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ANTITRUST AND THE NEW INDUSTRIAL STATE

JERROLD L. WALDEN*

A firm belief in competition as the solution to all economic problems characterized the catechism of the framers of the Sherman Act.¹ In an age when the social evils of industrialism may have outweighed its benefits, those enacting the law saw in the ever burgeoning trusts an evil of extreme magnitude which should be extirpated at the earliest opportunity.² If only competition in industry could be preserved against the ever encroaching monopolies, a just economy would spread its benefits to all.

There was much evidence to support the creed of Senator Sherman and his supporters at the time. The country had long suffered at the hands of the large railroad combinations which discriminated against various sections of the nation in freight rates. Such large combines as the Standard Oil Trust had driven countless independent businessmen from the scene as a result of their predatory practices.³ The passage of the antitrust laws constituted a monumental protest against the business practices of the "Robber Barons."

However, the decades following the enactment of the Sherman Act saw, if anything, an intensity in the growth of large industrial combinations. A study of the fifty-seven corporations doing a billion-dollar business in 1962 and comprising the leaders of the present industrial system disclosed that almost three-quarters of them had their genesis in the two decades immediately before or after the passage of the Act.⁴ Insofar as it was designed to discourage the growth of large combinations, it thus seems that the Sherman Act was a failure almost before the ink was dry on the law.

The Sherman Act was the last gasp of a rapidly receding agricultural economy. In 1889, agriculture had experienced its peak year in American history to that point.⁵ Yet, concomitantly, at some undisclosed period in the preceding decade, manufacturing had exceeded farm pro-

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¹ 15 U.S.C. § 1 *et seq.* (1964), formerly 26 Stat. 209 (1890).

² For a carefully documented examination of the historical antecedents of our anti-trust policy, see generally H. THORELLI, *THE FEDERAL ANTITRUST POLICY* (1954).

³ See generally I. TARBELL, *THE HISTORY OF THE STANDARD OIL TRUST* (1925).

⁴ See Walden, *Antitrust in the Positive State: II*, 42 TEXAS L. REV. 603, 661-705 (1964).

⁵ W. SHAW, *VALUE OF COMMODITY OUTPUT SINCE 1869*, at 247 (1947).

duction for the very first time. The United States was on its way to becoming the leading industrial nation in the world. Not only has the industrialization of America accelerated since the turn of the century, but most industry has gradually become concentrated into fewer and fewer hands. And today, the nation's market place is dominated by a small coterie of giant concerns.

Whatever the validity of the premises underlying the passage of the Sherman Act at the time of its enactment, the antitrust laws have come to have even less relevancy to the American economy in the closing decades of the twentieth century. The framers of the antitrust laws saw in them a safeguard for the farmer, the independent businessman, and the small merchant against the inroads then being made in the economy by the large industrial corporation. Today, however, the economy can be defined only in terms of the small number of giant industrial concerns which dominate it from every standpoint. The remainder of the economy is composed in the main of economic satellites dependent upon the strength of the few leaders of the industrial system for their continued health and prosperity.

Whether one takes as a starting point the one hundred or two hundred largest corporations or *Fortune's* annual list of five hundred leading manufacturing concerns, the dominance of giant industry over the American economy is apparent. In 1965, for example, the five hundred largest industrial concerns (comprising the *Fortune* list) transacted almost 60 percent of all industrial sales in the United States and accounted for 70 percent of profits.⁶ In the same year, they employed some 11.3 million persons, or more than 60 percent of the nation's industrial work force.⁷ In 1962, these five hundred companies owned over two-thirds of all manufacturing assets in the United States.⁸ Only this year, the Department of Justice has pointed out that as of 1967, the nation's two hundred largest manufacturing companies held 58.7 percent of all manufacturing assets, an increase from 48.1 percent in 1948.⁹ These figures are extremely impressive and indicate the extent to which the economic welfare of the nation depends upon the operations of a relatively few large corporate entities.

