Nebraska Law Review

Volume 46 | Issue 3 Article 3

1967

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Recommended Citation
Walter Adams, *Antitrust and Its Critics*, 46 Neb. L. Rev. 585 (1967)
Available at: https://digitalcommons.unl.edu/nlr/vol46/iss3/3

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ANTITRUST AND ITS CRITICS

Walter Adams*

We are in bondage to the law in order that we may be free—Cicero

In the labyrinth of antitrust, says a New Deal liberal, "the very Bigness upon which we all now depend may be illegal. Put thus candidly and plainly, this is slightly insane. It implies, quite correctly, that a shadow of criminality hangs over some of our highly respected business leaders. It suggests, accurately enough, that many obviously beneficial institutions of business whose products we use every day and in which millions of Americans are shareholders await their turn before the bar of justice. This so offends common sense that it has been necessary to envelop the whole subject of the antitrust laws in a fog of legal scholasticism, verbal distinctions without a distinction, economic gobbledygook and regulatory voodoo."[1]

An apostle of the New Conservatism concurs in this harsh judgment. "If I were asked," says Ayn Rand, "to choose the date which marks the turning point on the road to the ultimate destruction of American industry, and the most infamous piece of legislation in American history, I would choose the year 1890 and the Sherman Act—which began that grotesque, irrational, malignant growth of unenforceable, uncompliable, unjudicable [sic] contradictions known as the antitrust laws."[2]

Both these pronounciamentos represent an unsophisticated popularization of Justice Holmes' belief that "the Sherman Act is a humbug based on economic ignorance and incompetence."[3]

The modern businessman seldom joins in such blasphemy against a sacrosanct legal edifice—an institution which has come to be regarded a part of the American Way of Life. At least in public forums, the businessman proclaims, with Henry Ford II, "that monopolies cause stagnation," and "that our country could not prosper as it has without the benefit of sound antitrust legislation which has helped to keep us competitive over the past half-century. Though American businessmen may sometimes complain

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1 LILIENTHAL, BIG BUSINESS: A NEW ERA 167 (1952).

2 A. RAND, CAPITALISM: THE UNKNOWN IDEAL 42 (1966).

3 1 HOLMES-POLLOCK LETTERS 163 (M. Howe ed. 1941).

about the interpretation or administration of those laws," says Mr. Ford, "we know that—like spinach—they are good for us."[4]

But the complaints persist. Rarely do they take the form of an all-out, blunderbuss attack on the philosophy or purpose of antitrust. The flank attack is generally preferred to the frontal assault, the skirmish to the major engagement. The tactics tend to be pragmatic, non idelogical, specific, and subtle. The battle plan is adjusted to the terrain, and the enemy changes from encounter to encounter. In conspiracy cases, the real enemy is said to be monopoly; in monopoly cases, the reverse is said to be true. The battleground seems always to lie elsewhere, and antitrust seems always to attack the wrong target with the wrong weapon and for the wrong reason.

Many are the proposals calling for revisions in antitrust strategy. Taxonomically, they fall into the following policy categories:

1. Antitrust should attack monopoly, not conspiracy.
2. Antitrust should attack bad monopolies, not all monopolies.
3. Antitrust should attack conspiracies, not mergers and concentration.
4. Antitrust should be abandoned altogether, because conspiracy and monopoly are creatures of the state. In the absence of government interference, trade restraints would not and could not exist.

These proposals stem from varied and divergent sources. Some reflect "outside" criticism of judicial decisions; others, the view of judicial dissenters; still others, the erstwhile majority of the Supreme Court. While not always mutually compatibile, these policy positions share one common characteristic: they reveal a profound misconception of the rationale of antitrust and the role of competition as a regulatory device in a free economy.

To explore the nature of this misconception is the purpose of the following article.

I. "THE ANTITRUST LAWS SHOULD ATTACK MONOPOLY, NOT CONSPIRACY"

This slogan is revived whenever the Government successfully prosecutes a major conspiracy. In 1961, for example, after a United States district court had imposed fines of 1,787,000 dollars on twenty-nine electrical equipment manufacturers and sentenced seven industry executives to prison for conspiring to violate section

[4] Address by Henry Ford II to a group of German industrialists and government officials, Cologne, Germany, June 25, 1954 (mimeo).

one of the Sherman Act,[5] a financial commentator was moved to observe that the real purpose of the antitrust law is to prevent monopoly, and that "the law against price fixing through which the Government attempts to control or prevent monopoly, would if enforced to the letter, actually bring about monopoly."[6] The reasoning runs somewhat as follows: If prices were allowed to fluctuate without control, the giants in such industries as steel, machinery, automobiles, etc., would quickly become the only competitors in their field. Being more efficient than their smaller competitors, they would gain dominance over their industry and thus expose themselves to prosecution under section two of the Sherman Act. The only alternative, therefore, is for the giants to institute—as a matter of noblesse oblige—some price stabilization (*i.e.*, price fixing) scheme. By holding a price umbrella over the marginal producers, the giants would not only protect themselves against monopoly prosecution, but also shield their small business rivals against exploitation. But price fixing, of course, is not enough. In a world of identical prices, it must be supplemented with some scheme for market sharing. The sellers themselves have to decide who is to get what percentage of the market, and to devise some fair formula for doing so. Everybody in the industry must cooperate for the sake of mutual survival, and cooperation means denying to customers the opportunity of buying below standard or fair prices.

