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Morton Steinberg

United States Department of Justice

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A New Look at the Antitrust Laws*

By MORTON STEINBERG**

The horizontal and vertical growth of American business over the past six decades (since the passage of the Sherman Act in 1890) continually raises new economic and legal problems. These problems call for a new look at the antitrust laws and at the national antitrust policy with respect to their interpretation and enforcement.

In considering the national antitrust policy a basic postulate comes to mind regarding the aims of such a policy. Our society is dynamic in character. The fulfillment of the needs of yesterday have created the wants and the problems of tomorrow, and will continue to do so. A hundred years ago ours was principally an agricultural economy. Three-quarters of a century ago was the age of the "robber barons." A half century ago there was a merger heydey. Obviously, no one of these is an exemplary base period from which to draw, in determining upon the aims of a national antitrust policy. Fundamentally we seek to assure the continuation and strengthening of a national economy in which competition flourishes in the midst of efficient mass production and consumption. Only then may we be guaranteed continuation of those twin blessings: economic democracy and the highest standard of living in the history of mankind. Stated another way, we want the blessings of bigness in business without the evils of monopolization of business. This in abstract should be the national antitrust policy. When we come to the implementation of the national policy there is need for more specificity. Implementation, in one sense, is more important than policy. What is done in the name of policy may undo it.

In considering implementation of the national antitrust policy questions involving monopolies are of the first order, rather than

* The opinions expressed are personal and do not purport to reflect the official views of the Department of Justice.
** A.B., Wisconsin; LL.B., Detroit College of Law. Formerly Division Counsel, War Production Board, Regional Counsel, Federal Public Housing Authority, Counsel to American Agent, General Claims Arbitration, United States and Mexico. Member of Michigan and Supreme Court bars. Now a Special Assistant to the Attorney General, Antitrust Division, Department of Justice, Washington, D.C.
those involving restraints of trade or unfair trade practices that merely lessen competition. This is because effects adverse to the national welfare are probably not felt or realized until the restraints or practices have resulted in monopolization. The great oak casts no shadow while but an acorn.

Much of the recent literature on antitrust problems has consisted of a re-examination of the philosophy of the antitrust laws and its application to the workaday world of American industry. The burden of this literature is not against continuation of the antitrust laws, nor against their basic objective: maintenance of free enterprise in the United States. Mainly it has been a plea for a new look at the law, its interpretation and enforcement, in the light of modern industrial and economic realities, as seen by the authors of such literature.

The proponents of a new look at the antitrust laws urge such practical tests as Effective Competition or Workable Competition, as the formulae to apply in determining whether interstate or foreign trade has been in fact restrained, or whether such trade within a particular industry has been monopolized, or such monopolization has been attempted. Their position appears to be that in seeking, through enforcement of the law, to maintain free enterprise, the federal government has, in effect, whittled away and discouraged free enterprise by failing to take cognizance of industrial and economic realities. In short, they would apply the Rule of Reason to each individual situation, rather than rigid formulae, e.g., the rule that price-fixing is illegal per se regardless of the circumstances behind the pricing mechanism operating within a particular industry.

However, if there is to be a re-examination of the Rule of Reason, there should be common agreement as to its meaning and influence in the historical development of the antitrust laws and their enforcement. It is significant that the Supreme Court found a combination in illegal restraint of trade in the Standard Oil case

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1 The Rule of Reason was first announced as a basic doctrine in American antitrust jurisprudence in Standard Oil Company of New Jersey, et al v. United States, 221 U.S. 1 (1911). The Supreme Court ruled, despite a vigorous dissent by Mr. Justice Harlan, that the legislative terminology of the Sherman Act, "restraints of trade" and "attempts to monopolize and monopolization... took their origin in the common law..." and therefore only unreasonable restraints are a violation of the law.

(supra) after holding that a restraint first must be found to be unreasonable, and that fourteen years earlier the Court found a combination in illegal restraint of trade in the Freight case after holding that a restraint as such need not be unreasonable to be illegal. In the Standard Oil case the Court held that the defendants had restrained trade, among other things by securing for themselves preferential freight rates from railroads, price cutting, espionage, operating bogus independent companies, and engaging in other unfair practices. The Court held these practices unreasonable. In the Freight case the Court held that the "reasonableness" of the freight rates, the combination of competing railroads had agreed upon, was not an issue. Therefore, the Government was not obliged to prove that, under the common law, agreements among competing carriers to maintain even reasonable rates were void as restraints of trade. In short, in the Standard Oil case, the Court held, in effect, that unfair practices are obviously unreasonable. In the Freight case, it held, in effect, that price (rate) fixing among competitors is obviously unreasonable, regardless of the "reasonableness" of the rates. In both cases the Court construed the Sherman Act in the light of reason. In both cases the Court found the statute itself not unreasonable. Had the ruling been otherwise, in either case, the statute might not have met the constitutional test.

