Notre Dame Law Review

Volume 41 | Issue 3 Article 15

2-1-1966

Book Review

Marshall M. Hall

BOOK REVIEW

PERSPECTIVES ON ANTITRUST POLICY. Edited by Almarin Phillips. Princeton, New Jersey: Princeton University Press, 1965. Pp. ix, 454. $9.00.

The essays collected in this volume were presented at a seminar at the University of Virginia during the spring term of 1963 which dealt with the many and varied problems connected with antitrust policy in an economy based upon competition. The authors, acknowledged experts in business, labor, law, economics, and government, offer attitudes and opinions on such topics as: antitrust and national goals; administered prices; concentration of market power; problems of small business, commercial banks, and the transportation industries; the role of labor unions; exemptions from antitrust laws; and international competition. Thus, while each of the chapters is a separate essay, their arrangement is intended to provide some continuity of topics. However, the arrangement of topics and the purpose of the symposium was not to develop a particular, uniform view or thesis regarding competitive policy. On the contrary, it offers a broad spectrum of opinions and methods of analysis since "the participants were selected not only for their expertise but also to assure that a range of opinion and analysis was presented."[1] In short, the purpose of this collection is to illustrate the controversial aspects of competitive policy, not to settle the issues in this area.

The contributions in this volume include the following: H. Thomas Austern, "Problems and Prospects in Antitrust Policy — I"; Morris A. Adelman, "Problems and Prospects in Antitrust Policy — II"; Ward S. Bowman, Jr., "Problems and Prospects in Antitrust Policy — III"; Donald Dewey, "Competitive Policy and National Goals: The Doubtful Relevance of Antitrust"; Richard B. Heflebower, "Conscious Parallelism and Administered Prices"; Louis B. Schwartz, "Monopoly, Monopolizing, and Concentration of Market Power: A Proposal"; Lucile Sheppard Keyes, "The Problem of the 'Good' Trust"; Jesse W. Markham, "Mergers: The Adequacy of the New Section 7"; Richard H. Holton, "Antitrust Policy and Small Business"; George W. Mitchell, "Mergers Among Commercial Banks"; Merton J. Peck, "Competitive Policy for Transportation"; Walter Adams, "Exemptions from Antitrust: Their Extent and Rationale"; Herbert R. Northrup and Gordon F. Bloom, "Labor Unions and the Antitrust Laws: Past, Present, and Proposals"; Kingman Brewster, Jr., "The Influence of International Factors"; Laurence I. Wood, "Antitrust Policy: A View from Corporate Counsel"; Nat Goldfinger and Theodore J. St. Antoine, "A View from Labor"; John J. Corson, "The Impact of Antitrust Law on Corporate Management."

The first three chapters, by Austern, Adelman, and Bowman, comprise a general introduction and contain at least a summary treatment of most of the issues raised in the subsequent papers. While the concluding three chapters are also general, reflecting, however, the particular views of corporate counsel, labor, and management, the middle chapters present individual policy issues in depth.

Of the first three essays, the one by Austern, a lawyer, was in some respects the most interesting. The Adelman essay treats three topics — mergers, ad-

1 Text at v.

ministered prices, and the Common Market with respect to the salient issue of "economic power," *i.e.*, economies of scale and monopoly power — in his usual competent fashion. Similarly, Bowman does a respectable job in presenting his thesis that much of the "monopoly," if not most of it, in this country is beyond the reach of antitrust laws. By his definition, economic monopoly, as contrasted with illegal monopoly, includes supply-restricting or price-fixing power and effect wherever found — in business, government, or labor groups. *"Beyond the reach of antitrust* is, thus, a much broader category than *exemptions from antitrust.*"[2] The "exemptions," such as resale price maintenance in the distributive trades, union wages, and "regulated industries," are claimed to be secondary in terms of monopoly effect to the positive actions of Government, such as tariff and quota restrictions, crop support programs, oil proration, and foreign trading schemes, and the numerous state and local occupational licensing laws. The remainder of his essay briefly touches on the exemption problem involved in resale price maintenance, in labor, and in a particular regulated industry, transportation.

