPT THEIR FORMATS TO UNIQUE MARKET SEGMENTS REFLECTING THE PRICE-SERVICE PREFERENCES OF DIFFERENT CONSUMERS. I FIND IT IRONIC IN THE EXTREME THAT CHICAGO SCHOOL ECONOMISTS, WHO YIELD TO NO ONE IN THEIR FAITH THAT MARKETS PROVIDE THE BEST TEST OF WHAT CONSUMERS WANT, BELIEVE THAT VERTICAL PRICE FIXING IS OK BECAUSE A MANUFACTURER KNOWS BETTER THAN ITS DISTRIBUTORS WHAT CONSUMERS WANT. IT IS QUESTIONABLE WHETHER THE GREAT DIVERSITY THAT IS THE HALLMARK OF THE AMERICAN

DISTRIBUTION SYSTEM WOULD HAVE EMERGED HAD RESTRICTED DISTRIBUTION BEEN PER SE LEGAL, AS ADVOCATED BY POSNER AND OTHER CHICAGO SCHOOL ECONOMISTS.

IN SUM, NOT ONLY WAS FTC CHAIRMAN MILLER PREMATURE IN CLAIMING THAT "THE NEW LEARNING," HAD CARRIED THE DAY, HE WAS FLAT-OUT WRONG. BOTH THE THEORY AND EMPIRICAL WORK OF CHICAGO SCHOOL ECONOMISTS IS SERIOUSLY FLAWED. IT HAS NOT DISPLACED THE MAINSTREAM OF INDUSTRIAL ORGANIZATION, OR WHAT DEMSETZ LABELED THE "SELF-SUFFICIENCY THEORY." THIS "MAINSTREAM" OF INDUSTRIAL ORGANIZATION ORIGINATED IN THE IDEAS OF CHAMBERLIN, MASON AND BAIN, AND WAS WIDENED AND DEEPENED BY THE WORK OF SUCH CURRENT LEADERS IN THIS TRADITION AS LEONARD WEISS, F. M. SCHERER, WILLIAM SHEPHERD, ALFRED KAHN, DOUGLAS GREER AND WILLIAM COMANOR, TO NAME A FEW. THE NEW LEARNING GAINED MANY TRUE BELIEVERS, SOME ECONOMISTS AND MANY LAYPERSONS. ITS MAIN EFFECT HAS BEEN TO MUDDY THE WATERS OF KNOWLEDGE. BUT AS THE WATERS CLEAR WE SEE THAT THE MAINSTREAM HAS NOT BEEN ALTERED SIGNIFICANTLY. THE CHICAGO SCHOOL HAS MERELY DREDGED A CHANNEL OF ITS OWN, LEADING NOWHERE AND FILLING RAPIDLY WITH STAGNANT PROMISES.

REVISING ANTITRUST THROUGH COURT APPOINTMENTS

AMERICAN PRESIDENTS APPOINT, WITH CONFIRMATION BY THE SENATE, ALL MEMBERS TO THE FEDERAL JUDICIARY. PRESIDENT REAGAN'S APPOINTMENTS HAVE GENERALLY REFLECTED HIS CONSERVATIVE VIEWS. AS WITH HIS ANTITRUST AGENCY APPOINTMENTS, THE PRESIDENT HAS APPOINTED SEVERAL CHICAGO SCHOOL JUDGES TO THE APPELLATE COURTS.

THE MOST CONTROVERSIAL SUCH APPOINTEE IS RICHARD A. POSNER, A FORMER UNIVERSITY OF CHICAGO LAW SCHOOL PROFESSOR APPOINTED TO THE 7TH CIRCUIT COURT OF APPEALS. JUDGE POSNER APPLIES ECONOMIC ANALYSIS IN ALL AREAS OF LAW: ANTITRUST, TORTS, CONTRACTS, FAMILY LAW AND CONSTITUTIONAL LAW. FOR EXAMPLE, IN HIS VIEW, A FREE MARKET IN PRIVATE SUITS WILL SOLVE THE UNLAWFUL SEARCH AND SEIZURE PROBLEM (WARREN 1983:76). IMPROPER POLICY CONDUCT WILL BE DETERRED IF ENOUGH PRIVATE SUITS RESULT IN LARGE JURY AWARDS. THIS FAITH IN "FREE MARKET" SOLUTIONS TO PROBLEMS IGNORES THE REALITY THAT VICTIMS OF IMPROPER POLICE CONDUCT OFTEN DO NOT HAVE ADEQUATE LEGAL COUNSEL, JURY AWARDS GENERALLY ARE SMALL, AND THAT SOME CITY GOVERNMENTS WOULD PAY MUCH TO PROTECT A MODERN-DAY BULL CONNOR.