What is apparently meant, therefore, when reference is made to the Rule of Reason is a rule of reason: the reasoning of rational men in the setting of their time and the particular circumstances of a given situation. Under the common law a rule of reason was first applied to restraints of trade in an economy made up of small craftsmen and individual enterprises. The modern corporation was unknown. The Industrial Revolution fathered an entirely different economy as its long range effects began to be felt, particularly in the United States. Therefore, when we go back to the common law for an understanding of the Rule of Reason, these distinctions should be borne in mind.

Application of a rule of reason in today's economic setting merely because it was applied in the 18th or 19th century English economic setting may or may not be wise. To illustrate: the common law recognized that a simple transaction between seller and

*United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897).*
buyer temporarily eliminated from the market place the sale of a similar commodity to the same buyer or the purchase of the same commodity by another buyer. Obviously, this was a restraint of trade, but not an unreasonable one. Thus was a rule of reason applied. Whether or not to apply such a rule of reason to a 1955 full requirements contract must be determined in the light of the economic realities of today. Is it a reasonable restraint upon trade for a seller who controls a substantial share of the market for a particular commodity to obtain an agreement from a buyer to fill all of his requirements for that commodity only from that seller? If it will not in fact promote effective or workable competition among the seller and his competitors, and if, in fact, it may constitute an effective restraint upon the freedom of trade in that commodity, then it becomes an unreasonable restraint upon trade. The conclusion derives no less from an application of the Rule of Reason.

It would appear that even more caution ought to be used if the common law rule of reason is to be applied to modern monopolies than to modern restraints of trade because there is so little historical experience to draw upon (except with respect to state or state granted monopolies) from the craft societies of the preceding centuries. It is perhaps the nearly total absence of private monopolies in the common law past that has caused the courts to recognize the relationship between restraints of trade and monopolies. Under the common law rule a restraint of trade was unreasonable if a monopoly might result. Therefore, an individual's freedom to contract was considered the best insurance against the rise of monopolies. Under modern case law certain acts are illegal (as distinguished from unreasonable) even though the means employed are not inherently illegal, because they create a restraint of trade or a trend toward monopolization, or are such as to indicate an attempt to monopolize.  

In seeking to avoid the pitfalls of cliches and to resort to reason in enforcing the antitrust laws, the question arises: just what do we want from a national antitrust policy? To merely conclude that we want workable competition because it is well recognized that perfect competition is a classical myth, is not enough. To merely conclude that to maintain workable competition, all we

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need to do is to apply the classical rule of reason is not enough. Man is a rational being and even a *per se* rule has behind it *a priori* reasoning. Without basic objectives and standards for reaching these objectives, we only compound confusion. There may be as many rules of reason as there are judges and juries. Their number may be limited only by the limitations upon the ingenuity of rational beings.

Accordingly, we must go back to first things in order to agree upon a national antitrust policy. It cannot, for example, be concluded that a certain practice or course of conduct is a reasonable restraint upon trade and therefore legal because of its beneficial economic effects unless there first is agreement as to what is beneficial and what is harmful to the national economy.

It is not a valid assumption that big business and economic democracy are incompatible. On the other hand, business so big that it threatens economic democracy is obviously bad. Economic democracy is not a mere abstraction. It is the fibre out of which our pattern of life and thinking has been woven. It spells economic opportunity for the little man. It means an economic climate in which a little business may become a big business. It is the assurance of continuity and vigor in our middle class without which political democracy would soon wither away. So the basic question may be: how big is too big? And the answer is that when size carries with it a genuine threat to economic democracy, it is too big. But size is relative. The degree of bigness in one industry may constitute such a threat. The same degree in another industry may not.

Certain basic tests of too bigness may be developed and recognized. They have to do with the fundamental postulates of our economic philosophy. According, they are not concerned with the jurisprudence growing out of mere legalisms that conform to particular judicial decisions, or even out of particular laws. If such postulates are to continue as fundamental and legalisms (whether in the nature of legislative or judge-made law) endanger their continuance, the jurisprudence, not the postulates, will give way. As the late Justice Cardozo pointed out:

Sooner or later, if the demands of social utility are sufficiently urgent, if the operation of an existing rule is sufficiently productive of hardship or inconvenience, utility
will tend to triumph. "The view of the legal system as a closed book was never anything but a purely theoretical dogma of the schools. Jurisprudence has never been able in the long run to resist successfully a social or economic need that was strong and just."5

Accordingly, in determining the basic antitrust question: how big is too big, we are more concerned with economic and political consequences than with legal precedents. If the "social or economic need" is sufficiently "strong and just," then the proper legal test is the logic of probabilities i.e. the probability that the test will measure up to that need. The following basic tests of too bigness in business are suggested, without implying that they include all such tests, should be applied in this order, or are the ones most appropriate in every set of circumstances.

