LEGISLATION

THE FUTURE OF ANTI-TRUST LEGISLATION—The critical condition of American industry, in the throes of an economic collapse affecting every class of society, has naturally precipitated a series of attacks at every part of our industrial structure against which the blame for this condition might be laid. Of these attacks, one of the most severe has been directed against our anti-trust policy.[1] The resultant exposure of the effects on industry of the application of this policy may result in a basic change in a system of legislation that has withstood intermittent assaults for over forty years. Although an economic depression can never be attributed to a single cause, a time of depression may result in the exposure of the faults latent in a particular part of the economic system. The crippled state of American business has brought to light certain fundamental faults of American anti-trust legislation.

The most striking characteristic of the state of our industries at the present time is that in the majority of them, the productive capacity is far greater than the consumptive requirements.[2] The development of business at such a rate as to outstrip the needs of the consumer was brought about by a rapid improvement of technique, marked by increasing mechanization of industry, combined with an over-expansion of plants under the influence of the greatest period of inflation in our history.[3] Whether or not the consumptive needs will eventually increase sufficiently to meet the present productive capacity, the potentialities of production will during the next few years continue greatly to exceed the maximum demands of consumption. In the face of such a situation, the policy indicated to restore and preserve the normal relation of supply and demand so as to achieve a stabilization of industry is necessarily one of regulation. If the existing units of business are to survive, it is imperative that their combined production be restricted to consumptive needs, and that each unit be assigned its share in the total production. It is also important that prices proportionate to the marginal cost of production be maintained. The American policy of prohibiting self-regulation of industry and enforcing uncontrolled competition has been persistently preserved despite these conditions. Production continues to exceed demand; price-cutting is followed by the failure of the weaker concerns. The direct results of unregulated production and merchandising are the further demoralization of industries, increase in unemployment, and, in some instances, the premature exhaustion of natural resources.

The state of the oil industry best serves as an illustration of all of these results. The potential oil production of the United States is four times the

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[1] See for instance Marcosson, *What Price the Sherman Law?* SATURDAY EVENING POST, Feb. 21, 1931, p. 6; Barrows, *Oil: An Industry Drowning in a Flood of Laws* (1931) 84 REVIEW OF REVIEWS 58; Levy, *Revision of Anti-Trust Laws*, OFFICIAL BULL. AM. SUPPLY AND MACH. MFRS. ASS'N, Nov. 30, 1931; Woll, *Organized Labor Demands Repeal of Sherman Act* (1930) CXLVII ANNALS 185. See also the reports on the recent symposia on the anti-trust laws at Columbia University (published by Commerce Clearing House, 1932) and at New York University (RELATION OF LAW AND BUSINESS, 1932).

[2] Doriot, *Our Sick Industries* (1931) 20 YALE REVIEW 442, 448; Wolman, *Unemployment* (1930) 20 YALE REVIEW 234, 237; Levy, *A Contrast between the Anti-Trust Laws of Foreign Countries and of the United States* (1930) CXLVII ANNALS 125, 135.

[3] Doriot, *op. cit. supra* note 2. For a survey showing the rate of increase of production in various industries see Thomas, *The Growth of Production and the Rising Standard of Living* (1926) 12 ACADEMY OF POL. SCI. PROC. 651. For a discussion of state attempts to deal with the problem of overproduction by legislation, see Note (1932) 80 U. OF PA. L. REV. 436.

present demand,[4] yet new wells are drilled at the average of 200 a day,[5] and the estimated daily production is nearly three million barrels.[6] Where adjoining wells tap the same pool, each well-owner joins the race to drain all the oil he can before the pool runs dry.[7] Old wells cannot compete with the flush production of new drillings and are abandoned, with the probable loss of the oil in the abandoned wells.[8] The price wars caused by these conditions are notorious. Many producers are driven out of business, unable to meet the prices set by their competitors. Although the consumers profit momentarily by the lowered prices, the true nature of their profit has been aptly pointed out:

> "The public benefits in this exactly as beachcombers profit by a shipwreck. Shipwrecks are not, however, highly regarded as bases of prosperity, and it requires only the merest common sense to see that if disaster overtakes one member of America's family of basic industries, the others are bound to suffer." [9]

It is the purpose of this note to show to what extent the American anti-trust policy has prevented the alleviation of these conditions, and to indicate the nature of such changes in that policy as should bring about the stabilization of industry. For this purpose it is necessary to analyze the effects of the application of the laws that embody the American policy.

