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# THE PROPOSED ANTI-TRUST LAW CHANGES—COMPETITION ON THE DEFENSIVE

BY EMERSON P. SCHMIDT\*

TWO schools of economic thought have been struggling for supremacy regarding the question of the merits and demerits of competition versus monopoly. One, whose chief spokesman is Adam Smith, is idealistic and abstract. The other, whose dominant protagonist is Karl Marx, is deterministic and practical. The first claims that free and open competition furnishes an automatic check to profiteering, inefficiency, inequitable distribution of wealth and power. Adam Smith calls this force the Unseen Hand. The assumption is that such benevolent competition would exist everywhere were it not for the interference of unfair practices which can be prevented by law. The second school teaches that competition is a passing phase and that centralization, monopoly is inevitable; that competition is self-destructive, inefficient, and that the profit motive will wipe it out completely. This is, of course, the socialist view but one need not be a socialist to see a certain apparently inevitable tendency away from *laissez faire* towards combination.

For a century and a half those believing in competition have been dominant at the polls and in our legislatures so that in nearly all leading industrial countries both common law and statutes prohibit any co-operative business action which might be deemed to restrict trade unreasonably. The anti-monopoly sentiment came to a climax in 1890 with the passage of the Sherman Anti-Trust Law. The legislatures and the courts have been busy ever since either trying to enforce the law or to find reasons to make exceptions to and exemptions from the law.

As a result of a series of new laws the Sherman law has been modified as to labor and labor organizations, farmers, horticulturalists, planters, ranchmen, dairymen, nut and fruit growers and associations of each of them, exporters, marine insurance companies, railroads owning competing water lines, national banks, American steamship

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lines, telephone companies, and railroads as to consolidations and the packing industries. These classes of industries which have been granted exemptions from the Sherman law, or are subject to regulation, have now become the mass and only general business remains fully subject to the Sherman law.

Under the Sherman law competition was supposed to be unlimited and co-operative agreement and united action were held to have dire results. But the Panama Canal Act of 1913 established a slightly different standard. It authorizes railroads to own competing water lines providing the Interstate Commerce Commission determines that such ownership does not interfere with competition between the two. This act was the first Congressional recognition of the principle that competition might properly be subjected to regulation.

In the Federal Trade Commission law of 1914 Congress established a standard and acknowledged for the first time that competition should not as a matter of right be free but be restricted and regulated. Various sundry civil appropriation acts have provided that no part of the appropriations authorized shall be expended for the prosecution of producers of farm products or associations of farmers who co-operate in an effort to maintain fair and reasonable prices. Here Congress recognizes that it is in the public interest that producers be permitted to obtain fair and reasonable prices, or that it is against the public interest for a person to *sell* his products at *less* than fair and reasonable prices.

In the Shipping Board Act, Congress recognizes the principle that rate wars are uneconomic and that the result of such wars might be to create a monopoly more detrimental to the shipping business and to the public than the fixing of shipping rates and the allotment of tonnages by agreement among the owners. In the act providing for the operation of the transportation systems while under Federal control the Interstate Commerce Commission was authorized in fixing rates to take into consideration the fact that rates established by the carriers under the stress of competition might be unduly low. This is merely an admission that the Unseen Hand of competition works blindly and ineffectually.

If the principles thus recognized by Congress are economically sound when applied to transportation companies, farmers, insurance men, national banks, packers, exporters, steamship companies and many others why are they not sound when applied to general business?

The supreme importance of exempting another industry from the relentless teeth of the Sherman law has recently come to the fore. This is the case of the oil business. The general reader may be shocked at the suggestion that the oil business, notorious for its relations with the department of justice, should be exempt from the law. From the

foregoing illustrations it may be assumed that it is now Congressional doctrine that there may be too much competition, in certain lines at least. This reminds one of Proudhon's comparison of competition with arsenic—a little dose stimulates the heart, but a greater dose kills the patient. At any rate, Secretary Hoover in a speech at Tulsa, Oklahoma, in October, 1926, stated that, "an amendment to the Sherman Act permitting oil companies to curtail their drilling activities in small localized fields, which may threaten to upset the condition of the entire country, seems to be advisable." The whole history of the oil industry shows that prices break and the industry is demoralized in times of overproduction due to small isolated fields. We have the history of Glen Pool, of Cushing, of the conditions in California of 1920 and 1923 and now of Seminole. In the latter case the production of oil in a single county in one state from a few wells out of thousands throughout the country destroyed the profitableness of the industry in the whole country and an unprofitable and unstable industry is a public menace from the standpoint of credit, consumers' price and labor relations.

