1977: When Modern US Antitrust Began

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1977: Pivots in History

• The Strong Claim
• The Caveat
Agenda

- The Supreme Court Decisions
- The FTC Speeches
- Personal Views Only
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Background


1977: The Events

• Two Supreme Court Decisions
  – Brunswick v. Pueblo Bowl-O-Mat
  – Continental T.V., Inc. v. GTE Sylvania Inc.

• Two Speeches: FTC Chair Michael Pertschuk
  – New England Antitrust Conference: November
  – Association of American Law Schools: December
January 1, 1977: Legal Doctrine

• Monopolization
  – Broad view of improper exclusion: Alcoa (1945)
  – Keen concern for excluded firms: Utah Pie (1967)

• Vertical Restraints
  – Maximum and Minimum RPM: Illegal per se
  – Exclusive territories, location clauses: Illegal per se

• Horizontal Mergers
  – Illegal if post-acquisition share exceeds 4.49%
January 1, 1977: DOJ Pending Cases

• Section 2 Cases Seeking Structural Relief
  – Telecommunications: AT&T
  – Computers: IBM
  – Automobile Tires: Goodyear and Firestone

• Horizontal Restraints
  – Ethical Codes: Professional engineers
  – Criminal enforcement: Application of 1974 law to treat Section 1 offenses as felonies
January 1, 1977: FTC Pending Cases

- **Collective Dominance**
  - Cereal: General Foods, General Mills, Kellogg
  - Requested relief: divestiture, compulsory royalty-free trademark licensing
  - Petroleum refining: Amoco, Arco, Chevron, Exxon, Gulf, Mobil, Shell, Texaco
  - Requested relief: horizontal/vertical divestiture
January 1, 1977: FTC Pending Cases

• Monopolization
  – Reconstituted Lemon Juice: Borden
  – Instant Coffee: General Foods
  – Bread: ITT
  – Airline Guides: Reuben Donnelley
  – Rental Cars: Hertz
January 1, 1977: FTC Pending Cases

• Vertical Restraints
  – Soft Drink Bottling Exclusive Territories: Coca-Cola, Pepsi, Canada Dry, Seven-Up, Dr. Pepper, Crush
  – Apparel: Levi Strauss
January 1, 1977: FTC Pending Cases

• Horizontal Restraints
  – Advertising restrictions: American Medical Ass’n
  – Parallel adoption of base-point pricing: Boise Cascade, Champion International, Georgia-Pacific, Weyerhaeuser
  – See also: Eyeglasses Rulemaking
January 1, 1977: Pending FTC Test Cases

- Collective Dominance: Cereal, Petroleum
- Conscious, Parallel Adoption of Facilitating Practices: Lumber Products
- Advertising Restrictions in the Professions: Medical Services
- Duty Not to Discriminate: Airline Guides
January 1, 1977: Defendants in Pending FTC Antitrust Cases

- Energy: Amoco, Arco, Chevron, Exxon, Gulf, Mobil, Shell, Texaco
- Food: Borden, Canada Dry, Coca-Cola, Crush, Dr. Pepper, Gen’l Foods, Gen’l Mills, ITT, Pepsi
- Professions: American Medical Association
- Transportation: Hertz, Reubens Donnelley
- Lumber Products: Boise Cascade, Champion, Georgia Pacific, Weyerhaeuser
1977: Remarkable Year for Antitrust in the Supreme Court

• The Decisions
  – *Brunswick*: Antitrust injury
  – *Sylvania*: Non-price vertical restraints
  – *Illinois Brick*: standing for indirect purchasers
  – *Fortner II*: tying

• The Results
  – Defendants win them all
Brunswick (9-0 Decision)

• Issue: Damages in Private Challenge to Merger
• Rule: Plaintiff Must Proof “Antitrust Injury”
• Memorable Phrase (Thurgood Marshall)
  – “It is competition, not competitors, that the antitrust laws protect”
• Influence
  – Phillip Areeda and the modern Harvard School
  – Private rights of action and institutional design
**Sylvania (5-2 Decision)**

- **Issue:** Validity of Customer Location Clauses
- **Rule:** Rule of Reason Governs Nonprice Restrictions
- **Memorable Phrase (Lewis Powell)**
  - “[D]eparture from the rule-of-reason standard must be based upon demonstrable economic effect rather than ... formalistic line-drawing.”
- **Influences**
  - Modern Chicago School: Bork, Posner
  - Modern Harvard School: Turner
The Emergence of the Chicago-Harvard Double Helix