The Supreme Court, in a unanimous opinion, has enunciated the basic principle underlying both federal and state anti-trust statutes:

> "According to them, competition, not combination, should be the law of trade. If there is evil in this, it should be accepted as less than that which may result from the unification of interests, and the power such unification gives." [10]

The federal [11] legislative machinery is so constructed as to make this principle literally enforceable. The *Sherman Law*,[12] prohibiting under pain of severe criminal and civil penalties every contract, combination, or conspiracy in restraint of interstate or foreign trade, is supplemented by the *Clayton Act*,[13] which defines certain practices as restraints of trade and extends injunctive relief to individuals,

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[4] Marcosson, *op. cit. supra* note 1.

[5] Barrows, *op. cit. supra* note 1.

[6] Steele, *The Anti-Trust Laws and the Oil Industry* (1930) CXLVII ANNALS 77, 80.

[7] Barrows, *op. cit. supra* note 1. The proposed device to correct this practice is unitization, *i. e.*, operating as a unit the group of wells tapping the same pool. But for the legality of agreements apportioning the output of competitors see United States v. duPont de Nemours Co., 188 Fed. 127 (C. C. Del. 1911) and United States Tobacco Co. v. American Tobacco Co., 163 Fed. 701 (C. C. S. D. N. Y. 1908).

[8] Steele, *op. cit. supra* note 6, at 80.

[9] Barrows, *op. cit. supra* note 1.

[10] National Cotton Oil Co. v. Texas, 197 U. S. 115, 129, 25 Sup. Ct. 379, 382 (1905).

[11] A full discussion of state anti-trust laws would properly form part of this note. Limitation of space forbids the inclusion of the exact provisions of state legislation, but in the development of the subject, comments will be made on the parallel attitude of the federal and state legislatures and courts to the fundamental problems involved. There is a marked tendency on the part of the states to adopt the policies followed by the federal government. In most states the statutes are much more specific in their prohibitions than the federal statutes. In a few states, notably Pennsylvania, there are no anti-trust statutes, but in these jurisdictions the policies followed are very similar to those in the other states, the only difference being that agreements are declared void (under common law rules) and there are no criminal provisions. For a good outline of state anti-trust enactments, see DAVIES, TRUST LAWS AND UNFAIR COMPETITION (1916) 143-230. See also JENKS AND CLARK, THE TRUST PROBLEM (1917) 241-253.

[12] 26 STAT. 209 (1890), 15 U. S. C. A. § 1 (1928).

[13] 38 STAT. 730 (1914), 15 U. S. C. A. § 12 (1928).

and by the *Federal Trade Commission Act*,[14] which provides a commission to investigate alleged violations of the *Sherman Law* and to suppress unfair methods of competition, by the Act declared unlawful. For the purposes of the present discussion, the operation of this machinery upon individual monopolistic corporations is not important. The individual units of business are experiencing comparative security from restriction.[15] It is the influence of the legislation upon the efforts at cooperation among the separate units of business that presents the problem here treated.

In dealing with attempts at industrial cooperation, the attitude of the courts has been uncompromising. Their steadfast purpose has been to prevent any concerted action calculated to impede free competition, whether or not the attempted combination or agreement was aimed at a worthy purpose, achieved a beneficial result, or imposed only reasonable restrictions on competition.[16] An examination of the decisions reveals the thoroughness of their accomplishment of this purpose.