A variation of this argument is found in *Appalachian Coals, Inc. v. United States.*[7] There the Supreme Court approved defendants' scheme for stabilizing prices through the device of a joint sales agency. According to the Court, "good intentions will not save a plan otherwise objectionable,"[8] but defendants' purposes in the instant case were held to be proper and lawful: "The industry was in distress. It suffered from over-expansion and from a serious relative decline through the growing use of substitute fuels. It was afflicted by injurious practices within itself,—practices which demanded correction."[9] Moreover, defendants' plan for joint action might eliminate competition among themselves, but it did not give them the requisite market power for fixing arbitrary, unreasonable, monopoly prices. Was it not preferable, therefore,

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[5] For a detailed account of these cases, see J. HERLING, THE GREAT PRICE CONSPIRACY: THE STORY OF THE ANTITRUST VIOLATIONS IN THE ELECTRICAL INDUSTRY (1962).

[6] Bernstein, *Commentary*, The Value Line Survey, Mar. 13, 1961.

[7] 288 U.S. 344 (1933).

[8] *Id.* at 372.

[9] *Id.*

to permit defendants to operate as a loose-knit combination, and thus to maintain their corporate separateness, rather than forcing upon them a physical merging of their properties into a tight-knit combination which could exercise far greater price control in the market place? The Court stated:

> We know of no public policy, and none is suggested by the terms of the Sherman Act, that, in order to comply with the law, those engaged in industry should be driven to unify their properties and businesses in order to correct abuses which may be corrected by less drastic measures. Public policy might indeed be deemed to point in a different direction. If the mere size of a single, embracing entity is not enough to bring a combination in corporate form within the statutory inhibition, the mere number and extent of the production of those engaged in a coöperative endeavor to remedy evils which may exist in an industry, and to improve competitive conditions, should not be regarded as producing illegality.[10]

In short, conspiracy may, under some conditions, be the lesser of two evils and as such ought to be tolerated by the law.

Advocates of this "soft line" toward conspiracy—on the grounds that it is preferable to monopoly—are in effect proposing a system of industry self-government subject only to loose judicial surveillance. Under the scheme, the courts would judge conspiracies on a case-by-case basis, applying a rule of reason to determine whether in a particular set of circumstances a collusive arrangement is contrary to the public interest.[11] And it is precisely this rule of reason which the courts have consistently rejected—ever since Judge Taft refused to "set sail on a sea of doubt" or to assume "the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not."[12] Subsequent decisions have refined and crystallized this per se rule in section one cases, and articulated the rationale behind it in unmistakable terms. In *United States v. Trenton Potteries Co.*,[13] for example, Justice Stone

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[10] *Id.* at 376-77. Whatever the wisdom of this decision, there is general agreement on two points: (1) it is unquestionably an exception to the unilinear evolution of the case law under section 1 which has been marked by a consistent endorsement of the per se rule; and (2) the opinion has no precedent value, especially after United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[11] *Compare* A. PHILLIPS, MARKET STRUCTURE, ORGANIZATION, AND PERFORMANCE (1962) and Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139 (1952).

[12] United States v. Addyston Pipe & Steel Co., 85 F. 271, 284 (1898).

[13] 273 U.S. 392 (1927).

put it this way:

> The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies.[14]

Similarly, in *United States v. Socony-Vacuum Oil Co.*,[15] Justice Douglas explained the philosophy of the per se rule in these terms: "The reasonableness of prices has no constancy due to the dynamic quality of business facts underlying price structures. Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since those prices would not be subject to continuous administrative supervision and readjustment in light of changed conditions. Those who controlled the prices would control or effectively dominate the market. And those who were in that strategic position would have it in their power to destroy or drastically impair the competitive system. But," Justice Douglas emphasized, "the thrust of the rule is deeper and reaches more than monopoly power. Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference."[16]

Thus it is irrelevant, whether the participants in a collusive arrangement are activated by good or evil motives; whether con-

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[14] *Id.* at 397-98.

[15] 310 U.S. 150 (1940).

[16] *Id.* at 221.

spiracy is accomplished by formal contract or devious agreement; whether joint action results in market control or not; whether the amount of commerce involved is great or small; whether prices are raised, lowered or stabilized; whether the prices are fair and reasonable or not; whether the industry is endangered by ruinous competition, financial disaster, and other evils (real or fancied) or not. Collective action among competitors is conclusively presumed to be unlawful.[17] Whatever economic justification particular collusive agreements may be thought to have, they "are all banned because of their actual or potential threat to the central nervous system of the economy."[18] They are prohibited because the regulatory functions of the competitive market cannot be allowed to be subverted by private conspiracy unless some equally effective social safeguard is put in its place.

