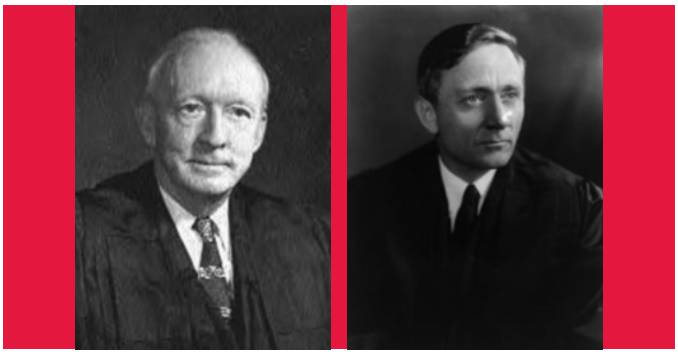

TRUSTBUSTERS

The Warren Court: A Distant Mirror?

Part II—The Two Most Ardent Trustbusters: Hugo Black and William O. Douglas

BY WILLIAM KOLASKY

OVER THE 15 YEARS EARL WARREN PRESIDED over the Supreme Court, he generally let other justices take the lead in shaping the Court's antitrust jurisprudence. The two justices who played the most active role in doing so were the two longest-serving justices on the Court during this period—Hugo Black and William O. Douglas, who were the only other justices to serve on the Court for Warren's entire tenure.

In this second part of our three-part series on the Warren Court, we focus on the backgrounds of Justices Black and Douglas to better understand what shaped their belief in the need for strong antitrust enforcement. We then examine some of their key antitrust opinions. In these opinions, they clearly revealed their view that effective enforcement of the antitrust laws should not require a long complicated microeconomic inquiry into the likely price effects of the conduct at issue, but could best be done by the courts on a more pragmatic basis, focusing on how that conduct was likely to affect the competitive structure of an industry.

The question we must ask as we look back on the Warren Court after 40 years of jurisprudence following the approach advocated by Robert Bork and other adherents to the Chicago School is whether we might be better off as a country today had we continued to follow the Warren Court approach to antitrust, rather than embracing the radically different approach of trying to predict the likely short-term price effects of conduct under the guise of protecting "consumer welfare." But that is a question we will have to save for Part III of this series.

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Hugo Black

When Earl Warren became Chief Justice in 1953, Hugo Black was the Court's senior justice, having been appointed by Franklin Roosevelt in 1937. Born in 1886 and raised in a small town in Clay County, Alabama, as the eighth and youngest child, Black liked to call himself a "Clay County Hillbilly."[1] In fact, however, Black had graduated near the top of his law school class at the University of Alabama and had built a successful practice as a plaintiff's personal injury lawyer in Birmingham before becoming a Senator in 1927.

During his ten years in the Senate, Black gained a reputation, according to some, as "probably the most radical man in the Senate."[2] Appalled by the Depression's effect on Birmingham, Black claimed to have become "a New Dealer before there was a New Deal."[3] Black campaigned vigorously for Roosevelt in 1932 and strongly supported all his New Deal legislation with one important exception: the National Industrial Recovery Act.[4] That Act authorized a newly created agency, the National Recovery Administration (NRA), to promulgate industrial codes of fair competition, usually developed by members of the industry itself. In explaining his opposition to the NRA, Black called it "a price-fixer's dream" that would "simply increase prices," making consumer staples "even more expensive," and "businessmen even richer"[5]—a view that later came to be widely shared and helped lead to the Supreme Court finding the NRA unconstitutional three years later in 1935.[6]

In 1937, after FDR's re-election, Black further endeared himself to Roosevelt by strongly advocating for Roosevelt's short-lived court-packing scheme, which was designed to prevent the Court from continuing to find FDR's New Deal legislation unconstitutional, as it had done with the NRA. It surprised no one, then, when Roosevelt nominated Black for the first vacancy that opened up on the Court after the plan was defeated. As Roosevelt knew, "No one is more confirmable before the Senate of the United States than a sitting Senator."[7]

It did not take long for whispers to start circulating in the Senate cloakroom about Black's past connections with the Ku Klux Klan. As a practicing lawyer in Birmingham, Black had been a member of the Klan for several years and had received its strong support in his 1926 Senate campaign.[8] No Senators, however, spoke about the issue publicly and the Chairman of the Judiciary Committee, himself an ardent New Dealer, decided that it was best to "forgive and forget," accepting Black's assurance

that he was not currently a member of the Klan—which begged the question of whether he ever had been.[9] With nearly unanimous support from his fellow Southerners, Black was quickly confirmed by a vote of 63 to 16, but with 17 Senators abstaining.[10]