1) What is its effect on the proper conservation of natural resources?
2) Are competitive advantages enjoyed merely because of size or because the public benefits in terms of superior quality, greater variety, better service, or lower prices?
3) Is the field in economic fact, as distinguished from legal fiction, open to newcomers?
4) Are suppliers or buyers utterly dependent on the big company, or are they reasonably independent of it?
5) Are the limits of its market economically defensible?
6) Is price normally consistent with reasonable utilization of capacity?

Conservation and development of domestic natural resources, next to conservation and development of human resources with all that the latter implies, is the most important single domestic aim of an intelligently organized society. Theodore Roosevelt recognized this a half century ago and his name ever since has been associated with conservation programs. It may be more than mere coincidence that he is also known to American history as the "trustbuster." For the patterns of land use, timber grabs, minerals waste and other raids upon the public domain, during the last half of the 19th century, were often tied to the monopolistic activities of those days. Accordingly, one test to determine whether a certain business organization, alone or in a concert of duopoly or oligopoly, has become too big, is to ascertain to what

5Benjamin Cardozo, The Growth of the Law (1924) 117.
extent, if any, it controls the use of a natural resource and what social or antisocial use it is making of that control. Use is also a factor because conservation implies more than to conserve in a literal sense. Disuse or failure to use under certain circumstances may be just as wasteful as to squander natural resources under other circumstances.

Too bigness should not be determined only by capital structure or volume of sales. Too often these are considered the only criteria. True, a company with a substantial surplus has an advantage over a competitor when the going is rough during economic depression, because of greater buying power in terms of carload lots, et cetera or because of its financial ability to retool and redesign, or to spend more on advertising. But these are not unfair competitive advantages unless (i) the capital aggregation was acquired *ab initio* by unreasonable restraints of trade or attempts to monopolize, or by unfair trade practices (ii) the benefits of volume discounts are not passed on to the consumers, and (iii) the advertising has no social value in terms of bringing to the attention of the public a genuinely better product or service for less money. Emerson’s maxim about the public beating a path to the doorway of a builder of a better mousetrap has no modern economic reality in the light of present day advertising techniques and sales displays.

Legal fictions alone are not the proper crucible in which to test economic realities. The newcomer to a particular trade or industry may have every legal right to enter the field, unless of course it is a public utility. But to stop there is to ignore the facts of economic life, if in truth the right is illusory. There is just as much practical justification for claiming a legal body for the ghost of such a right as there would be to claim that a field protected by patent rights is open to unlicensed newcomers. If, in fact, prohibitively large aggregations of capital are required; if, in fact, peculiar skills are required and know-how is not available or closed off to the newcomer; if, in fact, necessary raw materials are not available to him; if, in fact, other *sine qua non* ways and means are not his to adopt or acquire; then the field is not open to newcomers no matter how the law reads. To ignore such economic realities is one certain way to assure the growth and continued operation of monopolies.
The fourth test of too bigness also has to do with economic realities as distinguished from legal fictions. When, in fact, the big company is in a position to dictate the marketing policies and prices of its suppliers, it is too big for the welfare of the country.\(^6\) This is not to deny the legitimate economic influence inherent in the fact that the big company is *ergo* a big buyer of raw materials. But such influence should be held within reasonable bounds. The suppliers should be able to seek and find other outlets (in competitors of the big company, or in kindred or other fields) without facing bankruptcy if the big company outlet should be suddenly closed to them.

For the same reasons and to the same reasonable degree, buyers should be only reasonably dependent on the big company for the product of its operations.\(^7\) Here too, legitimate economic influence must be recognized. The big company would be a misnomer if its share of the market was not significant. But it should not be a position e.g. to force a "full line" on a reluctant customer.\(^8\) And the buyer should be not only free to buy elsewhere without fear of reprisals in time of scarcity, but actually have a choice at practically all times. Without the stimulus of competition quality decreases and price increases. To expect otherwise in a society where profit is a legitimate motive is to expect too much of human nature.