II. "ANTITRUST SHOULD ATTACK BAD MONOPOLIES, NOT ALL MONOPOLIES"

This view advocates a rule of reason or "abuse theory of combinations" in construing section two of the Sherman Act. It holds that section two does not and should not deal with the prevention of monopoly or the maintenance of competition. As Justice Holmes put it in a 1904 dissent, "the act says nothing about competition. . . . The prohibition [of combinations] was suggested by the trusts, the objection to which, as everyone knows, was not the union of former competitors, but the sinister power exercised or supposed to be exercised by the combination in keeping rivals out of the business and ruining those who already were in. It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared."[19] Restraining the trade of third parties or excluding them from trade altogether was the vice to be condemned, not the attainment or possession of dominance or market power.

After 1911,[20] and for more than thirty years thereafter, this doctrine was the judicial formula for dealing with tight-knit combina-

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[17] *Compare* Chief Justice Warren's restatement of the rule in United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956).

[18] This is from the famous footnote 59 of United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 (1940), which still stands as the definitive articulation of the per se rule in section 1 cases.

[19] Northern Securities Co. v. United States, 193 U.S. 197, 403, 405 (1904) (Holmes dissenting).

[20] Standard Oil Co. v. United States, 221 U.S. 1 (1911) and United States v. American Tobacco Co., 221 U.S. 106 (1911) mark the adoption by the Supreme Court of the "rule of reason" or "abuse theory of mergers" for section 2 cases under the Sherman Act.

tions. The law, said Justice McKenna in *United States v. United States Steel Corp.*,[21] "does not make mere size of an offence or the existence of unexerted power an offence. It, we repeat, requires overt acts and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition nor require all that is possible."[22] Unless a corporation abuses "the power or ascendancy" it possesses; unless it resorts to the "brutalities or tyrannies" of which Standard Oil and American Tobacco were guilty; unless it is motivated by evil intent "to crush its competitors or drive them out of the market," unless it has engaged in unfair or predatory practices, it cannot be held in violation of the law.[23] "Size," "monopoly power" or "market control" are irrelevant. The crucial distinction to be made is between "good" and "bad" monopolies, and that distinction must turn on "intent" and "practices"—on market conduct rather than market structure.

Various economic rationalizations may be offered to support the argument that substantial degrees of market power have to be tolerated in certain industries for the sake of acceptable "performance" levels. Thus, depending on the exigencies of the particular case, it has been argued that market power (*i.e.*, market control, dominance, monopoly) is necessary to insure operating efficiency of a mass production industry; to promote scientific research and technological progress; to give consumers the benefits of mass production and distribution; to support the foreign trade position of the United States and protect the balance of payments; to safeguard national security interests in the maintenance of strong productive facilities; to conserve natural resources; to assure the welfare of the labor force; etc.[24] In other words, the "good" trust may be a practical necessity to insure the magnificent performance of the American economy and the collective happiness of those who live under its beneficent dispensations.

Aside from the fact that these allegations are seldom supported by empirical evidence[25]—that they are no more than un-

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[21] 251 U.S. 417 (1920).

[22] *Id.* at 451.

[23] *Compare Id.* at 440-41.

[24] *Compare* Oppenheim, *supra* note 11, at 1188; Smith, *Effective Competition: Hypothesis for Modernizing the Antitrust Laws*, 26 N.Y.U.L. REV. 405 (1951); United States v. Aluminum Co. of America, 91 F. Supp. 333, 347, 416 (S.D.N.Y. 1950). *Contra* Adams, *The "Rule of Reason": Workable Competition or Workable Monopoly?*, 63 YALE L. J. 348, 361-69 (1954).

[25] For a definitive study on the relation between size and efficiency, see J. BAIN, BARRIERS TO NEW COMPETITION: THEIR CHARACTER AND CONSEQUENCES IN MANUFACTURING INDUSTRIES (1956). For a case study of

proved assertions—there are other reasons for rejecting the notion that the "good" trust, judged by "good" motives, "good" conduct, and "good" performance, should enjoy immunity from antitrust attack. First, with respect to good motives, Professor Handler correctly states:

> The proponents of any combination always profess the most exalted motives. Since their hearts and minds cannot be searched by the Courts, the Government, in the absence of admissions, must rely on the objective facts for contradiction. To infer intent from extrinsic circumstances is to add another link to the chain of proof and to open the door to metaphysical distinctions, evasions, and further uncertainty. The antitrust laws should be concerned not with a state of mind but with economic realities. It is the existence of monopoly, and not the reasons which prompted those responsible for its creation, which calls for corrective action . . . Monopoly is reprehensible in a political democracy whether or not accompanied by evil purpose or improper conduct . . . The distinction between good and bad trusts belongs to that outmoded era when the antitrust laws were regarded as a moral pronouncement rather than a charter of economic freedom.[26]

Second, with respect to good conduct, it is economically unrealistic to expect a dominant firm, once it has achieved substantial market power, to employ predatory practices to achieve its monopolistic ends. Its mere existence will be sufficient warning to smaller competitors that non-cooperation is tantamount to financial suicide. In the words of Justice Murphy, "domination may spring as readily from subtle and unexercised power as from arbitrary imposition or command. To conclude otherwise is to ignore the realities of intercorporate relationships."[27]

Thirdly, and still with respect to good conduct, it is contradictory and nonsensical to prohibit unconditionally all price fixing under section one of the Sherman Act, but to allow giant combinations under section two. The reason is obvious: Price control may be achieved by agreement or by merger; if achieved by agreement (loose-knit combination) it would be unconditionally forbidden under section one; if achieved by merger (tight-knit combination), and thus enjoying far more certain and effective control over

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the technological "progressiveness" associated with giantism in the steel industry, see Adams & Dirlam, *Big Steel, Invention, and Innovation*, 80 Q.J. ECON. 167 (1966). For other evidence of technological progressiveness, see J. JEWKES, D. SAWERS & R. STILLERMAN, THE SOURCES OF INVENTION (1958).

