

# Should the Antitrust Laws Be Revised?

BY ROBERT H. JACKSON

FOR forty years the United States has had a statute that appears to condemn every combination which restrains trade. Its general language might include almost any combination, trade association, or industry. But we have court decisions which make possible a plausible legal defense of almost any combination in restraint of trade. What business conduct the resulting law will really reach has become our major governmental mystery.

As a result of this confusion, we are faced with the following inescapable facts:

1. The Department of Justice has no satisfactory standards by which cases can be selected for prosecution or by which the success of any given prosecution may be predicted with assurance.

2. Business enterprise has no safe standards by which it may determine in advance the validity of concerted action, even when the principal purpose is to eliminate waste or to reduce costs of production or distribution.

3. The administrative arm of the government is unable to give commitments as to any combination, because the confusion of precedents and policy is such that a position taken in one case may prove an embarrassment in others.

The sum of these three facts is that there is no stated or intelligible policy which differentiates pursuit of industrial efficiency from industrial empire building.

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 bitterly contested case drags a delirious course from court to court and is seldom completed within the administration in which it was begun. The appropriations for enforcement will not sustain more than a half-dozen contested suits and are utterly inadequate to the task of policing our national economy.

I have no interest in "trust busting" for the sheer joy of "trust busting" or in legal assaults on combinations which have economic necessity on their side. We should not spend great sums to obtain decrees which are economically unenforceable and, when carried out in form, are often only lessons in futility. Antitrust suits provide spectacular legal battles and "famous victories." But this exercise for legal theoreticians often fails to produce any discernible economic effect.

The importance of present or past

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States in 1936, after having been for two years general counsel of the Bureau of Internal Revenue. He was theretofore engaged in practice in Jamestown, N. Y. He is a former president of the Federation of Bar Associations of Western New York.

efforts to enforce the law through antitrust suits is not to be belittled. Though these efforts have failed to break up price controlling organizations, or to check the continuing concentration of wealth and of industrial control, they have doubtless saved us many evils that would have accompanied completely unsupervised organizations. They have furnished, although obscurely, standards of conduct and of business practice which have improved business ethics during the process of centralization of American industry. They have saved us from the cartel system of Europe.

What is needed is 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. Destruction of monopoly has been a high sounding generality advocated by both political parties in nearly every campaign — but never with a too troublesome definiteness. "To be grandly vague," writes Herman Finer, "is the shortest route to power; for a meaningless noise is that which divides us least." For forty years administrations have alternated between a policy of being aggressively vague and passively vague, until an attempt to reduce business practice and controls to definite and intelligible codes was made under the National Industrial Recovery Act. Apart from any other value or defect of that plan, the brief experience with coöperative instead of competitive effort in industry should contribute richly in standards by which to weigh all future plans for social control of industry.

#### *Antitrust Policy and Its Alternative*

The basic philosophy and object of the antitrust laws, and the prob-

able alternative if they fail, are too little understood.

The antitrust laws represent an effort to avoid detailed government regulation of business by keeping competition in control of prices. It was hoped to save government from the conflicts and accumulation of grievances which continuous price control would produce and to let it confine its responsibility to seeing that a true competitive economy functions.

But it is a mistake to believe that they represent a philosophy of unconcern or indifference about our economic life. They assert, on the contrary, a definite economic plan, a sovereignty of public over private interest in business and an affirmative control over our economic life to provide conditions under which competition will function effectively.

To this end, though we know competition to be ruthless and at times a wasteful regulator, each competitor is protected and fostered, even if he be a "chiseler," an underseller, and a hair shirt to his industry.

Also, since there can be no effective competition except between rivals with some equality of strength and resource, and since the existence of many sources of supply is the best assurance of competition, the law aims to prevent concentration of wealth, and centralization of industrial, financial, or trade control, as well as complete monopoly.

This competitive system, between business groups, free and uncentralized, reduces the responsibility of the government to keeping the channels of competition unobstructed. This is the lowest degree of government control that business can expect.

The question we face today is whether we can keep that kind of economy or will be forced by its

breakdown to other and more drastic regulation.

