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## Phillips: Perspectives on Antitrust Policy

Edwin W. Tucker

*The University of Connecticut*

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

Has Congress established *an* antitrust policy for the United States? Have the so-called "antitrust laws"<sup>1</sup> preserved and promoted competition? In the seventy-five years which have followed the adoption of the first federal statute purportedly directed at thwarting restraints of trade and preventing monopoly, have the courts formulated a body of legal principles which clearly prescribe the business activities which the antitrust laws prohibit? Many students of antitrust law have taken the position that a negative answer must be given to these inquiries. They feel not only that the antitrust statutes have failed to promote a competitive business environment,<sup>2</sup> but also that the administrative agencies have not consistently taken cognizance of the supposed objectives of these laws

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1. The Sherman Antitrust Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1964); Clayton Act, 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 12-13, 14-21, 22-27, 29 U.S.C. §§ 52-53 (1964); Celler-Kefauver Act, 64 Stat. 1125 (1950), as amended, 15 U.S.C. §§ 18, 21 (1964); Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. §§ 13-136, 21a (1964); Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-58 (1964). The prime objective of the Celler-Kefauver Act was to amend the Clayton Act so that the latter would prohibit certain business activities that previously did not fall within the condemnation of the act. For the Supreme Court's interpretation of the legislative history of the Celler-Kefauver Act and its objectives, see *Brown Shoe Co. v. United States*, 370 U.S. 294, 311-23 (1962). Although the act took the form of an amendment to the Clayton Act, it has been repeatedly referred to as the Celler-Kefauver Act rather than as a part of the Clayton Act. The same procedure is followed in the course of this review.

2. For example, the purported objective of the Robinson-Patman amendment to the Clayton Act was to prohibit price discrimination which impaired competition. Whether the act was intended to foster competition or protect competitors is subject to debate. See generally BAUM, *THE ROBINSON-PATMAN ACT* (1964).

while discharging their duties with respect to overseeing various segments of the nation's economy.<sup>3</sup> The upshot of this legal environment is that businessmen, even when aided by competent legal counsel, cannot accurately forecast whether a planned merger or other activity will later be declared violative of our antitrust laws.<sup>4</sup>

Admittedly, benefits would inure to businessmen, as well as to other members of our society, if Congress and the courts clearly stated all the kinds of business activities that are prohibited by those acts of Congress collectively known as the antitrust laws.<sup>5</sup> However, the failure of the legislative and judicial branches of the federal government to announce succinctly the mandates of the law does not necessarily mean that they have been derelict in the performance of their duties. If each of these branches of the government directed its efforts toward tabulating once and for all a complete list of commercial activities which were to be treated as anathema to the economic well-being of the nation, would such an objective be attainable? In the milieu in which business must operate, such a goal seems unrealistic. Ours is a dynamic environment in which there is an ever-changing attitude toward the roles of government, business, and labor.<sup>6</sup> Propriety does not have a fixed meaning; the consensus of one day may be the minority or discarded view of the next. Ideas as to what is good and what is bad appear, often fluctuate, and in time disappear. National goals are multiple rather than singular.<sup>7</sup> In this setting, it is not surprising to find that our statutory scheme and judicial determinations in the field of antitrust are disjointed rather than symmetrical. Antitrust law in 1965 can be appropriately described as lacking consistency and being highly flexible, unsettled, and, to a degree, incomprehensible.<sup>8</sup>

*Perspectives on Antitrust Policy* is a collection of seventeen essays. The essays, each of which constitutes a single chapter, were initially presented as lectures in a series of weekly seminars held at the School of Law of the University of Virginia during the spring

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3. For a compact consideration of the extent to which federal, state, and local government activities in practice thwart the operation of the antitrust laws, see MASSEL, *COMPETITION AND MONOPOLY* 42-82 (1962).

4. This problem is extensively probed in chapters 15 and 17 of *Perspectives*.

5. A complete list of those business activities which are exempted by statute from the antitrust law appears in *Perspectives* at 301-11.