[26] TNEC MONOGRAPH NO. 38, A STUDY OF THE CONSTRUCTION AND ENFORCEMENT OF THE ANTITRUST LAWS 78-79 (1941).

[27] North Am. Co. v. SEC, 327 U.S. 686, 693 (1946). See also dissenting opinion by Justice Brandeis in American Column & Lumber Co. v. United States, 257 U.S. 377, 414 (1921).

price, it might well be immune under the "good trust"doctrine of section two. Such a policy would be self-defeating. "Indeed," as Judge Hand points out, "it would be absurd to condemn such [conspiratorial] contracts unconditionally, and not to extend the condemnation to monopolies; for the contracts are only steps toward that entire control which monopoly confers: they are really partial monopolies. . . . [T]here can be no doubt that the vice of restrictive contracts and of monopoly is really one; *it is the denial to commerce of the supposed protection of competition.*"[28]

Fourthly, with respect to good performance, the antitrust laws are based on the presumption, richly illustrated by industrial experience, "that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone."[29] Moreover, even if performance considerations were relevant, few if any concrete and measurable criteria have so far been suggested to make this a workable legal standard. As Judge Wyzanski observes:

> [W]ell as a monopoly may have behaved in the moral sense, its economic performance is inevitably suspect. The very absence of strong competitors implies that there cannot be an objective measuring rod of the monopolist's excellence, and the test of its performance must, therefore, be largely theoretical. What appears to the outsider to be a sensible, prudent, nay even a progressive policy of the monopolist, may in fact reflect a lower scale of adventurousness and less intelligent risk-taking than would be the case if the enterprise were forced to respond to a stronger industrial challenge. Some truth lurks in the cynical remark that not high profits but a quiet life is the chief reward of monopoly power. And even if a particular enterprise seeks growth and not repose, an increased rate in the growth of ideas does not follow from an increased concentration of power. Industrial advance may indeed be in inverse proportion to economic power; for creativity in business as in other areas, is best nourished by multiple centers of activity, each following its unique pattern and developing its own esprit de corps to respond to the challenge of competition. The dominance of any one enterprise inevitably unduly accentuates that enterprise's experience and views as to what is possible, practical, and desirable with respect to technological development, research, relations with producers, employees, and customers. And the preservation of any unregulated monopoly is hostile to the industrial and political ideals of an open society founded on the faith that tomorrow will produce a better than the best.[30]

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[28] United States v. Aluminum Co. of America, 148 F.2d 416, 428 (2d Cir. 1945) (emphasis added).

[29] *Id.* at 427.

[30] United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 347 (D. Mass. 1953); *aff'd per curiam*, 347 U.S. 521 (1954).

In the final analysis, however, the doctrine of the "good"trust is untenable under the antitrust laws because it subverts the regulatory system entrusted to the market place without putting another scheme for public protection in its place. The Sherman Act did not condone good trusts or condemn bad trusts, but forbade all trusts,[31] because "concentrations of power, no matter how beneficiently they appear to have acted, nor what advantages they seem to possess, are inherently dangerous. Their good behavior in the past may not be continued; and if their strength were hereafter grasped by presumptuous hands, there would be no automatic check and balance from equal forces in the industrial market. And in the absence of this protective mechanism, the demand for public regulation, public ownership, or other drastic measures would become irresistible in time of crisis. Dispersal of private economic power is thus one of the ways to preserve the system of private enterprise."[32] Private monopoly power represents the power of a handful of men over the economy. It may be benign or dangerous, but in a political democracy it cannot be entrusted to an industrial oligarchy—to "the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men. The fact that they are not vicious men but respectable and social minded is irrelevant. That is the philosophy and the command of the Sherman Act."[33] The law relies on a protective mechanism built on firmer foundation than baronial benevolence and noblesse oblige.

III. ANTITRUST SHOULD ATTACK CONSPIRACIES, NOT MERGERS AND CONCENTRATION

This view holds that antitrust has permitted two distinct—indeed, contrary—policies to exist side by side. "One policy has protected competition against such practices as conspiracies between firms to fix prices or limit production; this side of antitrust," says a *Fortune* writer," has played and should continue to play a helpful part in the ever increasing liveliness and flexibility of the American market. The other antitrust policy has been fearful of change; it has frowned upon the growth of firms, especially by merger . . . it has impaired the legitimate scope of freedom of contract and introduced arbitrary rigidities into the market through which we allocate resources."[34] Congress, therefore, should amend

[31] United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945).

[32] United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 347 (D. Mass. 1953).

[33] Dissenting opinion of Justice Douglas in United States v. Columbia Steel Co., 334 U.S. 495, 536 (1948).