The two methods of stabilizing an industry suffering from the effects of overproduction are briefly, the curtailment of production, and the setting of minimum prices. Wherever the courts have detected in agreements or combinations the design to effect either of these results, they have declared them illegal. The direct limitation of the production or sale of goods by combination or agreement among producers or distributors has been pronounced illegal under the provisions of federal [17] and state [18] anti-trust legislation; the same is true of agreements designed to achieve this result indirectly, by such devices as the apportionment of output [19] or the division of territory [20] among producers or distributors. Attempts to fix prices in combination, no matter with what purpose, and regardless of the

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[14] 38 STAT. 717 (1914), 15 U. S. C. A. § 41 (1928).

[15] Individual corporations in the form of mergers have received all the benefit of the Supreme Court's "rule of reason" pronounced in Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502 (1911) and American Tobacco Co. v. United States, 221 U. S. 106, 31 Sup. Ct. 632 (1911). The great mergers such as those approved in United States v. International Harvester Co., 274 U. S. 693, 47 Sup. Ct. 748 (1927) and United States v. United States Steel Co., 251 U. S. 417, 40 Sup. Ct. 293 (1920), being found to be combinations that do not unreasonably restrain trade, enjoy without restriction the power directly to control the prices and rate of output in the industries which they dominate. Among independent producers, on the other hand, any direct attempts at price or output control are prohibited whether reasonable or not. (See *infra* notes 17-23). The injustice of this discrimination has been clearly pointed out: Butler, *Needed Changes in the Anti-Trust Laws* (1930) CXLVII ANNALS 189, 190; see also Butler, *A Constructive Anti-Trust Law* (1930) 13 ACADEMY OF POL. SCI. PROC. 156, 159. For examples of the opposing views as to the desirability of mergers, see Note (1930) 79 U. OF PA. L. REV. 602, and FETTER, THE MASQUERADE OF MONOPOLY (1931).

[16] "A combination is not excused because it was induced by good motives, or produced good results"—Thomsen v. Cayser, 243 U. S. 66, 86, 37 Sup. Ct. 353, 359 (1916). See also Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 33 Sup. Ct. 9 (1912).

[17] Swift & Co. v. United States, 196 U. S. 375, 25 Sup. Ct 276 (1905); United States v. McAndrews & Forbes Co., 149 Fed. 823 (C. C. S. D. N. Y. 1906); Gibbs v. McNeeley, 118 Fed. 120 (C. C. A. 9th, 1902). See Coronado Coal Co. v. United Iron Workers, 268 U. S. 295, 310, 45 Sup. Ct. 551, 556 (1925).

[18] State v. Arkansas Lumber Co., 260 Mo. 212, 169 S. W. 145 (1914); Fisher v. Flickinger Wheel Co., 7 Ohio C. C. (N. S.) 533 (1906). Agreements or combinations for the purpose of limiting output are expressly prohibited by the constitutions of six states and by the statutes of twenty-eight others. DAVIES, *op. cit. supra* note 11, 179.

[19] United States Tobacco Co. v. American Tobacco Co., *supra* note 7; United States v. duPont de Nemours Co., *supra* note 7; Wheeler-Stenzel Co. v. National Window Glass Jobbers Ass'n, 152 Fed. 864 (C. C. A. 3d, 1907).

[20] Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 20 Sup. Ct. 96 (1899); Wheeler-Stenzel Co. v. National Window Glass Jobbers Ass'n, *supra* note 19. For a leading state case declaring the illegality of the apportionment of output and the division of territory, see Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510 (1892).

reasonableness of the prices fixed, have been consistently defeated by federal [21] and state [22] courts. Price-fixing agreements *per se* are illegal and prohibited. As a corollary to this rule, the division of earnings or profits between competing concerns is illegal.[23] In the leading federal decision on price-fixing, the Supreme Court reaffirmed the judicial and legislative policy toward all such agreements:

> "Whatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition." [24]

