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## MONOPOLIES AND THE COURTS

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There is general agreement on the part of business men and their lawyers, as well as in government circles and among the consuming public, that the Antitrust Laws should be revised. But the group which speaks for the business interests is not motivated, in its desire for revision, by the same considerations as the others, nor does it have in view the same objective or seek to reach the same result in modifying the present enactments.

The business man and his counsellor frequently start with the pessimistic observation that the Antitrust Laws are a failure; that economic affairs cannot be controlled by legislation; that experience with the Antitrust Laws proves that the Government is unable to break up monopoly or to prevent its creation; and that therefore further effort to curb monopoly should be abandoned.<sup>1</sup>

With these pessimistic views we are unable to agree. There is no denying that the Antitrust Laws have failed to achieve the chief purposes of their authors, but this by no means proves that government itself is powerless to achieve those ends. The full power of the Government has never yet been mobilized against monopoly.

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1. "What they argue is that the trend towards monopoly is so irresistible, and that incidentally it has so much about it that is economically defensible, that the only sound policy for the law to take is not to seek to interfere with it, but to let it work out to its conclusion and then impose governmental regulation upon it after it has been achieved.

"This argument rests on the optimistic assumption that we would somehow be more successful in controlling and regulating monopoly, once it has been established, than we are alleged to have been in checking and preventing it under the Sherman Act. It is difficult to see grounds for this optimism." Dickinson, *The Anti-Trust Laws and the Self-Regulation of Industry* (1932) 18 A. B. A. J. 600.

While a relatively minor section of the Government has had the function of attempting to curb monopoly, patent, tax, and tariff laws have favored its development. Indeed, as Senator Wagner has said, "Half of the laws enacted by Congress represent one school of thought, the other half another. No one can state authoritatively what our national policy is."<sup>2</sup>

Until government has mobilized all of its forces against monopoly it is too early to reach the judgment that government is impotent to deal with it. It is one of the purposes of this article to point out that, in addition to conflict of policy in the executive department and in the legislative department, there has been a general failure of cooperation on the part of the judicial department in achieving the suppression of monopoly; and that present results are no indication of what might be accomplished by means of a really united effort.

### I. NEED FOR CONTROL OF MONOPOLIES

The establishment of a consistent national policy of monopoly control, intelligible both to those expected to comply with it and those expected to enforce it, would be highly desirable and advantageous to American business. Few political sentiments are more deeply rooted in the economic and social convictions of the American public than that which has inspired laws against monopoly. That these sentiments are as prevalent among business men as among other sections of the public is amply shown by the fact that the overwhelming preponderance of antitrust complaints come from the business men themselves.

The Sherman Act of 1890 declared illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce."<sup>3</sup> The general language of the statute might include almost any combination, trade association or industry. But the courts have handed down decisions whittling away the scope of the law until it is possible to make a plausible legal defense in behalf of almost any combination in restraint of trade.

In view of the extreme uncertainty which prevails as a result of these vague and conflicting adjudications, it is impossible for a lawyer to determine what business conduct will be pronounced lawful or unlawful by the courts. This situation is equally embarrassing to business men wishing to obey the law and to government officials attempting to enforce it.

#### *Confusion in the Field of Resale Price Maintenance*

As a typical example of the fluctuating ambiguities of antitrust law, the nebulous rules laid down regarding resale price maintenance may be noted.

2. N. Y. Times, May 9, 1937, § 8, p. 9, col. 2.

3. 26 STAT. 209 (1890), 15 U. S. C. A. § 1 (1927). To the statutory, as well as common, law regarding restraint of trade may well be applied William Penn's comment: "If the common law be so hard to be understood, it's far from being very common." EDSELL, JOURNAL OF THE COURT OF COMMON RIGHT AND CHANCERY OF EAST NEW JERSEY (1937) 11.

*Bobbs-Merrill Co. v. Straus*<sup>4</sup> held that the copyright law, and *Bauer v. O'Donnell*<sup>5</sup> held that the patent law, gave the legally sanctioned monopolist nothing more than an exclusive right to make, use and vend his product, and did not authorize imposition of restraints on the alienation of chattels by fixing the resale price, after the original seller had parted with his title. The same rule was applied in the case of an unpatented medicine prepared by a secret formula in *Dr. Miles Medical Co. v. Park & Sons Co.*,<sup>6</sup> where expression was given to the public policy<sup>7</sup> of the common law in the federal courts.

In the *Miles* case the unlawful combination was effected through contracts which undertook to obligate dealers to maintain resale prices. But where the manufacturer is able to keep up prices by simply refusing to sell to price-cutters, there is no illegality. In *United States v. Colgate Co.*<sup>8</sup> the Court said: "In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell."<sup>9</sup>

Judge Westenhaver, in *United States v. Schrader's Sons*,<sup>10</sup> was unable to perceive any distinction between the *Miles* and *Colgate* cases, since he attached no legal weight to the fact that in the former case there was a written contract instead of tacit acquiescence in the marketing arrangement. He concluded that intent to monopolize, present in the *Miles* case, was perhaps the essential element of the offense which was lacking in the *Colgate* case.

On appeal, the Supreme Court upheld<sup>11</sup> the authority of both those cases, dwelling on the distinction between the situation where a manufacturer "merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them" and that where he "enters into agreements—whether express or implied from a course of dealing or other

4. 210 U. S. 339 (1908).

5. 229 U. S. 1 (1913).

6. 220 U. S. 373 (1911).

7. In patent, but not copyright, cases that policy was regarded as modified by the statute giving the patentee exclusive right to *use* (as well as make or vend) the article. (The word "use" did not occur in the copyright law.) Price maintenance was thought a "reasonable" condition which could be imposed on the assignee of the right to manufacture or use a patented article. See *Bement v. National Harrow Co.*, 186 U. S. 70, 93 (1902); *Henry v. Dick Co.*, 224 U. S. 1, 31 (1912). So was a "tying clause" requiring use of unpatented accessories produced by the maker of the patented machine; yet five years later the "tying clause" was outlawed as being in no sense a restriction on the use of the *patented* machine, and the *Dick* case expressly overruled, by *Motion Pictures Patent Co. v. Universal Film Mfg. Co.*, 243 U. S. 502 (1917). And a "licensing" scheme, where full value of the machine was paid at the outset to the maker, was treated as a sale in *Straus v. Victor Talking Machine Co.*, 243 U. S. 490 (1917). Cf. also, as to "tying clauses", *United States v. United Shoe Machinery Co.*, 247 U. S. 32 (1918); *International Business Machines Corp. v. United States*, 298 U. S. 131 (1936).

8. 250 U. S. 300 (1919).

9. *Id.* at 307.

10. See 264 Fed. 175, 183, 185 (N. D. Ohio, 1919).

11. 252 U. S. 85 (1920).

circumstances" which "undertake to bind" customers to observe fixed resale prices.<sup>12</sup>

In *Frey & Son v. Cudahy Packing Co.*<sup>13</sup> the Court reiterated that no formal written or oral agreement was necessary, but that a combination or conspiracy might be implied from a course of dealing or other circumstances, and was a question for the jury. The Circuit Court of Appeals was therefore wrong in its decision<sup>14</sup> (rendered in July, 1919, between the *Colgate* and *Schwader* decisions in the Supreme Court) holding that the trial court should have directed a verdict for the defendant, but the Supreme Court affirmed the Circuit Court of Appeals because of an erroneous instruction given by the trial court, to which exception had not been taken and which had not been criticized in the defendant's brief. The trial court had charged that the jury might reasonably find an unlawful combination if it found that the defendant repeatedly called its sales plan to the attention of wholesalers, and that they cooperated by selling at the prices named. "The recited facts, standing alone . . . did not suffice to establish an agreement or combination forbidden by the Sherman Act. This we pointed out in *United States v. Colgate & Co.* As given the instruction was erroneous and material."<sup>15</sup>

Of this disposition of the case Professor McLaughlin writes: "This action of the Supreme Court seems the most bizarre in the strange history of resale price maintenance in that court, being exceeded in perversity only by the decision of the District Judge in the *Colgate* case [whose construction of the second indictment in that case, McLaughlin says, seems unintelligible]. Of the six judges for the majority, four were opposed to the prevailing law of resale price maintenance as evidenced by their dissent in the *Beech-Nut* case, one was near death, and the last seldom dissented from anything."<sup>16</sup>

In *Federal Trade Comm. v. Beech-Nut Packing Co.*,<sup>17</sup> a proceeding against "unfair methods of competition" under the Federal Trade Commission Act, the Circuit Court of Appeals, like Judge Westenhaver, had followed<sup>18</sup> the *Colgate* case, though it conceded that it was "difficult to see why a different conclusion should be reached"<sup>19</sup> there than in the *Miles* case. But the Supreme Court found that "the Beech-Nut system goes far beyond the simple refusal to sell"<sup>20</sup> upheld in the *Colgate* case, and ordered the company to cease and desist from carrying its policy into effect by the use of five specific "cooperative methods" in which the defendant and its agents, dis-

12. *Id.* at 99.