6. The change in emphasis from equality of opportunity to economic security has had a significant impact on the nature of the effort exerted by the government in giving a sense of direction to the nation's economy. The appeal and decline of laissez-faire is clearly presented in FINE, *Laissez Faire and the General-Welfare State* (1956). For a current study of the nation's economic structure, see GINZBERG, Hiestand, & Reubens, *The Pluralistic Economy* (1965).

7. See, e.g., *Report of the President's Commission on National Goals*, in *Goals for Americans* 1-31 (1960), in which fifteen distinct national goals are listed and analyzed.

8. Most of the authors whose writings appear in *Perspectives* presumably would subscribe to this characterization.

semester of 1963. In a very short preface, the editor alludes to the diversity of approach, the dissimilarity of areas of expertise, and the differences of opinion of the contributors. He refers to the complexities of the antitrust laws and the absence of precisely defined objectives. Mr. Phillips points out that the seventeen contributors are apprehensive that neither legislators nor judges seem to know exactly how best to shape the American economy so as to promote individual, business, and national economic health and growth. The editor views the themes which underly most of the essays as enigmatic. Most of the authors ponder the questions whether businessmen or the government should control the economic development of the nation and whether our antitrust laws should seek to preserve *competition* or *competitors*.

The general tone of *Perspectives* is one of dissatisfaction with the current state of the law. Most of the authors conclude that our legislators and judges have missed the mark. Similarly condemned are some of the policies of the Interstate Commerce Commission<sup>9</sup> and the Federal Trade Commission,<sup>10</sup> as well as such government activities as the purchasing of materials and equipment and the use of public funds to support research and development by private industry.<sup>11</sup> Except for the chapter<sup>12</sup> in which, contrary to the import of another chapter,<sup>13</sup> the author writes in favor of continuing the scope of the present exemption of organized labor from the antitrust laws, accolades in support of our antitrust policies are almost entirely lacking. The bases of the discontent of these experts fall into several distinct categories.

*The Non-Economic Character of Our Antitrust Laws.* Have the congressmen who have written in support of and voted for our antitrust laws been motivated by a desire to attain certain economic objectives, such as the efficient allocation of our nation's resources, or have they been driven by such non-economic concepts as democratic idealism or the desire to gain the approbation, and thereby the votes, of their constituents? The goal of a country's economic structure, according to traditional economic thought, is to utilize the nation's human, natural, and capital resources most effectively and at the least possible cost. According to the advocates of laissez-faire capitalism, this result can be brought about if the interaction of supply and demand is the exclusive determinant of the manner in which resources and capital are marshaled and used. Competition is the only regulator of this kind of economic environment. Price, assortment of products, and allocation of income and wealth are the

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9. Ch. 11.

10. Ch. 1.

11. Ch. 12.

12. Ch. 16.

13. Ch. 13.

result of the unrestricted interplay of each seller vying with every other seller and each buyer pursuing his own self-interest by seeking to obtain the most he can for what he offers in exchange.

The contributors to *Perspectives* assert that our antitrust legislation is not sufficiently directed at attaining the best kind of economic environment for the nation.<sup>14</sup> Instead, they insist, our laws over-emphasize that aspect of the American psyche which favors a society composed of many small businessmen rather than a small number of large business organizations. Attacking our antitrust laws on the ground that they fail to deal with the problem which they are purportedly designed to resolve, these writers contend that in practice they often serve to deny the nation the economies of large-scale business operations. Further argument is made that the law in its present form serves to promote waste of the nation's resources and capital equipment by shielding economically inefficient business enterprises from destruction; to the extent that the anti-trust laws do not permit the untrammelled operation of those forces which bring success to those businesses which make the greatest contribution to the community and eliminate the least efficient businessmen, the American people have been denied the advantages inherent in an economy governed by unrestricted competition.