The vice in the unqualified assumption that "the public interest is best protected . . . by the maintenance of competition" is that the public interest is identified with the consumer interest alone. Certainly it is to the public interest that industries be preserved from destruction. Yet attempts at cooperation intended not to exploit the consumer but to save an industry from the effects of overproduction, price-cutting, or exhaustion of resources [25] are categorically prohibited because they employ devices for the reduction of the free play of competition, and are equally well adapted for the exploitation of the consumer. The true public interest involved in the cooperative agreements of industry has long been recognized in England, and this recognition forms a part of the industrial policy in that country:

> "Unquestionably the combination in question was one the purpose of which was to regulate supply and keep up prices. But an ill-regulated supply and unremunerative prices may, in point of fact, be disadvantageous to the public. Such a state of things may, if not controlled, drive manufacturers out of business, or lower wages, and so cause unemployment and labour disturbance. It must always be a question of circumstances whether a combination of manufacturers in a particular trade is an evil from a public point of view." [26]

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[21] United States v. Trenton Potteries Co., 273 U. S. 392, 47 Sup. Ct. 377 (1927); Keogh v. Chicago & N. W. Ry. Co., 260 U. S. 156, 43 Sup. Ct. 47 (1922); Standard Sanitary Mfg. Co. v. United States, *supra* note 16; Live Poultry Dealers Protective Ass'n v. United States, 4 F. (2d) 840 (C. C. A. 2d, 1924).

[22] People v. Jevne, 179 Cal. 621, 178 Pac. 517 (1919); Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577 (1899); Texas Standard Oil Co. v. Adoue, 83 Tex. 650, 19 S. W. 274 (1892). For state constitutional and statutory provisions against price-fixing agreements see DAVIES, *op. cit. supra* note 11, 168-178.

[23] Continental Wallpaper Co. v. Voight, 212 U. S. 227, 29 Sup. 280 (1909); Addyston Pipe & Steel Co. v. United States, *supra* note 20; United States v. McAndrews & Forbes Co., *supra* note 17.

[24] United States v. Trenton Potteries Co., *supra* note 21 at 397, 47 Sup. Ct. at 379.

[25] No case has yet been before the federal courts in which the validity of an agreement to limit production designed as a strictly conservation measure has been involved. There have been recent expressions of opinion that such an agreement would be declared legal; see *The Anti-Trust Laws* (1931) 84 REVIEW OF REVIEWS 64; Donovan, *American Industry and the Anti-Trust Laws* (address before Harvard Business School, Nov. 20, 1931). The western states are strong advocates of permitting such agreements, and a test case may soon arise regarding the legality of the Wisconsin Lumbermen's Agreement to curtail production. There is no expression on the part of the courts leading to the belief that they would hold such an agreement valid; the contrary would be inferred from the language of the Supreme Court—that the good motives inducing an agreement are immaterial. See cases *supra* note 16. The most prevalent opinion is that conservation agreements could not be sanctioned under the existing laws. See Hervey, *Anti-Trust Laws and the Conservation of Minerals* (1930) CXLVII ANNALS 67.

[26] Northwestern Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd., [1914] A. C. 461, 469. See also Crown Milling Co., Ltd. v. The King, [1927] A. C. 394, and Attorney General

The short-sighted policy at the base of the American system was adopted at a time when fear of the activities of great monopolies led to legislation condemning combination regardless of its purpose.[27] The absolute prohibitions of that legislation are still in effect despite fundamental economic changes.