American business must make up its mind whether it favors the regulation by competition contemplated by our antitrust laws or the only probable alternative — government control. Every step to weaken antitrust laws or to suspend them in any field, or to permit price fixing, is a certain, even if unknowing, step to government control.

Many leaders of conservative thought recognize that American business is faced with this alternative.

In April, commenting on the fact that the Aluminum Company suit not only puts the company on trial for monopoly, but also puts the existing antitrust laws on trial, Mr. Walter Lippmann said:

The restoration of competition is the only possible alternative to socialism, and it would be useless, as well as hypocritical, for any one to object to the collectivism of the New Deal and yet to cry out that an unmistakable economic monopoly should be tolerated by the law. . . .

Moreover, if private big business collectivism is to be tolerated in the basic manufacturing industries, then all other producers, farmers, secondary manufacturers, and workers in other industries are compelled to organize socially to protect themselves against such monopolies.

Let us now turn to certain symptoms of the failure or inadequacy of the present antitrust laws.

### *Decline of Competition*

Economists recognize a decline of competition and express anxiety as to its meaning.

The statistics show the disappearance of large numbers of industrial units. An era of bankruptcy has followed an era of merger and consolidation and only a relatively small

number of industrial units and sources of supply have survived. Competition among them is often moderated by financial controls, interlocking directorate, or by patent controls, basing point practices, or price leadership, or dominance in an industry. The probability of new units is greatly reduced by the constantly increasing investment necessary to secure the benefits of mass production and by the high cost of cultivating a national market.

The sharpest illustration of lessened competition is the experience of the government as a buyer. It should be the last to feel a decline of competition. Not only do laws protect the existence of competition among sellers, but the government is also required by law to purchase only on the basis of competitive bids. A rather ponderous machinery is set up for the handling of sealed offers — an official call for bids, great secrecy of the sealed envelopes placed in a strong box in a department safe as they are received, a tense moment on the announced day when the bids are made public — and then a fizzle. The matter can best be brought home by specific examples from among many available.

The Denver office of the Bureau of Reclamation opened 17 bids for reënforcement bars, 14 of which were identical to the last penny, namely, \$1,144.16. The United States Engineers at Los Angeles opened 12 bids for reënforcement bars and 11 of them were identical — \$194,051.89. The purchasing agent for the Fort Peck Dam opened 10 bids on reënforcement bars and each one of the 10 was \$253,633.80. In February, 1936, 16 companies each bid \$3,483.50 on a steel sheet order and in June, 15 companies each bid exactly the same figure again for a similar

order. Steel plates bids present a similar record. In steel pipe the prize situation appeared when 59 bids were opened by the Navy Department and each of the 59 companies bid \$16,001.83.

In government purchase of explosives about 425 bids were opened during 1935 and the first half of 1936 and the great majority were identical. Bids on cement follow the same pattern. In one instance 40 companies each bid exactly \$7,148.60. On another contract 43 bids were identical. The same situation has occurred with products of nearly all metal, paper, rubber, meat, wood, batteries, explosives, cement, machinery, office supplies, chemical and medical supplies, and all plumbing supplies.

I am not now passing judgment as to whether these bids are the result of a punishable conspiracy. But they certainly were not the result of identical costs of manufacture, nor of independent estimates. They are the product of artificial marketing machinery. Our antitrust laws are often interpreted to prohibit methods rather than results. What may be illegal if accomplished in one way is held to be legal if accomplished in another.

No matter whether the private business controls and arrangements which produce identical bidding be what the courts have heretofore called legal, or illegal, the effect is to compel purchasers to pay a price based on calculation, not on competition. Whatever the effect of this on private buyers, it completely destroys the mechanism set up by federal, state, and municipal governments to keep favoritism and corruption out of public buying. And it provides dramatic evidence that price competition in many industries is under mathematical control to the fraction of a cent.

### *Controlled Prices and Price Disparities*

This ability of some industries to control or peg their prices, while others fluctuate, results in a disastrous price disparity.