13. 256 U. S. 208 (1921).

14. 261 Fed. 65 (C. C. A. 4th, 1919).

15. 256 U. S. at 211.

16. McLAUGHLIN, CASES ON THE FEDERAL ANTI-TRUST LAWS OF THE UNITED STATES (2d ed. 1933) 478.

17. 257 U. S. 441 (1921).

18. 264 Fed. 885 (C. C. A. 2d, 1920).

19. *Id.* at 889.

20. 257 U. S. at 454.

tributors and customers undertook to prevent price-cutting. These methods were: reporting names of price-cutters; keeping them on a blacklist; employing special salesmen to report price-cutters and turn over orders to approved dealers; marking the products with symbols enabling the goods to be traced and the names of price-cutters to be ascertained; utilizing any other "equivalent cooperative means".<sup>21</sup>

What means the Supreme Court will find to be "equivalent" to the "cooperative means" thus condemned in the *Beech-Nut* case no one can guess. Apparently, under the *Colgate* case, a manufacturer may refuse to sell to price-cutters and may announce such intention; yet he may not, under the *Beech-Nut* case, employ efficient means for policing the trade and detecting instances of price-cutting. The *Beech-Nut* case goes beyond the rule of the *Schrader* and *Cudahy* cases, because the practices forbidden might be carried out by the manufacturer's own efforts, without combining or conspiring with distributors or customers. It seems strange to find a "contract", "combination", or "conspiracy" in such unilateral activity.<sup>22</sup>

In a recent case, *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*,<sup>23</sup> the Court upheld the constitutionality of state legislation legalizing resale price maintenance of trademarked commodities and declaring actionable as unfair competition the wilful sale, offering for sale or advertising of such commodities, whether or not the seller is party to the contract fixing the price. The Court considered the statute as "constituting legislative recognition of a rule which had been accepted by many of the state courts as valid at common law"<sup>24</sup> but which was rejected by the Supreme Court in the *Miles* case; and it found that "The essence of the statutory violation consists not in the bare disposition of the commodity, but in a forbidden use of the trade-mark, brand or name in accomplishing such disposition. The primary aim of the law is to protect the property—namely, the good will—of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end, and not as an end in itself."<sup>25</sup>

It seems strange that a trademark should confer greater rights than a patent; and, as has been seen, the Court held in *Bauer v. O'Donnell*<sup>26</sup> and subsequent cases that the holder of a patent could not fix resale prices. "Passing off" one man's goods under another's trademark is manifestly unlawful, but it seems curious to forbid selling what *is* a man's product under

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21. *Id.* at 456.

22. It is true that the Court did say (at p. 446) that the Beech-Nut Company "solicited and secured the cooperation of wholesalers, jobbers and retailers in reporting price cutters," and (at p. 455) that the facts "show suppression of the freedom of competition by methods in which the company secured the cooperation of its distributors and customers, which are quite as effectual as agreements express or implied intended to accomplish the same purpose."

23. 299 U. S. 183 (1936).

24. *Id.* at 188.

25. *Id.* at 193.

26. 229 U. S. 1 (1913).

his trademark. The only "good will" protected in such a case is the possible willingness of a buyer to pay an excessive price for a product of known excellence because of his ignorance that it may profitably be made and sold for less.

Of course, the *Seagram* case did not pass upon anything affecting interstate commerce. The Miller-Tydings rider<sup>27</sup> to the District of Columbia appropriation bill, however, amended the Sherman Act so as to exempt from its operation contracts prescribing minimum prices for the resale of trademarked commodities, when such contracts are lawful at the place in which such resale is to be made or to which the commodity is to be transported for resale.

### *General Uncertainty*

As a result of the indefinite and shifting interpretation which the anti-trust laws have received at the hands of the courts, of which the foregoing discussion of confusion in the field of resale price maintenance is but one characteristic illustration, a highly unsatisfactory situation prevails.

Legitimate business enterprise, desirous of knowing and obeying the law, has no safe standards by which to be guided. Every step taken for the purpose of eliminating waste, improving quality, or reducing costs of production and distribution, is perilous if there are circumstances to which the anti-trust laws might conceivably be applicable. In other words, every expansion of business, acquisition of plant or assets, merger, or cooperation with other concerns in the same line of business is subject to challenge by the Government and may expose extensive investments to the hazard and expense of prolonged and voluminous antitrust litigation if the Department of Justice should suddenly decide to institute proceedings.

It is natural for business men under such circumstances to demand some assurance that the Government will not set this ponderous and oppressive machinery in motion against them. Their desire to be able, in reliance upon such an assurance, to conduct their affairs without constant jeopardy is very understandable. But the Government is unable to give such commitments. This is true not only because of the danger of improvident action based on ex parte misstatements of facts, but also because the confusion of precedents and policy is such that a position taken in one case might prove embarrassing in others.

The incalculability of judicial interpretation of the antitrust laws is as perplexing to the law enforcement officers of the Government as it is to business men subject to those laws. The Department of Justice has no way of knowing whether the facts revealed by its investigations in a case warrant the institution of proceedings, or of judging with any assurance the likeli-

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<sup>27</sup> Pub. L. No. 314, 75th Cong., 1st Sess. (Aug. 17, 1937) c. 690, tit. VIII, 51 HARV. L. REV. 336.

hood of success when a prosecution is undertaken. Because of their difficulty and expense, the number of antitrust cases which the present limited appropriation for that purpose will permit is small. Consequently, many violators of the antitrust laws escape with impunity because the Government has its hands full in other quarters; and, by the same token, doubtless many small business men abandon challenged practices, which might ultimately be upheld in court, because they lack sufficient means and resources to risk the high cost of antitrust litigation. Moreover, at the end of a long court battle the Government may find that its efforts have accomplished nothing. Even if its legal contentions are upheld by the court, the economic effectiveness of a decree as a curb upon monopoly is apt to be slight.

In view of these circumstances, it must be confessed that there is no consistent or intelligible policy embodied in our law by which public officials and business men may distinguish bona fide pursuit of industrial efficiency from an illicit program of industrial empire building.

#### *Antitrust Policy and Its Alternative*

But the importance of formulating a policy which will preserve the advantages of mass production and cheap distribution, without the political and economic risks and resentments which go with monopoly, and without the wasteful spectacle of legal assaults on combinations which have economic necessity on their side, cannot be denied. Whatever solution of the anti-monopoly problem is adopted, to be acceptable it must be in terms of our ideals of political and economic democracy. The American people desires no economic or political dictatorship imposed either by government or by big business, no system of detailed price regulation by governmental edict or of price fixing by decree of private interests. Bureaucracy or regimentation of any kind is distasteful, but if a choice has to be made the public will prefer governmental to private bureaucracy and regimentation. The Antitrust Laws, however, represent an effort to maintain our traditional system of free enterprise—free alike from regimentation by government and from strangulation by monopoly.

It must be emphasized that the Antitrust Laws do not represent a philosophy of unconcern or indifference as to the nation's economic life, but on the contrary contemplate the sovereignty of public over private interest in accordance with a definite economic system, namely, a competitive economy. Under this classical competitive economic system, prices and production are regulated by competition. The Government escapes the onerous and odious task which direct control of industry would place upon it. Its responsibility is merely that of seeing that competition has the opportunity to function effectively. This is the lowest degree of government interference which business can expect.

Doubtless when a true competitive economy exists, and when actual conditions are substantially identical with the hypothetical conditions postulated by its adherents, their claims on its behalf are not unwarranted. It is then a fact that in dictating the course of economic activity the enterprising exertions of rivals animated by self-interest will prove more advantageous and beneficial to the public than the altruistic (hence presumably anæmic or academic) efforts of government officials. Such, at any rate, is the economic belief embodied in the Antitrust Laws.<sup>28</sup>

But if competition vanishes, and if conditions become such that those in control of production and distribution of economic goods no longer find that their own profit is increased by giving the public more and better products more cheaply and efficiently, then the breakdown of the classical competitive economy will necessitate some other form of regime in order to protect the public interest against private exploitation. More drastic direct regulation is thus inevitable if the system of competition cannot be made to work. Hence American business must make up its mind whether it favors truly effective regulation by competition, as contemplated by the antitrust laws, or the inescapable alternative—government control. Every step to weaken those laws, or to permit price fixing or monopolistic practices, is thus a step toward direct public control of economic operations hitherto performed by private enterprise.