One of the principal difficulties confronting antitrust lawyers, economists and judges arises out of attempts to define the "market" of a particular industry or company. Definition is necessary because without metes and bounds it is impossible to determine the extent of the control or influence exercised. To the big company the market may be horizontal or vertical or both i.e. the company may be so integrated that it not only produces the raw materials that go into its end product, but also constitutes a source of supply of such materials for its competitors in their manufacture and sale of such end products. It may be their principal source of supply. Or the supply also may be a raw material for the production of other end products manufactured by a quite


different industry. The company's own end product may first pass through several processing stages whereas some kindred companies are set up to complete only partial processing and their market for the semi-processed end product may include direct competitors of the big company. Or there may be a number of end products involved, each of which is suitable only for a different end use. The possible industrial and commercial "combinations" within a loosely-defined industry are apparently as unlimited as the number of combinations of moves on a chessboard. The test as to whether the ramifications of such "combinations" are economically defensible is not limited to a determination of the relative efficiency or inefficiency of the ramified operations or whether price benefits, if any, accrue to the consumer. Primarily, the test is whether the degree of influence brought to bear, far afield from the company's main operations, on the social and economic welfare of the country in other fields of trade and commerce, is good or bad.

Some students of the American scene, gazing into their crystal balls, forecast that future historians will name the application of the principle of mass production to industrial operations as our greatest single contribution to the forward march of mankind. Whether these soothsayers are entirely right is here irrelevant; that they are partially right appears obvious. Mass production is itself a product of American industrial genius. Without it our material standard of living would be much lower. Without it time for leisure would be greatly reduced. Time for leisure is the mark of an advanced civilization. A human society that devotes most of its hours to acquiring food and shelter is only a little above the level of a society of animals. Time for leisure accelerates the civilizing process, provided of course the leisure is used intelligently. It allows for study, self-improvement, spiritual contemplation, and greater individual participation in communal non-economic activities. A growing capacity for mass production tends to progressively reduce working hours and increase leisure hours. Therefore, the measure of capacity for mass production and the utilization of such capacity so that reductions in unit costs result and are passed on in lower prices to the consumer, are major tests of whether a big business is too big for the public weal. A big company that, in periods of economic normalcy,
operates at near capacity and regularly passes the benefits of mass production on to its customers is performing a public service and should be encouraged to continue to do so. On the other hand, the big company that, in such periods, operates at well below its reasonable utilization of capacity is doing a disservice, particularly if it is the largest single factor in the industry and it is the "price leader" or otherwise dominates the field. Such surplus capacity, if in fact it be surplus, may be the result of inefficiency, the influence of substitutes entering the competitive field, or conscious retention of excess standby facilities erected or maintained to discourage newcomers from entering the field. Accordingly, the big company may be too big because the public welfare demands that violence done to the principle of efficient mass production should not be condoned.

A number of tests of too bigness have been suggested. But how does a business, in the sense here discussed, become too big? The answer brings us back to the question of when is trade and commerce unreasonably restrained or competition lessened by particular trade practices. We might lightly dispose of the question by answering: when the restraints or practices promote or tend to promote monopoly. Obviously, the answer is not that simple. Restraints of trade and trade practices are many and varied. The nature of the business and the circumstances involved are significant factors. To separate the reasonable from the unreasonable, the fair from the unfair, in their varied settings, is no simple task.

A big company may become too big by violating (a) Sections 1 and/or 2 of the Sherman Act\(^9\) (b) Section 5 of the Federal Trade Commission Act\(^0\) (c) Section 7 of the Clayton Act, as amended\(^1\) (d) Section 3 of the Robinson-Patman Act\(^2\) or (e) all four of these basic laws and/or other related laws.

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\(^9\)Section 1 prohibits "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce ..." Section 2 prohibits any person to "... monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce ..."

\(^0\)Prohibiting "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce ..."

\(^1\)Forbidding a corporation to "... acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where ... the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly ..."

\(^2\)Forbidding any person "... to be a party to, or assist in, any transaction or
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In a temporal sense too bigness arrived before the last three of the aforementioned laws and amendments were enacted. As so often happens in a democratic society (where both “our side” and the “wrong side” have access to the public forum and where it is hoped they will continue to have such access), legal remedies for social ills are not discovered and applied until the illness assumes epidemic proportions. It was not until 1914 that “unfair methods of competition,” although never sanctioned under the common law, were formally put under the ban of statutory law. By that time the moral tone of the business community had risen. Of course, it had not risen to such an extent as to make the Federal Trade Commission Act an anachronism. But failure to recognize the problem and to enact preventive legislation twenty years earlier was enough to give evil trade practices a head start before their economic consequences were realized.

So too, it was not until 1914 that acquisition of the capital stock of competitors was expressly prohibited by law, where such acquisition would substantially lessen competition, or tend to create a monopoly. The first “age of mergers” was a decade behind us in 1914 when the Clayton Act was passed. Thereafter, the economic highway was strewn with the empty carcasses of corporate entities. It was not until 1950 that the Clayton Act was amended by prohibiting acquisition of the physical assets of competitors where such acquisition would likewise lessen competition or create monopoly. These failures, even more than the delay

sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser . . . to sell, or contract to sell . . . at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor . . . or to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.”