Shortly after his confirmation, while Black and his wife were vacationing in Europe, Black's Klan connections surfaced in a series of articles in the *Pittsburgh Post-Gazette*, claiming that he had been "a member of the hooded brotherhood that for 10 long blood-drenched years ruled the Southland with lash and noose and torch, the Invisible Empire Knights of the Ku Klux Klan."[11] The uproar was immediate, forcing the Blacks to cut their vacation short and return immediately to the States. Black scheduled a radio address to the nation to respond to the charges. All three radio networks and more than 300 independent stations carried his speech. His total audience nationwide of 40 million was reportedly the largest ever at that time, exceeded only by Edward VIII's abdication a year earlier.[12]

In his address, Black admitted his early Klan membership, in a cadence that sounds eerily familiar: "I did join the Klan. I later resigned. I never re-joined."[13] While a biographer describes his speech as "dramatic only in its sobriety and its careful abstinence from drama," Black later admitted his true feelings to one of his nieces: "With all of their deliberate falsehood, of every conceivable kind, [the press] have convinced the public of their utter insincerity and unreliability," in their "zeal to destroy."[14] It was remarkable, then, that during his tenure on the Court, Black became an ardent defender of the freedom of the press. Although Black never apologized publicly for having been a Klansman, he did admit privately to friends after the Court's decision in *Brown v. Board of Education*, nearly two decades later, that he deeply regretted his membership.[15]

When he first joined the Court in 1937, Black struggled in making the transition from being a Senator to being a justice on the highest court in the land. Justice Harlan Fiske Stone indiscreetly complained to a reporter about the "poor quality" of Black's draft opinions, which Stone described as "not even acceptable by law school standards."[16] Stone even suggested to his friend Felix Frankfurter, then teaching at Harvard, that he "surreptitiously tutor" Black in the law.[17]

Despite his slow start, Black would emerge over his three decades on the Court as one of its most influential justices. Black became what one biographer called "the living embodiment of the liberal judicial ideal," writing "simply and passionately about freedom of speech and equal protection of the laws" and being "steadfast against official oppression and petty brutality."[18] He "took his bearings from the text of the Constitution—a copy was always tucked in his suit pocket."[19]

Perhaps because of the antagonism for large companies he had developed while practicing as a plaintiffs' personal injury lawyer in Birmingham, Black showed a strong interest in antitrust throughout his time on the Court. Over his 34 years as a justice, Black wrote opinions in almost 50 antitrust cases, of which 30 were for a majority of the Court.[20] Of the nearly 200 cases that came before the Court while he was a justice, Black voted against the application of the antitrust laws only 20 times.[21] The antitrust cases in which Black voted most often with a majority for the defendant were those involving either the labor exemption or the Noerr-Pennington doctrine, reflecting both his favorable view of labor unions and his devotion to the First Amendment.[22]

In his antitrust opinions and votes, Black was a strong proponent both of extending the reach of the antitrust laws and simplifying their enforcement.

In his antitrust opinions and votes, Black was a strong proponent both of extending the reach of the antitrust laws and simplifying their enforcement. In terms of extending the reach of the antitrust laws, two of Black's most important decisions came before Earl Warren became Chief Justice. In the first of these, Black wrote the opinion for the Court in *United States v. Southeastern Underwriters Association*,[23] holding that the sale of insurance constituted a form of commerce that was subject to the antitrust laws—a decision Congress quickly overturned by the enactment of the McCarran-Ferguson Act exempting the "business of insurance" from the antitrust laws, leaving its regulation to the states.[24] Seven years later, in *Timken Roller Bearing Co. v. United States*, Black authored an opinion for the Court that substantially expanded the extraterritorial reach of the U.S. antitrust laws by rejecting the defendant's argument that American business should "be left free to participate in international cartels . . . in order to foster export of American dollars for investment in foreign factories which sell abroad."[25]

Black's desire to simplify the enforcement of the antitrust laws led him to become a strong proponent of expanding the per se doctrine beyond horizontal price fixing and customer allocation conspiracies to vertical restraints, such as tying and vertical distribution restraints.[26] Black's 1958 opinion for the Court in *Northern Pacific Railway v. United States* remains the most frequently quoted statement of the rationale for the per se doctrine:

> However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.[27]

In that same opinion, Black offered his clearest statement of what he understood the objectives of the antitrust laws to be:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered compe-