JUDGE POSNER'S REMOTENESS FROM REALITY WAS FURTHER ILLUSTRATED IN AN ANTITRUST DECISION IN WHICH HE REASONED THAT A PLAINTIFF SHOULD NOT BE

GRANTED DISCOVERY UNTIL AN ANTITRUST VIOLATION HAD BEEN PROVED. HE DID NOT EXPLAIN JUST HOW A PLAINTIFF WAS TO PROVE HIS CASE WITHOUT PRIOR DISCOVERY. IN DISSENTING FROM THIS DECISION, MR. JUSTICE POTTER STEWART, A RECENTLY RETIRED CONSERVATIVE MEMBER OF THE SUPREME COURT, CRITICIZED POSNER FOR FORGING "NEW-GROUND, DESPITE THE ABSENCE OF A FACTUAL RECORD...AND DESPITE THE EXISTENCE OF CONTRARY PRECEDENT.22/

NO AREA OF LAW IS BEYOND THE REACH OF POSNERIAN ECONOMICS. IN ONE DECISION HE MADE A COST-BENEFIT ANALYSIS OF A HIGH SCHOOL RULE PROHIBITING A STUDENT FROM PLAYING BASKETBALL WEARING A YARMULKE, A CAP WORN BY SOME JEWS, PINNED ON WITH A BOBBY PIN (WERMIEL 1984). POSNER CONCLUDED THE SAFETY COSTS OUTWEIGHED THE VALUE OF THE RELIGIOUS BELIEFS OF THE STUDENT.

PROFESSOR PONSOLDT (1983) OF THE UNIVERSITY OF GEORGIA LAW SCHOOL HAS ACCUSED POSNER OF "NOT REMEMBERING THAT HE IS NO LONGER SPEAKING AS A LAW PROFESSOR FROM THE UNIVERSITY OF CHICAGO." DESPITE SUCH CRITICISMS, POSNER IS AMONG THE LEADING CONTENDERS FOR THE NEXT VACANCY ON THE SUPREME COURT.

IRONICALLY, PRESIDENT REAGAN PLEDGED TO APPOINT JUDGES WHO PRACTICED "JUDICIAL RESTRAINT." YET THE CHICAGO SCHOOL ANTITRUST APPOINTEES ARE ACTUALLY RADICAL ACTIVISTS, PREPARED TO UPSET ANY PRECEDENT THAT DIVERGES FROM THEIR VIEW OF THE ECONOMIC WORLD. JUDGE POSNER, WHOSE ACTIVISM EXTENDS TO ALL AREAS OF LAW, HAS REDEFINED JUDICIAL RESTRAINT TO MEAN JUDICIAL ACTIVISM. WHILE ACKNOWLEDGING IT WOULD BE "PRETTY WILD" TO OVERRULE MARBURY V. MADISON, THE LEADING PRECEDENT IN AMERICAN LAW, IN HIS VIEW THIS WOULD REPRESENT JUDICIAL RESTRAINT BECAUSE "IT WOULD REDUCE THE POWER OF THE FEDERAL COURTS VIS-A-VIS THE OTHER ORGANS OF GOVERNMENT." (POSNER 1985:210) SUCH DOUBLESPEAK IS TOO MUCH FOR POSNER'S FORMER COLLEAGUE, PROFESSOR PHILIP KURLAND OF THE UNIVERSITY OF CHICAGO LAW SCHOOL, "A PILLAR OF OLD-FASHIONED RESTRAINT." AS HE SEES IT, "JUDGES ARE BEING APPOINTED IN THE EXPECTATION THAT THEY WILL REWRITE LAWS AND THE CONSTITUTION TO THE ADMINISTRATION'S LIKING. REAGAN'S JUDGES ARE ACTIVISTS IN SUPPORT OF CONSERVATIVE DOGMA" (CAPLAN 1986:G2).

BY THE END OF HIS TERM, PRESIDENT REAGAN WILL HAVE APPOINTED OVER ONE-HALF OF THE SITTING FEDERAL JUDGES. TO DATE THE PRESIDENT HAS APPOINTED ONLY ONE MEMBER TO THE SUPREME COURT. BUT WITH 5 OF ITS 9 MEMBERS NOW OVER AGE 70, THE COMPOSITION OF THE COURT COULD WELL CHANGE DRAMATICALLY BY NOVEMBER 1988. SOME HAVE SUGGESTED THAT IN CONFIRMING FEDERAL JUDGES THE SENATE SHOULD SCRUTINIZE MORE CLOSE THOSE HAVING "EXTRALEGAL" VIEWS OF THE

JUDICIAL PROCESS. SPEAKING SPECIFICALLY OF JUDGE POSNER, PROFESSOR PONSOLDT (1983) HAS SAID:

> JUDGE POSNER'S WRITING AND CONSULTING HAD LONG BEEN KNOWN FOR ITS REVISIONIST, ANTI-POPULIST CRITIQUE OF THE EXISTING BODY OF ANTITRUST LEGISLATION AND SUPREME COURT CASE LAW. . .
>
> PERHAPS, THEREFORE, IT SHOULD COME AS NO SURPRISE THAT JUDGE POSNER'S OPINION IN MARRESE RELIED ON HIS OWN VIEWS AND IGNORED AT LEAST SIX RELEVANT SUPREME COURT DECISIONS, CONSTITUTING THE 50-YEAR DEVELOPMENT OF THE LAW TO THE PRESENT DAY. . ..
>
> THE POSNER OPINION IN MARRESE REPRESENTS THE IMPERIAL JUDICIARY IN ITS EXTREME. THE POSSIBILITY OF SIMILAR NULLIFICATION, BASED UPON IDEOLOGY, SHOULD BE ADDRESSED SPECIFICALLY BY THE SENATE IN ITS CONFIRMATION HEARINGS, AT LEAST WHERE THE NOMINEE IS SO PUBLICLY ASSOCIATED WITH AN EXTRALEGAL VIEW OF PUBIC POLICY.