This is reminiscent of a true story told by Assistant Attorney General Stanley N. Barnes in an address to the Section of Antitrust Law of the American Bar Association in Boston on August 27, 1953. Judge Barnes noted that frequently lawyers for certain businessmen charged with violation of the antitrust laws will assure him of their clients’ respectability and the absence of moral wrong in the conduct of their business. To illustrate, Judge Barnes told of a protestation of innocence “made with regard to a situation where force was alleged to have been used. When violence was denied by defendant’s counsel, I asked him what about that certain incident when X’s truck was shot at, by certain individuals using rifles, the bullets from which penetrated X’s windshield. I was told that no bullets were actually fired; that it was a coca-cola bottle that had been thrown through the windshield. It is difficult for me to understand how any case involving such facts can be described as moral, or how those who commit such acts believe they did no wrong.”
in banning unfair trade practices, contributed to the growth of too bigness in American industry.\footnote{United States v. Columbia Steel Company, 334 U.S. 495, 532 (1948). See also dissenting opinion, Hamilton Watch Company v. Benrus Watch Company, Inc., 206 F. 2d. 736, 740-742 (2d. Cir. 1953).}

In some respects restraints of trade, and the trade practices that lessen competition or tend to promote monopoly, lend themselves less to fundamental tests of unreasonableness or unfairness than does too bigness on the part of a dominant company in a particular industry. This is because (i) at testing time the evil effect may not even have been visited upon the industry and (ii) if it has, it may appear to be or actually be, at that juncture, so picayune as not to apparently warrant governmental interference. Yet these are frequently the acorns from which the great oaks of industry grow. To the extent that fundamental tests may be devised the following are suggested, again without implying that they are all-inclusive, applicable to all circumstances, or that they should be applied in this order.

1) Does the restraint or trade practice unduly interfere in the affairs of competitors, their suppliers, or customers?
2) Does the restraint or trade practice tend to encourage or discourage the dynamics of growth and progress within the industry?
3) Does the restraint or trade practice tend to discourage newcomers to the industry?
4) Does the restraint or trade practice tend to concentrate or artificially regulate production or marketing or induce higher and unreasonable prices?
5) Is the restraint or trade practice, measured by the ethical standards of a truly competitive economy, basically unfair?

As was observed above, every business act involves some degree of restraint upon a competitor or competitors. But this is the stuff of competition. When a merchant advertises his wares in the local newspaper he is attempting to bring the superiority of his product over that of his competitor (either in terms of quality or price) to the attention of the public. To the extent that he succeeds, his trade practice (in this case, advertising) restrains the business of his competitor. No responsible person considers this trade practice either unreasonable or unfair, or an undue interference in the competitor's business. Or suppose this merchant
determines that his competitor's sales manager would be an asset to his business, accordingly offers him an increased salary, and hires him away from his competitor. If this were considered unfair it would not only penalize the sales manager (who, in the best American tradition, is trying to get ahead in the world), but would give the competitor an advantage he deserved only if he chose to meet the salary increase offered his sales manager. Again, suppose the merchant decides he could better display his wares (and therefore perhaps show up his competitor's wares to a disadvantage) by installing a new window front. Obviously, this is not unfair, nor if successful, an unreasonable restraint of trade. In fact, it might stimulate trade and thus indirectly redound to the benefit of his competitor. The foregoing "straw men" were not set up merely to be "knocked down." They illustrate that there is a large area in which the forces of ingenuity, drive, initiative and imagination (so typical of the American free enterprise scene) can maneuver, in a truly competitive sense. It can bring satisfaction and profit to those applying such forces and also constitute a service to society without undue interference in the affairs of competitors, their suppliers or their customers. True, these illustrations are confined to the retail level. They cover types of business that would be, in a Darwinian sense, primitive forms compared to the complex vertical and horizontal dinosaurs of big business. But the basic principles are the same. The manufacturer or processor also uses the medium of advertising. His advertising may be on a national scale. He may buy ten times the volume purchased by his nearest competitor. But this fact would not necessarily justify a threat to cease using a particular product unless the seller furnished him discriminatory advertising allowances not offered to competitors. The manufacturer may be also looking for better personnel. But this would not necessarily justify offering his competitor's personnel better employment provided they brought with them the competitor's legitimate trade secrets. The manufacturer may want to stimulate his business in an area of the country where his competitor has a freight advantage because of the proximity of the latter's manufacturing plant to the market. So he might legitimately seek a railroad

35 A & P case, supra.
siding near which to erect adjacent competing facilities. But this is a far cry from seeking to offset the freight advantage by attempting to influence rate-making bodies to publish a freight rate having the effect of overcoming the competitor’s geographic advantage. A competitor may refuse to do business with suppliers (whether the supply consists of advertising, transportation facilities, or raw materials) unless they refuse to give him an otherwise unfair advantage. He may refuse to sell to customers unless they agree to be his exclusively." This is not competition. This is dictation and there is no more room for dictatorship in an economic democracy than in a political democracy.