> tition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.[28]

Black's view that the antitrust laws serve these dual purposes led him to vote in favor of the government in every Section 7 merger case during his tenure. Just as Warren had in *Brown Shoe Co. v. United States*, Black read the legislative history of the 1950 Celler-Kefauver amendments as intending Section 7 to be used to arrest a trend to concentration in its incipiency.[29] As he wrote in his opinion for the Court in *United States v. Von's Grocery Co.*,[30] finding unlawful a merger of two small supermarket chains with a combined share of only 7.5 percent of all supermarket sales in the Los Angeles metropolitan area:

> It is enough for us that Congress feared that a market marked at the same time by both a continuous decline in the number of small businesses and a large number of mergers would slowly but inevitably gravitate from a market of many small competitors to one dominated by one or a few giants, and competition would thereby be destroyed. Congress passed the Celler-Kefauver Act to prevent such a destruction of competition. Our cases since the passage of that Act have faithfully endeavored to enforce this congressional command. We adhere to them now.[31]

In another merger case, *United States v. Pabst Brewing Co.*,[32] Black combined these ideas to find unlawful a merger between two brewing companies operating in Wisconsin, but selling beer nationally.[33] The district court below dismissed the government challenge to the merger, finding that it had failed to show that the relevant market should be limited to either Wisconsin or the three states around it, in which the two companies, Pabst and Blatz, had combined shares of 23.9 percent and 11.3 percent respectively, rather than the entire country, where their combined share was only 4.5 percent.[34]

In reversing the district court, Black read the language of Section 7 literally as prohibiting any merger that might substantially lessen competition "in any section of the country." In Black's view, the statute did not require "the delineation of a 'section of the country' by metes and bounds as a surveyor would lay off a plot of ground."[35] He ruled, therefore, that it was not necessary for "the Government to prove by an army of expert witnesses what constitutes a relevant 'economic' or 'geographic' market."[36] Instead, "the crucial question in this and every § 7 case . . . is whether a merger may substantially lessen competition anywhere in the United States."[37] Taking this approach, Black held that given the "very marked thirty-year decline in the number of brewers and a sharp rise in recent years in the percentage share of the market controlled by the leading brewers," the large shares of Pabst and Blatz in some parts of the country in which they distributed beer were sufficient for the Court to prohibit their merger.[38]

William O. Douglas: A Populist Out of the West

Franklin Roosevelt appointed William O. Douglas to the Supreme Court in 1939, to replace Douglas's hero, Justice Louis Brandeis. Douglas was only 40 at the time, making him the second youngest justice ever appointed.[39] Having started as the second youngest justice ever, Douglas also became, by the time of his retirement 36 years later in 1975, the longest-serving justice in Supreme Court history, a distinction he still holds.

During his tenure on the Court, Douglas authored even more majority opinions in antitrust cases than Black did—35 in all, including 11 for the Warren Court. Like Black, Douglas voted in favor of the government and private plaintiffs the vast majority of the time—in all but 27 of the 173 antitrust cases the Supreme Court heard during his 36 years on the Court.

Like Hugo Black, William O. Douglas was raised in a small rural community—in Douglas's case, Yakima, Washington, a small town in the center of the state with a population of just 3,000. His father died when he was young, so Douglas and his three sisters were raised in modest circumstances by his widowed mother, who doted on him and told him that he would one day be President.[40]

Although he graduated as valedictorian of his high school, Douglas could not afford to attend the University of Washington and instead went to a small local college, Whitman College, in nearby Walla Walla. After graduation, Douglas returned to Yakima, where he taught high school English for two years before deciding to go east for law school.[41]

After graduating near the top of his class from Columbia, Douglas spent the first three years torn between a career as a practicing lawyer or as a law professor before finally accepting a full-time teaching position at Columbia. Douglas was an instant success as a teacher. As one student recalled, he "blew in like a cowboy on a horse . . . . bursting with energy."[42] Accustomed to working hard, Douglas threw himself into building an academic reputation as a legal realist specializing in securities and bankruptcy law.

