Review, The Limits of Freedom of Contract, by Michael J. Trebilcock, 33 Journal of Economic Literature. 865 (1995). (Part Two)

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The first motion at the Federal Constitutional convention to include a guarantee of jury trials in civil cases was made only two days before the end of active session. General Charles Pinckney of South Carolina and Mr. Elbridge Gerry moved to supplement Article III's guarantee of jury trial in criminal cases with the words: "And a trial by jury shall be preserved as usual in civil cases." Mr. Nathaniel Gorham criticized this guarantee both because it was "not possible to discriminate equity cases from those in which juries are proper" and because "[t]he constitution of Juries is different in different States and the trial itself is usual in different cases in different States." General Pinckney concluded the discussion (before the motion was defeated) by observing that "such a clause in the Constitution would be pregnant with embarrassments."

This phrase makes an apt title for this piece for two reasons. First, it undoubtedly describes the piece that you are about to hear. I approach this topic with great humility and fear. I am not a constitutional scholar nor an historian. The average member of this audience could bring to bear broader and deeper knowledge of this topic. Saying that I am unencumbered by the blinders that previous scholarship and categorization might impose, provides small succor for me and I would suggest for you. Consider then this paper as being "posted": continue on at your own risk.

The title also relates to my thesis. The drafting embarrassments infected not only the initial attempt to guarantee civil jury trials but the final version of the Seventh Amendment as well. Scholars should stop looking for a complete theory to explain the contours of the Seventh Amendment mandate, because a complete theory of the Amendment would need to do and why the search for such a theory is somewhat quixotic. I will also focus some attention on the often forgotten sibling of the Amendment, the "Reexamination Clause," and argue that this clause can help us, in small ways, to interpret not only the "Preservation Clause" but also other parts of the Constitution.Optimal Pooling in Claims Resolution Facilities, 53 Law and Contemporary Problems 159 (1990).

The various claims resolution facilities discussed in this symposium exhibit a number of distinctive qualities and governing principles. A common characteristic of many of these facilities, however, is an attempt to avoid the litigation costs of individualized proof of damages by channeling mass tort claims into rough categories for compensation. All claimants within a particular category receive similar compensation, even though they might be able to prove disparate damages through litigation. This article seeks to analyze the efficiency of pooling disparate claims through the categorical compensation of claims facilities.

An efficiency standard for evaluating tort law usually focuses on the ability of the legal rules to induce efficient levels of precaution; the costs of implementing the rules are relegated to a second order of importance. But this standard often is inapplicable to claims resolution facilities because many of the settlements that establish the facilities place an absolute cap on the defendant's liability. Ken Feinberg, trustee of the Dalkon Shield Claimants Trust, stressed the importance of such caps to the feasibility of establishing claims facilities:

> The breakthrough in Agent Orange...and the breakthrough in Dalkon Shield was a court imposed cap on liability. That gives the company total peace.... That is why, once the companies put the money in, they disappeared.
>
>> Even if aggregate caps are not imposed by judicial fiat, they will be imposed by de facto economic fiat whenever the total liabilities of the defendant corporation exceed its net assets.

Because the deterrent effect of tort law turns primarily on a defendant's total liability, aggregate caps on damages shift the focus away from inducing efficient precaution to a concern with the cost of implementation. The most efficient way to distribute damage awards is to minimize the transaction costs in compensating victims. A large

component of the transaction costs in compensating mass tort victims concerns the cost of individualized proof of damage and causation. Categorical compensation systems of claims facilities have the potential to increase dramatically the percentage of the defendant's aggregate damages that is actually paid to mass tort victims.

Categorical compensation of mass tort victims is likely to be Kaldor-Hicks efficient relative to traditional individualized litigation, because such a distribution system will increase the average compensation for victims. It may be difficult, however, to construct categorical compensation packages that are also Pareto-efficient relative to litigation. The pooling of dissimilar victims into dissimilar categories often results in some claimants receiving less damages from a claims facility than from litigation. This will be especially true if categorical compensation systems induce claimants to file frivolous actions that dilute the average compensation in the pool.

The adverse selection of frivolous claimants represents an important transaction cost of claims facilities that non-frivolous claimants must bear. These adverse selection costs, in a sense, substitute for the litigation costs of individualized proof of causation and damage. Claims facilities are most likely to be Pareto-efficient when the adverse selection costs of claims facilities are less than the litigation costs of proof.

When categorical compensation is not Pareto-efficient, undercompensated claimants will attempt to separate from the pool through litigation. For this reason, claims facilities may face significant "participation constraints" in channeling claimants to lower-cost categorical pools. In some situation, forced pooling, which denies plaintiffs the option of individualized litigation, may be welfare enhancing.

This article is written in two parts. Part II presents a simple model of categorical compensation to show when claims facilities are likely to be feasible and efficient. Part III extends the model to "partial pooling" and compares these models to the facilities discussed in this symposium. The conclusion, in a more discursive fashion, suggests limits for this economic analysis and areas for further research.Unlocking the Stock Lockup in Mobil v. Marathon Oil, 1 Journal of Merger and Acquisition Analysis 37, (1990).