## II. INEFFECTIVE CONTROL BY ANTITRUST LAWS

### *Economic Concentration and Decline of Competition*

Results show that the Antitrust Laws have been till now quite ineffective in maintaining competition and preventing the domination of industries by monopoly. To be sure, their importance is not to be belittled. They have doubtless served to avert many evils by moderating the unrestrained ruthlessness which would have characterized economic combat in the total absence of surveillance by public authority. They have improved business ethics by furnishing obscure standards of fair dealing to govern competitive conduct. They have saved us from the cartel system of Europe.

But they have failed to break up price controlling organizations, or to check the continuing concentration of wealth and of industrial control.<sup>29</sup> Concentration of ownership and control of American industry was never

28. Similarly the judicial system of common law countries has always placed reliance upon adversary proceedings and cross-examination conducted by the parties (the "sporting theory of justice"), rather than the inquisitorial procedure by the judge *ex officio* which is common in Continental practice.

29. The undesirability of concentration of wealth in a democratic polity has long been recognized. Howland, *Monopolies: The Cause and the Remedy* (1910) 10 COL. L. REV. 91, 94. Bacon is quoted for the proposition that "Above all things, good policy is to be used, that the treasures and monies in a State be not gathered into few hands, for otherwise, a State may have great stock, and yet starve; and money is like muck, not good except it be spread." *Ibid.*



greater than today;<sup>30</sup> and such concentration is fatal to the operation of competitive economy. There can be no effective competition except when there are numerous competitors, approximately equal in strength and resources.

But most industries today are in the hands of a small number of huge corporations. In many cases the market is monopolized by a single company. Thus the Aluminum Company of America produces 100 per cent. of the aluminum manufactured in the United States. A single concern likewise does most of the business in the field of parlor and sleeping cars, cameras, shoe machinery, cash registers, and farm machinery. The situation is not very different with regard to price fixing and absence of competition in industries where the business is shared by a small number of concerns.<sup>31</sup> This is the situation with respect to electric machinery, locomotives, meat packing, cigarettes, passenger and freight cars.

Thus economists today point out an unmistakable decline of competition.<sup>32</sup> An era of bankruptcy following an era of merger hastened the disappearance of many concerns. Very few industrial units and sources of supply have survived. New units are discouraged from entering the field by reason of the constantly increasing investment necessary to secure the benefits of mass production, and by the high cost of cultivating a national market.

30. Concentration of corporate ownership of wealth, chiefly means of production, has proceeded to a surprising degree. In 1932, according to the statistics of the Bureau of Internal Revenue, 53% of all corporate owned assets in this country was held by 618 corporations which constituted only .2 of 1% of the number of corporations reporting. Five per cent of the corporations owned 85% of all the corporate owned wealth in 1932. More than 50% of all the net income enjoyed by corporations in 1932 went to 232 corporations, while of the country's manufacturing corporations 1.2% of the total number accounted for 63% of the aggregate net profits. In 1934 the only group of corporations to earn an aggregate net profit was the group whose assets exceeded \$50,000,000. Thus, the process of concentration was continuing.

There was likewise a high degree of concentration in the ownership of these corporations. 1929 was a banner year for stock ownership and in that year 3.28% of the population who filed individual income tax returns accounted for the receipt of more than 83% of all dividends paid to individuals. And 78% of those dividends reported were received by .3 of 1% of our population.

In 1933 the Bureau of Internal Revenue statistics show that there were only 1,747,740 taxable individual incomes in the United States and nearly 1/3 of all the property reported as passing by death was found in less than 4% of the estates. The Brookings Institution's studies in 1929 revealed that about 6,000,000 families or 21% of all families had family incomes of less than \$1,000 annually, and that 36,000 families in the high income brackets received as much of our national income in that year as 11,000,000 families with the lowest incomes. See *Hearings Before Senate Finance Committee on H. R. 8974*, 74th Cong., 1st Sess., 176, 213 (1935). See also BERLE AND MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932) 18 *et seq.*; LEVEN, MOULTON AND WARBURTON, *AMERICA'S CAPACITY TO CONSUME* (1934) 204.

Even these statistics do not properly measure the degree of concentration of control of industry, for by holding companies and interlocking directorates many corporations may be under a single control, and there is no discernible limit to the centralizing tendency.

31. Usually two. Hence the term "duopoly" is sometimes applied to describe the situation in such an industry. "Competition has changed in character and the principles applicable to present conditions are radically different from those which apply when the dominant competing units are smaller and more numerous. The principles of duopoly have become more important than those of free competition." BERLE AND MEANS, *op. cit. supra* note 30, at 45.

32. See, e. g., BURNS, *THE DECLINE OF COMPETITION* (1936).

Not only is the number of competing units tending to diminish, but effective competition among existing business concerns is on the wane. Competition among them is often moderated by financial controls, interlocking directorates, patent controls, basing point practices, price leadership, or dominance in an industry.

### *Extent and Effect of Artificial Prices*

The widespread extent of artificial price uniformity affords striking evidence of this breakdown of the competitive system. The sharpest illustration of the absence of competition between different firms is furnished by the experience of the Government as a buyer. Government purchases, being required by law to be made on the basis of secret competitive bids, should, in theory, like public auction sales, display the competitive system in its utmost perfection and vigor. But today, in spite of the ponderous mechanism established to assure secrecy and prevent collusion, the Government cannot get genuine competitive bids on basic products.

Identical bids are submitted, in countless cases, by bidders supposedly "competing" for Government contracts. For example, the Navy Department opened 59 bids for steel pipe and each of the companies bid precisely \$16,001.83. On cement, 40 companies each submitted bids identical to the penny, \$7,148.60. Time and time again the same situation has recurred. Identical bids have been received for metal, paper, rubber, meat, wood, batteries, explosives, cement, machinery, office supplies, chemical and medical supplies, and plumbing supplies.<sup>33</sup>

These identical bids were most certainly not the result of identical costs of manufacture, independently estimated. They are the product of artificial marketing machinery. Their effect is to compel purchasers to pay a price based on computation, not on competition. They demonstrate dramatically that artificial uniformity of price is maintained to the fraction of a cent by mathematical control.

Not only is there an artificial uniformity of price prevailing among different sellers at the same time, but in many industries prices are pegged or stabilized artificially over a period of time. Comparison of the prices of various commodities during the depression discloses that some industries were able to maintain their prices almost stationary while others were subject to fluctuation. Disastrous price disparity resulted. The price of farm products showed the greatest decline. Competitive textiles such as cotton goods, knit goods, silk and rayons likewise dropped considerably. Farm machinery and metal goods, on the other hand, fell very slightly in comparison.

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33. For numerous examples of identical bids, as well as statistics showing price disparities and the relation of rigid prices to reduced payrolls, see Jackson, *Should the Anti-Trust Laws be Revised?* (1937) 71 U. S. L. REV. 575, 577-579.

The maintenance of rigid and inflexible prices, resulting in decreased output, led to a calamitous increase in unemployment and reduction in wages. In some industries payrolls almost vanished, although prices of the product were practically unchanged. Thus while the price of cast iron pipe declined 7 per cent, payrolls declined 74 per cent. Although the price of agricultural implements was reduced only 14 per cent, payrolls in that industry fell off by 83 per cent. But in the more competitive textile industries, where prices were not kept rigid, payrolls did not decrease so drastically.

If stability of prices brought with it stability of employment and wage levels, price control might be found more tolerable. But those industries which made the smallest price concessions to purchasers during the depression reduced their payrolls most severely.

### III. REASONS FOR INEFFECTIVENESS OF ANTITRUST LAWS

#### *Conflicting Policies*

The uncertainties besetting anti-monopolistic measures on the part of Government officials and lawyers are undoubtedly in part at least the result of equal uncertainties in the camp of business men and economic theorists themselves. Business today does not know what policy it wants the Government to pursue. A part of the business world vigorously demands laws to protect, preserve, and extend competition. Another part complains of the effects of too vigorous competition. Most men who come to the Department of Justice complaining of someone's else price-fixing implore it to tell them how to "stabilize" their own industry, which is a polite term for the restraining of competition which they find it difficult to meet. Economists disagree violently whether it is too much competition or too little competition that causes most evils in business.