Meanwhile, however, there was turmoil within the law school, with the faculty split between the young legal realists with whom Douglas identified and an old guard that favored more traditional teaching methods. When the university president appointed a member of the old guard as dean, Douglas and other legal realists revolted.[43] Douglas briefly contemplated returning west to practice law, but was then recruited away from Columbia by the new dean of the Yale Law School, Robert Maynard Hutchins, who after becoming dean at age 28 was intent on making Yale a leading center of legal realism. One of the other legal realists Hutchins recruited to Yale was Thurman Arnold, who, like Douglas, hailed from the West. The two quickly became good friends and drinking companions.[44]

Hutchins, who left Yale shortly after Douglas arrived, to become the president of the University of Chicago, twice tried to lure Douglas away from Yale, the second time offering him a full professorship with tenure at a substantial increase in pay and flattering Douglas by calling him "[t]he most outstanding law professor in the nation."[45] Both times, Douglas parlayed these offers

from Hutchins into better offers from Yale—the second time with a fully tenured position as the Sterling Professor of Law at a salary comparable to what Chicago was offering to pay him.[46]

With Roosevelt's election in 1932, Douglas soon became restless again, wanting to follow several of his friends on the Yale faculty to Washington, DC, where they were now part of Roosevelt's Brain Trust.[47] After Congress passed the Securities Act of 1933, Douglas immediately sought to become a leading expert on the new Act. With help from several student research assistants at Yale, Douglas churned out seven major articles on the new law in just eight months.

When the Securities Exchange Act of 1934 was signed into law, creating a new Securities and Exchange Commission, Douglas immediately began importuning his friends in the Roosevelt administration for their help in securing a position on the new commission. Although he failed to obtain a position on the Commission itself, Douglas did succeed in being appointed to lead a study for the SEC on the use of so-called protective committees during bankruptcy proceedings.[48] The national attention he garnered by exposing the self-dealing that took place among large creditors in these protective committees enabled Douglas to lobby successfully for the next vacancy. Almost as soon as he became a commissioner, Douglas began trying to position himself to become chairman. In September 1937, his efforts bore fruit when his colleagues on the Commission elected him unanimously to become their chair.[49]

As the new chair, Douglas set about to create an image of himself as the "new sheriff in town."[50] Inviting photographers into his office, Douglas liked to lean back in his chair, propping his feet up his desk to reveal a hole in one of their soles, with a ten-gallon hat sitting on top of the file cabinet behind him and an upholstered six-shooter by his hand.[51] Over the next two years, as Chairman of the SEC, Douglas succeeded in delivering on his promise to clean up Wall Street, just as Wyatt Earp had tried to clean up Tombstone. One of the biggest notches in his belt was his successful pursuit of Richard Whitney, the blue-blooded president of the New York Stock Exchange, whom Douglas exposed as having embezzled hundreds of thousands of dollars. "Not Dick Whitney!" FDR exclaimed when he heard the news.[52]

Douglas's success at the SEC led to a call from the White House just after he returned from a Sunday round of golf in March 1939. The caller asked if he could come to the White House right away to see the President. When Douglas arrived, he was ushered into the President's study where FDR greeted him warmly: "I have a new job for you," the President began. "It's a mean job, a dirty job, a thankless job." Pausing briefly, the President added, "It's a job you'll detest. This job is something like being in jail." Smiling, Roosevelt then delivered the punchline: "Tomorrow I am sending your name to the Senate as Louis Brandeis' successor."[53]

Rendered momentarily speechless, Douglas quickly recovered to thank the President and accept, honored to have been asked to succeed a justice whose photograph he had kept displayed in his office at the SEC. When Roosevelt submitted his name a few days later, the Senate quickly confirmed Douglas by a vote of 62 to 4, with the dissenters, ironically, "asserting that he was a reactionary who was too friendly to Wall Street."[54]

No sooner had Douglas been appointed to the Court than speculation began that it would merely be a stepping stone to the presidency, as it had almost been for Charles Evans Hughes. One congressman predicted that Douglas's appointment to the Court, following his successful work at the SEC, would "probably mean his nomination for the Democratic ticket in 1940."[55] Douglas himself later admitted that Roosevelt had been right in predicting that he would dislike his new job: "I found the Court . . . a very unhappy existence." "I had been very, very active in the Executive Branch. I was now doing things that . . . [were] like having a professorship without any classes to teach."[56] Douglas took to referring to the Court as "the monastery."[57]

It soon became clear to his fellow justices that Douglas "cared much more about politics than about his work on the Court."[58] Douglas continued to be a mainstay at the President's regular poker games, where FDR reportedly appreciated "his fund of good dirty stories" and "his ability to drink with the best of them."[59] When Roosevelt decided to run for a third term in 1940 and to replace John Nance Gardner as his running mate, FDR told his staff that his choice was coming down to either Henry Wallace or Bill Douglas.[60]