- **Modern Chicago**
  - Centrality of microeconomic effects
  - Sensitivity to efficiency rationales
  - Favorable view of many forms of conduct previously viewed with hostility

- **Modern Harvard**
  - Wariness toward private rights of action
  - Skepticism toward “non-economic” goals
  - Emphasizes institutional capacity: agencies, courts
Examples of the Progeny

• *Trinko*
  – Scalia/Breyer joint venture
  – Administrative law and antitrust

• *Twombly*
  – Souter channels Areeda
  – Concerns about chilling effect of private rights
  – Equilibration via adjustment in pleading standards and evidentiary tests
Implications for Future Development of US Antitrust Doctrine

- Importance of Ideas About Substantive Antitrust Standards
- *But Also* Importance of Judicial Perceptions about Institutional Design and Capacity
  - Goals
  - Private rights
  - Capacity of antitrust authorities, other regulators
Mike Pertschuk

• US Senate
  – Influential Staff Member for Senate Commerce Committee: 1960s and 1970s

• Federal Trade Commission
  – Appointed by Jimmy Carter
  – Chairman: 1977 to 1981
  – Commissioner: 1981 to 1984
New England Antitrust Conference: November 1977

• Call to Action: The Inadequacy Narrative
  – “[T]here is a widespread perception that antitrust has failed to deal significantly with significant problems. In the clear, cold light, there appears to be a failure of philosophy, a failure of resources, and, most importantly, a failure of political courage, of will.”

  – Note: Recall FTC Agenda as of January 1, 1977
The Blindered Antitrust Agencies

“The antitrust enforcement agencies have often been lacking in historical perspective and imagination. Tending to think only like litigators or to restrict themselves to a narrow allocative efficiency approach to economics, they have failed to provide leadership in their most important and fundamental area of responsibility ...”
The Neglected Responsibility

• “[T]aking the broad view and attempting through enforcement initiatives and the power of information to bring the structure and behavior of major industries and, indeed, of the economy itself more into line with the nation’s democratic political and social ideals.”

• “Competition policy has inadequately served the American people because it has forgotten that human beings are its constituency.”
The Main Villain in the Story

• “Antitrust has been preoccupied with, if not entirely overtaken by, the narrow economic objective of allocative efficiency. The impact of the Chicago School has certainly been felt in the law schools, at the [FTC], and in the Courts. And yet competition policy, as I picture it, incorporates far more than the scientific search for efficiency.”
The Solution

• “There is ... a critical need to re-examine the purposes of competition policy and to arrive at a new consensus as to what we are about.”

• “In 1977, no responsive competition policy can neglect the social and environmental harms produced as unwelcome by-products of the marketplace: resource depletion, energy waste, environmental contamination, worker alienation, the psychological and social consequences of market-stimulated demands.”
Elaboration in Chairman Pertschuk’s AALS Speech in December 1977

• Section 5 of the FTC Act: Prohibits “Unfair Methods of Competition”
• Created by Congress to Give FTC an Elastic Device to Reach Behavior Beyond Sherman Act/Clayton Act
• Identified in AALS Talk as Underused and Valuable Means to Carry Out Broader Competition Policy Program
Suggested Applications in AALS Talk and Later Presentations

• Sue Firms that Gain Competitive Advantage by Failing to Comply with Other Laws
  – E.g., labor, taxation, environment

• Deal Directly with Dominant Firms through “No-Fault” Theory of Infringement

• Impose Limit on Corporate Size Achieved by Mergers

• New Monopolization Cases
  – DuPont: Strategic entry deterrence

• New Section 5 Cases
  – Ethyl: Facilitating practices

• Measures Considered
  – No-fault monopoly test case
  – Rule limiting conglomerate mergers
Litigation Resistance

• Commitments/Capabilities Mismatch
• Ferocious Opposition by Defendants
  – “The Death Penalty”
  – Some litigation successes: e.g., AMA
  – Significant failures: DuPont, Boise Cascade, Kellogg, Exxon
Political Backlash

- The National Nanny
- Funding Cut-offs
- Soft Drink Bottlers Bill
- Professions Jurisdiction
- Divestiture Authority
- Insurance
- Cereal Case
Implications for Future Extensions

• Institutional Considerations: Equilibration
• Do Capabilities Match Commitments?
• Political Consequences?
  – Broader mandate
  – Deconcentration