ULTIMATELY, IF THE U.S. SENATE FAILS TO STEM THE TIDE OF ACTIVIST APPOINTEES TO THE FEDERAL COURTS, JUDGES OF THE CHICAGO SCHOOL PERSUASION WILL TURN ANTITRUST LAW UPSIDE DOWN.

REVISING ANTITRUST BY LEGISLATIVE ACTION

THE CHANGES IN ANTITRUST POLICY DISCUSSED ABOVE WERE ACCOMPLISHED WITHOUT ANY LEGISLATIVE CHANGES IN THE ANTITRUST LAWS. INDEED, TO DATE THE CONGRESS HAS SHOWN CONSIDERABLE HOSTILITY TO THE AGENCIES' FAILURE TO ENFORCE EXISTING LAWS AND THEIR PRACTICE OF INTERVENING IN BEHALF OF DEFENDANTS IN PRIVATE CASES.

ON FEBRUARY 19, 1986, THE DEPARTMENT OF JUSTICE SENT TO THE CONGRESS FIVE LEGISLATIVE PROPOSALS FOR "IMPROVEMENTS IN AMERICAN ANTITRUST LAWS." THE PROPOSALS HAD BEEN FASHIONED BY COMMERCE SECRETARY MALCOLM BALDRIGE AND ATTORNEY GENERAL EDWIN MEESE III.

THE PROPOSALS DEAL WITH MERGERS, INDUSTRIES AFFECTED BY IMPORT COMPETITION, ANTITRUST REMEDIES, INTERLOCKING DIRECTORATES, AND THE EXTRATERRITORIALITY OF THE ANTITRUST LAWS. TIME PERMITS BRIEF DISCUSSION OF ONLY THE FIRST TWO OF THESE. SUFFICE IT TO SAY OF THE THIRD, ANTITRUST REMEDIES, THAT IT ALSO COULD HAVE DISASTROUS EFFECTS ON ONE OF THE BULWARKS OF EFFECTIVE ANTITRUST ENFORCEMENT, PRIVATE PLAINTIFFS ACTING AS PRIVATE ATTORNEYS GENERAL. HAVING EFFECTIVELY SQUELCHED FEDERAL ANTITRUST ENFORCEMENT THROUGH ADMINISTRATIVE ACTIONS, THE PROPOSED ACT WOULD SPIKE THE

GUNS OF PRIVATE ENFORCEMENT, LONG THE MAJOR SOURCE OF ENFORCEMENT IN CERTAIN AREAS.

ATTORNEY GENERAL EDWIN MEESE (1986) MADE PLAIN THAT THE PROPOSED NEW LAWS REST ON THE NEW LEARNING OF CHICAGO SCHOOL ECONOMISTS. AS HE PUT IT,

> DURING THE PAST 20 YEARS ADVANCES IN ECONOMIC THEORY HAVE SHOWN THAT THE ANTITRUST LAWS SHOULD PROTECT CONSUMER WELFARE AND PROMOTE ECONOMIC EFFICIENCY. UNFORTUNATELY, CURRENT ANTITRUST LAWS HAVE INSTEAD BEEN APPLIED AT TIMES IN A WAY THAT INHIBITS BUSINESS ACTIVITIES THAT WOULD BENEFIT CONSUMERS.

WITH THIS AS A FOUNDATION, THE NATURE AND PURPOSES OF THE PROPOSED "REFORMS" WILL COME AS NO SURPRISE TO THOSE FAMILIAR WITH "THE NEW LEARNING," WHICH TEACHES THAT ECONOMIC CONCENTRATION PROMOTES EFFICIENCY, NOT MARKET POWER.

MERGERS

THE PROPOSED MERGER MODERNIZATION ACT OF 1986 WOULD MAKE FUNDAMENTAL CHANGES IN THE LANGUAGE OF SECTION 7 OF THE CLAYTON ACT. WHEREAS THE EXISTING LAW PROHIBITS MERGERS WHOSE EFFECTS "MAY" SUBSTANTIALLY LESSEN COMPETITION, THE PROPOSED ACT WOULD REQUIRE PROOF THAT THE MERGER "WILL SUBSTANTIALLY INCREASE THE ABILITY TO EXERCISE MARKET POWER." THE PROPOSED ACT ALSO INCORPORATES THE JUSTICE DEPARTMENT'S MERGER GUIDELINES PROVISIONS THAT RAISES THE THRESHOLD FOR ILLEGAL MERGERS. THESE CHANGES WOULD GO FAR TOWARD PERMITTING ALL MERGERS EXCEPT THOSE THAT RESULT IN SUBSTANTIAL MARKET POWER. THIS WOULD EFFECTIVELY REPEAL THE CELLER-KEFAUVER ACT OF 1950, WHICH WAS DESIGNED TO STRIKE AT ACCUMULATIONS OF POWER BY MERGER WELL BEFORE THEY REACHED MONOPOLY PROPORTIONS. THE LEGISLATIVE HISTORY OF THE ACT MADE IT UNMISTAKABLY CLEAR THAT IT WAS DIRECTED AT INCIPIENT MONOPOLY AND THAT SHERMAN ACT (I.E. MONOPOLY) STANDARDS WERE NOT TO BE USED. THE MERGER ACT OF 1986 WOULD REPEAL THIS RULE.