While disappointed when Roosevelt picked Henry Wallace, Douglas could console himself that being only 43, there would be other opportunities in the future. Indeed, when Roosevelt decided to run for a fourth term in 1944 and to replace Wallace as his running mate, Douglas was again one of the two leading candidates for the vice presidential nomination, the other being Harry Truman. Although Douglas was regarded as "the candidate of the New Dealers," and "the personal preference of Roosevelt,"[61] he lost the nomination to Truman, who as a sitting senator had broader support within the Party. Four years later, Truman, seeking re-election, offered Douglas the number two spot on the ticket. Douglas, however, "equivocated, taking several days to make up his mind," at the end of which he declined, perhaps expecting Truman to lose.[62]

Perhaps because of his political ambitions and transparent lack of interest in much of the Court's work, relationships between Douglas and his colleagues on the Court began to deteriorate almost from the beginning. Felix Frankfurter, who had been appointed to the Court just a few months before Douglas, was particularly upset that Douglas seemed to be treating the Supreme Court as a stepping stone to the presidency. In a letter to Learned Hand, Frankfurter would call Douglas "the most cynical, shamelessly amoral character I've ever known."[63] Frankfurter grew to despise Douglas, whom he called one of the "two completely evil men I have ever met."[64] In return, Douglas took to referring to Frankfurter as "Der Fuehrer."[65] Robert Jackson, who joined the Court in 1941 after having served as Solicitor General and Attorney General, shared Frankfurter's dim view of Douglas.[66]

In his later years on the Court, another source of displeasure on the part of his fellow justices was Douglas's personal life, which the other justices thought unbecoming for a Supreme Court justice. According to one biographer, Douglas had always been a

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heavy drinker and an "inveterate womanizer,"[67] but beginning in 1950, after a nearly fatal horseback riding accident, Douglas's personal conduct became an even greater source of embarrassment to his colleagues on the Court as he embarked on a series of divorces and marriages, each to a woman younger than the one before. His fourth and final marriage, at age 67, was to a 22-year old college student. The alimony he owed from three divorces left Douglas increasingly strapped for money, forcing him during his later years on the Court to spend more time writing books and articles and less time on his judicial opinions.[68]

The most scathing description of Douglas during his later years on the Court was written by Richard Posner in a review of Bruce Allen Murphy's critical biography, *Wild Bill: The Legend and Life of William O. Douglas*. Posner had an opportunity to observe Douglas first hand when he clerked for William Brennan during the 1962 Term. In his review, Posner describes Douglas as a "flagrant liar," who was "a compulsive womanizer, a heavy drinker, a terrible husband to each of his four wives, a terrible father to his two children, and a bored, distracted, uncollegial, irresponsible, and at times unethical Supreme Court justice who regularly left the Court for his summer vacation weeks before the term ended."[69] Posner's judgment as to Douglas's work on the Court was equally harsh. Describing his opinions as "slipshod and slapdash," Posner concluded that "Douglas was not a good judge," probably because, as FDR foretold, he simply "did not like the job."[70]

However he felt about the job of judging, one area of law in which Douglas seemed to show a strong interest throughout his time on the Court was antitrust. During his 36 years on the Court, Douglas authored 35 majority opinions—an average of almost one opinion each term—and almost as many concurrences or dissents in antitrust cases.[71]

From the outset, Douglas believed that "big is bad," with his antitrust views profoundly influenced by those of his hero, Louis Brandeis. Brandeis's book, *Other People's Money*, became Douglas' "economic and political bible."[72] In a 1936 letter to Brandeis, he called it "a guiding star and inspiration."[73] The degree to which Brandeis shaped Douglas's antitrust views comes through most clearly in his dissent in *United States v. Columbia Steel Co.*[74] In that case, the Court, in a 5-4 decision, ruled against the government's challenge to U.S. Steel's acquisition of a large steel fabricator on the West Coast. In his dissent joined by three other justices, including Hugo Black, Douglas relied heavily on another of Brandeis's books, *The Curse of Bigness*, writing:

> We have here the problem of bigness. Its lesson should by now have been burned into our memory by Brandeis. *The Curse of Bigness* shows how size can become a menace—both industrial and social. It can be an industrial menace because it creates gross inequalities against existing or putative competitors. It can be a social menace—because of its control of prices. . . . Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men.[75]

Showing that many in Congress shared Douglas's views, dissatisfaction with the Court's decision in *Columbia Steel* featured prominently in the debates on the Celler-Kefauver Act, which amended the Clayton Act in 1950 to make it easier for the government to challenge other, similar mergers in the future in order to prevent further economic concentration.[76]