One of the characteristics of the American scene is growth. We refuse to stand still. “Bigger and better” may be a cheap slogan. But in American industrial and commercial life it has meant more for less, more important in terms of quality and innovation than in terms of quantity and price. It has contributed to our well-being. In terms of food and drugs it has strengthened our health. In terms of shelter and clothing it has added to our creature comforts. In terms of national defense we are infinitely stronger because of this drive for material progress. Because of it we have had and continue to have enough left over of our civilian and military production to make the free world much stronger. Accordingly, any restraints or trade practices that tend to discourage the dynamics of growth within any segment of American economic life, whether they be in the food industry, pharmaceuticals, building construction, armaments, textiles, or any other segment, should be held unreasonable and unfair.

Monopoly bespeaks an absence of competition, not in a legal sense its total absence, but a degree of monopolization that invests power in the monopolizer to exclude or destroy new competitors. Thus the seeds of monopoly are present in any restraint or trade practice that tends to discourage newcomers. Anything that makes it difficult or impossible to enter a field obviously discourages the newcomer. Such difficulties may have to do with the then state of business—a recession or depression. They may have to do with a paucity of capital or with the lack of specialized

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knowledge of the industry on the part of those who otherwise might like to enter the field. Obviously, for these difficulties existing competitors are not to blame. A business man is not expected to finance a potential competitor or give him his know-how, any more than he should be expected to furnish him with his customer lists. But suppose the competitor alone, or together with other members of the industry (through their trade association or otherwise), circulates in the trade false statements about the integrity, ability or financial responsibility of the newcomer. Or suppose a member of the industry operating a vertically integrated enterprise lets it be known that it would be unable to fill the raw materials needs of newcomers, when this is not the fact; or uses its influence in banking circles to impede the financing of the new competitive enterprise. Or suppose an existing member of the industry threatens a patent infringement action against the newcomer, when in fact there is manifestly no basis whatsoever for such a suit. The newcomer might have to consume all of his meager capital merely to establish that fact in court. These illustrations may be multiplied a hundredfold. They do not constitute acts of genuine competition, first because the newcomer is not yet a competitor, and second, because such acts do not result in the customer public getting a better product, a better service, or a better price.

In a normally free market the law of supply and demand determines the price of a given product. Of course there are other factors under abnormal conditions. But they are not due to competition or the absence of competition. War may have intervened. The government may have undertaken to stockpile the product for reasons of national defense. For the same reason, or to stop inflation or both, the government may have taken over as sole buyer and/or seller of the strategic material. Enemy submarines may have cut off or substantially reduced the domestic supply of the imported product. Normal operations in one industry or one company may throw the entire economy off balance or threaten the entire national defense program. We have found this to be particularly true in the case of such strategic and basic materials as aluminum, copper and steel. Accordingly, raw materials may be perforce channeled to particular end uses, depriving whole industries of their sources of supply, thereby cutting
down the production of certain other end products at the very time when the public demand for them is increasing. Most of us are familiar with such economic abnormalities (which, alas, appear to be "normalities" in a world of continuing political tensions), having lived through World War II with its Controlled Materials Plan, government buying through the Metals Reserve Corporation, wartime substitutes for household gadgets, et cetera. In a normal market these factors are absent. The factors that induce a particular company to expand or contract production, or to raise or lower prices are: general business conditions or business forecasts, finances, labor relations (strikes or threats of strikes), competition from substitutes, new markets or increased or decreased demand from existing markets, seasonal or other weather conditions, and a host of lesser factors. The adverse business factors mentioned are normal in the sense that they may spring neither from the influences of war or threats of war nor from concert of action among competitors within the industry. We should not expect a business man to maintain or expand production in the face of falling demand. But we should expect and insist that the decision be his; that it be reached independently and without prior consultation and/or agreement with his competitor or competitors. However, production and marketing practices are not limited merely to expansion or contraction in times of prosperity or depression or because of the circumstances of war or peace. A normal market may be a limited market because the nature of the product makes for a static demand. There may be just so much to go around, sales promotion and advertising to the contrary notwithstanding. Or it may be a market in which the only genuine competition may allegedly come from substitutes, or one in which the only customers are the state and federal governments, or there is only one supplier of the essential raw materials. The nature of the market determines to what extent and how it may be concentrated or artificially regulated. If it is inherently a limited one, the principal competitors may allocate most of the market among themselves, on a volume, customer, or geographic basis. They may try to keep out substitutes by legislation favoring their product. In bidding for state or