[34] Ways, *Antitrust in an Era of Radical Change*, FORTUNE, Mar. 1966, at 128.

the antitrust laws to make it clear that it is the national policy to punish conspiracies to fix prices, limit production, allocate markets, and suppress innovation, but that it is not the national policy "to prefer any particular size, shape, or number of firms to any other size, shape, or number; and that mergers—horizontal, vertical, or conglomerate—are entirely legal unless they spring from a manifest attempt to restrain trade."[35]

Similarly, Handler and Robinson agree that "we categorically outlaw—and properly so—such an inherently anti-competitive practice as price fixing," but they object to the current administration of the anti-merger legislation. Their argument runs as follows:

> Many of today's markets are relatively concentrated. We are not living in a horse and buggy age. It takes large amounts of capital to produce the type of goods and services that we have grown accustomed to and need to maintain our standard of living—not to mention our position of strength in the world. What evidence is there that the fragmentation of industry would enhance our national security, promote research and development, elevate quality standards, improve conditions of employment, reduce prices, maintain profits at a level necessary to encourage new investment, stimulate the proper flow of capital, and enlarge our rate of growth? What proof is there that having eight companies instead of four, sixteen instead of eight, thirty-two instead of sixteen, will improve the nature and quality of competition? What we do know is that a program of wholesale deconcentration would produce dislocations and confusion that could be extremely costly and jeopardize national survival.[36]

Stripped of emotionalism and demagoguery, these statements reflect a misunderstanding of the policy thrust of the Celler-Kefauver Act. The dominant theme pervading congressional consideration of that law was "a fear of what was considered to be a rising tide of economic concentration in the American economy."[37] The law contained, therefore, an implicit presumption against growth by combination, and in favor of growth by internal expan-

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[35] *Id.*

[36] Handler & Robinson, *The Supreme Court vs. Corporate Mergers*, FORTUNE, Jan. 1965, at 164. To put these charges in some factual context, it should be noted that recent enforcement of the Celler-Kefauver Act has not caused any *deconcentration* of American industry, but rather prevented a further increase in *existing concentration*. Nor has the enforcement process reached anything even approximating "wholesale" proportions. See the testimony of Dr. Willard F. Mueller in *Hearings on S. Res. 40 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., pt. 2, at 501 (1965).

[37] Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962).

sion. This presumption, in turn, rested on four major postulates.[38] According to the *first*, firms should grow by competition-creating rather than competition-lessening methods—by "building" rather than "buying." Thus, Bethlehem's expansion plans in the Chicago area had to be effectuated by building the new Indiana Harbor facilities rather than by absorbing the existing Youngstown installations. Judicial refusal to approve the Bethlemem-Youngstown merger did not block Bethlehem's growth; it did prevent, however, further concentration in an already highly concentrated industry. A *second* postulate supporting the anti-merger presumption holds that internal growth stems from success in the market, whereas combination implies the artificial elimination of a going concern. In one case, the firm's growth is based on consumer acceptance of its products or investor approval of its financial performance, whereas the merger process implies the short-circuiting of an exogenous market judgment. The *third* postulate states that economies of scale, wherever they are indeed significant, can be realized through internal growth as well as through acquisition and merger. Thus, to forbid "size" achieved through merger does not condemn a firm, an industry, or society to a loss of economic efficiency. The *fourth* postulate states that collective action in restraint of trade—whether among competitors or between suppliers and customers—is incompatible with a competitive free enterprise system. If price fixing is to be banned unconditionally *regardless of the amount of commerce involved*, how can there be objection to prohibiting mergers which are likely to cause a *substantial* dimunition of competition or a tendency toward *monopoly*? It is strangely paradoxical, if not obliquely disingenuous, to support a per se rule against *all* price control by agreement and to defend such price control even in cases involving *anti-competitive* mergers.

Viewed in this light, the criticism of recent merger decisions loses its great pitch and moment. Indeed, the structural standards articulated in *Brown Shoe*, and applied in a functional context,[39] make a great deal of sense in judging the competitive impact of particular mergers. Justice Warren is quite sound in inquiring

> whether the consolidation was to take place in an industry that was fragmented rather than concentrated, that had seen a recent trend toward domination by a few leaders or had remained fairly consistent in its distribution of market shares among the participating companies, that had experienced easy access to markets by suppliers and easy access to suppliers by buyers or had witnessed foreclosure of business, that had witnessed the ready entry

[38] *Cf.* Adams & Dirlam, *Brown Shoe: In Step with Antitrust*, 1963 WASH. U.L.Q. 158, 159-62.

[39] Brown Shoe Co. v. United States, 370 U.S. 294, 321-22, 332 (1962).

> of new competitors or the erection of barriers to prospective entrants . . . .[40]

One can hardly take umbrage at Justice Brennan's allegedly "simplistic" test in the *Philadelphia* case (involving the merger of Philadelphia's second and third largest commercial banks) which held that "a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anti-competitive effects."[41] Nor can one object to the "bombshell" in Justice Brennan's footnote in that case which states that "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great."[42] Nor can one pretend shock at Justice White's standard in the *Continental Can* case that "where there has been a 'history of tendency toward concentration in the industry,' tendencies toward further concentration 'are to be curbed in their incipiency' . . . Where a merger is of such size as to be inherently suspect, elaborate proof of market structure, market behavior, and probable anticompetitive effects may be dispensed with in view of Section 7's design to prevent undue concentration."[43] These are simply ways of saying that some mergers tend to weaken the competitive structure of an industry, and that the law prohibits them in order to preserve the competitive market as the central regulator of the economy.