Douglas reiterated these same concerns again a quarter century later in 1973 in his concurring opinion in *United States v. Falstaff Brewing Corp.*,[77] which would become the last case in which the Court condemned a merger on a potential competition theory because it had eliminated a potential new entrant into a highly concentrated market. In it, Douglas lamented "that the increasing concentration of economic power into large corporations was transferring local control of business 'to distant cities where men on the 54th floor with only balance sheets and profit and loss statements before them decide the fate of communities with which they have little or no relationship.'"[78] "A nation of clerks," he declared, "is anathema to the American dream."[79]

Given these views, it is not surprising that Douglas voted for the government or private plaintiff in 52 of the 60 antitrust cases that came before the Warren Court. Nor is it surprising that many of the 35 majority opinions he wrote in these cases have been harshly criticized by antitrust scholars, such as Robert Bork, Posner, and other adherents of the Chicago School of antitrust. In what is the most comprehensive review of his antitrust opinions from a Chicago School perspective, Professor C. Paul Rogers criticizes most of those opinions as "containing generalized, nonspecific language with the lack of any real factual analysis,"[80] and as being so "result-oriented" that "the government did always win if he had anything to say about it."[81]

Consistent with his view that big was bad, one area of antitrust law in which Douglas exerted particular influence was the extension of Section 7 of the Clayton Act beyond horizontal and vertical mergers to so-called conglomerate mergers. One of Douglas's best-known, and most widely criticized, decisions in this area was his opinion for a unanimous Court upholding an FTC challenge to Procter & Gamble's acquisition of Clorox ten years earlier.[82]

At the time of its acquisition of Clorox, P&G was already the country's largest diversified manufacturer of household products, with more than a 54 percent share of all sales of laundry detergents. Clorox at the time was the only national brand of household bleach, with 13 manufacturing facilities across the country and almost 50 percent of total sales nationally; its next closest competitor was distributed only in some regions of the country and had only a 15 percent share nationally.[83]

In a characteristically short nine-page opinion, Douglas affirmed the FTC decision finding that P&G's acquisition of Clorox violated Section 7, and ordering its divestiture. In doing so, he relied on two related theories. The first was potential competition, agreeing with the FTC that P&G, as the largest manufacturer of laundry detergents, was a likely potential entrant into the bleach market and whose presence on the fringe of the market would constrain Clorox's pricing. The second was entrenchment, agreeing with the FTC that the acquisition of "a smaller, but already dominant," firm like Clorox by a giant like P&G, with its much larger advertising budget, might "substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing . . . due to their fear of retaliation by Procter."[84] In this part of his opinion, Douglas even appeared to view whatever efficiencies P&G might achieve from being able to advertise Clorox products less expensively than the smaller Clorox as one of the reasons for prohibiting the acquisition, rather than as a potential defense.[85]

All nine justices agreed with Douglas's potential competition theory and only Justice Harlan, in his concurring opinion, expressed any doubts as to his entrenchment theory. By contrast, Robert Bork, in *The Antitrust Paradox*, cited Douglas's opinion in *Procter & Gamble* as a prime example of what he saw as wrong in the Warren Court's approach to antitrust. Bork ridiculed Douglas's entrenchment theory, arguing that having to compete with the larger and more efficient P&G was more likely to cause other smaller firms to work even harder to maintain their position, not to become more passive.[86] And while acknowledging that there was "a core of truth" to Douglas's perceived potential competition theory, Bork maintained that the facts did not support its application in *Procter & Gamble*.[87] He argued that, despite six firms having 80 percent of the household bleach market, the presence of 200 smaller producers proved that there was already ample competition and that entry was easy, dispelling the need for P&G's looming presence just outside the market to assure consumers competitive prices.[88]

The problem with Bork's argument is that national brands are generally able to charge premiums over generic products. P&G's presence on the edge of the market as one of the firms best positioned to launch a competing nationally branded bleach might well have been a constraint on the size of the premium Clorox could charge for its nationally branded bleach over the price of generic bleaches from smaller local or regional manufacturers.