It is these same large industrial companies which play such a vital role in the defense effort as part of the "Military-Industrial Complex" against which President Eisenhower warned the nation upon his de-

⁶ Loomis, *The 500: A Decade of Growth*, *FORTUNE*, July 15, 1966, at 213.

⁷ *Id.* at 231.

⁸ J. GALBRAITH, *THE NEW INDUSTRIAL STATE* 75 (1968).

⁹ *Wall Street Journal*, April 15, 1969, at 4, col. 1.

parture from office. Between 1950 and 1958, just 25 large companies received 47.6 percent of all prime military contracts.¹⁰ In the year ending June 30, 1967, the Department of Defense awarded \$25.6 billion in new contracts to one hundred large companies or their subsidiaries. This constituted 65 percent of the total dollar volume of new contracts awarded that year. And a mere twenty of these large corporations alone accounted for 40 percent of the dollar volume of such contracts.

The continued advancement of our society in economic terms is today largely dependent upon research for new products and new methods of manufacture. The recent moon landings are moot testimony to the importance of research to the nation today. Here again, a few large companies predominate. IBM, for example, spent \$5 billion over a four-year period for the development of the 360 computer — a sum roughly equivalent to the annual space budget of the United States.¹¹ In 1960, 384 firms with five thousand employees or more accounted for an estimated 85 percent of all industrial research expenditures in the United States.¹²

It makes little sense to speak realistically of the American economy other than in terms of the operations of a few large corporations, and it is in light of this basic industrial structure of the nation that the relevancy of the antitrust laws today must be appraised. It is true that few, if any, of these large corporations are monopolies in the classical sense. For the most part, the market place for any particular product or commodity is characterized by oligopoly where only a few sellers predominate. To the classical economist, however, oligopoly was almost as bad as monopoly because oligopolistic markets tended to behave like monopolistic ones. But in today's economy, oligopoly, however distasteful it may be, is the rule rather than the exception. In 1958, for example, there were at least 137 industries wherein the four largest companies accounted for one-half or more of the total value of shipments, and there were some 370 product categories for which the four leading concerns were responsible for 50 percent or more of the value of shipments.¹³ The trend toward oligopoly may very well be accelerating in spite of the antitrust laws.¹⁴ During the year 1968 a record total

¹⁰ SENATE COMM. ON BANKING & CURRENCY, REVIEW OF VOLUNTARY AGREEMENTS UNDER THE DEFENSE PRODUCTION ACT, 86TH CONG., 1ST SESS., REPORT BY ATT'Y GEN. PURSUANT TO § 708(a) OF DEFENSE PRODUCTION ACT OF 1950, Table 5 (Comm. Print 1959).

¹¹ J. SERVAN-SCHREIBER, *THE AMERICAN CHALLENGE* 138 (1968).

¹² J. GALBRAITH, *supra* note 8.

¹³ SUBCOMM. ON ANTITRUST AND MONOPOLY OF THE SENATE COMM. ON THE JUDICIARY, CONCENTRATION RATIOS IN MANUFACTURING INDUSTRY — 1958, 87TH CONG., 2D SESS., pt. II, REPORT BY BUREAU OF THE CENSUS 457 (Comm. Print 1962).

¹⁴ See Henderson & Henderson, *The Race to Oligopoly*, 1968 DUKE L.J. 637.

of 4,462 corporate mergers took place.¹⁵ Added to the 2,975 mergers occurring in 1967, the 2,377 in 1966, the 2,125 in 1965, the 1,950 in 1964, and the 1,361 in 1963, one finds a grand total of some 15,250 mergers transpiring in the latest six-year period.¹⁶ Their impact on industrial concentration has yet to be ascertained.