During the depression prices of some commodities remained relatively stationary and rigid, while certain others were flexible and moved up and down with the ebb and flow of business activity. For example, prices received by the farmer during the depression showed the greatest sensitivity and fell, as a whole, about 57%, and grains about 64%, while agricultural implements declined less than 17% as a maximum, and for most of the years only 5% or 6%, the 1926 price level being taken as 100% in each of these instances.

These figures may give the impression that we merely have a contrast between the prices of agricultural products and of manufacturers. Highly competitive textiles, however, such as cotton goods, went off 50% from the average for 1926, knit goods 53%, silk and rayons about 75%, while less competitive metals and metal products reached 23% as a maximum and the decline for most of the period was less than 15%.

The conviction grows that the difference between the rigid price in some lines and the sensitive price in others is largely influenced by the private economic planning done by those who object most vigorously to the Nation's engaging in public economic planning.

### *Price Control Does Not Stabilize Production or Employment*

If rigid prices meant stability of employment in the industry, we would find price control more tolerable. But generally, the more rigid

and inflexible the price of a product during the depression, the more calamitous was the decline in its labor's pay roll. In some industries pay rolls almost vanished, although prices of the product were little affected. According to the Bureau of Labor Statistics, pay rolls for the iron and steel industries declined about 75% while the wholesale price of ingots declined only 16%. The depression prices of cast iron pipe declined 7% and pay rolls declined 74%. While agricultural implements declined 14% in price, that industry's pay rolls took the prize decline of 83%. Virgin aluminum went down 21% in price and pay rolls of aluminum manufacturers declined about 70%. Cement declined 13% and its pay rolls 72%.

There seems to be something the matter with conditions which yield these percentages. This is confirmed by reference to the price and pay-roll percentages for more competitive industries. Prices on woolen and worsted goods declined 34% and the pay rolls about 51%. Cotton goods showed a decline of 43% and less than 51% in pay rolls. Knit goods declined 42% in price and 42% in pay roll. Leather showed a decline of 44% in price and 42% in pay roll.

Of course there are factors influential in producing these percentages, other than the factor of monopoly or of price control. But the correspondence between rigid prices and low pay rolls is so general as to surpass the probabilities of coincidence. The kind of "industrial stability" which means the ability to avoid price concessions does not promote, even if it does not injure, stability of employment or wage levels.

#### *Economic Concentration*

The concentration of ownership and control of industry is fatal to

the operation of competitive economy. Concentration destroys the sources and possibilities of competition, and the antitrust statutes attempt to check it, but the courts, blind to this purpose, have said "size is no offense."

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—only two tenths of one per cent. 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 the 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 was received by three tenths of one per cent. 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 one third of all the property reported as passing by death was found in less than four

per cent. of the estates. The Brookings Institution's studies in 1929 reported 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.

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.

The Canadian Royal Commission on Price Spreads recently made the following observations:

At first sight, indeed, it appeared that the separate and distinct problems which emerged in the evidence called for separate treatment and almost separate reports. On closer study, however, it became clear that many of the grievances complained of, and the problems disclosed, were manifestations of one fundamental and far-reaching social change, the concentration of economic power. . . .

The depression has, furthermore, demonstrated that the strong and the organized are attaining an ever increasing position of dominance in our economic life; that economic power is becoming concentrated. With this concentration old theories of economic control are proving inadequate.

This concentration of business accounts in large part for the lost influence of big business, its press, its legal lackeys, and its business organizations, in legislative and election struggles. Forty years ago big business had as its ally in every town and settlement the local merchant, local manufacturer, local banker, and local utility man. Each was a leading citizen, on whom many depended for

information and leadership as well as for credit and jobs. This type of man has largely gone. Why he has gone makes little difference.

In the place of this strong and leading individual we have a managing clerk at the chain store who cannot make a credit sale and a local superintendent for the factory. The local bank is closed and nobody who has more authority than a bill collector represents the utility in most communities. Big business has found it to its advantage to rotate even those men, so that no one of them is left in the community long enough to get his roots established or really to become a part of the life about him, to become a property owner, or to be regarded as a fellow citizen by those among whom he dwells as a representative of an absentee control.