In legislative circles the same divided counsels have prevailed. While the nation has forbidden monopoly by one set of laws, it has been creating it by another. Patent laws, valuable as they may be in some respects, often foster monopoly. There can be no consistent anti-monopoly policy without reconsideration of the conditions upon which monopolies shall be legalized by the protection of patents.

While the country has forbidden monopoly, it has also been subsidizing it. Monopoly has had tax advantages that have aided its rise. While the sale of a small business to another who wished to continue it as such would be subject to a capital gains tax, if it were absorbed by a big business the matter could be arranged in the form of a tax-free "reorganization". The tax-free reorganization privilege has been a powerful incentive for the concentrating of business. The advantage in single transactions, at the cost of the Treasury, has often exceeded the whole annual appropriation for anti-trust enforcement.

Moreover, the privilege of paying dividend profits free of tax from one corporation to another which is operated as a subsidiary for the holding company, is one of the most favored forms of creating and operating monopoly. The recent repeal of this privilege and the substitution of an intercorporate dividend tax has already proved highly effective in dissolving holding companies, and undoubtedly an increase in that tax would prove an automatic discouragement of that particular type of antitrust violation.

The protective tariff has likewise been productive of advantages to entrenched monopoly. Favors and benefits have been reaped by combinations powerful enough to "write their own tariff". Elimination of foreign competition has too often accompanied and facilitated suppression of domestic competition.

Only when the patent laws, the revenue laws, the Securities Act and all other laws of the United States are brought to exert their pressures toward the encouragement of small business rather than toward its destruction, can there truly be said to exist a national policy against monopoly.

### *Judicial Emasculation of Statutes*

#### (a) Sherman Act

If an anti-monopoly policy is to be made effective, it must be administered with tolerance, if not with sympathy, by the courts.<sup>84</sup> Let us look briefly and generally at a few outstanding antitrust decisions to learn the general judicial attitude.

In 1890 the Sherman Antitrust Act<sup>85</sup> was enacted. Five years later the first case under it reached the Supreme Court. The Court held that the activities of a combination which controlled 98 per cent. of the sugar refining business of the entire United States "bore no direct relation to commerce between the States or with foreign nations."<sup>86</sup> The effect of the decision is well stated by Professor Corwin, who says that it "did to all intents and purposes nullify the Sherman Act, and kept it nullified during the most critical period in our industrial history, when most of the great trusts were formed; and it did this in consequence of the Court's constitutional theories."<sup>87</sup> Thus the Court erected a shelter for industrial monopolies during

34. ". . . the Sherman Act cannot be criticized for its details since it has no details. The Act simply pronounces a condemnation of monopoly and of attempts at monopoly and leaves the matter there, entrusting to the executive arm of government and to the courts the application and enforcement of its broad provisions. It seems to follow from this conclusively that if the policy of the act is sound, and if none the less its effect has been unsatisfactory, this result must be attributed to its application and enforcement, and the responsibility must rest not on the act itself, or on Congress which enacted it, but rather on the policy of successive administrations in enforcing it and on the courts which have interpreted and applied it. That this is the case is demonstrated, I suggest, by the history of the application and enforcement of the Act." Dickinson, *supra* note 1, at 601.

35. 26 STAT. 209 (1890), 15 U. S. C. A. § 1 *et seq.* (1927).

36. *United States v. Knight Co.*, 156 U. S. 1, 17 (1895).

37. Corwin, Book Review (1926) 12 A. B. A. J. 170, 171. As stated by Harlan, J., in his dissenting opinion: "While the opinion of the court in this case does not declare the act of

the period of their formation. A comparison of the reasoning in the *Knight* case with that of the Chief Justice in the recent case of *National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*<sup>38</sup> shows in a striking fashion how thoroughly the influence of the former decision has been discredited. Taking the law as now established to be sound, we are forced to admit that the early struggle against monopoly was paralyzed by the Supreme Court, and that its decision was not even good law.

Failure to enforce the Antitrust Laws would have been bad enough. But they were not merely ignored, they were perverted. At an early date the Court discovered that labor unions were combinations in restraint of trade if they attempted to boycott the goods of any firm that was engaged in interstate commerce.<sup>39</sup> Those who enjoy comparative studies of the judicial process will find it interesting to note the elasticity of the interstate commerce conception in the cases where it was utilized against labor<sup>40</sup> as compared with the narrow interpretation in the *Knight* case when the sugar trust was under consideration.

In 1904 the Theodore Roosevelt administration attempted a revival of the Antitrust Law. In *Northern Securities Co. v. United States*<sup>41</sup> the

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1890 to be unconstitutional, it defeats the main object for which it was passed. For it is, in effect, held that the statute would be unconstitutional if interpreted as embracing such unlawful restraints upon the purchasing of goods in one State to be carried to another State as necessarily arise from the *existence* of combinations formed for the purpose and with the effect, not only of monopolizing the ownership of all such goods in every part of the country, but of controlling the prices for them in all the States. This view of the scope of the act leaves the public, so far as national power is concerned, entirely at the mercy of combinations which arbitrarily control the prices of articles purchased to be transported from one State to another State. I cannot assent to that view." 156 U. S. at 42-43. See also TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT (1914) 60.

38. 301 U. S. 1 (1937), 85 U. OF PA. L. REV. 733. Chief Justice Hughes quoted the familiar language of Chief Justice White in *Standard Oil Co. v. United States*, 221 U. S. 1, 68-69 (1911), declaring that the view of the *Knight* case which had been so repeatedly advanced by counsel in antitrust cases had "been so necessarily and expressly decided to be unsound as to cause the contentions to be plainly foreclosed and to require no express notice." Chief Justice Taft in *United Leather Workers v. Herkert*, 265 U. S. 457, 468 (1924) said: "The *Knight Case* has been looked upon by many as qualified by subsequent decisions of this Court. The case is to be sustained only by the view that there was no proof of steps to be taken with intent to monopolize or restrain interstate commerce in sugar, but only proof of the acquisition of stock in sugar manufacturing companies to control its making." Thus, as Mr. Taft had speculated ten years previously, if sugar refining were profitable only because of charges made for processing, like fees of a grist-mill, the monopoly in refining could not be reached by the federal commerce power; but Mr. Taft believed that the Court would now find, on the same pleadings and proof, a combination to restrain commerce as well as monopolize manufacture. TAFT, *op. cit. supra* note 37, at 82. Cf. also Holmes, J., dissenting, in *Hammer v. Dagenhart*, 247 U. S. 251, 279 (1918): "Notwithstanding *United States v. E. C. Knight Co.*, 156 U. S. 1, the Sherman Act has been made an instrument for the breaking up of combinations in restraint of trade and monopolies, using the power to regulate commerce as a foothold. . . . The objection that the control of the States of production was interfered with was urged again and again but always in vain." The rather remarkable resurrection of the *Knight* case by Mr. Justice Sutherland in *Carter v. Carter Coal Co.*, 298 U. S. 238, 300 (1936), is therefore to be regarded as a momentary aberration, corrected by Chief Justice Hughes in the *Jones & Laughlin* opinion.

39. *Loewe v. Lawlor*, 208 U. S. 274 (1908).

40. Thus, with respect to the bituminous coal industry as interstate commerce, compare *Coronado Coal Co. v. United Mine Workers of America*, 268 U. S. 295 (1925), with *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936).

41. 193 U. S. 197 (1904).

Supreme Court enjoined the exercise of rights as a stockholder by a corporation<sup>42</sup> which had been formed to acquire and hold the stock of two competing railroads. This decision may be said to constitute the high water mark of antitrust law enforcement, coming as it did after the *Knight* case, whose evil effects it undid, theoretically at least,<sup>48</sup> and before the *Standard Oil* case,<sup>44</sup> whose restrictive interpretation of the Antitrust Laws further paralyzed their effective enforcement.<sup>45</sup>

In the *Standard Oil* case the so-called "rule of reason" was established. Here the Court, in the face of the explicit words of the Act which forbade every restraint of trade, decided that Congress had intended to outlaw only those restraints of trade which the Court should find to be unreasonable. In so doing the Court overrode not merely the language of the statute, but the clear intent of Congress and its own previous decisions as well: no less than three times, after careful consideration, it had flatly refused to qualify the Sherman Act by adopting the "rule of reason". In the *Trans-Missouri* case<sup>46</sup> the doctrine was first rejected, the Court saying: ". . . we are asked to read into the act by way of judicial legislation an exception not placed there by the law-making branch of the Government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This we cannot and ought not to do."<sup>47</sup> After deliberation a rehearing of this case was denied, and its holding was followed in the *Joint Traffic*<sup>48</sup> and *Northern Securities* cases.<sup>49</sup>

42. In *N. Y. Times*, Oct. 2, 1937, p. 26, col. 2, it was announced that the stock transfer books of the company were to be finally closed on Oct. 30, 1937, and the assets distributed in accordance with a plan approved by stockholders.