Support for the position that our laws are in many instances neither preserving nor promoting competition can be found in legislation and judicial decisions. Patently, the Miller-Tydings Act<sup>15</sup> and the McGuire Act,<sup>16</sup> which exempt certain kinds of resale price maintenance arrangements from the antitrust laws, may actually stimulate anticompetitive behavior. Permitting manufacturers to set the price at which all retailers must market the manufacturer's merchandise protects an activity which is the antithesis of competitive conduct. For example, in applying the Robinson-Patman Act the Supreme Court has held that a supplier violated the law by charging a retailer a lower price than that demanded of other retailers in the same geographical area, even though the supplier was motivated to make such an arrangement in order to assist the individual retailer to meet the price being charged by retailers of a similar product.<sup>17</sup> Indeed, the Court refused to ascribe any probative

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14. *E.g.*, chs. 1 & 2.

15. 50 Stat. 693 (1937), as amended, 15 U.S.C. § 1 (1964). The Miller-Tydings Act is an amendment to the Sherman Act.

16. 66 Stat. 632 (1952), as amended, 15 U.S.C. § 45(a) (1964). The McGuire Act is an amendment to the Federal Trade Commission Act.

17. *FTC v. Sun Oil Co.*, 371 U.S. 505 (1963). The anomalous situation which has resulted under the Miller-Tydings Act and McGuire Act is illustrated by the result arrived at in *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), where the Court indicated that a manufacturer's efforts to maintain the resale price violated the Sherman Act if it failed to come within the exemption contained in the McGuire Act.

value whatever to that motivation.<sup>18</sup> In arriving at its determination, the Court directed its attention to the impact of such a practice on the other retailers who sold the supplier's product rather than to the benefits which might inure to consumers by the reduction in price granted to meet competition.

The foregoing is illustrative of one of the facets of antitrust policy which the essayists in *Perspectives* find objectionable. Such prescribed norms are viewed as manifestations of an impulse to satisfy non-economic goals under the guise of preserving and promoting competition. According to these essayists, the neglect clearly to identify and distinguish economics from matters of a different nature has resulted in the formulation of a body of legal rules which have hamstrung, rather than stimulated, our economy.

*Size and Power Rather Than Economic Impact as the Test of Illegality.* The question is presented whether the size of a business organization, without regard to the characteristics of the particular segment of the economy in which it functions, is a proper standard to invoke in determining the illegality of certain kinds of action. The Sherman Act, on its face, condemns certain kinds of activities without any regard to whether the pattern of conduct in issue is in fact detrimental to competition.<sup>19</sup> The Clayton Act declares that certain behavior is illegal if it tends to lessen competition substantially or to create a monopoly.<sup>20</sup> In *Perspectives*, it is argued that the current tendency of the courts to apply these laws on a per se basis of unlawfulness, rather than on a test of reasonableness under the circumstances, is injurious to American business as well as to competition.<sup>21</sup>

18. The Court held that the good faith defense to price discrimination contained in § 2b of the Clayton Act as amended by the Robinson-Patman Act, which permits the lowering of prices to meet competition, was applicable only to horizontal and not to vertical competition.

19. Section 1 of the act provides in part: "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, is hereby declared to be illegal." Section 2 provides: "Every person who 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, shall be deemed guilty of a misdemeanor . . ." Sherman Antitrust Act, ch. 647, §§ 1, 2, 26 Stat. 209 (1890), 15 U.S.C. §§ 1, 2 (1964).

20. Section 7 of the Clayton Act, prior to the Celler-Kefauver amendment, read in part as follows: "That no corporation engaged in commerce shall acquire . . . the whole or any part of the stock . . . of another corporation . . . where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce." Clayton Act, ch. 323, § 7, 38 Stat. 731 (1914). As amended, the section reads: "That no corporation . . . shall acquire . . . the whole or any part of the stock . . . or any part of the assets of another corporation . . . where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. . . ." Celler-Kefauver Act, ch. 1184, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964).