According to the premises underlying the Sherman Act, the marketplace is supposed to control all of the incidents of a firm's economic behavior, including the setting of production and the determination of prices. Agreements fixing prices¹⁷ or limiting production¹⁸ are unlawful per se. Prices and production should remain variables which fluctuate in accordance with the laws of supply and demand. These laws, however uncertain they may be, will, if working effectively, serve to allocate the resources of the economy for the best interests of all concerned. The chief characteristic of the nation's industrial system, however, has been its noticeable ability to relieve itself from the economic vagaries of the marketplace. Vertical integration has permitted the large concern to assure itself a source of materials and a market for its finished product at prices which it is able to control.¹⁹ Insofar as competitors are concerned, there is no need to agree upon prices because identical prices can be reached simply by reading each others' price lists. Sound business acumen leads to the conclusion that the individual concern will prosper most if it adheres to the published prices in the trade. Thus prices for many commodities are the same and rise and fall in unison under the phenomenon of price leadership without any overt conspiracy being involved. Under such circumstances, one wonders how seriously the Sherman Act's stern admonition against the collective setting of prices should be taken.

Nor are the prices which are adhered to simply determined by the laws of supply and demand. The prices set by dominant industrial enterprises are administered, that is, they are fixed by corporate executives based upon a formula which is calculated to cover costs, reserves for replacement and expansion, and return to shareholders. Prices are, for the most part, target prices which, for a predetermined rate of operation, are designed to yield a specified return on investment or net

¹⁵ 1968 MERGER REVIEW 1 (W. T. Grimm & Co., Jan. 1, 1969). Note also that 2,815 mergers occurred during the first half of 1969 alone. 1969 MIDYEAR MERGER SURVEY 1 (W. T. Grimm & Co., July 1, 1969).

¹⁶ 1967 MERGER REVIEW 1 (W. T. Grimm & Co., Jan. 1, 1968).

¹⁷ United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

¹⁸ See Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940) (dictum).

¹⁹ See J. GALBRAITH, *supra* note 8, at 28.

worth.²⁰ Thus, automobiles, for example, are priced by General Motors so as to yield a return, after taxes, of 15 percent on capital based on a sales volume of 80 percent of capacity.²¹

A general assault is also leveled by the large corporations on the demand side of the equation. This is done through large-scale advertising and planned obsolescence. In 1961, for example, the one hundred leading advertisers spent a grand total of \$1,717,920,651 on advertising in seven various media, or 47.3 percent of the total for all national advertising.²² The dominant corporations are also aided in maintaining demand through government price and monetary policies designed to maintain a high level of purchasing power throughout the economy. We can be sure that a large volume of automobile sales will take place each year although we cannot be certain whether the figure will be eight million or nine million or more cars.

Despite the Sherman Act, administered prices on the part of American industry have received the tacit approval of the federal government. Indeed, when industry has on occasion been tempted to take advantage of the laws of supply and demand and price accordingly, it has run into direct confrontation with either the executive or legislative branch of the federal government. In September 1961, for example, President Kennedy wrote the presidents of principal steel companies throughout the nation suggesting that the industry "forgo a price increase."²³ When United States Steel ignored this request and instituted a six dollar per ton increase in the price of steel, intense government pressure was brought to bear throughout the steel industry to secure a rescission of this raise.²⁴ Underlying this action and all attempts to set pricing guidelines for industry is the notion that large American corporations are collectively able to determine the price levels in the economy and should, as a patriotic measure, do so at levels suggested by the Government. This is known as price fixing by suasion, but it certainly finds no sanction in the Sherman Act.

American industry has managed to free itself from the marketplace in still another way through the phenomenon of administered prices. Administered prices are set high enough by the large industrial concern so as to leave sufficient sums in retained earnings and deprecia-

²⁰ See Lanzillotti, *Pricing Objectives in Large Companies*, 48 AM. ECON. REV. 921 (1958).

²¹ A. KAPLAN, J. DIRLAM & P. LANZILLOTTI, *PRICING IN BIG BUSINESS—A CASE APPROACH* 50 (1958).

²² See *PRINTER'S INK*, ANN. GUIDE TO MARKETING FOR 1963, at 386 (1963).

