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ECONOMIC CONSIDERATIONS IN THE ENFORCEMENT OF THE ANTITRUST LAWS OF THE UNITED STATES*

RALPH F. FUCHS**

THE PURPOSES of law determine its content and account for the decisions of courts and administrative agencies; but purpose is registered typically in rules and principles. Once these have been enacted or accepted, they are purportedly applied with only secondary, rather than primary, reference to the considerations that gave them birth.¹ In other words, a doctrinal screen separates the ends of law from the process of effectuating them through administration and adjudication. Decisions are reached, or at least rationalized, in terms of legal propositions recorded upon the screen,² rather than in terms of the purposes that lie behind. It is so in the traditional fields of private law; in the criminal law; and in large areas of public law, such as those by which pensions and benefits are provided. It is emphatically not so, however, under the anti-trust laws of the United States;³ for there the doctrinal screen is exceedingly thin and large of mesh, permitting—indeed requiring—the enforcement tribunals to look constantly through it to the purposes of the laws, instead of finding their patterns of decision upon the screen itself. The rules of anti-trust law are few and broad in terms; the necessity for resorting to social ends and economic data as guides to decisions is constant.

*This paper has been prepared for presentation to the Third International Congress of Comparative Law at the Hague, August 1-7, 1950. Since it is intended for the information of foreign lawyers having no previous acquaintance with the antitrust law of the United States and was subject to a word limit, it is rather elementary and cryptic. We believe it has suggestive value for readers in this country, however, especially by way of introduction to the subject.

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1. Cf. Holmes, *The Common Law*, esp. p. 5 (1881).

2. There is no intention here, of course, of estimating with precision the relative roles of legal doctrines and practical considerations in judicial administration. Sufficient to the argument is the point that lawyers and judges typically frame their questions and put their answers in doctrinal terms.

3. Under the terminology employed in the United States, antitrust law is the law designed to guard against monopolies, restrictive business combinations, and undesirable restraints of trade. Statutory and non-statutory doctrines of early English law, which had these purposes, form a background for 19th-century decisions, and occasional contemporary ones, in the United States, which do not rest upon modern statutes. In the United States, however, Federal and state legislation has almost entirely covered the field and forms the starting point for practically all decisions. Because of the nation-wide scale of much of American business and the greater vigor of enforcement by Federal officials as compared with those of the States (with rare exceptions), the state antitrust laws have become of decidedly secondary importance. This paper will be confined to the Federal laws.

I. The Evolution of Antitrust Doctrines and Methods of Enforcement

The principal Federal antitrust law is the Sherman Act of 1890.⁴ It prohibits "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations,"⁵ and any conduct whereby any person "shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations. . . ."⁶ Criminal prosecutions for violations and civil enforcement proceedings at the suit of the Attorney General and of private parties, are authorized.⁷

The terms of the Sherman Act's prohibitions are obviously broad and afford little guidance to the decision of cases arising under them. Under one interpretation originally urged, these terms derive more specific meaning from the preexisting common law and do not extend beyond it;⁸ but this view has not been accepted. Instead, the substantive clauses of the statute have been deemed to prohibit vague, rather than precise, categories of acts which conflict with the legislative purpose.⁹ That purpose, it can scarcely be doubted, was the maintenance of competition in the economy,¹⁰ in so far as conflicting laws of a specific nature were not in effect or might not be afterward adopted.¹¹

Since the terms of the statute were very sweeping, it became necessary to limit their application to acts and transactions which threaten the maintenance of competition, as distinguished from others which limit competition merely to serve some legitimate business purpose. Many business contracts limit the subsequent competition of the parties or of others in some way; yet clearly it

4. 26 Stat. 209 (1890), as amended, 15 U. S. C. § 1 *et seq.* (1946).

5. 15 U. S. C. § 1 (1946).

6. 15 U. S. C. § 2 (1946).

7. Violations of the Act are made misdemeanors by the sections just cited. Other remedial provisions, including injunction suits, are prescribed in sections 4-6, 15 U. S. C. §§ 4-6 (1946); in section 7, omitted from the Code, and in supplementary proscriptions of the Clayton Act of 1914, note 32, *infra*, 15 U. S. C. §§ 15, 26 (1946).

8. Holmes, J., dissenting, in *Northern Securities Co. v. United States*, 193 U. S. 197, 400, 403-404 (1904). Compare the same writer's opinion of the Court in *Swift and Co. v. United States*, 196 U. S. 375, 394-396 (1905).

9. *Standard Oil Co. v. United States*, 221 U. S. 1, 51-62 (1911).

10. The historical evidence is summarized by Chief Justice Stone in *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 489-493 (1940).

11. Legislation, which it is not necessary to cite, provides for regulated monopolies or restrictive licensing in transportation, communication, and other public services; legalized combination among employees and farmers; and government ownership of the post office, numerous electric power and local public utility projects, and atomic energy development.

was not intended by the Sherman Act to prevent contracts of partnership or sale which, to the extent of the business involved, tie the parties to each other, eliminating competition between them or excluding outsiders from competing for the same sales. To furnish a basis for discriminating between lawful transactions and unlawful restraints, the Supreme Court, after much difficulty,¹² announced its famous "rule of reason" under the Sherman Act, whereby "the standard of reason [is] . . . the measure [to be] used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided."¹³

This so-called rule was, of course, nothing but a formula to justify the courts in drawing lines between transactions deemed legitimate on economic grounds and those thought to be harmful. Far from affording a guide for the future, the opinion which announced the rule of reason appeared to merge the several clauses of the Sherman Act into one broad prohibition and thus to eliminate such definiteness as otherwise might have continued to result from the different phrases in the Act.¹⁴ Under this approach, the Court has been compelled to distinguish as best it could between concerted activity that aided¹⁵ and similar activity that restrained¹⁶ healthy competition, or between corporate consolidations that eliminated competition without warrant¹⁷ and those that appeared to be justified by considerations of efficiency in manufacturing or marketing.¹⁸ Similarly, some patent pools and cross-licensing agreements are sustained because they avoid conflict among the patentees and make an entire technology available to all, even though at the same time they strengthen the parties in competition with outsiders,¹⁹ whereas others are condemned because they establish control over an industry, sustaining prices and excluding competition.²⁰

12. Controversy within the Supreme Court over the interpretation of the Sherman Act is reflected in the following leading cases: *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290 (1897); *United States v. Joint Traffic Association*, 171 U. S. 505 (1898); and *Northern Securities Co. v. United States*, 193 U. S. 197 (1904).

13. *Standard Oil Co. v. United States*, 221 U. S. 1, 60, 61-64 (1911).

14. *Ibid.*

15. *Maple Flooring Ass'n v. United States*, 268 U. S. 563 (1925).

