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# Hawley: The New Deal and the Monopoly Problem

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THE NEW DEAL AND THE MONOPOLY PROBLEM. By *E. W. Hawley*. Princeton, N.J.: Princeton University Press. 1966. Pp. xv, 525. $10.

The irregularities and upheavals that have appeared at one time or another in the economic structure of every nation have generated, as might be expected, a plethora of preventive and curative prescriptions. Although the authors of these prescriptions usually agree on the ultimate purpose and result to be achieved by their respective plans—economic, social, and political forces operating in harmony to the advancement of the populace—they invariably disagree violently on the route to follow so as to reach these goals. Hence, what often appears is a patch quilt of incompatible policies, statutes, and bureaus, each challenging the other, so that, in the process of attrition, all are neutralized.

This country experienced more than its share of these cross-tensions of economic planning during the New Deal era of the 1930's. Much has been written in description and analysis of the personalities involved and of the *Zeitgeist* of the time.[1] To the long list, Professor Hawley adds "The New Deal and the Problem of Monopoly," a study of the conflicting schools of thought that influenced and shaped New Deal business policy, focusing primarily on the economic implications of the interplay between these groups.

## I.

Postulating that it was universally believed that the Great Depression could be traced to the existence of monopolies and cartels, Professor Hawley concludes that, to the majority of Americans, the obvious solution was a drastic reform of the economic institution. Two approaches, each with their vociferous advocates, appeared. First, there was the position taken by the antitrusters, that rigid and excessively high prices, along with the dilution of consumer power, could be erased by decentralizing industrial giants and by creating an atmosphere, via stringent antitrust prosecution, in which free competition would flourish. The second view favored national economic planning, and its adherents were to be found in three different camps: the political left, who believed that planning should be the responsibility of the state; a center group, who believed that government-business cooperative planning was possible; and those planners to the right, who advocated a trade association type of business structure.

All of these divergent views came together under the umbrella

1. One of the best studies of this period is SCHLESINGER, THE COMING OF THE NEW DEAL (1959). For a recent "insider's" view, see MOLEY, THE FIRST NEW DEAL (1966).

of the National Industrial Recovery Act of 1933. The act was broad enough to appeal to each of the pressure groups and until section 3 of the act was declared an unconstitutional delegation of legislative power in *Schecter Poultry Corp. v. United States*,[2] each group struggled to dominate the trend of policy under the banner of the competition ethic. Professor Hawley describes the conflict in the following terms (p. 50):

> Because of the strength of this competitive ideal and the necessity of making some gestures towards it, the National Industrial Recovery Act was a contradiction in terms from the beginning. Its proponents wanted to permit agreements that would violate the Sherman Act, yet they could not admit that they would permit monopolies or monopolistic practices; and the solution had been a clause exempting the proposed codes from the antitrust laws and another providing that no code should be so applied as "to permit monopolies or monopolistic practices...."

Both the economic planners and the antitrusters came away from the NRA experience suspicious and, in some cases, contemptuous of the other's position. Moreover, both possessed new ideas as to how to implement their own policies. Economic planners were to adopt a more cautious approach; they set out to attain well-defined goals through legislation, to isolate and attack specific problem areas, and thus to lay down a regulated economic order in successive stages. Antitrusters were convinced that big business' attempts to draft self-serving codes under the act demonstrated that the monopolistic structure of American industry had to be broken down. And finally, the business community believed that both approaches were untenable, and businessmen reverted to the tenets of Social Darwinism and "rugged individualism" which they interestingly enough ignored in practice, as was evidenced by their joining together in trade associations.

In examining these conflicts, Professor Hawley's book unfortunately pierces only the top layer of a more basic struggle of much greater consequence—the doctrines of *laissez faire* engaged in a last-ditch battle with economic and social reform. The author's failure to discuss this underlying conflict was undoubtedly intentional, since it would constitute a study in itself.[3] Nevertheless, the fact remains that the New Deal was merely a chapter in a story which began with Adam Smith, extended through Spencer's conversion of Darwin's theory of evolution into a sociological and economic doctrine, and

2. 295 U.S. 495 (1935). Mr. Chief Justice Hughes complained that "the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered." *Id.* at 542.