In any event, history may have proven Douglas right and Bork wrong. Fifty years later, despite Bork's claim that entry into the bleach market was easy, Clorox remains the only major national brand of bleach and still has a dominant share of the market. Over that 50-year period, the only two serious challenges to Clorox's dominant position as the only national brand of bleach have both come from its former merger partner, P&G—one in 1982 and another in 1988. On each occasion, the two companies each attempted to launch products in the other's market, only to withdraw when those attempted entries proved unsuccessful.[89]

Meanwhile, since P&G was forced to divest it in 1969, Clorox, as an independent company, has pursued a successful strategy of expansion through internal product development and acquisition. Its brands now include, in addition to its flagship laundry bleach, a number of other Clorox-branded household cleaners and other well-known household brands, such as Formula 409, PineSol, S.O.S. pads, and Handi-Wipes. One could argue that by maintaining Clorox as an independent company, the Supreme Court's decision in *Procter & Gamble* has served to reduce concentration in the consumer goods industry generally by leaving Clorox free to expand its own portfolio of household products and to compete on a more level playing field with the three industry giants: P&G, Colgate-Palmolive, and SC Johnson.

What this one example illustrates is that one should be careful before condemning the Warren Court's antitrust jurisprudence as the "dark ages" of antitrust. As we will see in the next and final article of this series, while today's approach to antitrust enforcement may seem more "scientific," it is by no means clear that the risk of error is any smaller than it was under the approach taken by the Warren Court, given that many cases still require what is, at the end of the day, an exercise of judgment by the decision maker.

That being the case, perhaps there is an argument for placing greater weight on the need for administrative simplicity and for greater focus on the potential long-term effects of a merger or other conduct on economic concentration, as opposed to a narrower focus on just the short-term price effects a merger in some narrowly defined "market." Perhaps Justices Black and Douglas were decades ahead of their time in foreseeing the harm increased concentration could cause for society as a whole, even if it might lead to greater efficiency and lower prices for consumers in the short term. But that is a question we will have to save for our next and final article on the Warren Court. ■

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1 Roger K. Newman, Hugo Black: A Biography 3 (1994).

2 *Id.* at 226.

3 *Id.* at 155, 157.

4 Pub. Law No. 73-67, 48 Stat. 195 (enacted June 16, 1933, codified at 15 U.S.C. § 703).

5 Newman, *supra* note 1, at 160.

6 *See* A.L.A. Schechter Poultry Corp., 295 U.S. 495 (1935) (often referred to as the "sick chickens" case).

7 Noah Feldman, Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices 134 (2010).

8 *See* Newman, *supra* note 1, at 240.

9 *Id.* at 241.

10 *See id.* at 242.

11 *Id.* at 249–50.

12 *See id.* at 257–58.

13 *Id.* at 258.

14 *Id.* at 258, 260–61.

15 *See* Howard Ball, Hugo L. Black: Cold Steel Warrior 16 (1996) (citing Newman, *supra* note 1, at 99–100).

16 Newman, *supra* note 1, at 273.

[17] Dennis J. Hutchinson, *Hugo Black Among Friends*, 93 MICH. L. REV. 1885, 1889 (1995); *see also* NEWMAN, *supra* note 1, at 275.

[18] Hutchinson, *supra* note 17, at 1885.

[19] *Id.*

[20] *See* W. Wallace Kirkpatrick, *Justice Black and Antitrust*, 14 UCLA L. REV. 475, 477 (1967).

[21] *See id.*

[22] *See, e.g.*, Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United States v. Hutcheson, 312 U.S. 219 (1941).

[23] 322 U.S. 533 (1944).

[24] Pub. L. No. 15, S. 340, 79th Cong. 1st Sess. (1945), 15 U.S.C. § 1011 et seq.

[25] 341 U.S. 593, 599 (1951).

[26] Justice Black invariably voted with the majority in cases in which the Court applied the per se doctrine to vertical restraints. This led to one of the few times Black and Douglas parted company in an antitrust case, in *White Motor Co. v. United States*, 372 U.S. 253 (1963), where Douglas wrote the majority opinion for the Court declining to declare vertical territorial restraints per se illegal and Black joined in a dissenting opinion by Justice Tom Clark. *Id.* at 275–76.

[27] 356 U.S. 1, 5 (1958).

[28] *Id.* at 4.

[29] *See* 370 U.S. 294, 317 (1962).

[30] 384 U.S. 270 (1966).

[31] *Id.* at 278.

[32] 384 U.S. 546 (1966).

[33] *See id.* at 551–52.

[34] *See id.* at 551.

[35] *Id.* at 549.

[36] *Id.*

[37] *Id.* at 550.

[38] *Id.* at 551.

[39] Justice Joseph Story was the youngest, appointed at the age of 32 in 1812.