²³ The incident is recounted in A. SCHLESINGER, *A THOUSAND DAYS* 583-88 (Crest Book ed. 1967).

²⁴ *Id.*

tion accounts to take care of plans for future expansion. Thus most corporations rely upon internal financing for their expansion needs, rather than upon the capital markets. Indeed, it is estimated that internal funds have supplied approximately 75 percent of all capital expenditures for replacement and expansion in American industry since the end of World War II.²⁵ Thus the capital markets no longer play an appreciable role in financing the pillars of American capitalism. Instead, it is current consumers, through the prices they pay for products, rather than investors through the purchase of securities, who provide the capital funds for American industry today. The capitalist system, as Marx predicted, has indeed withered away, but in its stead have arisen a large number of independent units quasi-sovereign in nature which, through large-scale planning, have insulated themselves from the whimsical caprices of the capital markets.

The large industrial corporation is no longer a phenomenon peculiar to the American scene. At the end of 1967, American companies had invested a total of \$64.8 billion abroad,²⁶ and large American concerns were beginning to dominate foreign markets to the same extent that they prevailed here at home. Canada, with some five thousand subsidiaries of American companies, had become virtually a colony of the United States. American concerns had invested a total of \$26.5 billion in Canada by the end of 1965.²⁷ It was estimated in 1964 that firms in the United States controlled 95 percent of the Canadian automobile and automobile parts industry, 89 percent of rubber products, 64 percent of electrical apparatus, more than 50 percent of the chemical industry, some 43 percent of the pulp and paper industry, 70 percent of the petroleum and natural gas industry, and 52 percent of the mining and smelting industry.²⁸ And the same report further estimated that American capital controlled nearly one-half of all of Canada's manufacturing industry at that time.²⁹

In Europe, the same picture has emerged. In Great Britain, three American auto companies have dominated the market — Ford, GM (Vauxhall) and Chrysler (Rootes), leaving just two British firms for the non-luxury automobile market.³⁰ According to *Time* magazine, in 1967 Americans owned one-half of all modern industry in Great

²⁵ Walden, *supra* note 4, at 610 n.14.

²⁶ *The Long Term View From The 29th Floor*, TIME, Dec. 29, 1967, at 56.

²⁷ N.Y. Times, Jan. 23, 1967, at 49, col. 4.

²⁸ Fowler, *The Impact of American Business*, THE ATLANTIC MONTHLY, Nov. 1964, at 119-20.

²⁹ *Id.*

³⁰ N.Y. Times, Jan. 18, 1967, at 65, col. 5-6.

Britain.³¹ In West Germany, by 1965, 40 percent of the auto industry was controlled by Americans through Opel and Ford; similarly, 30 percent of the oil industry was controlled by such American companies as Standard Oil, Mobil Oil, Caltex, and Veedol. And a firm which was three-quarters owned by Owens Illinois Glass had gained control of 40 percent of the glass market.³² In France, again the same story unfolded. It was reported in 1968 that American firms controlled 40 percent of the petroleum market, 65 percent of films and photographic paper, 65 percent of farm machinery, 65 percent of telecommunications equipment, and 45 percent of synthetic rubber.³³ In Europe as a whole, by the end of 1967 Americans controlled 80 percent of the vital computer business, 90 percent of the microcircuit industry, 40 percent of automobiles, and large shares of chemicals, farm machinery and oil.³⁴ In the underdeveloped nations of the world, much the same phenomenon can be seen in the form of control by large American corporations of concessions for raw materials such as copper, bauxite, oil, and iron ore.

We are now witnessing a new type of colonialism the ramifications of which are presently beyond conception. Whereas the old colonialism was imposed by force by a dominant military power upon a backward nation, the new colonialism is frequently welcomed with open arms by nations having long histories of economic and political independence. While the forces of nationalism in these countries often inveigh against foreign interests, these have been more than counterbalanced by the wealth which large American concerns have succeeded in bringing to foreign lands in the form of capital investment, production of goods, employment, and advanced technology.