3. See generally FINE, LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE (1956); HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT (1955 ed.).

finally exploded but did not culminate in the Supreme Court's sharp reversal in attitude in 1937. Since 1890, the strongest citadel of *laissez faire* had been the United States Supreme Court;[4] using the due process clauses of the fifth and fourteenth amendments, the Court had consistently struck down social and economic reform legislation as an interference with the "liberty to contract."[5] When the Court held unconstitutional a New York law limiting the working hours of bakers to ten hours per day, Mr. Justice Holmes in a dissenting opinion, objected sharply to what he considered to be the imposition of *laissez faire* on the nation under the guise of construing the Constitution:

> The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics* . . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a partciular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.[6]

Hence, in the last analysis, reform of any type, whether its base of support came from antitrusters or economic planners, had to pass over the rocks of the *laissez faire*-oriented attitudes of a majority of the Supreme Court. Initial New Deal reforms met defeat,[7] but in 1937, President Roosevelt requested Congress to authorize the appointment of a new Justice whenever an incumbent failed to retire at age seventy,[8] and although the President's request was denied, the Court's intransigence faded and the success of New Deal legislation, along with the demise of constitutional Social Darwinism, was assured. One could make out a good case for the suggestion that the most significant feature of the New Deal era was the laying to rest of the idea that the principles of *laissez faire* were implicit in the language of the Constitution.

Until the latter stages of the New Deal, activity under the existing antitrust laws was muted and overshadowed by the clamor for

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4. I have taken 1890 as the beginning of the era of negation under the due process clause. The late Judge Hough . . . was more specific. He dated it from the decision of *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota* . . . . In that case the Court decided that in establishing rates for railroads the question of their reasonableness cannot be left by the legislature to a state commission, but must be subject to judicial review.

JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 50-51 (Vintage ed. 1963).

5. See Holmes' dissent in Adkins v. Children's Hospital, 261 U.S. 525, 567 (1923).

6. Lochner v. New York, 198 U.S. 45, 75 (1905).

7. For a chart summarizing New Deal legislative failures at the hands of the Supreme Court, see JACKSON, *op. cit. supra* note 4, at 181.

8. In commenting upon the attitude of the Supreme Court, Roosevelt remarked: "Little by little, new facts become blurred through old glasses fitted, as it were, for the needs of another generation; older men, assuming that the scene is the same as it was in the past, cease to explore or inquire into the present or the future." H.R. Doc. No. 142, 75th Cong., 1st Sess. 4 (1937).

reform through other avenues. Nevertheless there *was* some activity, and it is unfortunate that the author does not fully explore the decisions that were handed down by the Supreme Court during this period. Between 1933 and 1940 the Supreme Court decided twelve cases involving the antitrust laws, eleven of which were concerned with Sherman Act violations[9] and one with a Clayton Act, section 3 violation.[10] Some of these decisions deserve comment. In 1933, the Court allowed 137 bituminous coal producers in the Appalachian area to sell through an exclusive selling agency which, among other things, set prices and apportioned orders for coal on an arranged basis.[11] The case is significant in that it represents a retreat from the price fixing per se rule of *United States v. Trenton Potteries Co.*[12] Unquestionably, the Court's retreat was due to a recognition that the economic circumstances existing in the coal industry were chaotic and deplorable. Thus there appears to be substantial contradiction between the Court's sensitivity to prevailing economic conditions, as reflected by its opinion in *Appalachian Coals,* and the harsh treatment it was subsequently to give economic reform legislation. However, there are several factors that may resolve the apparent contradiction. First, the Court had already reconciled the boundaries of "freedom to contract" and the related concept of property rights with the Sherman Act's mandate of free competition: not *every* contract restraining trade is proscribed by section 1 and *Appalachian Coals* was, therefore, merely an expansion of the "rule of reason."[13] Furthermore, there is a strong indication that the Court was embarking upon a task comparable to the journey begun in 1890 when due process was interpreted, via a substantive reasonableness standard, so as to include the dogma of *laissez faire.* To Mr. Chief Justice Hughes, the crucial "question thus presented chiefly concerns the effect upon prices."[14] He concluded that merely because "the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that . . . cooperative endeavor to correct them necessarily constitutes an unreasonable restraint of

9. Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940); United States v. Borden Co., 308 U.S. 188 (1939); Interstate Circuit v. United States, 306 U.S. 213 (1939); Puerto Rico v. Shell Co., 302 U.S. 253 (1937); Sugar Institute, Inc. v. United States, 297 U.S. 553 (1936); Indiana Farmer's Guide Publishing Co. v. Prairie Farmer's Publishing Co., 293 U.S. 268 (1934); Teamsters Local 167 v. United States, 291 U.S. 293 (1934); Central Transfer Co. v. Terminal R.R. Ass'n, 288 U.S. 469 (1933); Appalachian Coals, Inc. v. United States, 288 U.S. 356 (1933).