IV. ANTITRUST SHOULD BE ABANDONED ALTOGETHER, BECAUSE CONSPIRACY AND MONOPOLY ARE CREATURES OF THE STATE. IN THE ABSENCE OF GOVERNMENT INTERFERENCE, TRADE RESTRAINTS WOULD NOT AND COULD NOT EXIST

This view goes back to the common law notion that monopoly can be created only by exclusive grants of the King, and that only through such exercise of governmental power can third parties be restrained from engaging in a lawful trade or be deprived of their economic freedom. As Chief Justice White observed, "it is remarkable that nowhere at common law can there be found a prohibition against the creation of monopoly by an individual."[44] Mo-

[40] *Id.* at 322.
[41] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963).
[42] *Id.* at 365.
[43] United States v. Continental Can Co., 378 U.S. 441, 461, 488 (1964).
[44] Standard Oil Co. v. United States, 221 U.S. 1, 55 (1911).

nopoly in the concrete, it was felt could only arise from an act of sovereign power. Therefore, since "monopoly, as thus conceived, embraced only a consequence arising from an exertion of sovereign power, no express restrictions or prohibitions obtained against the creation by an individual of a monopoly as such."[45]

Some modern commentators have seized upon this notion to support their policy recommendations for unrestricted laissez-faire. Nathaniel Branden, for example, argues that "there is only one way to forbid entry into a given field of production: by *law*. Every coercive monopoly that exists or has ever existed—in the United States, in Europe, or anywhere else in the world—*was created and made possible only* by an act of government: by special franchises, licenses, subsidies, by *legislative* actions which granted special privileges (*not* obtainable on a free market) to a man or a group of men, and forbade all others to enter that particular field."[46] Therefore, Ayn Rand contends, "the concept of *free* competition *enforced* by law is a grotesque contradiction in terms . . . The only actual factor required for the existence of free competition is: the unhampered, unobstructed operation of the mechanism of a free market. The only action which a government can take to protect free competition is: *Laissez-Faire!*"[47] Antitrust laws, in this view, are superfluous in theory and nugatory in practice.

As in most theories, there is a grain of truth in this formulation. The current levels of concentration in the American economy cannot be explained simply in terms of technological or economic imperatives. Monopoly, to some extent, is the outgrowth of unwise, discriminatory, privilege-creating legislation—the concomitant of unimaginative, shortsighted, or corrupt exercise of administrative and regulatory power. Government today is, in many instances, the promoter of monopoly and frequently puts together the very power concentrations which the antitrust authorities are

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[45] *Id.* Nevertheless, as Chief Justice White observes in the same passage, the common law prohibited certain acts by *individuals* (*e.g.*, engrossing, regrating, and forestalling) from which "some of the *consequences of monopoly* might result (emphasis added)." *Id.*

[46] A. RAND, CAPITALISM: THE UNKNOWN IDEAL 66 (1966). The classical economists, by contrast, without yielding in their devotion to laissez-faire, pointed out that "the individual is unfree under *two* sets of circumstances: (1) when he is coerced or intimidated by law or government, *and* (2) when he is coerced or intimidated by the force or pressures his fellow men exert when they are not restrained by law or government from trying to impose their will on him." M. ADLER, THE IDEA OF FREEDOM 226, 234 (1958) (emphasis added).

[47] A. RAND, *supra* note 46, at 46, 48 (emphasis added).

later called upon to break asunder.[48] The examples are numerous: the long and pervasive list of antitrust exemptions;[49] the procurement practices of executive agencies, especially the Department of Defense;[50] the restrictive, exclusionary, and protectionist policies of the independent regulatory commissions;[51] the insulation of domestic oligopolies from import competition through tariff laws, anti-dumping legislation, import quotas, etc;[52] the granting of patents to private contractors performing research and development work for the government—at public expense and free of private risk.[53] These are examples—by no means exhaustive—of how the government attenuates and compromises the disciplinary role of the competitive market.

This does not, however, gainsay the need for antitrust laws or the desirability of governmental action to promote competition. Nor does it lend persuasive support to the policy claims of untrammeled laissez-faire. On the contrary, it underscores the virtue of government interference which is designed to improve the working of the competitive market mechanism as the central regulator of the economy; it underscores the vice of government interference which has the effect of creating, entrenching, and legitimizing private economic power and thus contributing to the subversion of the regulatory discipline imposed by competition. Unmitigated lassiez faire achieves neither goal. First, in the "private" sector of the economy which is entrusted to regulation by competition, lassiez-faire would quickly result in the destruction of the very freedom which its advocates ostensibly cherish. Since unfettered freedom presumably includes the right to destroy the freedom of others, it is incompatible with the maintenance of a free system! One man's freedom

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48 *Cf.* W. ADAMS & H. GRAY, MONOPOLY IN AMERICA: THE GOVERNMENT AS PROMOTER (1955).