Antitrust, we must conclude upon reflection, has little relevancy to the economic and political problems raised by the existence of an international economy dominated by relatively few giant corporate entities. We are vitally concerned, to be sure, with the level of prices established by large basic industries because of the impact upon economic growth, the ability of new firms to survive, increasing consumer purchasing power, and inflation. But the antitrust laws themselves prohibit collusive rather than consensual pricing,³⁵ and prices in our large industries today are imitative rather than conspiratorial in nature.

³¹ TIME, *supra* note 26.

³² Figures are from ATLAS 361 (1965).

³³ Figures are from J. SERVAN-SCHREIBER, *supra* note 11.

³⁴ TIME, *supra* note 26.

³⁵ See Theatre Enterprises, Inc., v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954).

While the Sherman Act may be a potent weapon against monopoly, modern markets are characterized by several large units which dominate the scene. Their behavior, it is true, may on occasion resemble that of the monopolist, but the Sherman Act does not make sheer size itself an offense,³⁶ nor does it proscribe oligopoly or any of its characteristics. It is extremely doubtful at this time if any large-scale attempt to fracture American industry would have much likelihood of judicial success even if it possessed the slightest political feasibility. Nor would it make much sense in economic terms.

The antitrust laws, it is true, have been utilized to wage a rear-guard action against the growth of new entities on the scale of those which now dominate American and international markets. In a number of significant cases, the courts have been successful in preventing mergers which would have created a new firm rivaling in size those already dominating the market.³⁷ However, one wonders if this has always been wise in terms of justice or economic sense. Certainly it is in the interests of those already in a dominant position to prevent the growth of new firms which might be strong enough to challenge their hegemony in specific markets. And by preventing just such a development, antitrust may do more to protect existing oligopolies against competition than it does to promote competition, as is said to be the case. Even here, however, the antitrust laws have proven less than successful in light of the record number of mergers occurring within the last few years which has given rise to the conglomerate on the economic scene. These new entities have grown in number and size sufficiently to present a significant challenge to present industry leaders.

One of the problems brought about by the size of dominant American concerns is their ability to influence public policy decisions, both at home and abroad, in a manner contrary to the interests of the general public. To what extent does the United Fruit Company, for example, influence governmental policies toward the Central American Republics? To what extent is our domestic policy with respect to the disposal of shale oil on public lands determined by the large oil companies? Undue influence as a result of economic power in the political arena may have vast consequences not only upon the development of the economy but upon the general welfare of the nation as well. Yet the Supreme Court has held in *Eastern Railroad Presidents Conference*

³⁶ *United States v. United States Steel Corp.*, 251 U.S. 417 (1920).

³⁷ See, e.g., *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958). Cf. *Briggs Mfg. Co. v. Crane Co.*, 185 F. Supp. 177 (E.D. Mich.), *aff'd*, 280 F.2d 747 (6th Cir. 1960).

v. Noerr Motor Freight, Inc.,³⁸ that the collective use of economic power for the purposes of lobbying in the legislature is protected by the right to petition and is not violative of the antitrust laws.³⁹ In *United Mine Workers v. Pennington*,⁴⁰ the Court carried this line of reasoning still further and held that the antitrust laws do not apply to the collective use of economic power to influence public officials in their policy making decisions. Thus, in an area of crucial importance if one is concerned with the abuses of power and size, the Sherman Act has been shorn of any influence whatsoever, and large corporations which dominate the economy have been turned completely loose to combine their efforts to influence legislators and policy makers to favor their private interests.