21. See, e.g., ch. 1.

Over the years the Supreme Court has vacillated between two approaches. At times the Court has employed a subjective frame of reference—is the action in question, in this industry, reasonable?<sup>22</sup> At other times, it has resorted to an objective test, asking whether a business which enjoys a given percentage of the market, or whether a certain kind of activity, in and of itself, is violative of the law.<sup>23</sup>

The examination made in this book of business mergers raises the question of the propriety of applying antitrust concepts to vertical and conglomerate combinations.<sup>24</sup> One of the authors concedes that it may be consistent with sound economic policy to prohibit certain horizontal mergers. He insists, however, that there is a very serious doubt as to whether a strong case can be made in economic terms to apply the mandates of the antitrust laws to vertical mergers and to conglomerate combinations.<sup>25</sup> Why, then, have the courts applied antitrust policies to vertical combinations and why have some courts insisted that our antitrust laws should be applied to conglomerate combinations as well? It is suggested that the answer may be found for the most part in the fear which many Americans have of bigness, power, and the mere presence of power in the market place. Inhibiting vertical and conglomerate mergers undoubtedly impedes the substitution of big business for small business. This result is consistent with the attitude that our national interests will best be served by the latter rather than the former type of business structure.

The Sherman Act declares that a monopoly is illegal per se. Except for those sectors of the economy where monopoly is protected by law, the bare possession of monopoly power is unlawful without regard to the manner in which it is used. One of the purported objectives of the Clayton Act is "to nip monopoly in the bud."<sup>26</sup> In *Perspectives* this per se approach is depicted as unrealistic. The proposition that a monopolistic situation once established will remain unless abated by government action is rejected as fallacious. It is urged that, in our ever changing economic environment, monopo-

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22. See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

23. See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Northern Securities Co. v. United States*, 193 U.S. 197 (1904). See also *United States v. First Nat'l Bank & Trust Co.*, 376 U.S. 665, 669-70 (1964).

24. See chs. 2, 4, & 8.

25. Ch. 8. For a discussion of the circumstances under which conglomerate mergers should be struck down under the Celler-Kefauver Act, see Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313 (1965). Professor Turner is now the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice.

26. *Transamerica Corp. v. Board of Governors*, 206 F.2d 163 (3d Cir. 1953). See also *United States v. E. I. Du Pont de Nemours & Co.*, 353 U.S. 586, 592 (1957).

lies will in time fade, their products replaced by the offerings of others in the market place.<sup>27</sup>

Of all of the attacks which the authors hurl at the current status of the antitrust laws, that condemning the current approach to monopoly seems to be the least tenable. It fails to take cognizance of the fact that monopolists do not simply stand by and permit others to invade their domain of dominance. While history is replete with illustrations of monopolies being broken up, monopoly power being curbed, and potential monopolists being deterred by governmental action from expanding the realm of their omnipotence, one would indeed be hard pressed to find many instances where, absent such action, monopolists were overwhelmed by newcomers in the market place. Admittedly, changes in technology may have an adverse effect on an existing monopoly. However, more often than not, the monopolist may be better equipped to utilize the fruits of change because of his position in the market place. The realities of life seem to strengthen, rather than erode, established monopolies.

*Exemptions From Antitrust Laws.* Are certain actors in the market place improperly exempted from the commands of the Sherman and Clayton Acts? Is there something sacrosanct about labor, transportation, insurance or those other participants in the market place which the law frees from the usual mandates of antitrust policy? *Perspectives* contains a cross-section of opinion in regard to this anomalous feature of the law.<sup>28</sup> The breadth of the immunity of labor from the Sherman and Clayton Acts is defended in one chapter<sup>29</sup> and objected to in another.<sup>30</sup> One author insists that section 14 (b) of the Taft-Hartley Act, which permits states to enact so-called "right to work laws," should be retained; another argues for its repeal. A chapter devoted to the transportation industry concludes that the regulators charged with overseeing this industry have become to an extent the protectors, rather than the policemen, of those whom they are charged with policing.<sup>31</sup> The author of this chapter of the book concludes that, because of administrative policies, the American people are being denied the benefits of competition in this sphere of the economy. As he views this sector, it is more protected than regulated.

*The Torment of Uncertainty.* Another one of the themes underlying this work is the lack of certainty in antitrust law. Both the reversal of previous positions, with the resulting inability of lawyers to predict with a reasonable quantum of confidence how a court

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27. Ch. 4.