20 Alcoa case, supra.
federal contracts an individual competitor may endeavor to induce public officials to draw closed specifications describing only his product. Or there may be an agreement among the ostensibly competing bidders to submit uniform bids. A competitor may seek a discriminatory price in his favor from the sole supplier of the raw materials for his end product. Each of these devices tends artificially to concentrate the production and marketing in the hands of one or a few big producers or sellers. It is not necessarily a better product, a better service or a lower price that brings this about. Rather, it is a conspiracy or combination unreasonably to restrain trade, or the commission of an unfair trade practice. It should be borne in mind that the ultimate aim of all such restraints and practices has to do with prices. They may be to obtain higher prices or to stabilize prices i.e. to keep them from falling. Regardless of the nature of the practices employed or of the ultimate aim, when the devices are such as to set in motion economic forces that artificially regulate the supply and demand and therefore the price, they not only violate the normal laws of economics in a competitive society but also the antitrust laws.

We, as a people, have a reputation for good sportsmanship. The boxer who makes a practice of hitting below the belt soon disappears from the ring. The "fixed" fight is decried. The bully who beats up a little guy frequently has to have police protection from a mob. We do not pit 200 pounders against 120 pounders, high school teams against college teams. Our athletic events are competitions in skills. Let the best man or the best team win. The loser is a good sport "or else." This sporting attitude not only has made our athletes among the best in the world, it has strengthened our moral fibre as individuals and our moral stature as a nation. By and large the tradition of fair play has been observed in the American world of business competition. In the American tradition, the business competitor does not seek a crutch from the outside, special consideration from the referee, nor the right to a head start. To win means to give the public more for less at a larger profit to him, because of the superiority of his product or service, mass marketing practices, efficiency of plant, or other factors peculiar to and indicative of his superior skills.\(^{21}\) So the last fundamental test of the reasonableness of a restraint of trade

\(^{21}\) Alcoa case, supra, at p. 430.
or the fairness of a trade practice suggests that we apply to the world of business the basic tenet of the world of sports: fair play. It may not be easy. Usually the best things do not come easy. Some economic technicians may argue that it is impossible because the two worlds are so different. But ethics that are a part of a way of life do not condone immoral conduct in one segment of that life while condemning it in another.

Until 1936 the national policy toward enforcement of the antitrust laws was one of maintaining “hard” competition in all areas of the economy, with some notable exceptions hereinafter mentioned. In that year the Robinson-Patman Act was passed. Among other things, it made unlawful “... any discount, rebate, allowance, or advertising service” which discriminated “against competitors of the purchaser” in their purchase “of goods of like grade, quality and quantity ...” Many serious students of the antitrust laws believe that this act “softens” competition, thereby creating confusion because of its inconsistency with the national policy of “hard” competition. According to these students of the subject, this section of the Robinson-Patman Act protects the high cost operator, whereas the “organic law” (the Sherman Act) is intended to protect the low cost operator; that it gives the former the undeserved crutch against his competitor. Obviously, it is not simple to reach a facile conclusion regarding this complex subject. In one sense it poses the question: shall so-called small business be shielded and protected from so-called big business? In another sense it asks: shall one of the tests of too bigness be that it competes too vigorously with small business? Unfortunately, from the viewpoint of easy solution, the answer to both questions is No! In the kind of competitive world necessary to the maintenance of economic democracy, all businesses, large and small, must “stand up and fight.” We have no desire to become a nation of small shopkeepers. This would be the ultimate end if it was the national policy to mollycoddle small business at the expense of big business. It would stifle all of the initiative to growth. On the other hand, a nation devoid of small shopkeepers is a nation that has lost its political as well as its economic liberties. When a small business grows into a big business it acquires larger social responsibilities. To attempt to avoid such responsibilities is as much a sign of immaturity in a big business as it is
in a small business that expects to be shielded merely because of its size.

However, there are many areas of our economy in which businesses large and small have been protected from “hard” competition. The Federal antitrust laws cover foreign as well as domestic (interstate) commerce. Yet, large and varied areas of the economy receive tariff protection from foreign competition. The little as well as the big "butter and egg man" under the law gets price support for his farm products, thereby in at least partial effect repealing for him the law of supply and demand. The business of selling insurance and the operations of many cooperative enterprises are exempted in whole or in part from the provisions of the Sherman Act and hence from the “hard” competitive influences brought to bear in other areas of the economy. State fair trade laws permit a manufacturer of trade-named articles to fix their resale prices by contract with one retailer and thereby bind all of the non-signatory sellers in the state not to sell such articles below such resale prices. The wisdom or folly of tariff protection and of farm parity price maintenance are not determined solely by their affect on domestic competitive enterprise. Neither are the state fair trade laws. More often than not, they have a “softening” influence. Enumeration of these statutory exemptions from the “hard” competition provisions of the Sherman Act is not meant to imply that they represent sound or unsound legislation. It is intended to suggest only that (i) “soft” competition under law is not a novelty introduced by the Robinson-Patman Act, and that (ii) constructive criticism of either the law or of its administration should not rest, even in part, on its alleged irreconcilability with the national policy of “hard” competition.