16. *American Column & Lumber Co. v. United States*, 257 U. S. 377 (1921).

17. *United States v. Reading Co.*, 253 U. S. 26 (1920).

18. *United States v. United States Steel Corp.*, 251 U. S. 417 (1920); *United States v. Columbia Steel Co.*, 334 U. S. 495 (1948).

19. *Standard Oil Co. (Indiana) v. United States*, 283 U. S. 163 (1931).

20. *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20 (1912); *Hartford-Empire Co. v. United States*, 323 U. S. 386, 324 U. S. 570 (1945); *United States v. National Lead Co.*, 332 U. S. 319 (1947); *United States v. United States Gypsum Co.*, 333 U. S. 364 (1947). Compare, as to copyright, *United States v. Paramount Pictures*, 334 U. S. 131, 141-144 (1948).

The "rule of reason," however, did not long remain the sole formula to guide the courts in applying the Sherman Act. Since its announcement, the Supreme Court has concluded in a series of decisions that some restrictive and monopolistic practices produce so serious a danger to competition or involve so menacing a concentration of economic power as to be "unreasonable per se." Under the principle of *stare decisis*, these practices thereupon became unlawful without reference to their possible economic justification under particular circumstances. Such has now become the holding with respect to agreements among competitors upon the prices they will charge or pay, at least if a substantial portion of the trade in a product is involved;²¹ agreements to refrain from particular forms of price competition, resulting in price uniformity;²² schemes to influence prices by market operations;²³ agreements between a seller and buyers of his product upon resale prices to be charged by the latter;²⁴ pooling of profits or receipts among competitors;²⁵ territorial division of markets among competitors;²⁶ agreements among holders of complementary patents, providing for licenses to others conditioned upon the licensees' charging stipulated prices for the patented product;²⁷ intentional maintenance of power to control prices or exclude competitors;²⁸ acquisition of power to control prices or exclude competitors through intentional expansion of a business enterprise;²⁹ agreements among competitors, occupying a dominant position in an industry, not to do business with specified outsiders, either to compel them to adopt business practices favored by the conspirators³⁰

21. *United States v. Trenton Potteries Co.*, 273 U. S. 392 (1927).

22. *Federal Trade Commission v. Cement Institute*, 333 U. S. 683 (1948). Similarly, agreements to restrict production for the purpose of influencing prices are necessarily illegal. *American Column & Lumber Co. v. United States*, 257 U. S. 377 (1921); *United States v. Aluminum Co. of America*, 148 F. 2d 416, 444-445 (2d Cir. 1945).

23. *United States v. Patten*, 226 U. S. 525, 540-543 (1913); *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940).

24. *United States v. A. Schrader's Son, Inc.*, 252 U. S. 85 (1920); *United States v. Univis Lens Co.*, 316 U. S. 241 (1942). See also *Boston Store of Chicago v. American Graphophone Co.*, 246 U. S. 8 (1918).

25. *United States v. Paramount Pictures*, 334 U. S. 131, 149 (1948).

26. *United States v. National Lead Co.*, 332 U. S. 319 (1947); *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284 (N.D. Ohio, 1949).

27. *United States v. Line Material Co.*, 333 U. S. 287 (1948).

28. *American Tobacco Co. v. United States*, 328 U. S. 781 (1946).

29. *United States v. Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945).

30. *Paramount Famous Lasky Corp. v. United States*, 282 U. S. 30 (1930); *United States v. First National Pictures*, 282 U. S. 44 (1930).

or to compel them to refrain from dealings with outsiders whose competition the conspirators desire to eliminate.³¹

In addition to these judicially evolved rules under the Sherman Act, the effort has been made to strengthen the antitrust laws by legislation supplementing that Act, whereby specific business practices which are thought to endanger competition are rendered illegal. Among the measures of economic reform adopted in 1914, early in the administration of President Woodrow Wilson, were the Clayton Antitrust Act³² and the Federal Trade Commission Act.³³ The former is a lengthy statute, the most important provisions of which forbid specified conduct, provided "the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce." The business practices so proscribed are: discrimination in the prices charged to different buyers of the same product and the knowing inducement or receipt of such discrimination;³⁴ sale or lease of any article on condition that the buyer or lessee shall not use or deal in the products of a competitor of the seller or lessor;³⁵ and acquisition of the capital stock of a competitor.³⁶ Enforcement of these provisions is entrusted to the Federal Trade Commission,³⁷ newly established by the Act bearing that name,³⁸ but may also be had through judicial proceedings in the same manner as under the Sherman Act, except that criminal proceedings are in some instances not available.³⁹ In addition, the Federal Trade Commission is empowered to proceed against an undefined group of practices originally designated as "unfair

31. *Fashion Originators' Guild v. Federal Trade Commission*, 312 U. S. 457 (1941). Although this case, like the *Cement Institute* case, arises technically under the Federal Trade Commission Act, note 33, *infra*, both decisions are equally applicable to the Sherman Act.

32. 38 Stat. 730 (1914), as amended, 15 U. S. C. § 12 *et seq.* (1946).

33. 38 Stat. 717 (1914), as amended, 15 U. S. C. § 41 *et seq.* (1946). The social philosophy embodied in the two foregoing statutes is interestingly presented in Woodrow Wilson, *The New Freedom*, a collection of addresses made during the 1912 presidential campaign.

34. Clayton Act § 2, as amended June 19, 1936, c. 592 (the Robinson-Patman Act), 49 Stat. 1526 (1936), 15 U. S. C. § 13 (1946).

35. *Id.*, § 3, 15 U. S. C. § 14 (1946). This provision has been broadened by interpretation to cover exclusive dealing arrangements which, although affirmative instead of negative in terms, have the effect of precluding the purchase or lease of others' products. The decisions on this point are reviewed in *Standard Oil Co. of California v. United States*, 337 U. S. 293 (1949).

36. *Id.*, § 7, 15 U. S. C. § 18 (1946). This provision has the weakness of not forbidding acquisition of the assets of a competitor to the same extent as acquisition of capital stock. Continued attempts to secure strengthening amendments have so far been unsuccessful.

37. *Id.*, § 11, 15 U. S. C. § 21 (1946).

