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A SUGGESTION FOR REVISION OF THE ANTI-TRUST LAWS *

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The primary question presented in considering any revision of the anti-trust laws is this: How far is it necessary to regulate competition in order to preserve fair competition? This immediately leads to a second question: How far can competition be regulated without destroying the essentials of a competitive system of private enterprise? In order to deal dispassionately with these questions we must try to eliminate certain prejudices and illusions which commonly confuse our efforts to think clearly and to discuss candidly the problems of governmental supervision or control of business operations.

We talk loosely of free competition and free enterprise, as though we had in mind an ideal of absolute freedom from any political interference in a "natural" order of things in which producers, distributors and consumers, unhampered by any laws, automatically would produce and exchange, in an unrestricted market, a supply of all possible goods and services equal to the demand, with assurance of a fair exchange between uncoerced sellers and buyers. But when we examine into the historical facts we find that no such order of things has ever existed in any large community—and no such order ever can be established in a modern nation. Disregarding a host of other causes for an increasing social control of private enterprise, let us concentrate our attention at the outset on the effect of monopolistic purposes and practices which develop early in business competition.

An unregulated system of competition paradoxically produces at once the monopolistic seeds of its own destruction. The stronger competitors naturally eliminate weaker rivals and, with increasing dominance in the market, move steadily toward the alternatives of combination into one all-

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powerful organization or agreement among the large surviving units to maintain profitable prices and for that purpose to allocate production or areas of distribution. This trend is inevitable because unlimited unregulated competition must result in wasteful duplications of expenditure and narrow, uncertain profit margins, which any efficient business man, seeking the obvious goal of secure and satisfactory profits, will try to eliminate.

We can hardly question the conclusion that without some form of anti-monopoly laws the eventual outcome of trade and industrial operations in serving the major essential needs of a modern community would be the concentration of control in organizations of such size and economic strength that effective competition would become impossible to inaugurate or to maintain. The trend toward such an outcome is now obvious in those fields of enterprise where a very large capital investment and far-reaching organization is essential, thus assuring enormous development losses to any small enterprise which might attempt to invade a well-occupied field—such as that of automobile manufacture.

On the other hand where a small amount of capital and a compact efficient organization can quickly establish an effective competition in price or service, the natural, monopolistic advantages of large scale enterprises may be balanced by weaknesses inherent in big organizations. Bureaucracy, red tape, inertia, remote controls, inflexibility and excessive conservatism, are familiar examples of these weaknesses.

Here enters into our problem the factor of unfair competition developing both in the abuses of power by big business, evidenced, for example, by price wars or discriminations, and in those cutthroat practices of little business which may defraud the customer as to the quantity or quality of goods delivered, and deny to the worker a fair reward for his labor. Thus we find ourselves confronted with the need for eliminating those methods of competition which we try to define as "unfair", either because they promote a monopolistic control of what should be a free market, or because they promote a freedom to injure others which degrades the processes of production and exchange into a primitive warfare abhorrent to our standards of civilization.

Up to the present time we have come to accept the need for such laws as will prevent monopolistic controls and outlaw the most generally disapproved forms of unfair competition. But on the whole these laws have been pretty unsatisfactory both to business men and to the consuming public. They have imposed a great many uncertain, hampering restraints upon legitimate business operations; and they have not prevented some of the most offensive methods of unfair competition. They have not protected consumers from excessive prices for many essential goods and services, although consumers have been partly compensated for such overcharges

by the socially and economically unsound privilege of buying many other things for less than a reasonable cost of production.

In the anti-trust laws the government imposes a great variety of poorly defined restraints upon free competition which are theoretically intended to increase competition.[1] Thus, by restraining the liberty of individuals controlling large economic powers, we seek to preserve the liberty of individuals of small economic power, and to relieve them from an oppressive and destructive competition. On the other hand, the government provides protections as well as restraints for modern, private enterprise—notably such as protective tariffs to prevent free competition from abroad.