It cannot be said that the courts have been blind to the desirability of alleviating the effects of this policy. In some recent decisions there is evidence of their recognition of the social utility and desirability of industrial cooperation. Industry was greatly encouraged by the decisions of the Supreme Court in the *Maple Flooring Association*[28] and *Cement Manufacturers Association*[29] cases, which for the first time sanctioned the activities of trade associations.[30] Although these decisions evidenced a more lenient view towards cooperative activities,[31] subsequent developments have discounted their significance. The opinions were cautiously worded and the limitation of their effect definitely stated. They went in fact no farther than to decide that the gathering and dissemination of trade information relating to the cost and volume of production, previous selling prices and stocks on hand were legal only if such information was exchanged "without reaching any agreement or concerted action with respect to prices or production".[32] The later decisions of the Court evidence no weakening of the rule that any direct action toward price or production control is illegal.[33] In the face of existing legislation the courts have been powerless to sanction concerted action designed to achieve those ends. The permitted activities, helpful though they may be, fall far short of the needs of industry. The ineffectiveness of a voluntary agreement to curtail production is demonstrated by the probable failure of the "Sunday Shutdown" agreement between oil producers which seems likely to be abandoned because of the impossibility of insuring uniform observance.[34] It has been justly said of the activity of trade associations:

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of Australia v. Adelaide Steamship Co., Ltd., [1913] A. C. 781. For a criticism of the American system as contrasted with the anti-trust policy of other nations, see Levy, *op. cit. supra* note 2.

[27] See Evans, *The Supreme Court and the Sherman Anti-Trust Act* (1910) 59 U. OF PA. L. REV. 61, 66.

[28] Maple Flooring Ass'n v. United States, 268 U. S. 563, 45 Sup. Ct. 578 (1925).

[29] Cement Manufacturers Ass'n v. United States, 268 U. S. 588, 45 Sup. Ct. 586 (1925).

[30] The pronouncement of these decisions elicited this sanguine prediction from Mr. Gilbert H. Montague: "Looking into the future, and seeing how the business cycle can be brought under the control of society, I can see all the tremendous social and psychological results which may follow. Business can be maintained on present or even better levels, peaks of over-speculation can be cut down, valleys of undue depression can be filled up, extremes of feast and famine can be avoided, and industry can, with reasonable assurance, be stabilized on fairer price levels."—Montague, *New Opportunities and Responsibilities of Trade Associations as a Result of Recent United States Supreme Court Decisions* (1926) 11 ACADEMY OF POL. SCI. PROC. 579, 582.

[31] Especially in view of the fact that these cases reversed the holdings of two earlier cases involving factual situations almost identical: United States v. American Linseed Oil Co., 262 U. S. 371, 43 Sup. Ct. 607 (1922) and American Column Lumber Co. v. United States, 257 U. S. 377, 42 Sup. Ct. 417 (1921). See Probst, *The Failure of the Sherman Anti-Trust Law* (1926) 75 U. OF PA. L. REV. 122.

[32] Maple Flooring Ass'n v. United States, *supra* note 28 at 586, 45 Sup. Ct. at 586. In United States v. Trenton Potteries Co., *supra* note 21 at 400, 47 Sup. Ct. at 380, the Court said: "The decisions in Maple Flooring Association v. United States and in Cement Manufacturers Protective Association v. United States were made on the assumption that any agreement for price-fixing, if found, would have been illegal as a matter of law." It was so well recognized at the time these cases were decided that they did not pretend to give any color of legality to price or production agreements [See, for instance, Donovan, *The Legality of Trade Associations* (1926) 11 ACADEMY OF POL. SCI. PROC. 571; Probst, *op. cit. supra* note 31] that it is difficult to account for the optimistic view taken by Mr. Montague and others of the impetus cooperative acivities would gain from these decisions.

[33] Federal Trade Comm. v. Pacific States Paper Trade Ass'n, 273 U. S. 52, 47 Sup. Ct. 255 (1927); United States v. Trenton Potteries Co., *supra* note 21.

[34] New York Times, January 3, 1932, 2d news section, p. 10.