[40] *See* BRUCE ALLEN MURPHY, WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS 25 (2003); *see also* WILLIAM O. DOUGLAS, GO EAST YOUNG MAN 17–21 (1974).

[41] *See* MURPHY, *supra* note 40, at 37–42.

[42] *Id.* at 72.

[43] *See id.* at 75.

[44] *See* William Kolasky, *Thurman Arnold: An American Original*, ANTITRUST, Summer 2013, at 89, 90; *see also* DOUGLAS, *supra* note 40, at 167–68.

[45] MURPHY, *supra* note 40, at 96.

[46] *See id.* at 104.

[47] *See id.* at 106.

[48] *See id.* at 107.

[49] *See id.* at 133.

[50] *See* FELDMAN, *supra* note 7, at 164.

[51] *Id.*

[52] MURPHY, *supra* note 40, 153.

[53] *Id.* at 173.

[54] C. Paul Rogers III, *The Antitrust Legacy of Justice William O. Douglas*, 56 CLEV. ST. L. REV. 895, 900 (2008).

[55] MURPHY, *supra* note 40, at 179.

[56] *Id.* at 184.

[57] *Id.*

[58] *Id.* at 188.

[59] *Id.* at 185.

[60] *See id.* at 189.

[61] FELDMAN, *supra* note 7, at 258.

[62] *Id.* at 319–20.

[63] *Id.* at 260.

[64] *Id.* at 306.

[65] *Id.*

[66] *See id.* at 264.

[67] *Id.* at 320.

[68] *See* MURPHY, *supra* note 40, at 296–97.

[69] Richard Posner, *The Anti-Hero*, NEW REPUBLIC (Feb. 24, 2003).

[70] *Id.*

[71] *See* Rogers, *supra* note 54, at 895.

[72] *Id.* at 905 (citing Leon Epstein, *Economic Predilections of Justice Douglas*, 1949 WIS. L. REV. 531, 560 (1949)).

[73] *Id.* at 905–06 (quoting THE DOUGLAS LETTERS 35 (Melvin I. Urofsky & Philip E. Urofsky eds., 1987)).

[74] 334 U.S. 495, 534–40 (1948).

[75] *Id.* at 535–36 (internal ellipses omitted). In his dissent, Douglas also quoted Brandeis to rebut the proposition that monopolies emerge because they are efficient and competition is wasteful: "[T]he only argument that has been seriously advanced in favor of private monopoly is that competition involves waste, while the monopoly prevents waste and leads to efficiency. This argument is essentially unsound. The wastes of competition are negligible. The economies of monopoly are superficial and delusive. The efficiency of monopoly is at the best temporary." *Id.* at 534 n.1 (quoting LOUIS D. BRANDEIS, THE CURSE OF BIGNESS 114–15 (1934)).

[76] *See, e.g.*, 96 CONG. REC. 16,501–02 (1950) (statement of Sen. Kefauver).

[77] 410 U.S. 526, 538 (1973). Douglas himself had originally developed the potential competition theory for challenging a merger in his opinion for the Court in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964), nine years earlier (holding merger illegal because although the acquired company had not yet gained entry into California, its effect as a potential supplier made it a substantial competitive factor in that market).

[78] Rogers, *supra* note 54, at 926 (quoting *Falstaff*, 410 U.S. at 541–42 (Douglas, J., concurring)).

[79] *Falstaff*, 410 U.S. at 543. In his concurring opinion, Douglas also reiterated his view that large firms are generally less, not more, efficient than smaller firms: "The tendency to create large units is great, not because larger units tend to greater efficiency, but because the owner of a business may make a great deal more money if he increases the volume of his business ten-fold, even if the unit profit is in the process reduced one-half. It may, therefore, be for the interest of an owner of a business who has capital, or who can obtain capital at a reasonable cost, to forfeit efficiency to a certain degree, because the result to him, in profits, may be greater by reason of the volume of the business. Now, not only may that be so, but in very many cases it is so." *Id.* at 541.

[80] Rogers, *supra* note 54, at 999.

[81] *Id.*

[82] FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).

[83] *See id.* at 571–73.

[84] *Id.* at 578.

[85] *See id.* at 579.

[86] *See* ROBERT BORK, THE ANTITRUST PARADOX 256–57 (1978).

[87] *See id.* at 259–60.

[88] *See id.* at 260.

[89] *See* Karen Dillion, *I Think of My Failures as a Gift*, HARV. BUS. REV. (Apr. 2011); Martha Groves, *Clorox Washes Out of Detergent Business*, L.A. TIMES, May 18, 1991.