It might be assumed that the laws regulating competition would be based upon a consistent national economic policy. But when analyzed, we find they are, in fact, based largely upon conflicts of emotion arising out of shifting conflicts of temporary economic interests.

We begin, for example, with emotional enthusiasm for large enterprises, for mass production, for cheapening the price of things we buy and the variety of products offered for sale. Under this emotional stimulus the government encourages large scale industries. Then we find fear arising among small business men and consumers that these great powerful organizations will destroy the small business man and, having ended his competition, will be able to exploit the consumer. Also we have the fear of the workers, fear of increasing regimentation into the service of an economic power so strong that terms of employment will be dictated and not negotiated.

Out of these fears come demands to restrict the size of private enterprises and to restrain the powers of those who control them. There are demands to protect small business men, workers and consumers, not merely against abuses of power, but against the possibility of abuses; and many of these latter demands are impractical because in the creation of great power lies always the possibility of abuse.

Then further demands arise for a positive rather than a negative control, in order to compel the payment of better wages, the working of shorter hours, the reduction of prices, some provision for pensions, unemployment insurance and other securities for workers against the hazards which are inevitable in competitive private business.

It becomes more and more apparent to the managers of private business that their responsibilities and risks are to be increased, while at the same time their freedom to meet such responsibilities is diminished and impaired. In this situation charges fly back and forth that private enterprise is unwilling or unable to fulfill its public obligations; and that the government is pre-

1. See generally, Probst, *The Failure of the Sherman Anti-Trust Law* (1926) 75 U. OF PA. L. REV. 122; Note (1931) 79 U. OF PA. L. REV. 602.

venting the fulfillment of such obligations by restraining the freedom of private enterprise.

If we are to deal reasonably and not emotionally with our present business problems, we need to face the fact that we have had always a system of regulated competition; that individual freedom of competition has always been restricted by government; and that what we must preserve, if we are to retain a competitive system, is not an absolute individual liberty nor absolutely free competition, but a reasonable freedom of action within a reasonably well-defined area of competition.

If, for example, we do not believe that it is socially healthy to compete in the payment of as low wages as possible, or in the employment of workers for as long hours as possible, or in the employment of child labor, we need a defined economic policy based either upon economic considerations, or moral considerations, or upon both. We generally agree that fraud and deceit are not only socially undesirable, but that they degrade business and retard, instead of promoting, the growth of business. We ought to be able to agree that competition in over working and under paying labor has evil effects both socially and economically. But in seeking to establish such standards of regulated competition, we face not only practical difficulties, but the prejudices of those who have been accustomed by tradition to the enforcement of moral and health requirements by the police power but who are still convinced that any exercise of a similar power to improve economic conditions is an undue interference with individual liberty and destructive of free competition.

I read recently a typical statement made some time ago by a trusted adviser of business, who said that the economic worth of a worker can be determined only by competition. Strictly speaking, this may be true; but it does not follow that there should be no regulation of the competitive conditions under which economic worth is to be measured. This same man would agree probably that we should maintain protective tariffs, because he would not have the economic worth of an American worker measured by competition with foreign workers living on a very low standard. It is also a fact that our economy must provide in some way for those who have no employment, or who are incapable of earning their subsistence. Therefore, from an economic standpoint those enterprises which do not pay a subsistence wage must have their workers, either currently or eventually, supported out of the surplus product of other enterprises. Any intelligently regulated competition will not permit a competition in wasting human lives and energy any more than a competition in wasting natural resources.

The great difficulty, however, in governmental regulation is to draw the line between that minimum amount of necessary regulation which preserves the maximum area of competition and that dangerous expansion of

regulation which may spread until there is not a sufficient area of competition left, so that as a result prices and wages will be legally fixed instead of competitively determined. We had innumerable examples of this difficulty in the operations of the NRA. When it was sought to raise an actual rate of 5 or 10 cents an hour to a minimum of 14 cents an hour, protest was inevitable that 14 cents an hour itself was an inadequate wage, according to ethical standards. Yet, as a matter of cold fact, if raising the minimum wage for this particular service would reduce materially the demand for the product, the immediate and perhaps the final result would be increased unemployment. But how can we officially sanction an utterly inadequate wage?