THE DEPARTMENT OF JUSTICE "ANALYSIS" (MEESE 1986) OF THE PROPOSED ACT DECLARES THAT IT IS "NECESSARY TO FINE-TUNE THE ANTITRUST LAWS" BECAUSE "THE BODY OF ECONOMIC LEARNING UPON WHICH ANTITRUST ENFORCEMENT POLICY AND JUDICIAL DOCTRINE REGARDING MERGERS IS BASED HAS CHANGED SUBSTANTIALLY." FROM WHENCE CAME THIS NEW ECONOMIC LEARNING?

SIMPLY PUT, THE NEW BODY OF LEARNING UNDERLYING THE NEW MERGER PROPOSAL IS THE CHICAGO SCHOOL "BELIEF" THAT PRIVATE MARKET POWER IS SELDOM A PROBLEM

UNLESS IT IS ABETTED BY GOVERNMENT. THIS IS WHY THE MERGER GUIDELINES ARE LITTLE CONCERNED UNLESS A MERGER RESULTS IN HIGHLY CONCENTRATED MARKETS. SINCE THE MARKET POWER CONCEPTS IN THE PROPOSED MERGER LAW REST SQUARELY ON THE CHICAGO SCHOOL'S NEW LEARNING, THE CASE FOR THE LAW IS NO STRONGER THAN THE EMPIRICAL FOUNDATIONS OF THIS LEARNING. AS DISCUSSED ABOVE, THE BEST AVAILABLE EMPIRICAL EVIDENCE REGARDING THE RELATIONSHIP BETWEEN CONCENTRATION AND PERFORMANCE DEMONSTRATES THAT THE CHICAGO SCHOOL "BELIEFS" HAVE NO BASIS IN EMPIRICAL EVIDENCE. AND INSOFAR AS THE PROPOSAL RESTS ON THE BELIEF THAT MERGERS ARE NECESSARY TO INCREASE EFFICIENCY, HERE TOO A GROWING BODY OF EVIDENCE DEMONSTRATES THAT MORE OFTEN THAN NOT MERGERS PROMOTE INEFFICIENCY, NOT EFFICIENCY (D.C. MUELLER, 1985; RAVENSCRAFT AND SCHERER 1986).

INDUSTRIES AFFECTED BY IMPORTS

THE PROPOSED PROMOTING COMPETITION IN DISTRESSED INDUSTRIES ACT OF 1986 IS DESIGNED "TO PROVIDE A NEW FORM OF RELIEF FOR DOMESTIC INDUSTRIES INJURED BY INCREASED IMPORTS." THE NEW "RELIEF" CONTEMPLATED BY THE PROPOSAL IS TO GIVE THE PRESIDENT AUTHORITY TO GRANT AN ANTITRUST EXEMPTION TO MERGERS AND ACQUISITIONS AMONG MEMBERS OF THE INJURED INDUSTRY. THE DEPARTMENT OF JUSTICE "ANALYSIS" (MEESE 1986) GIVES THE FOLLOWING RATIONALE FOR THE PROPOSAL:

> ...ECONOMISTS NOW RECOGNIZE THAT MERGERS AND ACQUISITIONS CAN CREATE ECONOMIES OF SCALE AND EFFICIENCIES. BUSINESS MAY, IN TURN, TRANSLATE RESULTING COST SAVINGS INTO LOWER PRICES OR BETTER QUALITY PRODUCTS OR SERVICES IN ORDER TO REPAIR MARKET SHARE OR PROFITABILITY LOST TO IMPORTS.

THIS PROPOSAL ASSUMES FOREIGN FIRMS OUTCOMPETE AMERICAN FIRMS BECAUSE THE LATTER ARE NOT LARGE ENOUGH TO ENJOY ECONOMIES OF SCALE ENJOYED BY FOREIGN BUSINESSES. THIS IS LARGELY NONSENSE. AMERICAN FIRMS CLAIMING THEY ARE UNABLE TO COMPETE OFTEN FAR SURPASS IN SIZE THEIR FOREIGN RIVALS AND ARE LARGE ENOUGH TO ENJOY ALL ECONOMIES OF SCALE. CONSIDER TWO OF THE INDUSTRIES HARDEST HIT BY IMPORTS, AUTOMOBILES AND STEEL.