38. Note 33 *supra*.

39. Clayton Act §§ 15, 16, 15 U. S. C. §§ 25, 26. *Cf. Id.*, § 9, 15 U. S. C. § 24 (1946); Robinson-Patman Act § 3, 15 U. S. C. § 13a (1946).

methods of competition"⁴⁰ and now enlarged to include also "unfair or deceptive acts or practices."⁴¹ The Commission proceeds by administrative order, preceded by hearings, in exercising all of its powers. Its orders are judicially enforceable, subject to review as to legality by the courts.⁴²

It was intended that the 1914 legislation should accomplish two improvements, among others, in antitrust enforcement. These were: (1) outlawry of specific conduct dangerous to competition or productive of monopoly,⁴³ and (2) continuous surveillance of competitive practices by an administrative agency which should be able to identify additional conduct presenting the same dangers and to proceed promptly and expeditiously in all such situations.⁴⁴

For a variety of reasons⁴⁵ the hopes entertained with respect to the contribution of the Federal Trade Commission to these aspects of antitrust enforcement have remained to a large extent unrealized.⁴⁶ Commission proceedings have been frequently protracted, rather than expeditious.⁴⁷ The Supreme Court early claimed for

40. Federal Trade Commission Act § 5, as amended, 15 U. S. C. § 45 (1946).

41. Act of March 21, 1938, c. 49, 52 Stat. 111 (Wheeler-Lea Act). The amendment was designed in part to permit the Commission to deal with practices harmful to consumers, without the necessity of showing that harm to competitors could also be expected to result. See *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643 (1931); *Federal Trade Commission v. Raladam Co.*, 316 U. S. 149 (1942).

42. Clayton Act § 11; Federal Trade Commission Act, as amended by the Wheeler-Lea Act, 15 U. S. C. § 45 (1946).

43. See Sen. Rep. No. 698, 63d Cong., 2d sess. 1 (1914); 51 Cong. Rec. 13,484 (1914).

44. See Sen. Rep. No. 597, 63d Cong., 2d sess. 8, 15 (1914); H. R. No. 1142, 63d Cong., 2d sess. 18 (1914); 51 Cong. Rec. 11,455 (1914). In addition, more effective dissolution decrees under the Sherman Act, which the Commission was to aid in formulating, and a body of Commission-developed antitrust law which should serve as a more satisfactory guide to businessmen than was then available, were sought by means of the new legislation.

45. Among other factors, the quality of appointments to the Commission has been far from uniformly adequate to the task to be accomplished. See Herring, *The Federal Trade Commissioners*, 8 Geo. Wash. L. Rev. 339 (1940). Despite criticism from an early date (see Gerard C. Henderson, *The Federal Trade Commission* (1924)), moreover, the Commission has adhered to certain methods of administration which have reduced its effectiveness. Cf. Final Report, Attorney General's Committee on Administrative Procedure, Sen. Doc. No. 8, 77th Cong., 1st sess. 135-137 (1941). The Commission's annual reports for subsequent years reflect later changes in its organization and procedure.

46. The Commission has, however, made a major contribution to the understanding and regulation of business enterprise by a noteworthy series of investigations and reports. It has also devoted much effort to the elimination of false and misleading advertising, a problem which is collateral to the one here under discussion.

47. An extreme example is the proceedings which eventuated in the decision in *Federal Trade Commission v. Cement Institute*, *supra*, note 22. These continued in the Commission for six years. 37 F. T. C. 87. Judicial review of the Commission's order required almost five years. See Aetna

the judiciary the ultimate determination of what methods of competition are "unfair" within the meaning of the Federal Trade Commission Act.⁴⁸ And the Commission itself has been unable to reduce its conclusions to the form of a workable code which can be given effective application.⁴⁹ The definiteness of the rules embodied in the Clayton Act is, moreover, somewhat illusory because of the qualification that the proscribed practices, to be illegal, must present a threat of substantial lessening of competition or tendency toward monopoly. The meaning of this provision clearly depends upon economic factors which have not on the whole been reduced to rules and hence require exploration in particular situations.

The apparent definiteness of some of the judicially-evolved rules of "per se illegality" under the Sherman Act also disappears upon closer examination. Price fixing agreements, for example, although condemned, are not necessarily illegal if less than a "substantial portion" of an industry participates in them.⁵⁰ The "rule" against them, moreover, is subject to the possible exception that arrangements designed to enable the members of an industry to mitigate the effects of unrestrained competition, amounting to near-disaster, are lawful.⁵¹ The judgment as to the presence of saving circumstances in particular cases turns necessarily upon the economic factors involved. Similarly, the power to control prices or exclude competitors, which is illegal if purposefully acquired or maintained, is a matter of economic fact not easy of ascertainment. The masterful analysis in the leading opinion upon the sub-

Portland Cement Co. v. Federal Trade Commission, 157 F. 2d 533, 537 (7th Cir. 1946), for an account of the proceedings in the initial reviewing court. Cf. also Attorney General's Committee on Administrative Procedure, *op. cit. supra* note 45, at 367-374.

48. See Federal Trade Commission v. Curtis Publishing Co., 260 U. S. 568, 579-580 (1923). Partly responsible for this development is a lack of clarity in the legislative purpose, evidenced in the discussions in Congress. Thus it was said, in answer to objections to the breadth of discretion apparently conferred upon the Commission by the bill then pending, which was later enacted, that "The term 'unfair competition' has a more or less fixed meaning in law. It is a term that is known to the law, and has been defined in part by the courts." 51 Cong. Rec. 11,107 (1914). The words "unfair competition" appeared in the bill under discussion, but were eliminated from the Act as finally adopted.

49. See Handler, *Unfair Competition*, 21 Iowa L. Rev. 175 (1936), for a critical discussion of the Commission's performance in this regard.

50. Cf. United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 212 (1939).

51. Appalachian Coals, Inc. v. United States, 288 U. S. 344 (1933). The reasoning of this case is repudiated in the opinion in United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 214-222 (1939); but the decision is distinguished, not overruled, *id.* at 216. Hence it remains as a precedent that may be invoked in future periods of adversity. Other circumstances that may justify limited price fixing appear in Chicago Board of Trade v. United States, 246 U. S. 231 (1918).

ject is somewhat weakened by the unrealistic dictum, not necessary to the decision of the case, that ninety per cent of an industry "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four per cent would be enough; and certainly thirty-three per cent is not."⁵² The validity of concentrations of economic power in the hands of corporate entities therefore remains subject to grave doubts. These doubts may be resolved as to particular cases by judicial decisions relating to them; but little guidance for other situations results from such decisions.⁵³

Judicial distaste for voyaging upon a "sea of doubt"⁵⁴ in economic matters, or for engaging in lengthy trials with regard to economic problems,⁵⁵ is partially responsible for some of the decisions that have laid down "rules" of antitrust law in the past; for each formula to guide decisions, to the extent that it is definite, forecloses troublesome controversy thereafter. Lately a number of developments have evidenced a strengthened judicial resolve to accept legislative prescriptions⁵⁶ and administrative judgments⁵⁷

52. *United States v. Aluminum Co. of America*, 148 F. 2d 416, 424 (2d Cir., 1945). The Supreme Court's inability to arrive at criteria of illegality, including the requisite percentage control of the industry involved, in a long series of cases dealing with industrial mergers, is demonstrated in Handler, *Industrial Mergers and the Anti-Trust Laws*, 32 Col. L. Rev. 179 (1932), and the same author's *Study of the Construction and Enforcement of the Federal Anti-Trust Laws*, T. N. E. C. Monograph No. 38 (1940).