"Although this is a very useful procedure, it falls far short of the natural and simpler course of permitting competitors to put a stop to senseless practices of excessive competition by mutual agreement." [35]

The course of legislation in the last two decades exhibits a growing realization by the legislators of the unsoundness of a policy that categorically condemns combination restraining trade. A brief reference to some of the enactments will show an increasing tendency to grant legislative exemption to certain classes from the operation of the *Sherman Law.*

The protection of the domestic producer in his competition with foreign trade raised a serious problem. Although foreign competitors have no advantages in our domestic markets, where their acts are subject to the provisions of the anti-trust laws,[36] they enjoy a tremendous advantage abroad, since they are not as a rule subject to restrictions against combination,[37] whereas an American exporter is prohibited from doing in this country any act contrary to the anti-trust laws, though the act has to do solely with his foreign trade.[38] The *Webb-Pomerene Act* [39] was designed to remedy this situation. The Act permits the formation of associations of exporters and exempts their agreements from the provisions of the anti-trust laws, provided their agreements have no direct effect on domestic prices. These associations must, however, market their products under the trade name adopted by the cartel organization; the benefit of the use of an individual trade-mark is denied to a member of the association. This restriction leaves the exporter under a serious handicap.

By the terms of the Clayton Act,[40] labor and agricultural organizations are declared not to be illegal combinations; and it is provided that nothing in the anti-trust laws shall be construed as prohibiting the members of such organizations from "lawfully carrying out the legitimate objects thereof". The Act also purports to limit the use of the injunction in labor disputes to cases where irreparable harm is threatened, for which there is no adequate remedy at law, and to legalize strikes, picketing, and boycotting. In practice, these clauses for the protection of labor are of little importance, since the federal courts have without hesitation enjoined any activities of labor organizations which were found to have the direct effect of restraining interstate trade or of creating a monopoly.[41] This course has been followed by the state courts with regard to labor activities restraining intrastate trade.[42] Organized labor for some years has been the most ardent advocate of repeal of existing anti-trust laws.[43]

On the other hand the right of agricultural organizations to make cooperative agreements has been greatly extended by the *Capper-Volstead Act,*[44] which permits farmers, ranchmen, dairymen, and nut or fruit growers to act together in collectively marketing their products and to make the necessary contracts and

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[35] Levy, *op. cit. supra* note 1.

[36] United States v. Pacific & Arctic Ry., 228 U. S. 87, 33 Sup. Ct. 443 (1913).

[37] Copland, *Some Reciprocal Effects of Our Anti-Trust Laws, With Special Reference to Australia* (1930) CXLVII ANNALS 117; Levy, *op. cit. supra* note 2; Kirsh, *Foreign Trade Functions of Trade Associations: The Legal Aspects* (1928) 76 U. OF PA. L. REV. 891.

[38] United States v. American Tobacco Co., *supra* note 15.

[39] 40 STAT. 516 (1918), 15 U. S. C. A. § 61 (1928).

[40] *Supra* note 13.

[41] Bedford Cut Stone Co. v. Journeymen Stonecutters Ass'n of North America, 274 U. S. 37, 47 Sup. Ct. 522 (1927); Duplex Printing Press Co. v. Deering, 254 U. S. 443, 41 Sup. Ct. 172 (1921); Lawlor v. Loewe, 235 U. S. 522, 35 Sup. Ct. 170 (1915); Vandell v. United States, 6 F. (2d) 188 (C. C. A. 2d, 1925).

[42] Shaughnessy v. Jordan, 184 Ind. 499, 111 N. E. 622 (1916); Overland Publishing Co. v. Crocker, 193 Cal. 109, 222 Pac. 812 (1924); Seubert v. Reiff, 98 Misc. 402, 164 N. Y. Supp. 522 (1917); Gildehaus v. Busse, 19 Ohio N. P. (N. S.) 263 (1916).

[43] In 1925 the American Federation of Labor declared for repeal of the Sherman Law and has been agitating for the same since that time. Woll, *op. cit. supra* note 1, at 187.

[44] 42 STAT. 388 (1922), 7 U. S. C. A. § 291 (1928).

agreements to that end. Their agreements are subject only to the approval of the Secretary of Agriculture, who may restrain an association from "unduly" causing the enhancement of prices.