AMERICAN AUTOMOBILE COMPANIES DWARF THEIR FOREIGN COMPETITORS. FOR EXAMPLE, THE COMBINED SALES OF GENERAL MOTORS AND FORD ARE AS GREAT AS THE COMBINED SALES OF TWELVE FOREIGN AUTOMOBILE COMPANIES (THE THREE LARGEST IN JAPAN, GERMANY, FRANCE AND BRITAIN, RESPECTIVELY). GENERAL MOTORS, ALONE,

HAS SALES ABOUT AS GREAT AS NINE JAPANESE AUTO MAKERS, AND EVEN CHRYSLER IS LARGER THAN ALL BUT TWO OF THE JAPANESE COMPANIES. MOST JAPANESE AUTOMOBILE *COMPANIES ARE MIDGETS COMPARED TO THEIR AMERICAN COMPETITORS. EVEN JAPAN'S* FOURTH LARGEST AUTOMOBILE COMPANY, HONDA MOTOR, IS LITTLE MORE THAN 10 PERCENT AS LARGE AS GENERAL MOTORS AND IS SMALLER THAN CHRYSLER.

SIMILARLY, LEADING AMERICAN STEEL COMPANIES GENERALLY DWARF THEIR FOREIGN COMPETITORS. AND A RECENT STUDY BY THE STAFF OF THE FEDERAL TRADE COMMISSION (FRANKENA AND PAULTER 1985) FOUND THAT ALL EIGHT OF THE LARGEST AMERICAN INTEGRATED STEEL COMPANIES ARE LARGE ENOUGH TO ENJOY FULL ECONOMIES OF SCALE.

TRUE, AMERICAN COMPANIES HAVE FAILED TO MEET THE COMPETITIVE CHALLENGE IN MANY INDUSTRIES. BUT THIS HAS BEEN DUE TO A VARIETY OF COMPLEX FACTORS UNRELATED TO THEIR SIZE, INCLUDING THE OVERVALUED DOLLAR AND LOWER FOREIGN LABOR COSTS. THESE ARE NOT MATTERS THAT CAN BE CHANGED BY CONCENTRATING AMERICAN BUSINESS INTO THE HANDS OF A FEW HUGE FIRMS. GREATER SIZE DOES NOT NECESSARILY INCREASE EFFICIENCY. AS ROBERT TOWNSEND (1970:17B) HAS SAID, THOSE WHO CONFUSE BIGNESS WITH EFFICIENCY ARE "LIKE THE POOR LADY WHO THOUGHT ALL SHE HAD TO DO TO BECOME AN OPERA SINGER WAS TO DRINK LOTS OF HEAVY CREAM." PARTICULAR BIG BUSINESS ORGANIZATIONS ARE EFFICIENT; BUT OFTEN THEIR CURRENT SIZE LARGELY REFLECTS THEIR INNOVATIVENESS WHEN THEY WERE SMALLER. LARGE SIZE, AS LEIBENSTEIN OBSERVES, OFTEN LEADS TO LAXITY AND MANAGERIAL PROBLEMS. SUCH INEFFICIENCIES ESCAPE PUBLIC ATTENTION WHEN FIRMS POSSESS MARKET POWER THAT CONFERS HIGH PROFITS DESPITE INFLATED COST STRUCTURES.

SECRETARY OF COMMERCE MALCOLM BALDRIGE, THE CHIEF ADMINISTRATION CHAMPION OF THIS PROPOSAL, SHOULD LEARN A LESSON FROM THE EXPERIENCE OF JAPANESE GOVERNMENT OFFICIALS WHO AT ONE TIME HELD VIEWS IDENTICAL TO HIS. THE JAPANESE MINISTRY OF INTERNATIONAL TRADE AND COMMERCE (MITI) IN THE 1960S ATTEMPTED TO CONSOLIDATE JAPAN'S NINE AUTOMOBILE COMPANIES INTO TWO LARGE COMPANIES TO BETTER COMPETE WITH THE U.S. FIRMS. THE JAPANESE AUTOMAKERS REFUSED TO GIVE UP THEIR INDEPENDENCE AND HAVE THRIVED SINCE THEN, DESPITE REMAINING SMALL BY AMERICAN STANDARDS.

THE FUTURE OF ANTITRUST

HOW, THEN, CAN WE EXPLAIN THE GREAT IMPACT OF CHICAGO SCHOOL ECONOMICS ON ANTITRUST POLICY? TO HEAR FORMER FTC CHAIRMAN MILLER TELL IT, THE

SUCCESS REFLECTS THE TRIUMPH OF SUPERIOR THEORY AND EMPIRICAL WORK OF CHICAGO SCHOOL SCHOLARS. THIS, OF COURSE, IS NONSENSE. ON CLOSE EXAMINATION, "THE NEW LEARNING" IS WRITTEN ON TABLETS OF SANDS. WE MUST LOOK ELSEWHERE FOR REASONS OF THEIR RECENT ASCENDANCY. AS OBSERVED BY ONE OF CHICAGO'S OWN, PROFESSOR MELVIN W. REDER (1982; 36), IN SPEAKING OF THE SCHOOL'S TWO CURRENT INTELLECTUAL LEADERS, "THE FRIEDMAN-STIGLER POLICY POSITION WAS TOO ATTRACTIVE IDEOLOGICALLY, AND TOO SUCCESSFUL AS PROPAGANDA, FOR HESITANT CONSERVATIVES TO REFUSE SUPPORT."[23/] THEIR IDEAS HAVE TRIUMPHED, FOR NOW, BECAUSE THEY MAP A COURSE MANY VESTED INTERESTS WISH TO TRAVEL. WILL CHICAGO SCHOOL "BELIEFS" SURVIVE EVEN THOUGH EFFECTIVELY CHALLENGED IN THE MARKET PLACE OF IDEAS? THE ANSWER WOULD BE LESS AMBIGUOUS WERE ECONOMICS A "HARD" SCIENCE. BUT THE APPEALING SIMPLICITY OF CHICAGO SCHOOL BELIEFS, ABETTED BY THEIR IDEOLOGICAL ATTRACTIVENESS AND FERVOR, GIVES THEM A UNIQUE ABILITY TO SURVIVE. THIS ALONE MAKES THEIR FUTURE IMPACT ON ANTITRUST POLICY A DISTURBING SPECTER.