The Austern piece provides, among other things, a neat review of American antitrust legislation. Particularly striking is his observation that despite the presumed roots in the English Common Law and in the struggles with Crown monopolies, "the concept of 'antitrust' is as American as apple pie."[3] Austern is critical of both the Clayton and Robinson-Patman Acts for dealing with symptoms instead of the underlying disease and thus leaving the door open to misapplication to the little fellow as well as the industrial giants. He also cogently discusses the shift in emphasis that the Federal Trade Commission (FTC) underwent from the 1914 theory that its action would be "prophylactic, preventing monopoly in its incipiency through the use of cease and desist orders."[4] Any already-established monopoly would presumably be dealt with by the sister prosecuting agency, the Department of Justice. However, in short time the FTC also took over enforcement of the Sherman Act. It proceeded against Sherman Act violations as being "unfair methods of competition" in violation of the FTC Act. "This is roughly equivalent to saying that a murder is also a breach of the peace."[5] He also discusses how the Supreme Court decision in the spring of 1963 in the *White Motor Company* case[6] shifted or at least retarded the trend of expanding the *per se* category of antitrust offenses.

Dewey, in a most refreshing essay, argues the truth of three closely related propositions, *viz*: (1) Present federal antitrust policy is largely irrelevant to the important problems of the American economy; (2) The costs as well as the benefits of antitrust should be considered as the former may exceed the latter; (3) Assuming (1) and (2) are true, the case for antitrust must primarily rest on noneconomic arguments which the professional economist has no special competence to appraise.

Dewey considers the major problems of American capitalism to be possible defeat in (1) a military contest, (2) an ideological contest for the support of the

2 Text at 50.
3 Text at 4.
4 Text at 14.
5 *Ibid.*
6 White Motor Co. v. U.S., 372 U.S. 253 (1963).

politically influential groups, or (3) some sort of output contest with rivals. Looking at the one most likely to be affected by antitrust policy, problem number three, he observes that there has been no significant statistical case for or against monopoly as a source of technological progress. In addition, any contribution antitrust might make toward maintaining full employment is felt to be small since the most disturbing cost rigidities in our economy are the wage rigidities over which antitrust agencies have little real power. Although the elimination of administered prices by antitrust action may be helpful, it is more than offset by the Robinson-Patman Act which tries to reduce "price discrimination" or price flexibility. Finally, following the thesis that has been advanced most frequently by the "Chicago School" that rational business behavior dictates that you buy out a rival or merge with him rather than engaging in predatory price-cutting, the antitrust policy takes a new twist. "Antitrust does in fact greatly limit the use of mergers and cartels and, hence, provides a *raison d'etre* for predatory price-cutting."[7]

The Heflebower essay discusses in a complete and systematic fashion the various failings or difficulties of the term "administered prices." Since the unsatisfactory nature of this concept is hinted at in a number of the other essays, the chapter is certainly appropriate.

After reminding us of the dangers of dogmatism in regard to antitrust policy — best exemplified by the great industrial machines that have been built in Germany and Japan on the basis of cartels and concentration of economic power on the one hand, and the lack of evidence supporting "the bigger, the better" or efficiency argument for large firms on the other — Schwartz goes on to suggest legislation that would circumscribe the behavior of unduly powerful economic entities. His proposal would use both absolute total assets or sales between one-fourth to one-half billion dollars and relative figures — first or second in any line of commerce, doing at least 10 percent of the business, etc. — to determine dominance. His suggestion is most interesting and should be read in detail by any serious student of antitrust policy.

The Keyes essay is in a sense a continuation of an earlier article that discussed the "good trust." The "good trust" is a ". . . type of enterprise which is not characterized by illegal conduct or wrongful intent but which, because of its possession of market control, *may* still be in violation of Section 2 of the Sherman Act."[8] Although the 1953 *Shoe Machinery* case[9] indicated that the "good trust" is not necessarily in violation of this section, some other interpretations of the Act suggest that such enterprises are necessarily in violation of Section 2. This essay examines in detail the central questions involved in the problem of the "good trust."