28. Ch. 12 deals exclusively with the question of exemptions.

29. Ch. 16.

30. Ch. 13.

31. Ch. 11.

will rule in regard to a particular business procedure, and the drag on decision-making by businessmen caused by the lack of an adequate basis upon which it can be determined whether a particular activity will later be declared unlawful are aspects of the current antitrust picture which are censured by several of the authors.<sup>32</sup> While there is merit in the criticism that these conditions are symbolic of a basic defect in our antitrust laws, is there a remedy? The authors' proposals that greater attention be paid to the laissez-faire dogma, that government policies be more consistently applied, and that exemptions from antitrust laws, regardless of how well-intended, be eliminated, fail to take into consideration the total environment in which American business must operate. Are the inconsistency, the floundering, and the lack of clarity really avoidable? While certainty and precision would indeed be desirable, is it reasonable to expect a simple, readily ascertainable, and settled set of norms in an area of human endeavor which itself is anything but static?

As business objectives change, as new techniques appear and old ones vanish, as innovations give rise to formerly unforeseen kinds of human activity, and as societal desiderata are modified, the law governing business arrangements must likewise change. It is this ability to change the commands of the law to meet the requirements generated by new events which has been commended as one of the strongest aspects of our legal system. Even a cursory examination of the current contents of our criminal law or the law governing civil rights reveals that fundamental changes have been made in these areas within the past decade. The same can be said for other segments of the law.

There is nothing unique about American business which will permit our antitrust laws to be reduced to an immutable set of standards. Ours is essentially an unstable economic environment, one which at times may even be described as volatile. In such an atmosphere it is constantly necessary to alter prescribed norms to meet the exigencies of change. Would the economy and the nation's businessmen have fared as well as they have if our antitrust policies had too little resiliency? Some of the essayists might be taken to task for their failure to applaud, however mildly, the overall willingness of the courts and Congress to change the law to meet the needs of our society.

Among the most notable features of *Perspectives* is its latitude. The material very beneficially forces the reader to think in terms of the total picture rather than individual aspects of a complex problem. It rejects a "cubbyhole" approach. Illustrative of the scope of the volume is the chapter entitled "The Influence of Interna-

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32. Special consideration is given to this question in chapter 17, which is entitled *The Impact of Antitrust Law on Corporate Management*.

tional Factors," written by Kingman Brewster, Jr., in which the author compares the different standards of propriety enforced by the courts in regard to domestic and foreign commerce.<sup>33</sup> With the increased significance of international trade in our economic life, this section of the book can prove especially helpful to those who have previously directed their attention exclusively to the domestic side of antitrust policies.

A reader who is already familiar with antitrust law will find that this book will broaden his horizons. After completing his reading he will probably feel compelled to re-evaluate his prior personal appraisal of current antitrust policies. Those who are specialists in one or two spheres of antitrust law will find that they will return to their areas of concentration with new insights gained from having studied those chapters which delve into matters beyond their own immediate interest. For the neophyte, this volume can prove to be an especially helpful introduction to the field. The prime purpose of the authors is to shed light on fundamental concepts and dilemmas rather than to explore minutia, subtle niceties, and distinctions which more often than not serve to confuse, rather than edify, the newcomer.

This volume, like others which undertake the study of a portion of the law in the throes of adapting to change, is somewhat dated. New material would have to be added to make this work entirely current. However, this factor does not detract from the exemplary manner in which this collection of essays deals with the problem of achieving the kind of economy to which our nation aspires. Those who have already read this book, as well as those who will do so in the future, would undoubtedly welcome to their library an expanded and up-to-date edition of *Perspectives*, on the condition that it contain the same kind of breadth of treatment, depth of perception, and the touch of the polemic found in its predecessor. I for one would like to see how the same authors would treat the recent Supreme Court decisions relating to joint ventures,<sup>34</sup> reciprocity,<sup>35</sup> and potential competition.<sup>36</sup> It would indeed be pleasant to learn that in the immediate future the authors who contributed to *Perspectives* will undertake such a task.

*Edwin W. Tucker,*  
*Assistant Professor of*  
*Business Law,*  
*The University of Connecticut*

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33. Ch. 14.

34. *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964).

35. *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965).

36. *United States v. Continental Can Co.*, 378 U.S. 441 (1964); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964).