APPENDIX A

DATA USED IN DEMSETZ'S ANALYSIS

THE DEMSETZ ANALYSIS DISCUSSED IN THE TEXT AT NOTES 13-17 USED DATA REPORTED IN THE IRS SOURCE BOOK FOR CORPORATE INCOME TAX RETURNS. IN THIS REPORT, IRS TYPICALLY PLACES FIRMS IN 3-DIGIT MINOR INDUSTRY GROUPINGS THAT EMBRACE MORE THAN A SINGLE RELEVANT ECONOMIC MARKET. THIS RESULTS IN PLACING FIRMS OPERATING IN DIFFERENT INDUSTRIES (PROPERLY DEFINED) IN THE SAME GROUP. FOR EXAMPLE, IN 1979, IRS MINOR INDUSTRY GROUP 371, MOTOR VEHICLES AND EQUIPMENT, HAD 1,678 FIRMS. THIS INCLUDED AUTOMOBILE COMPANIES, OTHER MOTOR VEHICLE COMPANIES AND MAKERS OF ALL TYPES OF MOTOR VEHICLE EQUIPMENT. DEMSETZ COMPUTED A WEIGHTED AVERAGE CONCENTRATION RATIO FOR IRS MINOR INDUSTRY GROUP 371, USING CENSUS OF MANUFACTURERS CONCENTRATION RATIOS AND VALUE OF SHIPMENTS OF CENSUS INDUSTRY GROUP SIC 371. THE RESULTING CONCENTRATION RATIO LARGELY REFLECTS CONCENTRATION OF THE AUTOMOBILE INDUSTRY. DEMSETZ ASSUMED THAT THIS CONCENTRATION RATIO PROVIDED AN ACCURATE MEASURE OF CONCENTRATION IN EACH SIZE CATEGORY IN IRS MINOR GROUP 371. BELOW ARE THE NUMBER OF FIRMS AND THEIR ASSETS IN GROUP IRS 371 DISTRIBUTED IN THE SIZE CLASSES USED BY DEMSETZ:

ASSET SIZE (000)	NO. OF FIRMS	ASSETS (MILLIONS)
$0-500	1,089	$ 188
500-5,000	479	660
5,000-50,000	83	1,069
50,000-100,000	8	520
100,000 AND UP	18	39,829
	1,677	42,266

IT REQUIRES LITTLE KNOWLEDGE OF THE MOTOR VEHICLE AND PARTS INDUSTRIES TO APPRECIATE THE PROBLEMS INHERENT IN THESE DATA. AS A STARTER, AN OBSERVER MAY PROPERLY WONDER, WHO ARE THE 18 FIRMS IN THE $100 MILLION AND OVER CLASS? THEY OBVIOUSLY INCLUDE MUCH MORE THAN THE FOUR AUTOMOBILE COMPANIES. BUT MORE IMPORTANTLY, WHAT ABOUT FIRMS IN THE OTHER SIZE CLASSES. IT IS ABSURD TO ASSUME THAT THE 1,089 FIRMS IN THE SMALLEST CLASS, AS WELL AS IN THE OTHER SMALLER CLASSES, SELL THE SAME PRODUCTS AS THOSE IN THE LARGEST SIZE CLASS.

THIS PROBLEM IS NOT UNIQUE TO THE MOTOR VEHICLE INDUSTRY GROUP. TO VARYING DEGREES IT AFFLICTS EVERY GROUP USED BY DEMSETZ. FOR EXAMPLE, THE SOFT DRINK BOTTLING INDUSTRY GROUP HAS 1,796 FIRMS. ONLY TWO OF THESE ARE IN THE $100 MILLION AND OVER GROUP. THESE TWO PRESUMABLY ARE COCA COLA AND PEPSI COLA, WHICH MAKE AND SELL MAINLY SOFT DRINK SYRUPS AND OTHER PRODUCTS THAT CLEARLY ARE IN DIFFERENT RELEVANT PRODUCT AND GEOGRAPHIC MARKETS THAN ARE THE HUNDREDS OF SMALLER COMPANIES, WHICH CONSIST PRIMARILY OF SOFT DRINK BOTTLERS.