49 HOUSE COMM. ON SMALL BUSINESS, 84th Cong., 2d Sess., A REPORT ON THE HISTORY OF CONGRESSIONAL ACTION IN THE ANTITRUST FIELD SINCE 1900, 33-41 (Comm. Print 1956).

50 JOINT ECONOMIC COMM., 89th Cong., 2d Sess., BACKGROUND MATERIALS ON ECONOMIC IMPACT OF FEDERAL PROCUREMENT—1966 (Comm. Print 1966).

51 *Cf.* Adams, *The Role of Competition in the Regulated Industries*, 48 AM. ECON. REV. SUPP. 527 (1958); Adams, *The Regulatory Commissions and Small Business*, 24 LAW & CONTEMP. PROB. 147 (1959). See also L. KEYES, FEDERAL CONTROL OF ENTRY INTO AIR TRANSPORTATION (1951); M. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955).

52 *Cf.* Adams & Dirlam, *Steel Imports and Vertical Oligopoly Power*, 54 AM. ECON. REV. 626 (1964); Adams & Dirlam, *Dumping, Antitrust Pollicy, and Economic Power*, 14 BUS. TOPICS 20 (1966).

53 R. BARBER, THE POLITICS OF RESEARCH 71-90 (1966).

to live requires interference with another man's freedom to kill him. The liberty of the sheep to coexist with the wolf is meaningless in the absence of a shepherd. Free enterprise makes sense only within a framework of freedom, within a system of rights which maximizes the individual freedoms of an entire society. And, since competition is a human artifact rather than a gift of nature, its preservation requires governmental action. It requires laws, like antitrust, to protect the competitive order against subversion by individuals and private groups.[54]

Second, in the "regulated" sector of the economy where entry cannot be entirely free (for technological or economic reasons) laissez-faire is also manifestly unworkable. In broadcasting, for example, the number of radio frequencies and television channels is necessarily limited. How, then, shall the inevitable scarcity problem be solved within the parameter of available alternatives? Shall the government sell the airways, as Ayn Rand suggests, on a "first come, first served" basis and then *protect* the monopoly rights thus acquired against intrusion by present and future contenders (*i.e.*, competitors)?[55] Is such legitimization of monopoly power the real meaning of laissez-faire? Or, should the government recognize fixed natural limitations upon the number of stations that can operate without interfering with one another,[56] and then allocate the spectrum in such a way as to maximize the dispersion of economic power within the limits imposed by technology? Clearly, the policy desideratum here, as elsewhere, is not the sanctioning of *some* private rights but the maximization of a *bundle* of rights—not

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[54] Half a century ago, John Bates Clark articulated the meaning of free competition and the guidelines for its preservation as follows: "In our worship of the survival of the fit under free natural selection we are sometimes in danger of forgetting that the conditions of the struggle fix the kind of fitness that shall come out of it; that survival in the prize ring means fitness for pugilism, not for bricklaying nor philanthropy; that survival in predatory competition is likely to mean something else than fitness for good and efficient production; and that only from strife with the right kind of rules can the right kind of fitness emerge. Competition is a game played under rules fixed by the state to the end that, so far as possible, the prize of victory shall be earned, not by trickery or mere self-seeking adroitness, but by value rendered. It is not the mere play of unrestrained self-interest; it is a method of harnessing the wild beast of self-interest to serve the common good—a thing of ideals and not of sordidness. It is not a natural state, but like any other form of liberty, it is a social achievement, and eternal vigilance is the price of it." J. CLARK, THE CONTROL OF TRUSTS 200-01 (1914).

[55] A. RAND, *supra* note 46, at 119. Miss Rand offers similarly contradictory views on the rationale of patent grants. *Id.* at 125.

[56] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953).

the protection of individual freedom but of a system of freedom. In short, laissez-faire must be more than a password for government legitimizing of private privilege.

V. CONCLUSION

As should be evident by now, the foregoing criticisms reflect a profound misconception of the economic rationale and political philosophy underlying the antitrust laws. They show a misunderstanding of the theory and policy implications of classical economics which constitute the historic roots of antitrust. They indicate a refusal to face up to two fundamental policy objectives of classical economics,[57] *viz.* (1) to utilize individual freedom as the central motive force in a free economy, and (2) to utilize competition as the principal safeguard against the abuse of private economic power. A brief discussion of each of these is now in order.

(1) Individual freedom, according to the classical economists, was the best method of maximizing social welfare. "The statesman, who should attempt to direct private people in what manner they ought to employ their capitals," wrote Adam Smith, "would not only load himself with a most unnecessary attention, but assume an authority which could safely be trusted to no council and senate whatever, and which would nowhere be so dangerous as in the hands of a man who had folly and presumption enough to fancy himself fit to exercise it."[58] Not the state, but the free play of market forces should determine the kinds and quantitites of goods to be produced, the factors of production to be employed, and the division of distributive shares. Individual economic activity should be coordinated through an autonomous and impartial planning mechanism—one that is external to human control, maniuplation, or perversion. The individual appetite for private gain should be harnessed for social ends by an "invisible hand"—the incentives and compulsions of a competitive market.