The effort to regulate competition in wage payments must clearly be limited to an effort merely to prevent a competition for which there can be no social or economic justification; hours too long for efficient work, or for maintaining the health and decency of living conditions; wages too low to sustain the necessary cost of maintaining the human machine. Above these floor levels there is an ample field of competition, just as there is an ample field for competition in games, wherein the rules prevent the maiming or crippling of opponents.

There is also a further field for the voluntary regulation of competition, wherein those engaged in a trade or industry can agree upon higher floor levels of working conditions and business practices, and can exert the full force of cooperative action to bring about the general acceptance of such levels, without attempting to use the compulsory powers of government to maintain such standards, at least until they have been clearly demonstrated to be economically sound.

Now, against such efforts of governmental and voluntary private regulation to improve the general standard of living and to increase the purchasing power of some submerged classes of workers, we find the objection of an economic theory, which, crudely stated, is that increased labor costs are inevitably followed by increased prices and increased mechanization, resulting in diminished purchasing power and diminished employment. In pursuit of this theory, strong arguments are advanced in favor of a price reduction policy on the apparent assumption that prices can be reduced without wage reductions and that increased volume of production will supply more work and eventually more purchasing power.

It seems strange to me that the fallacy of applying either a wage increase or price decrease theory to the entire economic process is not obvious. It is undoubtedly true that in many instances increased labor costs will require increased prices. It is also true that in many instances increased labor costs, although increasing the prices of one group of products will add to the purchasing power for another group of products and thereby increase production. It is undoubtedly true that decreased prices of some

products will increase volume of production and add employment, but it is also true that decreased prices are absolutely impossible in many other lines without decreasing wages and diminishing purchasing power.

The one sound principle which it seems easy to state, but difficult to administer, is the principle of economic balance, which requires decreased prices for some commodities and increased wages for some workers. The application of this principle requires a constant readjustment of prices and wages, which will most fairly and readily take place if all the conflicting economic interests of management, labor and consumer concerned with agricultural and industrial production and distribution, are adequately organized to press for a fair consideration of their needs, with effective machineries of cooperation and adjustment. These should be encouraged and may be in part maintained by the government, so that when one economic interest is being unfairly treated, there will be the probability of readjustment before the entire economic balance is seriously disturbed.

There are today too many public and private regulators of competition to justify the illusion that we can restore a self-regulating competitive system by any single or simple program. The effort simply to destroy monopoly by sweeping prohibitions and intermittent prosecutions has accomplished and will accomplish little except to add to the difficulties of maintaining, by cooperative methods, an industrial security protecting alike the interests of investors and of labor. The effort to regulate wages and hours by law, unless carefully limited, will move us toward an increasing political control of industry. The dangers of such increasing political control do not lie merely in the restraint of individual freedom. They lie also in the difficulty of finding any tolerable standard for a fair price or a fair wage, except a competitive standard.

But it should be reasonably clear that the preservation of individual liberty in the conduct of private enterprise and the maintenance of competition as a regulator of prices and wages require at the outset an acceptance of the actualities of our present industrial civilization. We cannot arrive at a solution by emotional demands for complete individual liberty and absolutely free competition in a political economic system where social restraints on individual freedom and social restraints upon competition are a long established fact, and where what is needed is not the abolition of all restraints, but an improvement in their character and consistency.

We need to define the area in which the individual can freely determine his price policies and wage policies and be free to enter into contractual arrangements with all those to whom they are voluntarily acceptable. Within that same area of individual freedom men should be permitted to cooperate, but they should not be free to coerce others, nor free to exercise any monopolistic controls of trade or industry unless they are willing to

submit their affairs to that regulation in the public interest which is necessary when competition, as a regulating force, has been eliminated.