43. *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211 (1899), had the same effect with regard to loose combinations, but most "trusts" were formed by merger, following the *Knight* case. The *Northern Securities* decision created apprehension "that every great combination in the country is liable to prosecution and dissolution under the Anti-Trust Act." Raymond, *The Federal Anti-Trust Act* (1910) 23 HARV. L. REV. 353, 375. However, "the government showed no disposition to enforce the law as thus newly construed against the many corporations which might fall within its prohibitions. The Attorney-General of the United States is reported to have said soon after that decision, 'The government will not run amuck.'" *Id.* at 377. See also *United States v. United Shoe Machinery Co.*, 247 U. S. 32, 77 (1918).

44. *Standard Oil Co. v. United States*, 221 U. S. 1 (1910). For an account of this case and its setting, see ADAMS, *THE THEORY OF SOCIAL REVOLUTIONS* (1913) 119-126.

45. Nevertheless the *Northern Securities* decision did not accomplish a great deal. "The indictments which logically ought to follow this decision", as Mr. Justice Holmes said (193 U. S. at 405), were not forthcoming. "The precedent established in the *Northern Securities* case of merely enjoining corporations found guilty of criminal conspiracy from continuing their crimes in the future was consistently followed by the Court. It is therefore unnecessary to follow in detail the prolonged and tedious farce of the government's attempt to enforce the Sherman Act. Many 'trusts' were nominally dissolved, but fear of the law, as emasculated by the Supreme Court, was so slight that all the time many more trusts of precisely the same nature were being formed." BATES, *THE STORY OF THE SUPREME COURT* (1936) 231.

46. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290 (1897). See especially pp. 327-341, and the dissenting opinion at p. 343.

47. *Id.* at 340.

48. See *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 573 (1898).

49. See 193 U. S. 197, 331 (1904).

Congress steadfastly refused<sup>50</sup> to adopt amendments weakening the statute by incorporating the interpretation contended for by the dissenting justices in the *Trans-Missouri* and *Joint Traffic* cases. And the Executive was in accord with the law-making branch as to the wisdom of that course.<sup>51</sup> But big business clamored and the personnel of the Court changed. One of the dissenting minority in the earlier cases was now Chief Justice, and it was he who wrote the opinion in the *Standard Oil* case proclaiming the "rule of reason", when the Court, notwithstanding the attitude of Congress and the President and its own prior decisions, reversed itself.

In a vigorous and logical dissenting opinion Mr. Justice Harlan arraigned the Court's action:

"The court by its decision . . . has not only upset the long-settled interpretation of the act, but has usurped the constitutional functions of the legislative branch of the Government. . . . I feel bound to say that what the Court has said may well cause some alarm for the integrity of our institutions.<sup>52</sup> . . . This Court . . . has now done what it then said it could not constitutionally do. It has, by mere interpretation, modified the act of Congress, and deprived it of practical value.<sup>53</sup> . . . This Court, let me repeat, solemnly adjudged many years ago that it could not, except by '*judicial legislation*,' read words into the Antitrust Act not put there by Congress. . . . The Courts . . . have no function . . . to *amend* legislative enactments. . . . Nevertheless, . . . the Court has now read into the Act of Congress words which are not to be found there, and has thereby done that which it adjudged in 1896 and 1898 could not be done without violating the Constitution, namely, by interpretation of a statute, changed a public policy declared by the legislative department.<sup>54</sup> . . . There is abroad, in our land, a most harmful tendency to bring about the amending of constitutions and legislative

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50. In 1909 Senator Nelson, on behalf of the Senate Judiciary Committee, in an adverse report on a bill to amend the Sherman Act, said: "To inject into the act the question of whether an agreement or combination is *reasonable* or *unreasonable* would render the act as a criminal or penal statute indefinite and uncertain, and hence, to that extent, utterly nugatory and void, and would practically amount to a repeal of that part of the act." "And while the same technical objection does not apply to civil prosecutions, the injection of the rule of reasonableness or unreasonableness would lead to the greatest variableness and uncertainty in the enforcement of the law. The defense of reasonable restraint would be made in every case and there would be as many different rules of reasonableness as cases, courts and juries. What one court or jury might deem unreasonable another court or jury might deem reasonable." SEN. REP. No. 848, 60th Cong., 2d Sess. (1909) 10, 11.

51. In a message to Congress on January 7, 1910, before the Supreme Court reversed its ruling made in the *Trans-Missouri* and *Joint Traffic* cases, President Taft said: "It has been proposed, however, that the word 'reasonable' should be made a part of the statute, and then that it should be left to the court to say what is a reasonable restraint of trade, what is a reasonable suppression of competition, what is a reasonable monopoly. I venture to think that this is to put into the hands of the court a power impossible to exercise on any consistent principle which will insure the uniformity of decision essential to just judgment. It is to thrust upon the courts a burden they have no precedents to enable them to carry, and to give them a power approaching the arbitrary, the abuse of which might involve our whole judicial system in disaster." 45 CONG. REC. 382 (1910). And see THORNTON, COMBINATIONS IN RESTRAINT OF TRADE (2d ed. 1928) 298 n.

52. 221 U. S. 1, 83 (1910).

53. *Id.* at 99.

54. *Id.* at 104.

enactments by means alone of judicial construction. . . . To overreach the action of Congress merely by judicial construction, that is, by indirection, is a blow at the integrity of our governmental system, and in the end will prove most dangerous to all." <sup>55</sup>

A New England critic thus commented on the case:

"The task the Chief Justice assumed was difficult almost beyond precedent. He proposed to surrender to the vested interests the principle of *reasonableness* which they demanded, and which the tribunal he represented, together with Congress, had refused to surrender for fifteen years. To pacify the public, which would certainly resent this surrender, he was prepared to punish two hated corporations, while he strove to preserve, so far as he could, the respect of the legal profession and of the public. . . .

"In any other country but the United States, a chief justice so situated would doubtless have affirmed the old precedents, permitting himself, at most, to point out the mischief which, he thought, they worked. Not so a lawyer nurtured under the American constitutional system, which breeds in the judge the conviction that he is superior to the legislator. His instinct, under adequate pressure, is always to overrule anything repugnant to him that a legitimate legislative assembly may have done. In this instance, had the case been one of first impression, nothing would have been easier than to have nullified the Sherman Act as an unreasonable exercise of the police power, as judges had been nullifying statutes of which they disapproved for a couple of generations previously; but the case was not one of first impression. . . . Therefore, for him the path of least resistance was to use his *reason*, and, as a magistrate, to amend a statute which Congress ought to have amended, but had *unreasonably* omitted to amend. Such was the final and logical result of the blending of judicial and legislative functions in a court, as they are blended under the American constitutional system." <sup>56</sup>

Having decided in the *Standard Oil* case that the Sherman Act did not mean all that it said, the Supreme Court went on to explain in the *Tobacco* case,<sup>57</sup> decided two weeks later, that the Act meant more than it said. Its provisions, according to Chief Justice White, "embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed." <sup>58</sup> In other words, the mere acquisition of assets or any act whatever would be held illegal if the Court felt that such conduct was "unusual and wrongful".<sup>59</sup> It was no longer needful to find a contract, or a combination, or a conspiracy in restraint of trade as specified by the

55. *Id.* at 105.

56. ADAMS, *op. cit. supra* note 44, at 124-125.

57. *United States v. American Tobacco Co.*, 221 U. S. 106 (1911).

58. *Id.* at 181.

59. *Ibid.*



statute.<sup>60</sup> The Court's opinion as to the economic desirability of any proposed restriction of competition thus became the only test to be applied in determining whether it would be held lawful or unlawful under the Sherman Act.

The verbose sophistry with which the Chief Justice sought to disguise the fact that in obtaining this result prior decisions were being overruled, and to make it appear that to use judicial reason or intelligence in order to arrive at a reasonable interpretation of a statute is the same thing as to reach, by that process, an interpretation applying the statute only to transactions which the Court does not regard as reasonable, deceived no one. But dissatisfaction with such intellectual legerdemain must not be permitted to obscure the fact that the law as thus newly formulated by the Supreme Court in the *Standard Oil* and the *Tobacco* cases was regarded with approval in many quarters,<sup>61</sup> and that the overruled decisions themselves did not strictly follow logic and the letter of the Congressional enactment.