On June 13, 1938, the 75th Congress authorized the establishment of a select committee and directed it, among other things, to make a full and complete investigation and study of the concentration of economic power in the American society. This group

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22 Prior to the enactment of the McGuire Act (amending Section 5(a) of the Federal Trade Commission Act) in 1952, the Supreme Court held in Schwepmann Brothers, et al v. Calvert Distillers Corporation, 341 U.S. 384 (1950) that the Miller-Tydings amendment to the Sherman Act did not require such non-signatory sellers to maintain these resale prices. The United States Court of Appeals (Fifth Circuit), in June of 1953, held that the McGuire Act made such contracts binding on non-signatories. Schwepmann Brothers Giant Super Market v. Eli Lilly and Company 205 F. 2d. 788 (5th Cir. 1953). The Supreme Court, on October 19, 1953, refused to hear an appeal from this decision.
was designated the Temporary National Economic Committee and has become popularly known as the TNEC. The TNEC made investigations into nearly every facet of our economic life. On the basis of these investigations extensive and intensive studies were made.

One such study, published in 1940, undertook a "social audit" of the performance of particular industries e.g. furniture and automobiles; of groups of industries e.g. manufacturing and finance; and of individual companies e.g. United States Steel Corporation and American Telephone and Telegraph Company. Among these tests were measurements of the degree to which the particular industry, the groups of industries, and the individual companies, provided maximum consumption, minimum costs (in terms of resultant low prices), maximum employment, and maximum utilization (no waste) of capacity. The extent to which these social objectives were met, according to the authors, determined whether the "social audit" disclosed a profit or loss to society.

These tests were valid in 1940. They are valid today. In terms of a new look at the antitrust laws they furnish long range significant guideposts. In terms of restraints of trade or monopoly trends they may furnish legal justification for invalidating certain industrial practices and validating others. Production measurements disclose possible restraints on production, or the absence of such restraints. Employment measurements may disclose whether the technology of the industry, group or company, is static or dynamic. Minimum cost measurements may not only disclose the degree of efficiency of operations, but also the presence or absence of competition in terms of the level at which prices are pegged to such costs.

However, the authors of Monograph 7 admit that these tests do not constitute:

. . . a complete or thorough-going audit . . . For they give no indication of such vitally important facts as . . . opportunity for new entrants . . . tariff-or-subsidy-or-nuisance costs to consumers and the like. None of these tests indicates whether business is making wise use of our natural resources . . . The impact of business . . . on the spread . . . of scientific economic fact. Nor is any measurement made

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23 TNEC Monograph No. 7 entitled Measurements of Social Performance of Business, 1940.
of the extent to which the dollar sign has been placed on the sacred religious, aesthetic, cultural, and ethical aspirations of the American people.\(^{24}\)

Some of these are touched on above: the wise use of natural resources; the wise use of advertising. Even though the impact of business (the "dollar sign") on the artistic, intellectual and moral standards of society cannot be measured with any scientific gauge, it need have no stigma attached to it. The dollar sign may be a good symbol. For the business of making money, in its finest sense, is the business of producing and distributing wealth from the ground, the air, and the waters around us to the entire community.

\[\ldots\] The truth is, business does not exist to make profits any more than we live to eat. On the contrary, it exists to perform a service for the community. Now, unquestionably, profits make it possible to perform that service. They provide a guidepost to those industries which society considers should be expanded. \[\ldots\] For business has, first and foremost, a moral purpose—namely, to perform a necessary service for the community; profits, on the other hand, in terms of values, come second.\(^{25}\)

Business ethically conducted perforce adds to the moral tone of the whole community. A jungle philosophy about competition depresses the moral tone. A national antitrust policy should take into account the ethical as well as the material considerations involved in producing or getting the "mostest for the leastest." It should be flexible enough to measure ends by the means employed and means by the ends to be reached. And it should recognize that competition itself is but a means to an end. The end is not only the creation of a cornucopia out of which will flow an abundance of housing, food and clothing for every man, woman, and child, but that in the process each individual will grow in intellectual and moral stature and human dignity.

\(^{24}\) Ibid. 5.

\(^{25}\) Excerpt from an address by John S. Coleman, President, Burroughs Corporation, at the Commencement Exercises of Bethany College, Bethany, West Virginia, June 7, 1953.