Markham's chapter discusses the singular effectiveness that the 1950 amendment to the Clayton Act has had in arresting mergers that unreasonably

7 Text at 80-81.
8 Text at 130.
9 United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

enhance market power. He goes on to add, however, that more recently ". . . Section 7 seems to have been bent to serve the ends normally served by small business legislation, and the standard of 'injury to competitors' has emerged as a companion, if not the ranking partner, to the standard of 'substantial injury to competition'."[10] The more recent standard no doubt evolved from the vertical and conglomerate mergers whose competitive effects have been the subject of so little comment by economists.

Although based on several widely varying industries and subject to some exceptions, Markham was able to suggest some generalizations that could be made from the first thirty cases. They involved markets capable of being defined with reasonable precision, and one or more of the following considerations: (1) The merger gave the acquiring firm 20 percent or more of the defined market; (2) The merger strengthened the market position of a firm already among the largest five, frequently the largest three, in terms of its defined market share; (3) Mergers in this industry in the recent past substantially lessened competition and, in most cases, successive mergers by the defendant had contributed to this trend.

Holton's essay briefly discusses the pros and cons of small business protection arguments before examinating in detail the distributive trade, which has been involved in so many of the antitrust cases involving small business. In particular, the "case of gasoline distribution is used as a vehicle for exploring the economic interrelationships in distribution which lead to antitrust problems."[11] A very brief statistical verification of the gradually shrinking role of small business in the American economy is used as his take-off point in this inquiry. His comments on firm versus market demand elasticities and price wars — especially on the evidence against the collusion thesis — are most enlightening.

Chapters 10 and 11 focus on industries — banking and transportation — which until recently were rarely discussed in an antitrust context. Therefore, both authors, Mitchell in banking and Peck in transportation, devote some space to describing the salient characteristics of these industries. Banking and transportation were outside the scope of antitrust policy in the past because it was believed that the kind of real world solution the market would generate in these industries would be both undesirable and unworkable. The authors accordingly stress the advantages of a competitive or market solution to the problems of these industries as distinct from the workings of antitrust policy. They also imply, in possible contrast to Dewey's chapter, that antitrust is necessary for competition to work in these industries.

Mitchell suggests that banks and bankers are very like firms and managers and argues that policies which stress such concepts as an "overbanked" economy are "badly out of step with the times."[12] In particular, he argues that bank mergers are primarily a function of profit-seeking and discounts many of the popular reasons (management problems, desire to offer a complete range of

10 Text at 187.
11 Text at 191.
12 Text at 226.

banking services, social prestige and political power associated with bigness, etc.) that have been used to explain bank mergers. Stressing the advantages of competition, he concludes that prospective bank mergers ought not to be appraised in the light of "public interest" but as they contribute to a reduction or potential reduction in competition.

Peck makes a somewhat more detailed analysis of the advantages and disadvantages of competitive policy in transportation and, although he comes out strongly for competition as opposed to regulation, he warns us not to expect too much as "the adjustments will be via relatively small changes at the margins of the various sectors of transportation."[13] Peck's analysis is sound and is also a good, brief introduction to the problems of the transportation industry (airlines excluded).

The next two chapters (Adams, and Northrup and Bloom) discuss the exemptions from the antitrust laws. Adams analyzes in broad perspective the exemptions from antitrust by regulation and "administrative preemption." He finds, as do most observers of regulation, that regulatory policy falls far short of any desired ideal and vigorously proclaims its ineptness. He calls for deregulation where possible and, where regulation is necessary, he would still require the regulatory agencies "to promote competition to the maximum extent possible."[14]

Exemption by administrative preemption arises primarily in defense, space, and atomic energy where, Adams argues, the administrative decisions of certain agencies foster the kind of structure, behavior, and performance that the antitrust laws are designed to prevent. His examples are well taken — profit pyramiding, private ownership of patents derived from research and development financed by the government, the creation of monopolies or near monopolies by contract-letting practices — although some, *e.g.*, profit pyramiding, have already been corrected. The criticisms by Adams are well taken but it is not clear that other criteria such as quality, timing, and technical know-how might not outweigh the antitrust objective. In short, the goals of all government agencies may not necessarily coincide with the goals of antitrust agencies.[15]