10. International Business Mach. Corp. v. United States, 298 U.S. 131 (1936).

11. Appalachian Coals, Inc. v. United States, 288 U.S. 356 (1933).

12. 273 U.S. 392 (1927).

13. The so-called "rule of reason" was introduced into the antitrust vernacular in Standard Oil Co. v. United States, 221 U.S. 1 (1911).

14. 288 U.S. at 373.

trade."[15] Thus it can be argued that as of 1933 the Court, through the Sherman Act, intended to pass upon the "reasonableness" of prices.[16]

But the acquiescense (or retreat) of the Supreme Court in 1937 to the onslaught of New Deal policy was complete. Thus, in 1940, when faced with a case in which the defendants participated in a concerted buying program designed to stabilize prices in the oil industry, the Court abruptly shut the door on a reasonableness of prices inquiry.[17] Price fixing was held to be unreasonable per se and the Court stated that "elimination of so-called competitive evils is no legal justification for such buying programs."[18]

## II.

The conflicts, theories, and compromises of the New Deal were not erased by World War II and its aftermath. Indeed, their residue is very much a part of coeval life. For example, the Keynesian fiscal spending approach still dominates the economic scene and it was in the throes of the New Deal that the concept of countervailing power, or "counterorganization" as Professor Hawley labels it, "gradually, haltingly, incoherently, almost haphazardly" appeared (p. 187). The essence of the latter theory, as advanced by J. K. Galbraith, is simple: "private economic power is held in check by the countervailing power of those who are subject to it."[19] While acknowledging that counterorganization was not the dominant theme of New Deal policy, Professor Hawley contends that New Deal programs "generated a new organization consciousness among previously weak and relatively unorganized groups" (p. 189). In particular, governmental sanctions were applied as a means of developing countervailing power in agriculture and labor. Professor Galbraith, in discussing the legacy of the New Deal application of counterorganization or countervailing power, perhaps overzealously suggests that "in fact, the support of countervailing power has become in modern times perhaps the major domestic peacetime function of the federal government."[20]

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15. *Id.* at 374.

16. Writing in 1937, Arthur Burns said in a discussion of the implications of the *Appalachian* decision: "Apparently in this case the Court, interpreting the Sherman Act, has embarked upon a journey towards the control of prices, although that control is indirect and tentative." Burns, *The Anti-Trust Laws and the Regulation of Price Competition*, 4 LAW & CONTEMP. PROB. 301, 305 (1937).

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

18. *Id.* at 220.

19. GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER 111 (rev. ed. 1956).

20. *Id.* at 136. In a recent case, United Mine Workers v. Pennington, 381 U.S. 657, 675 (1965), the specter of original power (certain coal producers) combining with

Professor Hawley points out that the only group too weak, too poorly organized, and too indifferent to the power potential of counterorganization was the consumer. He is correct. Not only did consumers fail as a group to avail themselves of their inherent countervailing bargaining power, but the passage of the Robinson-Patman Act[21] in 1936 was designed to render impotent the one group (large distributors and chains) that had been operating as their "proxy" in bargaining confrontations with large manufacturers. Prior to Robinson-Patman, mass distributors, developed as a counter to the bargaining power possessed by manufacturers, were able to demand and obtain price discounts—the savings from which were largely passed on to the consumer.[22]

As a legacy of the New Deal, the Robinson-Patman Act has not been easy to live with.[23] It has been justifiably called "one of the most tortuous legislative pronouncements ever to go on the statute books."[24] Moreover, the act is not compatible with the overall purpose of the antitrust structure. As Donald Turner, the present head of the Antitrust Division of the Justice Department, has written, "protection of a certain class of competitors may yield different results from protection of the competitive process generally, particularly where the protected class is threatened by more efficient techniques."[25] And, despite persistent urgings for amendment,[26] the complexities and shifting nuances of the Robinson-Patman Act will undoubtedly linger on as part of the antitrust fabric. Furthermore, one would have to dispute Professor Hawley's conclusion that the "good faith meeting of competition" proviso "diluted" the original purpose of the act by providing the Federal Trade Commission and the courts with an opportunity to use a "rule of reason" approach (pp.

countervailing power (the bargaining unions) so as to force less competitive and smaller competing coal producers out of business was raised.

21. 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1964).