ADDITIONALLY, THERE ALSO IS A PROBLEM IN THE WEIGHTED AVERAGE CONCENTRATION RATIO THAT DEMSETZ DERIVED USING CENSUS BUREAU INDUSTRY SHIPMENTS DATA. A PROBLEM ARISES BECAUSE DEMSETZ'S PROCEDURES ASSUME THAT FIRMS IN A PARTICULAR IRS 3-DIGIT MINOR INDUSTRY GROUP SELL THE SAME MIX OF PRODUCTS AS THOSE THAT COMPRISE A CENSUS BUREAU 3-DIGIT SIC INDUSTRY GROUP. IN FACT, THERE OFTEN IS LITTLE CORRESPONDENCE BETWEEN THE TWO. IRS PLACES A FIRM IN AN IRS INDUSTRY GROUP BASED ON THE FIRM'S MOST IMPORTANT PRODUCT. ALL LARGE DIVERSIFIED CORPORATIONS OPERATE IN MORE THAN ONE 3-DIGIT INDUSTRY GROUP BECAUSE THE MAJOR PRODUCT OF A COMPANY LIKE ITT MAY BE BAKING, ALTHOUGH ITS CONTINENTAL BAKING OPERATIONS CONSTITUTED LESS THAN 10% OF ITS INCOME. IN THAT EVENT ALL OF ITT'S SALES AND PROFITS WOULD BE INCLUDED IN THE IRS INDUSTRY GROUP INCLUDING BAKING. AS A RESULT, THERE NEED BE LITTLE CORRESPONDENCE BETWEEN THE CONCENTRATION RATIO DERIVED FOR A 3-DIGIT CENSUS INDUSTRY GROUP AND THE AVERAGE CONCENTRATION RATIOS OF THE FIRMS OPERATING IN AN IRS INDUSTRY GROUP.

FOOTNOTES

1/ BAXTER RESIGNED AS HEAD OF THE ANTITRUST DIVISION IN DECEMBER 1983; HIS TWO SUCCESSORS HAVE CONTINUED HIS POLICIES. MILLER REMAINED HEAD OF THE FTC UNTIL SEPTEMBER 1985, WHEN HE BECAME HEAD OF THE OFFICE OF MANAGEMENT AND BUDGET. THERE HAVE BEEN NO DISCERNABLE CHANGES IN ENFORCEMENT PHILOSOPHY UNDER THEIR SUCCESSORS.

2/ "GOVERNMENT MAY ABANDON FIGHT TO STEM CONGLOMERATE TAKEOVERS," WALL STREET JOURNAL, NOVEMBER 14, 1980, P. 23.

3/ THE MERGER GUIDELINES DECLARE THAT, "THE DEPARTMENT IS LIKELY TO CHALLENGE ANY MERGER IN [MARKETS WITH HERFINDAHL INDEXES OVER 1,800] THAT PRODUCE AN INCREASE... OF MORE THAN 50 POINTS..." THE SOFT DRINK INDUSTRY HAD A PRE-MERGER HERFUNDAHL INDEX EXCEEDING 2,500. PEPSI COLA'S ACQUISITION OF SEVEN UP WOULD INCREASE THE HERFINDAHL INDEX BY ABOUT 300 POINTS AND COCA COLA'S ACQUISITION OF DR. PEPPER WOULD INCREASE THE HERFINDAHL INDEX BY ABOUT 550 POINTS.

4/ SHAFER V. BULK PETROLEUM CORP., 45 ANTITRUST & TRADE REG. REP. (BNA) 313-314 (AUG. 29, 1983).

5/ MONSANTO CO. V. SPRAY-RITE SERVICE CORP., 104 U.S. 1464 (1984).

6/ BORDEN, INC. V. FEDERAL TRADE COMMISSION, 674 F. 2D, 498 (1982).

7/ BORDEN, INC., 92 F.T.C. 669 (1978).

8/ "FTC'S PROPOSED SETTLEMENT OF BORDEN CASE," 44 ANTITRUST & TRADE REGULATION REPORT, MARCH 3, 1983 AT 525.

9/ ID. AT 528.

10/ ITT CONTINENTAL BAKING CO., FTC DOCKET NO. 9009, BNA, ANTITRUST & TRADE REGULATION REPORT, VOL. 47, NO. 1177, AUGUST 9, 1984, AT 283.

11/ ITT CONTINENTIAL BAKING CO., NOTE 10 SUPRA AT 311.

12/ BUSINESS WEEK, AUGUST 29, 1983, P. 50.

13/ ID.

14/ THE PROCEEDINGS OF THE CONFERENCE, WHICH WAS HELD MAY 1 AND 2, 1974, WERE PUBLISHED IN GOLDSCHMID, ET AL., 1974. ACCORDING TO ONE OF THE CONFERENCES ORGANIZERS, PROFESSOR HARVEY J. GOLDSCHMIDT, COLUMBIA UNIVERSITY LAW SCHOOL, THE CONFERENCE WAS ATTENDED BY "MOST OF THE NATION'S LEADING THINKERS ON INDUSTRIAL CONCENTRATION." ID. AT VIII.