Northrup and Bloom present a brief history and analysis of labor unions and the antitrust laws. They come out in favor of the present practice of union exemption from antitrust but are still very definitely in favor of curtailment of labor union "power." They propose that the Norris-LaGuardia Act be repealed or substantially revised and that Sections 8(a)(5) and 8(b)(3) of the Taft-Hartley Act that require employers and unions to bargain in good faith also be repealed. However, in the face of declining union membership and the difficulties that beset the unions as they try to organize labor in the South, one wonders whether Bloom and Northrup may not have ascribed too much power to unions.

13 Text at 267.
14 Text at 299.
15 This chapter also includes a useful appendix — Statutory Exemptions from the Operation of the Federal "Antitrust (or Antimonopoly)" and Certain Trade Regulation Laws.

Kingman Brewster discusses a somewhat neglected aspect of antitrust policy — "the legal complications and implications of antitrust policy in foreign commerce."[16] The legal limitations of our international antitrust policy are briefly defined and their somewhat chauvinistic character described. Brewster argues that the "per se," "rule of reason," and "market power" concepts are interpreted somewhat differently in the international context but it is difficult, given the brevity of his paper, to fully appreciate the differences of interpretation.

The last three chapters are perhaps the most openly partisan since they are not only *written* by people who are employees of organizations which have a stake in the way the antitrust laws are practiced and enforced but, judging from the titles of these chapters, are *designed* to present a particular point of view.

Wood's chapter is perhaps the most novel of the three as he focuses on the fact that it is individuals who commit the acts that the antitrust-enforcing agencies prosecute and that it is necessary to protect the civil rights of individuals, both singly and in the aggregate. He points out the vagueness of the various antitrust laws and the dilemma that salesmen and managers face in interpreting this vagueness, and concludes with a request for careful analysis and discussion on the part of both government and business. Mr. Wood offers no explicit solutions to any of the problems he raises and one gets the feeling that in this gray area there are few broad rules which have general applicability.

Goldfinger and St. Antoine present the arguments left out by Northrup and Bloom concerning the inapplicability of the antitrust laws to labor unions. They imply that there is general agreement among "serious knowledgeable thinkers" that the antitrust laws ought not to apply to labor unions. We doubt, however, whether the concensus is as great as Goldfinger and St. Antoine would have us believe. Indeed, they do such a good job developing the thesis that unions have but very little power that in the end they are obliged to change direction and argue that unions are not without significant economic effect.

The final chapter by Corson amplifies some of the points made earlier by Wood and, by reference to several different cases, manages to convey the impact that the atmosphere of uncertainty generated by the antitrust laws has on corporate management. One might differ with Mr. Corson over his views of the dilemma which confront zealous IBM salesmen in the light of the consent decree requiring IBM "to limit its sales of tabulating cards to not more than one-half of the total of such sales."[17] In the end, however, we both agree with and applaud his conclusion — "The problem I have tried to depict will not be met by any amendment of the antitrust laws or modification of enforcement practices. It is essentially a management problem."[18]

This book has achieved its goal of discussing a number of controversial issues in the area of antitrust policy. The individual pieces are cross-referenced, which permits comparison of the different views although one would also have liked to read comments by the members of the seminar on the papers of their

16 Text at 355.
17 Text at 432.
18 Text at 443.

colleagues. A table of cases index, in addition to the more typical index, is also a useful innovation. The main shortcoming of the book is perhaps the appeal of the several authors to casual empiricism, single observation, or straight assertion to substantiate very debatable points about the real world. All in all, this book seems destined to have an important place in the literature on antitrust policy.

*Marshall M. Hall**
*David R. Kamerschen**

* Assistant Professors, Department of Economics, Washington University (St. Louis).