We need definite and defined regulations of competition which are justified to preserve the health of individuals, the health of society and our economic well being. But we need also a clear understanding that we are not substituting regulation for competition in determining the compensation to which the worker is entitled for his services, or the owner is entitled for the use of his property, or the manager is entitled for his ability to organize and to direct the conduct of private enterprise.

We can and should maintain the principle that price fixing and wage fixing and production controls are inconsistent with the competitive system. But at the same time we can properly insist that competition in reducing wages or prices may become destructive of the public interest and that production controls which individuals always employ separately may sometimes be properly employed by groups, under public supervision, to protect public interests, as, for example, to prevent the waste of natural resources. Such questions of public policy should be submitted to the scientific determination of persons not authorized to regulate wages, prices and production for the purpose of conforming them to any planned ideal economy, but for the purpose of preserving the regulative force of competition by restraining those excesses of competition, which in the end destroy a competitive system.

In final analysis we must maintain a competition in wages, prices and production if we are to maintain a competitive system. Otherwise we will move into the need of controlled wages, prices and production—a politically planned economy—for which we can find nowhere adequate ability, information or scientific impartiality. We have no competent substitute for the automatic regulator of a free purchasing power, which determines wages and prices and volume of production in a fair competitive system.

Let us agree that we have not yet arrived at a consistent national economic policy which is, or can be, expressed in law.[2] Consider for example our attitude toward monopolies. Regardless of politics we all solemnly declare that "a private monopoly is indefensible and intolerable". But then we write laws establishing patent monopolies throughout the business world with no legal qualifications to prevent intolerable and indefensible abuses of the powers thus granted to regulate and stifle competition.

We write protective tariffs for the avowed purpose of protecting the earning power of not only American capital but also American labor—including, we should assume, agricultural labor. But we have no established

2. One of the most compact expositions of this situation will be found in Mr. Gaskill's recent book THE REGULATION OF COMPETITION (1936) [See Grismore, Book Review (1936) 84 U. OF PA. L. REV. 919.]. Another more extended demonstration will be found by anyone who reviews without economic or political partisanship the history of the NRA—an effort which I undertook (with a less favorable bias than may be assumed) in a book entitled THE RAINBOW (1936).

and effective policy to insure to the worker and consumer behind that tariff wall the protection of his standard of living, which the limitation of imports is intended to provide.

We not only permit, but by constitution and statute we secure, to the private owners of natural resources, unregulated monopolies of raw materials which are primary necessities. As a result, if controlled by a few, these essentials can be slowly sold at high prices; or, if widely held, they can be recklessly wasted in a scramble for sales at prices insufficient to pay even a decent wage for the labor employed in their production and distribution.

We not only permit, but by our corporation laws we encourage, the development of gigantic artificial persons with tremendous powers and economic advantages over the individual manufacturer or merchant or farmer or industrial worker; and then we legislate in haphazard fashion against big business operations in order that these giants of our own creation may not trample down all individual enterprise.[3]

Consider likewise our lack of any consistent or well defined public policy in the protection of fair competition. Long, long ago we abandoned the notion that trading was a game of wits in which there were no moral obligations on either side. And in recent decades we have looked beyond the immediate interests of a seller and a buyer and have found a public interest in the methods of competition employed by sellers in their rivalry with each other. Still more recently the concept of a public *moral* interest in fair trading has been extended to recognition of an equally vital public *economic* interest in preventing industrial demoralization, business depressions and social insecurity, of which one contributing cause is cutthroat competition with its accompanying degradation of labor conditions.

The public economic interest, underlying the Clayton Act,[4] was also concerned with unfair competition because (in the language of Mr. Justice Brandeis): "The belief was widespread that the great trusts had acquired their power, in the main, through destroying or overreaching their weaker rivals by resort to unfair practices".[5] Thus the legislative policy embodied in the creation of the Federal Trade Commission [6] seemed to be a logical effort to supplement the prohibitions of the Sherman Anti-Trust Law [7] with an administrative regulation of competition so as to insure that the methods employed in selling goods should be fair.