53. The decision in *United States v. Columbia Steel Co.*, 334 U. S. 862 (1948), by a 5-4 vote of the Justices of the Supreme Court, is illustrative. Clear analysis of the facts is employed in the opinion, leading to the Court's conclusion that illegal control of segments of the steel industry was not shown to be likely to result from the acquisition of a locally important fabricating concern by the United States Steel Corporation; but the conclusion is not demonstrably either correct or incorrect. The case, moreover, repudiates the suggestion in a case decided only the year before, *United States v. Yellow Cab Co.*, 332 U. S. 218 (1947), that acquisition of "some appreciable part" of the market for a concern's product, by purchase of the businesses of possible customers, is in itself illegal. Hence both so-called "vertical" integration of businesses and so-called "horizontal" acquisitions remain subject, in effect and for the time being, to the "rule of reason."

54. See the opinion of Judge (later Chief Justice) Taft in *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 283, 284 (6th Cir. 1898).

55. See Dession, *The Trial of Economic and Technological Issues of Fact*, 58 Yale L. J. 1019, 1242 (1949), for a discussion of the legal and judicial techniques involved in such proceedings.

56. *Standard Oil Co. of California v. United States*, 337 U. S. 293 (1949). In this case the Court adopted a rule that agreements of a single seller which may be illegal under section 3 of the Clayton Act provided the "effect may be to substantially lessen competition," are illegal without more if they cover a substantial portion of the trade in a given product. Vigorous dissenting opinions contended that the probable effect upon competition should be made a subject of judicial determination in the light of all relevant facts, after a trial directed to that issue.

57. *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37 (1948); *Federal Trade Commission v. Cement Institute*, 334 U. S. 839 (1948).

whenever possible. This tendency, however, while it may mitigate the necessity of weighing economic factors in antitrust cases as they arise in court, cannot dispense with that necessity altogether. To the extent that it rests upon deference to administrative determinations, moreover, it simply emphasizes the importance of the role of the Federal Trade Commission in these matters and enlarges the need for realistic, statesmanlike administration within that agency. The Commission, to a greater extent than the courts, must continue to determine whether particular practices arising before it actually may tend "to substantially lessen competition or . . . create a monopoly."⁵⁸

II. Major Economic Factors Influencing Decisions

Given the doctrinal framework and means of enforcement just outlined, the tribunals that have carried on the task of administering the antitrust laws of the United States have been influenced in their decisions by a number of major considerations of policy. These are largely economic, but to some extent also social and political, in nature.

To an undetermined extent, of course, the Sherman Act is based upon a belief in the desirability of a competitive, profit-seeking, private-enterprise economy such as is contemplated in the economic theory dominant at the time the statute was enacted, accompanied by that minimum of governmental regulation which is envisaged in *laissez faire* ideology.⁵⁹ The Act itself was looked upon, doubtless, as essentially a police measure, designed to preserve an economic order within which human welfare might be achieved through competitive processes.⁶⁰ The framers of the Act had no thought, however, of halting the expansion of corporations. So far as they were concerned, the subjection of large areas of busi-

58. For an illustration of the difficulty of such determinations see *In the Matter of Standard Oil Co.*, 43 F. T. C. 56 (1946), *aff'd*, with modifications, *Standard Oil Co. v. Federal Trade Commission*, 173 F. 2d 210 (7th Cir. 1949), *cert. granted*, 338 U. S. 865 (1949), in which two specific policies under the antitrust laws appear to come in conflict and the answer to the problem presented turns largely upon the relevant conceptions of competition.

59. Hamilton and Till, *Antitrust in Action*, T. N. E. C. Monograph No. 16, 3 (1940). Illuminating excerpts from the legislative history of the Sherman Act may be found in Milton Handler, *Cases and Materials on Trade Regulation*, 208-218 (1937).

60. Hence the Act, however distasteful at times to the owners of large-scale capital, is consistent with the ideology that modern private enterprise has adopted in the United States as a defense against unwanted governmental regulation. Compare *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211 (1899), with *Adair v. United States*, 208 U. S. 161 (1908); and see Beard, *Individualism and Capitalism*, 1 Encyc. Soc. Sci. 145, 153-54, 161 (1930).

ness enterprise to the unitary control of single managements might continue, provided "restraints" upon competitors or upon competition in the markets where goods were sold were not imposed.⁶¹ Thus was introduced a dichotomy into the conception of the structure and mechanics of a competitive order which has persisted to the present day.⁶²

Closely allied to the traditional capitalist ideology as a factor influencing the antitrust laws and their administration—although less clearly relevant under the economic terms employed in the statutes—is the belief in a society composed in large part of independent, self-reliant individuals which has found frequent expression in the course of American history. Eloquently uttered by Louis D. Brandeis both before his accession to the Supreme Court and in judicial proceedings while he was on the bench,⁶³ this belief has recently been advanced as added cause for declining to sanction the exercise of market controls by a large-scale corporate enterprise and for compelling the surrender by such a corporation of some of its assets, if not its total dissolution.⁶⁴ It has also been repeated with renewed fervor by Mr. Justice Douglas in dissenting opinions.⁶⁵ Justice Douglas advocates such methods of antitrust interpretation, including acceptance by the courts when necessary of the duty of making onerous economic determinations, as will contribute most effectively to the maintenance of independent, small enterprises.⁶⁶

Belief in vigorous competition and small enterprise has been accompanied, strikingly, by the desire for security and for orderly progress through planning as a factor to be taken into account in antitrust administration, as well as in other economic regulatory measures.⁶⁷ Woodrow Wilson, even while advocating free enter-

61. Cf. Handler, *supra* note 59.

62. See the recent Symposium on the Federal Antitrust Laws, 39 Am. Econ. Rev. 689 (1949), especially the views of Arthur R. Burns at 691, Frank Albert Fetter at 695, Ben W. Lewis at 703, 705, and Edward S. Mason at 712.

63. See especially his dissenting opinion in *Liggett Co. v. Lee*, 288 U. S. 517 (1933), a case involving the constitutionality of state legislation intended to have a restrictive effect upon chains of retail stores. In *American Column & Lumber Co. v. United States*, 257 U. S. 377 (1921), Brandeis's preference for small enterprise over large led to his dissenting conclusion that an association of small businesses should not be held to violate the Sherman Act by cooperative activity in connection with the production and sale of a commodity, lest the members be driven to merging the ownership of their businesses. *Id.* at 418-419.

64. *United States v. Aluminum Co. of America*, 148 F. 2d 416, 428, 429 (2d Cir. 1945).