15/ CHICAGO SCHOOL ECONOMISTS SEEM ESPECIALLY FOND OF USING THESE CRUDE IRS DATA. TELSER (1964), IN A MUCH QUOTED STUDY, USED IRS DATA IN AN EARLIER STUDY IN WHICH HE EXAMINED THE RELATIONSHIP BETWEEN ADVERTISING AND CONCENTRATION AND REPORTED AN "UNIMPRESSI VE" CORRELATION, WHICH CONTRADICTED THE FINDINGS OF VIRTUALLY ALL OTHER RESEARCHERS. MANN (1974) ATTRIBUTED TELZER'S RESULTS TO HIS USE OF IRS DATA POORLY SUITED FOR SUCH ANALYSES. H.M. MANN, "ADVERTISING CONCENTRATION, AND PROFITABILITY: THE STATE OF KNOWLEDGE AND DIRECTIONS FOR PUBLIC POLICY," IN GOLDSCHMID, OP. CIT. AT 143-144.

16/ AS OBSERVED IN APPENDIX A, THE DATA DEMSETZ USED WERE BIASED TOWARD FINDING A ZERO RELATIONSHIP. THE FLAWS IN HIS DATA WERE SOMEWHAT LESS SERIOUS FOR THE LARGEST FIRMS BECAUSE THEIR WEIGHTED CONCENTRATION RATIOS WERE MORE LIKELY TO REFLECT THE ACTUAL CONCENTRATION OF INDUSTRIES IN WHICH THEY OPERATED THAN THOSE IN WHICH THE FIRMS IN SMALLER SIZE CLASSES OPERATED. IT SEEMS MOST PLAUSIBLE THAT DEMSETZ'S OBSERVED NEGATIVE CORRELATIONS IN SMALL CLASS SIZES REFLECTS THAT SMALL FIRMS IN IRS MINOR INDUSTRY GROUPS OPERATE IN MORE COMPETITIVE MARKET SEGMENTS THAN DO THE LARGEST FIRMS IN THESE GROUPS. SEE THE MOTOR VEHICLE EXAMPLE IN APPENDIX A.

17/ DEMSETZ HAD PUBLISHED A PIECE SETTING FORTH HIS IDEAS AND SOME OF HIS DATA IN 1973, BUT HIS PRESENTATION AT THE ARLIE HOUSE CONFERENCE ON THE NEW LEARNING IN 1974 WAS MORE COMPLETE, PRESENTED BEFORE AN INFLUENTIAL AUDIENCE, AND WAS SUBSEQUENTLY PUBLISHED IN A WIDELY READ BOOK. SUPRA NOTE 14.

18/ LEONARD WEISS, WHO COMMENTED ON THE STUDY IN HIS PRESENTATION AT THE CONFERENCE, POINTED OUT SOME OF THE SERIOUS FLAWS IN THE STUDY (WEISS 1974:225-227).

19/ THERE IS LESS VARIATION IN PRICE AMONG SELLERS OF PRODUCER GOODS THAN AMONG SELLERS OF CONSUMER GOODS BECAUSE THE LATTER ARE DIFFERENTIATED.

20/ ALTHOUGH MOST CROSS-INDUSTRY STUDIES USE DATA SUPERIOR TO THOSE EMPLOYED BY DEMSETZ, NONETHELESS ALL HAVE SERIOUS PROBLEMS IN DEFINING MEANINGFUL PRODUCT AND GEOGRAPHIC MARKETS. FOR EXAMPLE, THE GEOGRAPHIC DISPERSION INDEX OFTEN USED TO CORRECT FOR MARKET SIZE IS CRUDE AT BEST. SIMILARLY, EVEN ADJUSTED CENSUS PRODUCT OR INDUSTRY DEFINITIONS LEAVE MUCH TO BE DESIRED (WEISS 1972). FINALLY, ECONOMIC THEORY TEACHES THAT THE PRICE ELASTICITY OF DEMAND IS CRITICAL IN DETERMINING THE SIZE OF MONOPOLY OVERCHARGES. YET CROSS-INDUSTRY STUDIES MUST IMPLICITLY ASSUME ALL INDUSTRIES HAVE THE SAME ELASTICITY OF DEMAND. PRICE STUDIES SUFFER FROM EACH OF THESE DEFECTS TO A FAR SMALLER DEGREE THAN DO CROSS INDUSTRY STUDIES.

21/ THE ONLY EXCEPTION, IN THEIR VIEW, IS WHERE RPM FACILITATES COLLUSION AMONG MANUFACTURERS OR THEIR DISTRIBUTORS. BUT NOT ONLY IS SUCH COLLUSION RARE, THEY BELIEVE, IF IT OCCURS IT SHOULD BE CHALLENGED AS A HORIZONTAL RESTRAINT RATHER THAN AS A VERTICAL RESTRAINT.

22/ MARRISE V. AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS 692 F. 2D 1083, (1982).

23/ IN A FOOTNOTE REDER ADDED, "IN 'SUPPORT' I INCLUDE GRANTS FOR RESEARCH, CONFERENCES, AND SO FORTH. BUT ALSO, AND MORE IMPORTANT, I INCLUDE ACCESS TO CONSERVATIVE POLITICIANS AND BUSINESS LEADERS, AND TO THE MEDIA" (REDER 1982; 36).

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