If the oversupply is merely from a localized field why would the anti-trust act, which is against combines in restraint of interstate commerce, stand in the way of a curtailing agreement among these localized competitors? Is this not purely an *intrastate* matter? The Supreme Court of the United States has consistently laid down the doctrine that Congress has no power to regulate the manufacture or production of any commodity merely because it may enter interstate commerce. This probably is most clearly laid down in a child labor case.<sup>1</sup>

Unfortunately a different rule applies in this case, probably. Chief Justice Taft laid down the rule in the *Coronada Coal* case<sup>2</sup> which would probably apply here. He said that when the intent of those preventing production of a commodity, "is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets their action is in direct violation of the anti-trust act." Now, the price of oil is determined (in relation to the demand) by the great purchasing companies which do an interstate business. Oil is the most necessary national commodity we have. The price is affected by the sum total of all the production in all the fields. If there is an overproduction in Oklahoma it affects the price in Kansas, in Pennsylvania and in California. Overproduction may occur only in one county as in Seminole recently. But the combination of the competitive producers of that small area to limit production

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<sup>1</sup> *Hammer v. Dagenhart*, 247 U.S. 251.

<sup>2</sup> *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 294.

is another matter, of more than local interest. Such combination may so limit production of the commodity entering interstate commerce and the price of the products in interstate markets that the industry as a whole is not demoralized. This is the opinion of Secretary Hoover and other experts.

Thus, if this is correct, if the supply "entering and moving in interstate commerce or the price of it in interstate markets" is affected, such an admittedly wholesome combination is illegal. Secretary Hoover clearly realizes that this would bring any restrictive agreement, even though covering only the producers within a single county, under the axe of the Supreme Court. Hence he urges the oil men to lobby for release from the inflexible restrictive claws of the anti-trust laws.

The oil industry is used here merely as a "case." Over-production with its consequent demoralization and instability is imminent in scores of other industries. Government reports show that our window glass industry can produce in seventeen weeks all the glass we can use in fifty-two weeks. The same difficulty is found in the steel, automobile, flour milling, shoe, rubber tire, and coal industries as well as others.<sup>3</sup>

But the anti-trust laws will not allow stabilizing agreements among the competitors. Our official policy is to let them fight it out as best they can, all taking the consequences. Unless the laws are repealed we will likely be forced to go through periods in each industry of cut-throat competition, price wars, intrigue, wage cutting, and labor troubles, stupendous marketing schemes and the like.

Obviously, if the anti-trust laws are abolished some sort of regulating agencies will have to be erected to protect the consumer and perhaps labor from exploitation by the combines and the monopolies. To date numerous such agencies have been entrusted with power to regulate: the Interstate Commerce Commission as to railroads and telephone companies, the Federal Reserve Board as to national banks, the United Shipping Board as to American shipping companies, Secretary of Agriculture as to the packers, and the Federal Trade Commission as to all other business.

It may be objected that this will put more government into business. Yet it might be said that the Sherman Act as it stands puts more government into business than all other statutes combined and to grant additional power to an administrative agency, probably the Federal Trade Commission, would take government out of business to an extent little appreciated by those who unquestioningly accept the Sherman Act.

The entrance of more government into business is not viewed with equanimity. It is conceded by all, except socialists, that unrestricted

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<sup>3</sup> See "Fight Against Monopoly" *American Federationist*, February, 1926.

competition has been the dynamic in nineteenth century business when new markets remained to be conquered, raw materials abounded and when competitors were separated by poor communication, inadequate roads and relatively long distances. Sentimentalists and unadventurous spirits view this competitive system as one from which we must not depart, at all costs. They cling to an ideal long after the conditions which made that ideal have passed.

Today competition is no longer the natural and reasonable economic system due to the expansion of markets at a diminishing rate, many raw materials becoming exhausted necessitating co-operative conservation and bringing competitors closer together through good and cheap transportation and rapid communication. Our Federal and state legislatures try to retain the nineteenth century system but with little avail. If there is this fundamental economic tendency towards combinations and monopolies due to their efficiency and economy as against the competitive system would it not be well to recognize it and allow the consumer to get the benefit of it? In those branches of industry and trade where competition still functions satisfactorily we ought not to try to supplant it with monopoly. Our policy ought to be to allow monopoly only in those lines where competition is naturally self-destructive and uneconomical.