65. *United States v. Columbia Steel Co.*, 334 U. S. 495, 534 (1948).

66. *Standard Oil Co. of California v. United States*, 337 U. S. 293, 315 (1949).

67. Also, of course, in connection with the imposition of protective import duties.

prise, looked upon the controlled freedom of the locomotive, running smoothly because of superb coordination of its parts, as the analogue of freedom in society.⁶⁸ During the post-1929 depression when the winds of adversity blew strong, the philosophy of economic planning, mitigating the evils of competition when necessary, found eloquent expression (once more in dissent) by the same Justice Brandeis who believed in small enterprise—and, therefore, in its preservation rather than its self-destruction.⁶⁹ During this period, the Supreme Court found room within the antitrust laws for the lawful operation of a common selling agency for a group of coal producers, despite the price uniformity and the probable sustaining effect upon prices which that operation would have.⁷⁰ Earlier, a regulation of an organized commodity exchange which resulted in price fixing for short periods of the day was upheld as valid upon a theory, enunciated by Mr. Justice Brandeis, that some economic restraints “merely regulate . . .,” whereas others suppress, competition, and that the distinction between the two must be drawn in the light of relevant economic factors.⁷¹ As respects price-fixing or price-influencing arrangements, this view has now been repudiated under the Sherman Act in favor of a more hard-bitten philosophy;⁷² but the decisions still stand and may again be invoked in less prosperous times.

When the economy of the United States is viewed as a whole, including both the parts that are subject to the antitrust laws and those that have been excepted⁷³ or have come under other forms of regulation, it is clear that in fact, as regards privately-owned business, an ever-changing adjustment has been struck between competition protected from impairment on the one hand and sanctioned restraints and regulations on the other hand. In addition, considerable segments of governmentally owned and managed enterprise, such as the post office, the Tennessee Valley Authority, the Atomic Energy Commission, federal lending agencies, the public educational system, and local public utilities, have been maintained. As a result of the adjustment that has been struck, labor and farmers may combine to engage in forms of price fixing and collective

68. *The New Freedom* 281-284.

69. *New State Ice Co. v. Liebman*, 285 U. S. 262 (1932).

70. *Appalachian Coals, Inc. v. United States*, 288 U. S. 344 (1933).

71. *Board of Trade of Chicago v. United States*, 246 U. S. 231, 238 (1918).

72. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940).

73. *S. Chesterfield Oppenheim, Cases on Federal Anti-Trust Laws* 63-69 (1948), contains a useful summary of statutory exclusions from these laws. To these must now be added the Act of June 17, 1948, c. 491, 62 Stat. 472 (1948), 49 U. S. C. § 5b (1946).

bargaining which are forbidden to others; while utility enterprises, both publicly and privately owned, are allowed protected, stable (although limited) earnings so far as consumers can be made to provide them. Taxation is employed to provide through the public treasury for personal, "social" security and for the earnings of business enterprises, such as ocean shipping, which are deemed to be in need of such provision.

The reasons for these disparities of treatment lie, of course, in the social importance of the interests sought to be protected, as these are legislatively, administratively, or judicially viewed. The motivating considerations behind protective measures may relate to human welfare, national defense or pride, or protection of favored enterprises against loss. Whatever the specific considerations may be, the losses or adversity that otherwise would fall upon someone loom as greater than the state is willing to tolerate; and measures are accordingly taken to prevent them if possible.

The philosophy of national responsibility for the general welfare implicit in sovereignty and set forth originally in the provision of the Constitution that Congress shall have power to levy taxes to provide for the general welfare,⁷⁴ has recently found explicit, although equivocal, legislative expression in the Employment Act of 1946. That Act envisages coordinated legislative and administrative measures, drawing upon all of the powers of the Federal Government, "for the purpose of creating and maintaining . . . conditions under which there will be afforded useful employment opportunities, including self-employment, for those able, willing, and seeking to work, and to promote maximum employment, production, and purchasing power."⁷⁵ These necessary governmental measures are to be taken, however, "in a manner calculated to foster and promote free competitive enterprise;" but the end purpose is pretty clearly the general welfare, for which the rest is but a means. Although Congress at times seems still unaware of its own pronouncement, *laissez faire* has thus been deprived of its status as the dominant economic and political philosophy of the United States Government.

Like all other measures of national economic regulation, the antitrust laws should be appraised and administered in the light of this dominant national purpose; and it is believed that such has in fact been the uniform intention, and usually the practice, of those charged with responsibility for their enforcement. Just as the anti-

74. U. S. Const. Art. I, § 8, cl. 1.

75. 60 Stat. 23, § 2, 15 U. S. C. § 1021 (1946).

trust laws have yielded to other legislative measures when necessary, so discrimination has been exercised in their application, for the purpose of promoting "maximum employment, production and purchasing power." The "rule of reason," the various "per se" doctrines that have supplemented it, and the additional acts of legislation have been largely means to this end,⁷⁶ as the interests of producers and consumers and of diverse groups in each category have been balanced against each other.

In the administration of the antitrust laws, the responsible tribunals have been compelled to deal frequently with three economic factors that bear closely upon the dominant over-all purpose. These are (1) the tendency of business enterprisers possessing sufficient market control to curtail production and enhance prices in order to maximize profits; (2) the influence of heavy capital investment in intensifying the extremes and the hardship of price competition; and (3) the tendency for the production and marketing of numerous commodities to become concentrated in the hands of ever-larger (and usually fewer) aggregates of ownership.

In recent years the first of these three factors has received definite theoretical attention. Whereas formerly "conspiracies" to "victimize" the purchasers and consumers of products through unnecessarily high prices were viewed as abnormal practices,⁷⁷ it is recognized today that the profit incentive operates normally to cause business enterprisers to endeavor to create conditions under which profits can be maximized and to take advantage of these conditions when they exist. The recurring (but not universal)

76. An exception may be the Miller-Tydings amendment to section 1 of the Sherman Act, 50 Stat. 693 (1937), 15 U. S. C. § 1 (1946), which yielded the policy of that Act as judicially evolved, outlawing resale price maintenance contracts between sellers and buyers, to the contrary policy of subsequent state legislation validating such contracts as to trade-marked and branded commodities. The pressures that resulted in the adoption of the amendment came largely from associations of small retailers who sought means of securing protection against the price competition of chain-store merchants who handled the same goods. However speciously, they invoked the philosophy of maintaining small enterprise and the principles of fair dealing in support of their endeavor. These had early persuaded Louis D. Brandeis to become the best-known proponent of the legalization of resale price maintenance. *Cf.* Mason, Brandeis, *A Free Man's Life* 424-428 (1946). For light on the campaign for resale price maintenance see 2 Marketing Laws Survey, State Price Control Legislation 31-59 (U.S. Works Progress Administration, 1940); Temporary National Economic Committee, Final Report and Recommendations, Sen. Doc. No. 35, 77th Cong., 1st sess., 142, 164, 232-237 (1941).