Target Corporations trying to fend off hostile tender offers increasingly have resorted to the sale of treasury stock to white knights. The sale of treasury (or authorized, but unissued) shares has been challenged in a number of court cases by target shareholders and by competing tender offerors as a stock "lock-up" that forecloses other bidders from making competing offers for the target. This paper analyzes the Sixth Circuit's decision in Mobil Corp v. Marathon Oil Co. in which the court struck down a stock lock agreement that Marathon Oil Company Marathon Oil) entered into in 1981 with United States Steel Corporation (U.S. Steel or USS) to fend off a hostile tender offer by Mobil Corporation (Mobil).Colleges in Collusion, The New Republic 19 (October 16, 1989).

A group of sellers - say, cement manufacturers - gets together to set the price for a ton of cement. Or the presidents of the ten largest cement manufacturers meet once or twice a year to set the size of discounts they will offer for their product. If their conduct is discovered, the cement companies are in trouble. They face civil suits for triple damages and even could go to jail for price-fixing. And the prosecution would hardly merit a mention in the back of the business section. The cement manufacturers' conduct represents a classic violation of federal antitrust law.

It is a bit troubling, then, that the Justice Department's recently revealed investigation of agreements among top colleges to fix financial aid awards - and possibly to set tuition charges - has been received with so much surprise and some criticism. Colleges have no magical immunity from federal antitrust laws. The Justice Department's investigation, which seeks to subject university presidents to the same rules that govern presidents of cement manufacturers, should be applauded.

The Justice Department is investigating whether a group of Ivy League and elite liberal arts colleges colluded to set both tuition and financial aid awards. The institutions have denied agreements to set tuition. However, some of them freely admit to meeting in committees to set uniform scholarship awards for college applicants who have been accepted by more than one school in the group. Because of the agreements, an applicant would receive the same financial aid offer from different schools.

Tuition and financial aid agreements would eliminate price competition among schools and accordingly run afoul

of the Sherman Act's per se prohibition of horizontal price-fixing. An agreement to set the amount of financial aid is economically no different from a horizontal agreement among manufacturers to fix uniform discounts for their products. A scholarship is, in effect, a discount from the basic tuition price. The price of a college education - at tuitions that commonly run more than $15,000 a year at Ivy League schools - is a major consumer purchase that easily dwarfs the purchase of a new automobile. Collusion to limit the amount of discounts on college tuition injures the student/consumers just as much as collusion to limit sticker price discounts for new cars would injure driver/consumers.

The collusion to fix scholarship awards, if proved, constitutes a classic form of price discrimination: selling the same good (in this case, a college education) at different prices (varying financial aid packages). The goal of price discrimination is to separate consumers into groups that value a product differently and then to charge different prices to the different groups. A Private Revolution: Markovits and Markets , 64 Chicago-Kent Law Review 861 (1989).

Although the title of Professor Markovits' article begins with the words "International Competition" and "Market Definition," the thrust of his article is not about the effect of international competition on market definition. Indeed, Markovits believes that the presence of foreign competitors should not influence the way in which markets should be defined because, in Markovits' words, "markets should never be defined at all."

For Markovits, the judicial and academic interpreters of the Clayton Act have erred in assessing whether a merger will tend to lessen competition by calculating the market shares and market concentration. Markovits' major thesis is clearly that the traditional market-oriented approach to competitive-impact analysis is not cost-effective, and should be replaced by his own non-market approach. His minor thesis, and the article's nexus with this Symposium, is that "the presence of international competition makes the market-oriented approach even more conventionally cost-ineffective" and therefore the internationalization of the economy militates even more in favor of his non-market approach.

This is not Markovits' first attack on the market-oriented approach. For the uninitiated, the article is likely to be hard going as Markovits "elaborates, refines, and summarizes" the theoretical framework of his previous works. The piece relies on a broad array of terms which Markovits coined in earlier pieces.

In this Comment, I intend to follow Markovits' lead and, notwithstanding the Symposium's title bypass many issues of international competition. Like Markovits, I see few theoretical reasons why the increasing importance of international competition should change our "meta-theory" of merger analysis. To be sure, we must resist the temptation to draw geographical markets by political borders if we are interested in uncovering the economic realities. Applying one's meta-theory to the international context may raise issues without domestic antitrust counterparts. For example, in estimating the ease of entry or the elasticity of foreign supply, special attention needs to be paid to tariffs, quotas and idiosyncratic aspects of international trade (such as monetary exchange risks).

In this Comment, I will respond to Markovits' attack on the market-oriented approach and, in brief, sketch an economic defense for defining markets and caring about market concentration. In the first section, I contrast traditional methods of defining markets with the Justice Department Merger Guidelines. The Guidelines' approach to market definition is a significant advance over the traditional criteria for market definition and, contra to Markovits' thesis, makes market definition less arbitrary. The second section apologizes for assessing competitive impact with inter alia concentration figures such as the Herfindahl-Hirschman Index. The final section embeds market definition and concentration analysis within the larger structural approach to identifying the likelihood of collusion.Determinants of Airline Carrier Conduct, 8 International Review of Law & Economics, 187 (1988).