Cooperative agreements and combinations have been sanctioned in other fields. By the *Merchant Marine Act* of 1916,[45] shippers are exempted from the provisions of the *Sherman Law.* The *Transportation Act* of 1920[46] encourages a program of combination between carriers, subject to the approval of the Interstate Commerce Commission.[47] There are some economists who advocate the adaptation of our anti-trust policy to present industrial conditions by the further extension of exemptive legislation.[48] Such a course seems neither logical nor in accord with American concepts. It is not a sound course to enunciate a policy forbidding all combination on the one hand and then to enact a series of laws on the other hand the effect of which is to declare that the policy from which they grant exemption is unsound and inapplicable in a particular field. Furthermore, a system of class legislation is certainly contrary to American principles.[49] The needed changes cannot be attained by compromise. Our economic situation requires a basic alteration of an outworn policy.

There are a few who would repeal the *Sherman Law.* It is universally respected for the part it has played in the suppression of monopolies which were operating not only to exploit the consumer but to stamp out all competition. Its prohibition of such combination still expresses a fundamental American principle. The nature of the change required is a lessening of the application of the prohibition against combination to make possible combinations or agreements that would restrain trade in the literal sense, but only to the extent necessary for the stabilization of industry. A widely advocated form of amendment is one that would provide a commission or legislative court with the power to give advisory opinions on the legality of proposed agreements, and to exempt from the criminal provisions of the anti-trust laws the parties to agreements approved by the commission, pending final approval or disapproval by the courts.[50] While such an administrative change would have a helpful effect in clarifying the laws and in encouraging agreements which are not attempted because of the fear of criminal penalties if the agreements be adjudged illegal, it is subject to the serious objection that it could not extend to parties the power to make the type of agreements so urgently required. Since both price-fixing and production curtailment are clearly

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[45] 39 STAT. 728 (1916), 45 U. S. C. A. § 44 (1928).

[46] 41 STAT. 474 (1920), 49 U. S. C. A. § 1 (1928). For an account of the formation of railroad combinations under this authority, see Waterman, *The Progress of Unification* (1930) 13 ACADEMY OF POL. SCI. PROC. 369.

[47] It is not pretended that the foregoing is a complete catalog of federal exemptive legislation. The examples are chosen to illustrate the impossibility of uniform enforcement of the federal anti-trust laws. For reference to a substantial part of the federal legislation that has affected the anti-trust policy see DAVIES, *op. cit. supra* note 11, 123-142. For a discussion of the tendency to pass exemptive legislation see Fernley, *Special Privilege under our Federal Anti-Trust Laws* (1930) CXLVII ANNALS 32.

[48] This suggestion has been most commonly made with reference to industries requiring the protection of natural resources. See Hervey, *op. cit. supra* note 25. See also comment on the Walsh Bill, *infra* note 50.

[49] Fernley, *op. cit. supra* note 47, at 36.

[50] In one form or another, the establishment of a commission has been recommended by the following authorities: Merritt, *What the Anti-Trust Laws Should Be* (1930) CXLVII ANNALS 195; Donovan, *The Need for a Commerce Court* (1930) CXLVII ANNALS 138; Butler, *Needed Changes in the Anti-Trust Laws, op. cit. supra* note 15. The extension of very great powers to the Federal Trade Commission is proposed by the Walsh Bill, introduced in the Senate January 25, 1932, which would grant the Commission the power to approve "co-operative contracts for curtailment of production and for other acts to avoid ruinous competition", subject to revocation by the Commission when no longer in the public interest. It would seem that this bill goes too far, as it gives an administrative body plenary power to exempt from the express provisions of existing legislation, and is too bureaucratic a measure to be likely of approval.