If a few hundred large corporations are to dominate the international economy in the foreseeable future, the question that immediately comes to mind is who is to control this enormous aggregate of power? It is quite clear from what we have said heretofore that it is not the competitive marketplace which governs the behavior of these firms. Nor, as has been clearly shown by Professor Adolph Berle, is it any longer the shareholders of the large corporations.⁴¹ The general conclusion has been reached that the management of each of these concerns is a self-perpetuating oligarchy which determines its own behavior and selects its own successors.⁴² Were this the case, it would present a number of problems which might be difficult to resolve, but it would at least ensure that this vast amount of power, for better or worse, was diffused among several hundred separate institutions. There is evidence to indicate, however, that control over the economy may be much more highly centralized than would first appear. In 1939, the National Resources Committee conducted a study of the two hundred largest non-financial corporations and the fifty largest banks. It found that the interrelationships between these corporations, such as interlocking directorates, stockholding interests and financing relationships, were such that there were eight identifiable interest groups which controlled concerns having two-thirds of the assets of the companies studied.⁴³ The largest of the interest groups was the Morgan First Na-

³⁸ 365 U.S. 127 (1961).

³⁹ See Walden, *More About Noerr—Lobbying, Antitrust and the Right to Petition*, 14 U.C.L.A.L. REV. 1211 (1967).

⁴⁰ 381 U.S. 657 (1965).

⁴¹ A. BERLE & G. MEANS, *THE MODERN CORPORATION & PRIVATE PROPERTY* (rev. ed. 1967).

⁴² E. MASON, *THE CORPORATION IN MODERN SOCIETY* 6, 13 (1959).

⁴³ NATIONAL RESOURCES COMMISSION, *THE STRUCTURE OF THE AMERICAN ECONOMY* 161 (1939).

tional Bank group which embraced assorted industrials, rails, banks and utilities with over \$30 billion in assets.⁴⁴ There is strong evidence that relationships of this sort still persist and that policy decisions throughout vast segments of American business may be determined by a relatively small group of men high up in American financial circles.

In 1967, for example, Morgan Guaranty Trust Company held substantial minority stock interests in or had interlocking directors with companies having total assets of \$27.7 billion,⁴⁵ while First National City Bank of New York had similar relationships with large corporations having \$43.1 billion in assets.⁴⁶ Similar relationships between large Eastern banking interests and the industrial sector of the economy can be shown. What we strongly suspect to be the case is that not only is industry in the United States highly concentrated, but also *control* over American industry is even more highly centralized.

To this problem, too, the antitrust laws furnish little assistance. The Clayton Act⁴⁷ prohibits interlocking directorates between competing corporations but does not cover the sinews of control which a few large financial institutions can exert over the economy through minority stockholdings and by strategically placing their minions on the boards of directors of large segments of American industry.

In conclusion, we have tried briefly to depict the basic structure of the American economy and the fact that the American pattern seems destined to prevail throughout the world within a short number of years barring unforeseen circumstances. We have also endeavored to show that insofar as providing a solution for the basic problems raised by the new industrial state, the antitrust laws provide scant comfort. While the level of administered prices is of utmost concern in view of the power of a few firms to control the prices of basic commodities, antitrust, with its concentration on conspiratorial action, can provide no adequate remedy. Nor are the antitrust proscriptions against monopoly at all relevant to the oligopolistic market structures that prevail throughout the economy today. To the extent that the antitrust laws against mergers are employed to prevent the growth of new oligopolies to compete with those already entrenched in the market, they perhaps do more harm than good. What is of special significance is the fact that antitrust proscriptions against collective action have been held in-

⁴⁴ *Id.*

⁴⁵ STAFF OF THE SUBCOMM. ON DOMESTIC FINANCE OF THE HOUSE COMM. ON BANKING & CURRENCY, 90TH CONG., 2D SESS. 700 (Comm. Print 1968).

⁴⁶ *Id.* at 716.

⁴⁷ 15 U.S.C. § 19 (1964).

applicable to the crucial problem of the undue use of economic power to attain political ends. Finally, we have seen that the antitrust laws have yet to consider the use of interlocking relationships to further concentrate economic power into the hands of a few large financial interests. These are all crucial problems for the new industrial state if we are to preserve a truly independent economy and the people are to retain control over their society. But for their solution, I fear we must look elsewhere than to antitrust as it has been traditionally administered.