Thus, big business has destroyed its own defense, has devoured its own young. The small business man who used to be our most ardent capitalist and the most uncompromising of conservatives has been crushed, or merged, or consolidated, or otherwise retired. This has brought about a subtle change, not only in economic life, but in social and political life as well. There are values in local independence and responsibility which are being sacrificed to balance-sheet values.

This process seems not to be discernible to, much less appreciated by, the people who dominate the large industries in our great cities. It is plainly discernible to those who live in smaller cities and see the life of the community as a whole.

#### *Revision Suggested*

Can we say that our forty years of antitrust litigation, conducted by administrations which alternated between aggressive and non-aggres-

sive policy, developing fine-spun interpretations by courts and creating uncertainty in business, have produced a satisfactory crop?

Where do we stand at the end of it? Today the government itself cannot get competitive bids in basic products, the welfare of our people is dislocated by disparities between controlled and free prices, great industries in slack times hold their prices though their volume falls and their labor is idle, small businessmen in many lines of useful enterprise are falling like autumn leaves, and the profits of commerce concentrate in fewer hands. This is a condition that I would label "Handle with care — inflammable."

In its "Platform for American Industry" the National Association of Manufacturers condemns all extensions of government control, and says:

In opposing unsound economic and social measures it is unnecessary to propose alternatives.

If our business organizations take the defeatist attitude that there can be no remedy, or if their only contribution is opposition, they are losing an opportunity to bring practical, informed, and experienced advice to the aid of officials, most of whom would, as I do, admit their perplexity and inadequacy to the problem.

No flawless and objectionable plan will come from any source and no plan that I can foresee will be able to avoid an increase in governmental activity and control in our economic life.

The Attorney General has urged a revision of the antitrust statutes, and it would not be appropriate for me, in this stage of the matter, to put forward specific proposals which, even if advanced only as private and

personal opinions, might be attributed to the Department or the Administration. But it is not difficult to see the outlines of big questions that will need practical answers.

Can we identify a field in which competition still may function and be protected? What changes should be made in patent laws, tariff laws, tax laws, and laws concerning federal incorporation or the licensing of interstate corporations, in order to mobilize all the powers of government against monopoly? Whether we should except natural-resource industries from competition, and regulate them in the interest of prudent utilization now, and conservation for the future, and whether any single formula can be applied to all industries, must be considered.

Most challenging of all is the field in which the law is powerless to restore a competition which has already vanished. Shall we recognize and regulate monopoly where competition cannot be revived? And, if so, shall we confine it to legalistic regulation, modeled on public-utility regulation, that being the only regulatory legal technique we have so far developed? Or shall we use economic weapons to combat economic ills, and create a public competition where private fails, or subsidize competition when it is otherwise unable to survive?

The problem bristles with these and a thousand other questions that challenge those who would be progressive without being unpractical. An unimpassioned and unrestrained study must be made of the monopoly question as it thrusts itself upon government today and of the course that may be taken to preserve the advantages of our mass production and cheap distribution without the political and economic risks and resentments which go with monopoly.

Our solution of the anti-monopoly problems must be in terms of our ideals — the ideals of political and economic democracy. We want no economic or political dictatorship imposed upon us either by the government or by big business. We want no system of detailed regulation of prices by the government nor price fixing by private interests. We do not want bureaucracy or regimentation of any kind, but we will prefer gov-

ernmental to private bureaucracy and regimentation, if we have to make such a choice. We can not permit private corporations to be private governments. We must keep our economic system under the control of the people who live by and under it. In the words of the President in his second inaugural address, "We must find practical controls over blind economic forces and blindly selfish men."

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#### THE LAWYER'S TASK

WHEN Calhoun advised Wirt "to study less and trust more to genius," the Attorney General remarked, "He has certainly practised on his own precepts, and has become, justly, a distinguished man. It may do very well in politics, where a proposition has only to be compared with general principles with which the politician is familiar. But a lawyer must understand the particular facts and questions which arise in his cause, before genius has any materials to work upon; and in that preparatory examination consists the labour of the profession." (From a letter of William Wirt, Attorney General of the United States, 1817-1829.) — Cummings and McFarland, *Federal Justice*, p. 89.