In 1920, when the case of *United States v. United States Steel Corp.*<sup>62</sup> came before the Court, the decision rested upon the conclusion that whatever restraint of trade or monopoly existed in the steel industry was not, in the Court's judgment, unreasonable, although the "rule of reason" as such was not mentioned in the opinion. "The corporation did not achieve monopoly",<sup>63</sup> it was said, and "the law does not make mere size an offence or the existence of unexercised power an offence".<sup>64</sup> While professing that "we do not mean to say that the law . . . can be disregarded, but only that the appropriate relief in each instance is remitted to a court of equity to determine",<sup>65</sup> the four majority justices proceeded to exercise the "flexibility of discretion"<sup>66</sup> which they considered so essential and valuable a feature of our equity jurisprudence, and reached the conclusion that "we are unable to see that the public interest will be served by yielding to the contention of

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60. Cf. Raymond, *The Standard Oil and Tobacco Cases* (1911) 25 HARV. L. REV. 31, 39-40, 48. Compare the similar field of judicial discretion claimed for the Court by the *Beech-Nut* case, already discussed.

61. TAFT, *op. cit. supra* note 37, at 96, stated that these decisions clarified the law, which had previously been obscure and uncertain. Raymond, *supra* note 60, at 42, felt that as a construction de novo "The interpretation adopted could hardly fail to receive general approval from lawyers and laymen", and, at 32, that in following "the logic of facts" rather than precedents the Court "merely obeyed a characteristic trait of the English-speaking race."

62. 251 U. S. 417 (1920). Typical of antitrust litigation, the proceedings in this case were instituted in 1911 during President Taft's administration; argument under the Expediting Act was had in 1914 and a decision in 1915; an appeal to the Supreme Court was argued in 1917 and reargued in 1919. In 1920 the case was decided, with three justices dissenting and two not participating.

63. *Id.* at 444.

64. *Id.* at 451. In *United States v. International Harvester Co.*, 274 U. S. 693, 708 (1927), after litigation lasting 15 years, the Supreme Court refused to dissolve the company and reiterated its dictum that bad behavior, not size and power, was the test of unlawful monopoly.

65. 251 U. S. at 452.

66. *Ibid.*

the Government respecting the dissolution of the company or the separation from it of some of its subsidiaries; and we do see in a contrary conclusion a risk of injury to the public interest, including a material disturbance of, and, it may be serious detriment to, the foreign trade." 67

In the minority opinion, voicing the views of three justices who were unwilling "to practically annul the Sherman Law by judicial decree", 68 Mr. Justice Day said: "I know of no public policy which sanctions a violation of the law, nor of any inconvenience to trade, domestic or foreign, which should have the effect of placing combinations, which have been able thus to organize one of the greatest industries of the country in defiance of law, in an impregnable position above the control of the law forbidding such combinations. Such a conclusion does violence to the policy which the law was intended to enforce, runs counter to the decisions of the court, and necessarily results in a practical nullification of the act itself." 69

Five different judicial interpretations of the language of the Sherman Act, all of them doubtless "reasonable", may now be compared:

(1) A strictly literal interpretation, under which, for example, formation of a partnership between two individuals, previously competitors, would be banned. This construction has been rejected on all hands as proving too much, except by Judge Lacombe in *United States v. American Tobacco Co.* 70

(2) The learned and logical, but somewhat narrow exposition by Mr. Justice Holmes in the *Northern Securities* case 71 and by Judge Taft in *United States v. Addyston Pipe & Steel Co.*, 72 giving to the terms of the Act the same significance they bore at common law, but defining that common-law meaning with precision and exactness. 73

(3) The view taken by Mr. Justice White in the dissenting opinion in the *Trans-Missouri* case, that the Act forbids only restraints unlawful at common law, that reasonable restraints are not invalid at common law, and that if the Act of Congress departs from the common law it is itself unreasonable. 74

(4) The view of the majority of the court in the *Trans-Missouri* case, that the terms of the statute cover all contracts which in fact restrain or may restrain trade, whether valid or invalid at common law, the statute thus not being limited to unreasonable restraints. 75 According to this view,

67. *Id.* at 457.

68. *Id.* at 461.

69. *Id.* at 463.

70. See 164 Fed. 700, 701 (C. C. S. D. N. Y. 1908); *cf.* Holmes, J., in the *Northern Securities* case, 193 U. S. 197, 410 (1904); *United States v. Keystone Watch Co.*, 218 Fed. 502, 516 (E. D. Pa. 1915).

71. See 193 U. S. 197, 404 (1904); Raymond, *supra* note 43, at 376.

72. See 85 Fed. 271, 282 (C. C. A. 6th, 1898).

73. In some cases, it is true, as Judge Taft points out, the courts "have set sail on a sea of doubt, and have assumed the power to say . . . how much restraint of competition is in the public interest, and how much is not." *Id.* at 283-284.

74. See 166 U. S. 290, 344-352 (1897).

75. *Id.* at 328.

however, as qualified by the majority in the *Joint Traffic* case,<sup>76</sup> it seems that the intent or effect of an agreement, to constitute a restraint of trade, must be direct and substantial, and not indirect or incidental. As Chief Justice White pointed out in the *Tobacco* case, this is in effect equivalent to accepting the "rule of reason",<sup>77</sup> although the question of determining what may reasonably be regarded as a restraint is different from that of determining what restraints may be regarded as reasonable.<sup>78</sup>

(5) The interpretation given by Chief Justice White in the *Standard Oil* and *Tobacco* cases, that the Act prohibits any "unusual" or "wrongful" <sup>79</sup> acts which "unduly" or "injuriously" <sup>80</sup> restrain trade.<sup>81</sup>

#### (b) Clayton Act

The "rule of reason" has likewise been employed to wipe out the effect of the Clayton Act,<sup>82</sup> which was passed in 1914 to fortify the Sherman Act by reaching incipient restraints of trade.<sup>83</sup> Section 7 of the Clayton Act provides that no corporation shall acquire stock of another corporation "where the effect of such acquisition may be to substantially lessen competition between" them. Likewise acquisition by a corporation of stock of two or more corporations is forbidden "where the effect of such acquisition, or the use of such stock," as by voting, "may be to substantially lessen competition between such corporations, or any of them" whose stock is so acquired.<sup>84</sup> Section 11 directs that if, after complaint and hearing, the Federal Trade Commission is "of the opinion" that any of the provisions of Section 7 "have been or are being violated, it shall . . . issue . . . an

76. See 171 U. S. 505, 568 (1898).

77. See 221 U. S. 106, 179 (1911).

78. Evans, *The Standard Oil and American Tobacco Cases* (1912) 60 U. OF PA. L. REV. 311, 321, says: "Even Justice Harlan, therefore, did not apply the Act to all contracts that in fact restrained trade. . . . It is no more judicial legislation to adopt the standard of due or undue than to adopt the standard of direct or indirect, even though we may be of opinion that the two standards are not the same and that the construction of the statute has in essence been changed by the two decisions under discussion." Raymond, *supra* note 60, at 44, adds: "In making this criticism the learned justice overlooked the fact that the law, as it stood before this decision, was not settled by Congress but by the Court. What Congress meant is very doubtful. There was just as much judicial legislation in deciding that restraint of trade covered all restraint as in deciding that it covered only unreasonable restraint. In fact the decisions on this act constitute a long course of judicial legislation. The Court in the *Standard Oil* case may be criticized, if one likes, for overruling previous decisions, but hardly on the ground that it was legislating." Since the words of the Act "have meant very different things to different individuals", it is Raymond's contention that "this difference of opinion shows clearly that the Anti-Trust Act standing by itself has no precise and easily ascertained meaning." Raymond, *supra* note 43, at 354.

79. See 221 U. S. 106, 181 (1911).

80. *Id.* at 179.

81. In holding that the expression "contract in restraint of trade" in the Act is to be understood in a broad sense rather than the "subjective" sense denoting at common law a contract restricting the contractor's own freedom (as defined by Mr. Justice Holmes in the *Northern Securities* case), the Chief Justice is in accord with the majority in the *Trans-Missouri* case.

82. 38 STAT. 730 (1914), 15 U. S. C. A. § 12 *et seq.* (1927).