77. The view that organized activities to reduce competition in the sale of a product are unnatural and improper is most strongly expressed in the opinion of the Court in *American Column & Lumber Co. v. United States*, 257 U. S. 377 (1921).

economic fact appears to be that greater profits result from a smaller volume of business in a given product at prices which can be realized from this volume than from a larger volume, saleable only at lower prices. The rate of profit may be higher from a lesser volume of business even when total profits are not; and the prospect of enhanced returns from a controlled volume of business may be particularly attractive to the individual producers or producing enterprises that lack incentive to expand.⁷⁸ Under such conditions the single enterprise will adjust its prices and volume of business to a program of restriction if assurance can be obtained that competitors will do likewise rather than capture business through price cutting.⁷⁹ Such assurance can arise in either of two ways: (a) by agreement or (b) by mutual understanding among competitors of the wisdom of a restrictive policy, coupled with knowledge of each other's prices or production policies at all times. As has been noted, agreement upon prices or price policies is ordinarily illegal; but circumstances under which a restrictive policy may be followed without agreement are common and present a legal problem which, as yet, has not been clearly answered.

In dealing with adherence to such a restrictive policy, which

78. Cf. Fly, *Economic Theory and The Sugar Institute Decisions*, 45 Yale L. J. 1339, 1343 (1936). The text in the opening pages of this article contains a lucid treatment of the economic factor here under discussion.

79. Cf. Burns, *The Decline of Competition* 26, 27, 199 (1936); I Lyon, Watkins, and Abramson, *Government and Economic Life* 277-279 (1939); Chamberlin, *The Theory of Monopolistic Competition*, c. 3 (5th ed., 1946). No assertion that there is any economic "law" which dictates such conduct, or any universal tendency to engage in it, is intended, of course. Contrary conduct, as well as failure of price maintenance attempts, has been observed and may be frequent. Cf., e.g., Stocking and Watkins, *Cartels or Competition?* 261, n. 13 (1948); Wilcox, *Competition and Monopoly in American Industry*, TNEC, Monograph No. 21, 48-51 (1940) (the rubber industry in the United States prior to 1935). See also Mason, *Price and Production Policies of Large-Scale Enterprise*, 29 Am. Econ. Rev. Supp. 61 (1939). Notice must also be taken of the difficulties created by concealed price cuts, accompanying purported adherence to quoted prices, which many price-maintenance schemes have failed to overcome. See *Sugar Institute v. United States*, 297 U. S. 553 (1936). Professor Mason has recently again called attention to the concept of "effective competition," whereby the demands of antitrust policy are met if, under all the circumstances prevailing in an industry and despite limited power over prices by sellers or buyers, there is "a fairly large number of sellers and buyers, no one of whom occupies a large share of the market, [an] absence of collusion among either group, and [a] possibility of market entry by new firms." Mason, *Current Status of the Monopoly Problem*, 62 Harv. L. Rev. 1265, 1268 (1949). Granted that, under modern conditions, nothing more is possible or desirable than administration of the antitrust laws in such a way as to promote and preserve competition in this sense, it is still worth while to examine the logic of "imperfect" competition and identify those aspects of it that are likely to give trouble and to call for remedial action if not offset by other factors.

is known as "imperfect" competition,⁸⁰ the courts and the Federal Trade Commission may now draw upon economic reasoning which was not articulated until a few years ago. According to this reasoning, competitors who have continuous knowledge of each other's prices, or production policies bearing upon prices, know that any effort by one to obtain a competitive advantage through lower prices, or through expansion that can only lead to lower prices, will be met promptly by the others,⁸¹ with consequent loss of the benefit that had been sought. The result will be lower prices to all with consequent enlargement of volume but, unless market conditions require such a readjustment, lower profits than a price-maintenance policy would have brought. Hence frequently, in the situations where price-maintenance increases profits, or even where it is merely thought to do so, a restrictive policy results naturally from the availability of information as to actual prices or production policies.⁸² This result is particularly probable in capital goods and raw materials industries, where demand is usually inelastic in relation to price and price reductions may not even add materially to volume of business.⁸³ It is dependent, however, upon the existence of obstacles to the advent of new competition, such as spring from the need for heavy capital investment to commence mass production or from patent, copyright, or trade-mark monopolies in the hands of existing producers.⁸⁴ Such barriers to the intrusion of unwanted competition are sufficiently usual to afford protection to existing enterprises in many situations.

80. Wilcox, *supra* note 79, at 3, 4.

81. The response of competitors may be delayed, of course, or avoided altogether, by factors such as trade-marks, uniqueness of style, etc., subsumed under the term "product differentiation," which enable price differentials to exist. Chamberlin, *op. cit. supra* note 79, c. 4; Brown, *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 Yale L. J. 1165, 1170-1175 (1948).

82. Considerable attention has been given recently to evidence that concerns having power over prices may exercise it under some circumstances to hold their charges below the highest feasible levels on products they sell, as many have done during the post-war boom period. They are doubtless moved to this course by possible adverse effects on labor and government attitudes and on consumer good will, which might result from charging all that the traffic would bear. Cf. Lewis, *supra* note 62; Adelman, *Effective Competition and the Antitrust Laws*, 61 Harv. L. Rev. 1289, 1290 (1948).

83. Burns, *op. cit. supra* note 79, at 26, 27. Cf., however, Stocking & Watkins, *supra* note 79, at 247-248, pointing out that demand for raw materials as a whole may be quite elastic, even though the demand for a single product, taken by itself, is inelastic.

84. Stocking and Watkins, *supra* note 79, at 11, 12; Hamilton, *Patents and Free Enterprise*, T. N. E. C. Monograph No. 31, 76-86 (1941); United States v. U. S. Gypsum Co., 333 U. S. 364 (1948); United States v. Timken Roller Bearing Co., 83 F. Supp. 284 (1949).

The recurring pattern in many areas of business that have attracted enforcement efforts under the antitrust laws is one of real or suspected price maintenance under the conditions just outlined. Knowledge among competitors of each other's prices or policies affecting prices comes about either because the competitors are extremely few in number or because, where the number is somewhat larger but not too large for practical communication, information is exchanged among them usually through trade associations. Where the competitors are few, "price leadership"⁸⁵ or tacit understanding⁸⁶ readily arises; where the number is greater, a variety of reporting schemes has been devised to enable each to proceed with relative security in regard to the others.⁸⁷

It is relevant to note here again that, according to certain legal doctrines reviewed above,⁸⁸ which have been enunciated rather recently under the Sherman Act, the intentional acquisition or maintenance of power to control prices is illegal. By power to control is not meant absolute power free of limits, but power within limits to exercise choices⁸⁹ such as cannot be made by one who deals in a fully competitive market.⁹⁰ If these doctrines are logically and rigorously applied, the small number of firms dominating an industry who watch each other and follow calculated, restrained price policies, and the larger number who establish means of watching each other and follow similar policies, violate the law unless, in the case of the smaller number, their position

85. Burns, *op. cit. supra*, c. 3; United States v. United States Steel Corp., 251 U. S. 417 (1920); United States v. International Harvester Co., 274 U. S. 693 (1927).