and explicitly prohibited by the existing laws,[51] the commission would have no other course than to advise against the legality of any agreement of this nature which might be submitted to it. It is clear, therefore, that an amendment that will correct the present effect of the laws must be aimed at the *Sherman Law* itself. Such an amendment is now in the hands of the Judiciary Committee of Congress;[52] this bill, sponsored by the National Civic Federation, goes directly to the root of the situation. After a preamble stating *inter alia* that decisions interpreting the *Sherman Law* "have disregarded, ignored, or negatived the preservation and the welfare of American industries against the effects of excessive competition" and that "the public welfare is best promoted not only by a proper safeguarding of consumers against excessive sales prices . . . but also by a proper safeguarding of American industries and the producers, workers, and all other persons engaged in such industries, from the effects produced by excessive or ruinous competition" the bill sets forth the following amendment:

> Sec. 9. That the words "in restraint of trade", wherever used in this Act, shall be deemed and interpreted to mean only such restraint of trade as, having due regard to the interests of producers, workers, consumers, and distributors, shall be to the detriment of the public.

This amendment has been recently criticised on the ground that it amounts to a virtual repeal of the *Sherman Law:*

> "The effect of such a statute, as construed by the British courts,[53] is to permit agreements between and consolidation of competitors to the point of complete monopoly. Competition as the regulator of prices and production disappears and no government control of prices is substituted. The reasonableness of prices fixed by the combination would be subject to judicial investigation, it is true, but only when a discouraged prosecutor might be moved to action by some especially oppressive action by the monopoly." [54]

Partly to meet this objection, partly to facilitate the formation of agreements, it is submitted that the best solution to the whole problem would be a twofold action: the adoption of the above amendment to the *Sherman Law,* and in addition the adoption of the amendment to the *Federal Trade Commission Act* sponsored by the American Bar Association,[55] giving the Commission advisory powers over trade agreements and the power to grant immunity from the penalties of the *Sherman Law* to the parties acting under approved agreements.

The principal obstacles in the way of this solution are practical. The magnitude of the task before the Commission in weighing the complex effects of proposed agreements and in adjusting the conflicting interests involved would be tremendous; the element of favoritism in its decisions could not be entirely excluded, and the approval or disapproval of agreements would inevitably be accompanied by "log-rolling" and by occasional yielding to "interests". The problems presented by one trade agreement would be complicated by the necessity of considering the inter-relation of the industries. The work of the Commission would include all the difficulties met by the Interstate Commerce Commission, but multiplied a hundred times. Though these difficulties are very real, the present situation of industry demands a decisive step, and it is submitted that it

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[51] See cases *supra* notes 17-23.

[52] 71st Congress, 3d Session, H. R. 17360.

[53] The author refers to the case of Attorney General of Australia v. Adelaide Steamship Co., Ltd., *supra* note 26.

[54] CLARK, THE FEDERAL TRUST POLICY (1931) 292.

[55] The Butler Bill, now before Congress. For a detailed description of this bill and its probable effect see Butler, *Needed Changes in the Anti-Trust Laws, supra* note 15.

would be far better to take the step indicated, in spite of the difficulties of its application, than to abandon industry to its fate. The author of the proposed amendment to the *Federal Trade Commission Act* defended it several years ago: [56]

> "If objection be made that to grant this additional authority to an administrative agency is to put more government in business, I reply that the Sherman Law puts more government in business than all other statutes combined, and that to grant this additional power would take government out of business to an extent that we are now able to appreciate."

The enactment into law of these two bills would have the result of opening the way to all the agreements necessary to achieve a proper stabilization of business, without impairing the present safeguards against monopoly. The parties to agreements would, of course, still be subject to the existing criminal and civil penalties if they acted without the approval of the Commission. The example of the federal government in adopting such legislation would doubtless be followed in most of the states. Of all of the suggested remedies, it would seem that in these two bills will be found the proper policy for the regulation of industry under the conditions of today.

W. W. W.

[56] Butler, *Amending the Anti-Trust Laws* (1926) 11 ACADEMY OF POL. SCI. PROC. 655, 659.