Since Joe Bain's seminal work in 1959, industrial organization research has focused on structure, conduct, and performance. Bain thought that, aside from feedbacks of second order, structural variables determined industry conduct and that, in turn, structure and conduct determined industry performance. Subsequent scholars seized upon the structure-conduct relationship to suggest that structural theories could be used in antitrust analysis. If structural variables (such as concentration) influence the likelihood of collusive conduct, an understanding of

structural characteristics could then be used to (1) focus investigative resources on markets in which collusion is likely, (2) detect actual instances of collusion, and (3) reduce the likelihood of collusion by changing the structure itself.

Empirical tests of the ways in which structural variables influence collusion, however, have only been indirect. Dozens of econometric articles have examined the structure-performance relationship by regressing structural variables (such as concentration) on performance variables (such as profits). But these "structure on profits" regressions have only indirectly tested the relationship between structure and collusion - by assuming, often implicitly, that abnormal profits stem from collusion. Demsetz noted that often such indirect tests of conduct are unidentified, because firm-specific efficiency as well as collusion could induce a positive correlation between profits and concentration.

This article represents a first attempt to overcome the problems inherent in inferring conduct from performance by regressing estimates of conduct itself on the structural variables that theory suggests induce collusive behavior. Directly examining the relationship between conduct and structure can test not only traditional structural theories - such as Stigler's hypothesis that the number of sellers influences the degree of collusive behavior and Posner's hypothesis that collusion is likely to take place in markets in which the gains from collusion are the greatest - but also newer structural theories that have been explicitly advanced in the airline context, such as the hypothesis that airline routes are "contestable markets" that will be competitive regardless of concentration.

The tests in this article have important policy implications in detecting and deterring collusion. The analysis not only indicates where collusion has taken or will take place, but it also quantifies the extent to which structure influences behavior. While many theories predict that more competitors will induce more competition, theory has little to say about the size of the competitive gain. Thus, empirical analysis not only can confirm existing theories, but also can provide policymakers with information about the possible benefits of changing structure.

Calculating quantitative estimates of behavior is the crucial starting point. Following Iwata, marginal cost and elasticity estimates were combined with price and market share data to estimate conjectural variations in the airline industry both before and after deregulation. As derived below the conjectural variation measures how competitively a firm reacts to changes in the output of its rivals: Firms that reduce their output in response to output reductions of their rivals are acting collusively; firms that increase their output to offset output reductions of their rivals are acting competitively.

The conjectural variation approach to modeling airline carrier conduct has both important strengths and weaknesses as an analytic tool. As elaborated below, collapsing an airline's behavior into a scalar strategy variable places restrictive assumptions on the model. Studying the airline industry, however, allowed the estimation of over two thousand conjectural variations (by carrier and route) using appealing measure of market conduct because it not only represents the firm's expectations of other firms' conduct, but also, be feeding back into its own reaction function, determines the firm's own conduct (its non-cooperative strategy).

Section II of the paper describes the calculation of the conjectural variations and tests whether carriers displayed competitive, collusive, or Cournot behavior. Section III forms the central part of the paper: There I describe the structure/conduct regressions and test whether specific structural variables influence conduct. In section IV slopes of the firms' reaction curves are estimated. Tests for the equality of the conjectured and actual reaction curve slopes are made. Such tests are shown to test not only for the presence of Bresnahan consistency but also for a generalized form of Stackelberg leadership Halfway Home, 13 Law and Social Inquiry 413 (1988).

Examining the proper role of broadcast regulation remains a central means for testing our understanding of the First Amendment. This is true not only because broadcasting plays a uniquely pervasive role in shaping public debate, but because broadcast regulation has continually presented courts with commentators with real and pressing issues that force us to give concrete meaning to the lofty exhortation "Congress shall make no law...." In the past year alone, the Federal Communications Commission rescinded its controversial but long-standing fairness doctrine; stepped up enforcement of its decency standards; and may soon force Rupert Murdoch, but the legislative legerdemain of Senator Kennedy, to divest himself of dual media ownership in Boston and New York.

With these and other issues of broadcast regulation before the courts, Lucas Powe offers a powerful and thought-provoking book, American Broadcasting and the First Amendment, to shed empirical light on the efficacy of government control of the electronic press. By presenting a rich and detailed account of the actual history of broadcast regulation in the United States, Powe intends to distinguish among the competing First Amendment theories which, as he correctly points out in his introduction, are "contingently based on fact".

This essay suggests that while Powe's attempt is noble, his methodology is incomplete and the facts he presents are not sufficient to reject any of the competing First Amendment theories. The first section of this essay describes the theoretical landscape in which Powe operates. The second and third sections describe the weaknesses in Powe's factual approach and examine the FCC's fairness doctrine to suggest what a more complete empirical test would entail. The fourth section relates the competing theories of broadcast regulation to economic theories of capture.

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