The central notion here is that individual freedom is conducive to social advantage, that a policy of laissez-faire or *pas trop gouverner* will achieve a harmony between the pursuit of self-interest and the maximization of general welfare. But the classicists were not so naive as to believe that this harmony was natural, spontaneous, or self-generating. As Lord Robbins points out, "The invisible hand which guides men to promote ends which were no part of their intention, is not the hand of some god or some natural

[57] For an excellent treatise on this subject, see W. SAMUELS, THE CLASSICAL THEORY OF ECONOMIC POLICY (1966).

[58] A. SMITH, THE WEALTH OF NATIONS 423 (Mod. Lib. ed. 1937).

agency independent of human effort; it is the hand of the lawgiver, the hand which withdraws from the sphere of the pursuit of self-interest those possibilities which do not harmonize with the public good."[59] The invisible hand is the hand of government acting in the role of rule maker and umpire—creating the framework in which alone economic freedom can perform its assigned social task.[60]

Individual freedom can be meaningful only within a pattern of freedoms, and the crucial question therefore revolves around the distribution of freedoms within an economic power structure. The crucial problem is to "distinguish between [government] interventions that destroy the need for intervention and interventions that tend to perpetuate it."[61] Thus, as Bentham points out, it is not enough to shout laissez-faire and oppose all government action: "To say that a law is contrary to natural liberty, is simply to say that it is a law: for every law is established at the expense of liberty—the liberty of Peter at the expense of the liberty of Paul."[62] If individual rights were absolute and unlimited they would mean license to commit the grossest abuses against society.[63]

The classicists were not content, therefore, with an exclusively negative view of government, summed up in the slogan of laissez-faire. They recognized, with Hobbes, that a state of nature is fraught with "fear and violent death" and that man's life in nature is for this reason "poor, nasty, brutish, and short"; that good order does not arise from a universal perception of a harmony of interests; that government is not a purely voluntary association; that, on the contrary, good order requires an irreducible element of governmental force, coercion, and intervention so as to maintain the framework in which alone freedom can flourish. Harmony and mutuality of interests being neither automatic nor inevitable, it becomes the "function of government in the modern world . . . to provide and enforce a framework of rules for securing freedom, and the conditions necessary for effective freedom, in economic life."[64] Laissez-faire was a policy prescription not so much for individual freedom as for a free economic system.

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[59] L. ROBBINS, THE THEORY OF ECONOMIC POLICY IN ENGLISH CLASSICAL POLITICAL ECONOMY 56 (1953).

[60] As John Stuart Mill observed, "All that makes existence valuable to anyone, depends on the enforcement of restraints upon the actions of other people." Quoted in W. SAMUELS, *supra* note 57, at 50.

[61] L. ROBBINS, POLITICS AND ECONOMICS 50-51 (1963).

[62] 3 THE WORKS OF JEREMY BENTHAM 185 (J. Bowring ed. 1962).

[63] According to Bentham, "An absolute and unlimited right over any object of property would be the right to commit nearly every crime." Quoted in W. SAMUELS, *supra* note 57, at 196.

[64] F. KNIGHT, FREEDOM AND REFORM 205 (1947).

(2) In the classical system, the invisible hand (*i.e.*, the competitive market) had to serve a dual function. On the one hand, it was to harness the individual to social ends; on the other, it was to deprive him of power so great that, if abused, it would result in harm to his fellows. In the words of Adam Smith, "It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their self-interest. We address ourselves, not to their humanity, but to their self-love, and never talk to them of our necessities, but of their advantages."[65] Nevertheless, this self-interest is only one side of the coin. It is the motive force that drives men to action. Something else is needed to keep these private appetites within social bounds —to prevent private profiteering at public expense—and that element is competition. Competition is the coordinator of individual activity, the planning mechanism built around private choices, the allocation system guiding the use of society's resources. But it is also the regulatory device for limiting and controlling economic power. It is the social safeguard against the abuse of private discretion.

In this view, competition is a regulatory system. Its objectives are the same as that of any regulatory system, but its techniques are different. It achieves its social ends, not through direct participation in the economic game, but through a set of prohibitory rules designed to insure the desired outcome. It relies not on the visible hand of the central planner, but on an autonomous, objective, and impersonal market process. It exercises compulsion, not through direct governmental decision making, but through rules which guide, limit, and discipline private decision makers.

In a sense, the regulatory scheme of competition is analogous to the rules of a football game. The team is free to use a running or a passing game, a T-formation or a single wing attack, end runs or line plunges; but it may exercise discretion only within prescribed limits. The field is of specified dimensions; there are rules as to team size, with no mergers allowed; there are prohibitions against off-sides, clipping, ineligible receivers, and similar competitive methods; above all, there is a referee to enforce these rules, and an athletic association to change the rules whenever necessary to improve the quality of the game.

In the final analysis, that is the role of antitrust in a free economy. It is a regulatory system which functions through prohibitory rules. It sets the limits within which individuals are free to do as they please. But, like any regulatory system, it must protect its own integrity. It must insure that the freedom it allows

[65] A. SMITH, *supra* note 58, at 14.

to individuals is not used to destroy the freedom of others or to subvert the entire system of freedom. Most important, perhaps, it must prevent the foxes from ending up as masters of the hen-house.