22. See generally FTC, *Special Discounts and Allowances to Chain and Independent Distributors—Drug Trade*, S. Doc. No. 94, 73d Cong., 2d Sess. (1934); FTC, *Special Discounts and Allowances to Chain and Independent Distributors—Grocery Trade*, S. Doc. No. 89, 73d Cong., 2d Sess. (1934); FTC, *Special Discounts and Allowances to Chain and Independent Distributors—Tobacco Trade*, S. Doc. No. 86, 73d Cong., 2d Sess. (1934).

23. See generally *Eine Kleine Juristische Schlummergeschichte*, 79 HARV. L. REV. 921 (1966).

24. DIRLAM & KAHN, FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY 119 (1954).

25. Turner, *The American Antitrust Laws*, 18 MODERN L. REV. 244, 249 (1955). Turner, writing with Professor Kaysen, advocates repeal of the Robinson-Patman Act "in favor of a statute dealing separately with (a) price discrimination directed against competing sellers and (b) price discrimination that harms particular buyers." KAYSEN & TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 47-48 (1959).

26. See Patman, *For H.R. 11 and S. 11 To Strengthen the Robinson-Patman Act and Amend the Antitrust Law Prohibiting Price Discrimination*, 11 VAND. L. REV. 399 (1957).

266-67). Case law indicates that the boundaries of the section 2(b) defense are so obscure as to sharply dissipate its efficacy. In brief, the "good faith" defense has proved an inconsequential obstacle to prosecution under the Robinson-Patman Act.[27]

A significant portion of the book, 200 pages or so, is devoted to a summary of attempts to revitalize the economy through the Sherman and Clayton Acts. By eliminating abuses, such as price uniformity under basing point systems, and by focusing prosecution upon specific non-competitive industries, such as the movie industry, the antitrusters hoped to provide an atmosphere where competitive forces would operate so as to place a premium on efficiency and consumer welfare. It was very clearly a negation of national economic planning. Thurman Arnold, who was in charge of antitrust prosecution from 1938 to 1943, and was the chief architect of this form of attack on the ills of the economy was, according to Professor Hawley, "never . . . greatly concerned about the mere possession of economic power or the so-called evils of bigness per se" (p. 428). To him, "large organizations, as long as they were efficient and passed along the savings to consumers, were desirable" (p. 428). Arnold's approach, which was to prohibit conduct that interferred with normal market patterns, seemed to echo the mood of the thirties.

Certainly the Sherman and Clayton Acts were designed to reach specified types of conduct, but it is interesting to note that in the post-war period the prevailing concern has been with size and the powers that flow from the "rising tide of economic concentration in the American economy."[28] The anti-merger act was strengthened in 1950.[29] Recent cases indicate that the standards of proof necessary for successful prosecution in merger cases might be less stringent than those previously required,[30] and Antitrust Division chief Turner has revealed a plan to curtail market power and reduce industrial concentration.[31] Consequently, it appears that we are witnessing a shift in the direction of antitrust policy. Using the flexibility of the language in the antitrust repertory,[32] (or taking advantage of what Professor Julius Stone calls "categories of illusory reference")[33]

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27. See Austin, *Robinson-Patman and Meeting Competition: A Myriad of Problems With No Solutions*, 40 TUL. L. REV. 313 (1966).

28. Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962).

29. Clayton Act § 7, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964).

30. United States v. Pabst Brewing Co., 384 U.S. 546 (1966); United States v. Von's Grocery, 384 U.S. 270 (1966); see Hale & Hale, *Delineating the Geographic Market: A Problem in Merger Cases*, 61 NW. U.L. REV. 538 (1966).

31. KAYSEN & TURNER, *op. cit. supra* note 25.

32. Mr. Chief Justice Hughes noted that "the Sherman Act, as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions." Sugar Institute, Inc. v. United States, 297 U.S. 553, 600 (1936).

33. STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS 235-300 (1964).

courts are mirroring a general concern with concentration by taking a harsh stand against any type of activity that might lead to further market consolidation.

Professor Hawley concludes by remarking that "current policy . . . , like that of the New Deal era, is still a maze of conflicting cross-currents . . ." (p. 492). He doubts that consistent policies will ever be established. His assessment is undoubtedly correct; but perhaps this lack of unity is desirable. All the different approaches—antitrust, fair trade, Keynesian fiscal policy, national planning, etc. —serve as "countervailing" forces and thus prevent a single and more than likely oppressive and coercive system from dominating the economic scene.

In any event, Professor Hawley is to be commended for his exploration of the monopoly problems of the New Deal era. His study serves as an informative background against which to view contemporary problems.

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