86. American Tobacco Co. v. United States, 328 U. S. 781 (1946). This case involves mutual adherence to advantageous price policies by a few large buyers, as well as sellers. All that is said with reference to price practices on the part of sellers is applicable also to buyers in the rarer situations where the advantage in economic power rests with them—with the modification, of course, that their effort will be directed toward holding prices down rather than toward sustaining them.

87. That such is the purpose of numerous trade association plans, which have embodied a succession of devices for enabling members to keep track of what was going on, taking cognizance of legal hazards revealed by Supreme Court decisions, is clearly evident from the account given in Pearce, *Trade Association Survey*, T. N. E. C. Monograph No. 18, 46-56, 352 (1940).

88. See text to notes 28, 29 *supra*.

89. The opinion in the *Aluminum Co.* case, holding the Company's power to be illegal, recognizes clearly the limits to that power imposed by the possibility of imports and by the competition of other products, to say nothing of potential competition within the industry even in the face of the advantages which the Company enjoyed.

90. The classic example of such a market is, of course, the commodity exchange; but any line of business in which prices are determined separately in each transaction, without knowledge among buyers or sellers of each other's identities, is likely to belong in the same category.

is achieved without design through the failure of competitors or, perhaps, through lawful use of one or more patents or other lawful bases for monopoly power. No decision has as yet actually rested alone upon this logic, however.⁹¹ Only in the *Aluminum Company* case⁹² has the logic been set forth with complete clarity; and even there abuse of power through squeezing of competitors was also present in the facts. In all other cases involving the problem, in which decisions adverse to defendants were reached, similar "predatory practices" were prominent or a concerted effort to limit or apportion production or control prices was clearly evident. Hence it is still to be seen whether the existence of non-collusive power over prices may alone lead to decisions holding such power to be illegal,⁹³ or whether it will remain, as heretofore, simply an aid to the recognition of situations where oppression of competitors or collusive effort to control prices is manifested.⁹⁴

In so far as the decisions display a tendency to tolerate control over prices by business enterprisers, with benefit to themselves, the reason lies less in a desire to permit large profits to be achieved by this means than in recognition of a need for preventing the evils

91. An exception should perhaps be made of certain cases in which combinations of the ownership of partially competing railroad lines were held illegal, especially *Northern Securities Co. v. United States*, 193 U. S. 197 (1904); *United States v. Union Pacific Co.*, 226 U. S. 61 (1912); and *United States v. Southern Pacific Co.*, 259 U. S. 214 (1922). It is probable, however, that the decisions in these cases were influenced by the general bad odor into which the railroad industry had fallen because of past bad practices and the financial manipulation which attended personal and corporate struggles for "empire." *United States v. Yellow Cab Co.*, 332 U. S. 218 (1947), looks in the same direction as the railroad cases; but the Government's effort to secure dissolution failed. 80 F. Supp. 936 (N.D. Ill., 1948), *aff'd*, 338 U. S. 338 (1949).

92. *United States v. Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945).

93. As stated in the opinion of the court, *Tag Manufacturers' Institute v. Federal Trade Commission*, 174 F. 2d 452 (1st Cir., 1949) appears to present this question. The decision sustains the Institute's arrangements, in the absence of proof that the power was used to sustain prices. In the *Sugar Institute* case also, advance announcement of prices, understood to be effective until further notice, but without obligation to adhere to them, was accepted as valid because of historical factors within the industry. Publication of current prices, theoretically subject to change without notice, is common, of course.

94. Arguably, the decisions in *American Column & Lumber Co. v. United States*, 257 U. S. 377 (1921), and *Maple Flooring Ass'n v. United States*, 268 U. S. 563 (1925), which frequently are regarded as essentially in conflict, may be reconciled on this ground. In the former, actual prices of the members of the hardwood association were distributed quite promptly among the membership. Without agreement to follow a common policy, the members were nevertheless enabled to do so. In the later case, a single average cost figure was communicated, giving no assurance as to the members' price policies in the absence of an obligation, which was not shown, to use the figure as a basis for calculating prices.

of "cut-throat" competition. These evils include not only the human consequences of business failure, analogous in some degree to the effects of sub-standard wages and depressed agricultural prices, but also the intensified business hardship of competitive price reductions in industries characterized by heavy capital investment—the second of the economic factors mentioned above as frequently important in the administration of the antitrust laws. The quest for security, so prevalent among all participants in economic activity, becomes particularly urgent under these circumstances. The failure to achieve control over prices may lead, in times of inadequate demand, to competitive price reductions which carry income far below cost of production. So long as some margin above variable costs is realized and can be applied to interest upon indebtedness and other fixed costs, the business receiving the margin is better off than it would be if it ceased operating. Moreover cost per unit of product falls rapidly as volume of production rises, under conditions of heavy capital investment. Hence the effort to secure volume of business at the expense of competitors and to continue to receive some income in excess of out-of-pocket costs may well lead to price reductions that will prove disastrous to solvency when reserve funds have been exhausted. It is likely, moreover, that the facilities of businesses which fail under these circumstances will not be withdrawn from production. Being frequently more advantageously saleable for use as entities than for dismantling, these facilities may pass into the hands of new owners who, freed of a large part of previous capital charges, may offer lethal price competition to remaining solvent enterprises.⁹⁵ Consumers may benefit from low prices under these conditions; but expenditures for the preservation of physical properties may be omitted and, in the extractive industries, conservation of natural resources may suffer.⁹⁶ In any event, investment of additional funds in an industry that falls into these circumstances is likely to be discouraged.⁹⁷

95. Burns, *supra* note 79, at 29-34; Hamilton and Till, *Anti-trust in Action*, T. N. E. C. Monograph No. 16, 19-20 (1940); Clark, *Studies in the Economics of Overhead Costs*, c. 21 (1923).

96. The Annual Report of the United States Secretary of Agriculture for 1947 brings out strikingly the relationship between adequate farm incomes and adherence to soil-conserving measures. Enormous waste in the lumber and coal industries is proverbial. As to petroleum see Rostow, *A National Policy for the Oil Industry* (1948) and works cited, some of which adopt conflicting views.