83. See *Standard Fashion Co. v. Magrane-Houston Co.*, 288 U. S. 346, 356 (1922).

84. 38 STAT. 731 (1914), 15 U. S. C. A. § 18 (1927).

order requiring such person to cease and desist from such violations, and divest itself of the stock held" contrary to the provisions of the section "if any there be, in the manner and within the time fixed by said order."<sup>85</sup>

The Circuit Court of Appeals of the Seventh Circuit, in *Swift & Co. v. Federal Trade Comm.*,<sup>86</sup> upheld an order of the Commission made as the result of violation of the Clayton Act when Swift & Co., rather than establish new plants in two localities in Georgia and Alabama, purchased the stock of existing concerns, which probably could not have long withstood the competition of Swift & Co., and took over and operated the existing plants of those concerns. The court said that the facts were plain and the case one of little difficulty "were it not for the petitioner's insistent urge that the statute does not mean what it says, and that the court should read into it 'the rule of reason' and insert additional requirements, viz.: That the competition between the two companies prior to consolidation was substantial, and the effect of the acquisition was injurious to the public."<sup>87</sup> . . . If an exception to the operation of the statute ought and is to be raised in cases where the concern whose stock is acquired is comparatively small or weak, or for any reason unlikely long to endure, it must come through statutory enactment, and not by judicial construction."<sup>88</sup>

The Supreme Court, however, adopted the "rule of reason" which the Circuit Court of Appeals had refused to read into the act, and thus nullified by judicial construction the applicable portion of the statute just as effectively as if it had been held unconstitutional.

The decision reaching this result was *International Shoe Co. v. Federal Trade Comm.*,<sup>89</sup> holding that the words "substantially lessen competition" were to be treated as if they read "lessen substantial competition"; and that, accordingly, the acquisition by one shoe company of the stock of another was not forbidden, since the product of the two companies, "because of the difference in appearance and workmanship, appealed to the tastes of entirely different classes of consumers"<sup>90</sup> and was sold to a different class of dealers, so that there was observable no "contest . . . in the market for the same purchasers"<sup>91</sup> between the two companies with respect to 95 per cent of their business. The Court likewise found that the company whose stock was acquired was in financial straits, a condition which prevented continued competition by it with the acquiring concern!

As pointed out in the dissenting opinion, representing the views of three justices, the decision seems "to proceed on the assumption that manu-

85. 38 STAT. 734 (1914), 15 U. S. C. A. § 21 (1927).

86. 8 F. (2d) 595 (C. C. A. 7th, 1925).

87. *Id.* at 597.

88. *Id.* at 599 (concurring opinion).

89. 280 U. S. 291 (1930).

90. *Id.* at 296.

91. *Id.* at 297.

facturers, each engaged in marketing a product comparable in price and adapted to the satisfaction of the same need, do not compete if they do not sell to the same distributors",<sup>92</sup> even if the same ultimate consumers in the same localities are served by the two producers.

The Court's opinion is predicated on the theory that potential competition is not within the purview of the statute, that competition which is not substantial cannot be substantially lessened, and that whether competition is substantial is not a matter of absolute volume but of percentage. The view that competition between two corporations must be substantial before it can be substantially lessened is quite similar to the theory that the effect on competition in general is the test, rather than the effect on competition "*between such corporations*" as contemplated by the terms of the Clayton Act.<sup>93</sup> To apply such a test is to apply the Sherman Act test and to discard the earlier construction of the Clayton Act which viewed the latter statute as seeking "to reach the agreements embraced in its sphere in their incipiency."<sup>94</sup> The Court's decision therefore amounts to an excision of the specific language of the Clayton Act.

A further barrier was erected by the Supreme Court against enforcement of this section of the Clayton Act when it reversed<sup>95</sup> the Circuit Court of Appeals of the Seventh Circuit in the *Swift* case discussed above, on the ground that no practical relief would be afforded by requiring Swift & Co. to divest itself of its stock holdings after it had, by means of its stock ownership, acquired all the property and business of the two competing companies. If, however, at the time complaint is made by the Federal Trade Commission, the acquiring company has not yet obtained the assets of the company whose stock is owned, the order requiring divestment of the stock may also prevent use of the stock to acquire the assets. For Section 11 of the Clayton Act requires that the wrongfully held stock be divested, "if any there be, *in the manner*" fixed by the Commission.<sup>96</sup> The rule thus proclaimed by the Court leads to a race of diligence between the Commission and the stockholding corporation.

The words "if any there be" probably suggested to the Court the basis for erecting still another barrier for the protection of corporations seeking to evade the policy of the law in the recent case of *Arrow-Hart & Hegeman Electric Co. v. Federal Trade Comm.*<sup>97</sup> It was there laid down in an opinion by Mr. Justice Roberts that if the corporation wrongfully acquiring the stock disposed of it before the Commission compelled disposal of it, the

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92. *Id.* at 304.

93. 38 STAT. 732 (1914), 15 U. S. C. A. § 18 (1927) (*italics supplied*).

94. See *Standard Fashion Co. v. Magrane-Houston Co.*, 288 U. S. 346, 356 (1922).

95. 272 U. S. 554 (1926).

96. 38 STAT. 734 (1914), 15 U. S. C. A. § 21 (1927) (*italics supplied*).

97. 291 U. S. 587 (1936).

Commission could do nothing to prevent a merger brought about by the transferee of the stock.

In that case the Arrow Co. and the Hart & Hegeman Co. desired to merge, and for that purpose a holding company acquired the stock of both competing concerns. Against it the Commission proceeded. The holding company thereupon transferred its stock to two new holding companies which were created, one to take the stock of the Arrow Co. and the other that of the Hart & Hegeman Co. The original holding company was then dissolved. The two new holding companies and the two original concerns whose stock they held merged, forming the consolidated Arrow-Hart & Hegeman Co., against which the Commission sought relief by joining it as a defendant in the proceedings instituted against the now defunct holding company which had wrongfully acquired the stock.

In deciding that the only remedy the Commission was empowered to afford in case of wrongfully acquired stock was to order the wrongdoing stockholder to divest itself of the stock, and that this remedy was not available under the facts of the *Arrow-Hart* case, the Court confined the jurisdiction and powers of the Commission strictly within the statutory authority conferred on it. However, a minority of four justices in this case felt that the corporate fiction should have been disregarded and the offender against the prohibitions of the Clayton Act not allowed to take refuge behind a cleverly erected screen of dummies.

### (c) Commodities Clause

In an effort to strengthen the antitrust policy, the Commodities Clause<sup>98</sup> was enacted as a part of the Interstate Commerce Act to divorce transportation from production and to put an end to discriminations which grew up where a railroad company occupied the inconsistent positions of both carrier and shipper. The Government made an effort to prevent use of the holding company as a device for evasion, and the Court rendered an opinion in *United States v. Elgin, Joliet & Eastern Ry.*<sup>99</sup> with reference to the United States Steel Corporation's relationship to a railroad company.

The decision turned on whether the Steel Corporation dominated and controlled the carrier. The Government's proof of control was by such facts as these: The Steel Corporation owned all of the railroad capital stock and furnished 60 per cent of its tonnage. It maintained close and constant supervision through conferences and correspondence. The railroad had not less than four officers and directors of the Steel Corporation selected from its most important officials on the railroad's board of directors. The board of directors was selected and elected by the proxy for the Steel Corporation. The president then selected the officers who were elected by the

98. 34 STAT. 584 (1906), 49 U. S. C. A. § 1 (8) (1929).

99. 298 U. S. 492 (1936). Mr. Justice McReynolds wrote the opinion.

board at his suggestion. The president had a settled practice of entering into contracts without any previous approval by the board of directors, which were later ratified and affirmed. Dividends were declared and the amount fixed only after approval by the Steel Corporation. Surplus funds were deposited with the Steel Corporation at a rate of interest which it fixed. The Steel Corporation approved the expenditures for capital account and improvements when in excess of \$10,000, which included about 70 per cent of its total capital expenditures. Nevertheless, a majority of the Supreme Court held that the proof was not sufficient to establish control of the subsidiary by the parent Steel Corporation. There was a dissent by Justices Stone, Brandeis and Cardozo which will repay reading by those interested in the way laws are not enforced.

If this decision is a standing measure of the degree of proof required in anti-monopoly cases, Congress and the Executive are under a heavy handicap in any effort to enforce anti-monopoly laws.

#### (d) Federal Trade Commission Act

After experimenting for many years with efforts to enforce the Antitrust Laws through the courts, Congress enacted the Federal Trade Commission Act,<sup>100</sup> which was designed to add to the existing remedies against monopoly proceedings before an administrative body.<sup>101</sup> The Commission has, however, witnessed a steady diminution and crippling of its powers by a series of restrictive judicial interpretations.<sup>102</sup> Its function was to prevent unfair methods of competition. Of course it was impossible to define by statute the multitude of unfair practices. The Commission was expected, after investigation, to determine what practices were unfair methods of competition. But the Supreme Court decided, "It is for the courts, not the Commission, ultimately to determine as a matter of law what they include",<sup>103</sup> and it went back to its old precedents for the definition.

The Court next decided that it would not only define the terms but that it would also examine the whole record in any case and ascertain the issues presented and whether there were material facts in evidence not given sufficient weight by the Commission.<sup>104</sup> Chief Justice Taft filed an opinion the substance of which is that he was unable to decide just what it was that the majority was deciding. It was apparent, however, from the outcome, as the Chairman of the Commission stated, that the Court had claimed the

100. 38 STAT. 717 (1914), 15 U. S. C. A. § 41 *et seq.* (1927).

101. See BLAISDELL, *THE FEDERAL TRADE COMMISSION* (1932); HENDERSON, *THE FEDERAL TRADE COMMISSION* (1925); McFARLAND, *JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION* (1933).

102. Judicial restriction on the Commission's powers in connection with enforcement of the Clayton Act have already been discussed, *supra* p. 250.

103. *Federal Trade Comm. v. Gratz*, 253 U. S. 421, 427 (1920).

104. *Federal Trade Comm. v. Curtis Publishing Co.*, 260 U. S. 568 (1923).

power to frame an issue of its own and to support it by its own findings of fact.

Another blow to the Commission was dealt in *Federal Trade Comm. v. Klessner*<sup>105</sup> and *Federal Trade Comm. v. Raladam*.<sup>106</sup> In the *Klessner* case, involving use of a trade name, the Court held that "filing of the complaint before the Commission was not in the *public interest*"<sup>107</sup> and that the Federal Trade Commission Act does not afford "a private administrative remedy"<sup>108</sup> to an aggrieved competitor, even if purchasers are deceived or confused by defendant's use of the name. In the *Raladam* case, where deceptive statements injurious to the public were used in advertising an obesity remedy, the Court held that the defendant was not engaged in an "unfair method of *competition*"<sup>109</sup> since it was not shown that the business of competing medicine vendors had been injured. Moreover, as the Court pointed out, if there were such competitors, they were probably fraudulent concerns for whose protection the governmental machinery invoked had not been established.

The *Klessner* decision flies in the face of the law as enacted by Congress. The Court falls into the not uncommon, but nevertheless undesirable, practice (condemned by Mr. Justice Holmes, dissenting in the *Northern Securities* case)<sup>110</sup> of imagining that the statute contains language different from that actually employed by Congress, and then seeking to ascertain the meaning of the words thus substituted for those of the legislature. To the often difficult task of determining what Congress intended by the words it used, the Court adds the problem of what it meant by words it did not use.

Mr. Justice Sutherland in the *Raladam* case says: "By the plain words of the act, the power of the Commission to take steps looking to the issue of an order to desist depends upon the existence of three distinct prerequisites: (1) that the methods complained of are *unfair*; (2) that they are methods of *competition* in commerce; and (3) that a proceeding by the Commission to prevent the use of the methods appears to be in the *interest of the public*."<sup>111</sup> The "plain words of the Act", however, are: "Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear *to the commission* that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve . . . a complaint. . . ." <sup>112</sup>

105. 280 U. S. 19 (1929).

106. 283 U. S. 643 (1931).

107. 280 U. S. at 23 (*italics supplied*).

108. *Id.* at 26.

109. 283 U. S. at 646 (*italics supplied*).

110. See 193 U. S. 197, 403 (1904).

111. 283 U. S. 643, 646-647 (1931) (*italics by the Court*).

112. 38 STAT. 719, 15 U. S. C. A. § 45 (1927) (*italics supplied*).



It is evident that these words give to *the Commission*, and not to any court, discretion to determine whether the public interest would be served by the institution of proceedings. They do not touch the jurisdiction of the Commission to entertain proceedings once begun, or constitute a criterion of substantive law to govern its disposition of such proceedings.

It is very proper that the Commission should have such discretion, in order to prevent the law enforcement agencies from being swamped by unimportant and trivial complaints. The discretion to decide whether a case is of sufficient public importance to justify proceedings is the same sort as that exercised by a prosecuting attorney in preferring charges, or by an attorney-general in bringing a writ of quo warranto, or by the Supreme Court itself in granting review by certiorari (as distinguished from review as on writ of error or on appeal).

Professor Bates thus sums up the effect of the two decisions: "Practically, this amounted to saying that one illegitimate business, as defined by the Court itself, could not be prevented unless it were in competition with other illegitimate business, and if it were it still could not be prevented because all these forms of business were equally illegitimate."<sup>113</sup>

#### (e) National Industrial Recovery Act

The most recent, and possibly the most controversial, attempt on the part of the Government to curb socially undesirable business practice, was the National Industrial Recovery Act.<sup>114</sup> Its total demolition by a single decision of the Supreme Court added another chapter to the history of trade regulation, which differed only in its dramatic suddenness from the more gradual dismemberment to which the Sherman, Clayton and Trade Commission Acts had been subjected.

At the end of this long road we read like an epitaph Senator Wagner's statement that "no one can state authoritatively what our national policy is."<sup>115</sup> The Senator spoke with characteristic restraint. He might well have added that no one can state authoritatively what our national policy *can be* under the attitude of the Court.

#### *Inadequacy of Judicial Remedies*

This record of judicial "enforcement" of legislation against monopoly is one in which members of the legal profession can find little satisfaction. Indeed the result of forty-seven years of efforts by lawyers to curb monopoly has produced little discernible economic effect. Antitrust litigation has provided "famous victories" from which nothing came at last, after prolonged

113. BATES, *op. cit. supra* note 45, at 268.

114. 48 STAT. 195 (1933), 15 U. S. C. A. § 701 *et seq.* (Supp. 1936).

115. See *supra* note 2.

legal battles more spectacular than successful. Court proceedings have not suppressed monopoly so much as they have educated business to avoid the cruder and more easily proven contracts and combinations in restraint of trade. A half century of litigation and judicial interpretation has not made the law either understandable or respected.

Accordingly, there is substantial reason for doubting whether lawsuits and judicial pronouncements constitute an adequate or appropriate weapon against monopoly.<sup>116</sup> Every antitrust problem is economic as well as legal. Economic questions are not well investigated or settled in adversary combat, conducted under technical rules and evidentiary limitations. A contested case is dragged out over many years in traveling from court to court, and is seldom completed within the administration that begins it. The amounts appropriated for enforcement of the Antitrust Laws will not sustain more than a half dozen contested suits; and the sums thus spent go toward obtaining decrees which, when carried out in form, are often only lessons in futility.

In dealing with economic matters, practical adjustments, even more or less arbitrary in their nature, arrived at by the business judgment of those in a position to negotiate a fair bargain, would often be more beneficial both to the general public and to the interested parties than the most scrupulous measurement of business transactions by skilled jurists against the abstract standards provided by legal reasoning.

#### IV. SUGGESTED REVISION OF ANTITRUST LAWS

In view of the proposals which President Roosevelt has recently made in regard to this subject, it would be inappropriate at this time to suggest specific lines of action which, even if advanced only as private and personal opinions, might be attributed to the Department or to the Administration. But at least the larger questions presented may be indicated.

Is it possible to define certain bounds within which competition may still flourish? How may the Government work out a consistent policy expressed not only in its Antitrust Laws, but also in the laws relating to patents, tariffs, taxes, and federal incorporation and licensing of interstate corporations, so as to throw its whole weight in the direction of curbing monopoly? And how far should the administration of this policy be left in the hands of the courts? Will it prove necessary to distinguish resource industries from the others for purposes of judicious utilization in the present and conservation for the future?

Perhaps the most difficult question of all is presented by those industries where monopoly already prevails to such an extent that the law is powerless to revive competition. Should such monopolies be recognized and regulated as such? And should the technique of legalistic regulation, now

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116. Cf. BURNS, *op. cit. supra* note 32, at 570-571.

familiar in the field of public utility law, be buttressed by the indirect, but perhaps more effective, use of economic weapons, such as the creation of government competition in the form of "yardstick" enterprises<sup>117</sup> or the subsidizing of competition, where other methods do not avail?

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117. Government competition, consumers' laboratories, requirements of labeling and inspection, government ownership or operation and drastic types of regulation and "death sentences" are the products of disappointment over failure to enforce appropriate regulations of rates, commercial practices and restraints of trade.