97. In the bituminous coal industry of the United States the opening of new mines has been deterred less than the spread of coal-conserving practices and devices. Hamilton and Wright, *The Case of Bituminous Coal* (1925), *passim*.

It is arguable, of course, that concerted measures to cope with such conditions, regardless of their merit, are forbidden by the antitrust laws and can only be undertaken if legislatively authorized,⁹⁸ as concerted action by farmers has been authorized. Further, it can be argued that it is not wise to authorize such private controls and that, if controls are needed, they should be set up under public authority, as has been done in the regulation of public utilities.⁹⁹ Statutes establishing public controls are difficult to secure, however, and are subject to weaknesses of their own. Until the pressures generated by a depression or in some particularly hard-hit industry¹⁰⁰ have again come before the courts, it is not possible to say that the difficulty of preserving efficiency and solvency for large-scale enterprise in a fluctuating economy, unless some form of control over prices is maintained, has no claim to recognition in the administration of the antitrust laws.

The third economic factor listed above, the tendency toward larger and fewer aggregates of ownership in modern business, had a strong influence for more than thirty years after the adoption of the Sherman Act in favor of relaxation of the statute as against large corporations.¹⁰¹ Recently it has again been accepted by a majority of the Supreme Court as a consideration favorable to the legality of a corporate acquisition which had been challenged.¹⁰² The extent of the tendency has been pointed out strikingly in the literature.¹⁰³ Justification for it is offered on the basis of a variety of alleged benefits, including especially (a) increased technological efficiency through larger units of manufacture, combining both successive stages in production and greater volume of production

98. The most essential and pervasive features of the scheme established by the National Industrial Recovery Act of 1933 were of this type and were so authorized; but official supervision of industry programs was contemplated. See II Lyon, Watkins, and Abramson, *Government and Economic Life*, c. 27 (1940).

99. The bituminous coal industry in the United States was subjected for a period before World War II to public control which, however, was experimental and did not achieve a stable pattern before its demise in 1941. *Id.* c. 24. Cf. the exchange of views between Professors Rostow and Hamilton in 50 *Yale L. J.* at 543-620 (1941).

100. See *National Ass'n of Window Glass Manufacturers v. United States*, 263 U. S. 403 (1923).

101. Especially in *United States v. United States Steel Corp.*, 251 U. S. 417 (1920).

102. *United States v. Columbia Steel Co.*, 334 U. S. 495 (1948).

103. The facts are assembled in Wilcox, *supra* note 79, c. 1; Smaller War Plants Corporation, *Economic Concentration and World War II*, Sen. Doc. No. 206, Part 1. 79th Cong., 2d sess. Cf. also Levi, *The Antitrust Laws and Monopoly*, 14 *U. Chi. L. Rev.* 153 (1947). For a critical discussion see Adelman, *supra* note 82, at 1292-1295.

at the same stage,¹⁰⁴ and (b) increased economic efficiency made possible by assured outlets and sources of supply for products, where concerns which use certain articles or materials are brought under the same ownership as those that make them.¹⁰⁵ The validity of these contentions, as applied to combinations sufficiently large in scale to raise questions under the antitrust laws, has not been either established or disproven.¹⁰⁶ In the nature of things it probably cannot be, except in particular situations to which attention is directed. There can scarcely be doubt, however, as to the economic power over prices which results when a few aggregates of ownership enjoy the entire trade in a given commodity, or as to the monopolization of a market or source of supply which occurs in fact when ownership of a customer or supplier is acquired. The most critical test of the present vitality of the antitrust laws will come when, without the mitigating factor of actual or threatened economic hardship and in the absence of abuse of the economic power enjoyed, a large aggregate of capital controlling a considerable segment of an industry¹⁰⁷ is again compelled to rely in an antitrust proceeding upon the alleged benefits of bigness as justification for its size.

Undoubtedly business combinations, whether aggregates of ownership or organizations of otherwise separate units, are able to engage in economic planning such as cannot occur in a fully competitive system. The question naturally arises, therefore, whether the philosophy of the antitrust laws, which would place

104. The two forms of integration are known, respectively, as "vertical" and "horizontal." Both exist to a degree in all production, as contrasted with the minutest possible division of labor. Integration which goes beyond the conventional, or which involves uniting physically separate establishments under one ownership, gives rise to questions of public policy.

105. The *Yellow Cab Co.* and *Columbia Steel Co.* cases involve combinations partially of this variety, as do the American Telephone & Telegraph Company's ownership of the Western Electric Co., the chain grocery stores' ownership of food processing concerns, and the community of ownership of a variety of concerns maintained by the duPont interests, which are currently being challenged. A still different variety of integration occurs when concerns dealing in products that have no physical relation to each other are brought under one ownership, as has happened notably in the food and drug manufacturing and processing fields. Cf. United States Federal Trade Com'n, Report on the Present Trend of Corporate Mergers and Acquisitions (1947).

106. Adelman, *supra* note 82, at 1291, 1292. Cf. Blair, *Technology and Size*, 38 Am. Econ. Rev. Supp. 121 (1948), and the comments of Stewart at 166; Federal Trade Commission, *Relative Efficiency of Large, Medium Sized, and Small Business*, T. N. E. C. Monograph No. 13 (1940).

107. The *Columbia Steel Co.* case, while presenting this question in a sense, actually involved only a relatively minor absorption of a regional concern by the United States Steel Corporation, coming after a more important acquisition which had received government sanction. The power of the Corporation as a whole was not challenged.

strict limits upon the opportunity for such planning, is opposed to economic planning in general. The answer is that it is not, unless the antitrust philosophy condemns not only business combinations but also all forms of control. Historically and to some extent in administration, as has been noted, the antitrust laws constitute a positive program for maintaining a competitive system, as well as a prohibition of specific evils. The assertion is frequently made today that success of the antitrust program is essential to democracy and to the avoidance of public regulation or socialization, which are asserted or assumed to be undesirable.¹⁰⁸ Yet the laws as formulated are directed only against aggregates of power in the hands of business enterprisers, and they contain no commitment to private enterprise as against public ownership or in favor of competition as against possible legislative provision for some publicly regulated scheme of economic organization. In the setting of contemporary thought and tendencies, particularly as they emerge in the Employment Act of 1946, the antitrust laws should be viewed as neutral in relation to other types of planning or control which, in time, may supersede them at least in part.¹⁰⁹ The solution of the economic problems of the future is likely to require resort to all of the organizational devices evolved by men which are consistent with the fundamental values of western culture, rather than doctrinaire adherence to only a single one.

108. Arnold, *Democracy and Free Enterprise* 44-62 (1942); Berge, *Cartels: Challenge to a Free World* 234-235 (1944).

109. Cf. Edwards, *An Appraisal of the Antitrust Laws*, 36 *Am. Econ. Rev. Supp.* 172 (1946).