3. *Cf.* Arrow-Hart & Hegeman Electric Co. v. Federal Trade Comm., 291 U. S. 587 (1934), 82 U. OF PA. L. REV. 763; In the matter of Goodyear Tire and Rubber Co., Federal Trade Comm., March 5, 1936, 84 U. OF PA. L. REV. 1030; Appalachian Coal Inc. v. United States, 288 U. S. 344 (1933), 81 U. OF PA. L. REV. 1006.

4. 38 STAT. 730 (1914), 15 U. S. C. A. §§ 12-27, 44; 18 U. S. C. A. § 412 (1927); 28 U. S. C. A. §§ 381-383, 386-390 (1928); 29 U. S. C. A. § 52 (1927).

5. Federal Trade Comm. v. Gratz, 253 U. S. 421, 434 (1920).

6. 38 STAT. 717 (1914), 15 U. S. C. A. §§ 41-51 (1927).

7. 26 STAT. 209 (1890), 15 U. S. C. A. §§ 1-7, 15 (1927).

The latest and in many ways the most far reaching extension of governmental power began with legislation designed to regulate maximum hours of work,[8] minimum wages,[9] the employment of child labor [10] and other labor conditions, which have a direct economic effect on the production as well as the distribution of goods and services. In the early stages the objectives of such regulations were generally regarded as only moral. The effort was to remedy the social evils of excessive hours of labor, of wages insufficient for a decent subsistence, of stunting the growth and crippling the lives of little children, of subjecting wage-earners to unsanitary and dangerous conditions of employment. During the great depression, however, with its extraordinary stimulation of economic thinking, there arose a strong opinion, even in many conservative groups, that a principal factor of unfair competition in which there was a public economic interest was the competition between employers in reducing labor costs by excessive hours of work, inadequate wages and other measures of social injustice which had baneful economic consequences in reducing the volume of employment and purchasing power.

There is today too much controversy among economists, politicians and organizations of employers and employees over the economic effects of regulating hours, wages and working conditions to expect any general agreement upon a national economic policy which would go very far in the direction of eliminating competition in labor costs. Indeed we must recognize that this competition is frequently the dominant element in price competition—so that any comprehensive regulation of labor costs may become in effect price regulation, and hence profit regulation, and practically force governmental price fixing and profit fixing. Such a development could hardly be regarded as a means of preserving a competitive system of private enterprise.

Thus we are compelled in seeking for any unity of public opinion in support of a revision of the anti-trust laws to carry forward our concept of unfair competition with caution and self-restraint both in the field of trade practices and in the field of employment conditions. Otherwise, regulations of competition may eliminate the essentials of competition. In regard to trade practices it was made quite evident in the two year experience of the NRA that methods of competition which met with the disapproval of a large majority of those engaged in a particular industry might be supported as fair and necessary to their survival by a vigorous and militant minority. In regard to labor practices it was made quite evident that often maximum

8. 15 STAT. 77 (1868); 27 STAT. 340 (1892), 40 U. S. C. A. §§ 321-323 (1928).

9. 40 STAT. 960 (1918).

10. 39 STAT. 675 (1916), *held unconstitutional in* Hammer v. Dagenhart, 247 U. S. 251 (1918). 40 STAT. 1057, 1138, tit. XII (1919), *held unconstitutional in* Bailey v. Drexel Furniture Co., 259 U. S. 20 (1922).

hours and minimum wages meant entirely different things to employers and to employees. If the employer could establish a forty hour week, but felt that forty-eight would be occasionally necessary, he conceived that forty-eight was logically the maximum. On the other hand the normal forty hours, or even a possible thirty-six, would be the only definition of maximum which the employees would regard as sound. In the same way the definitions of a "minimum wage" which developed in debates over code requirements would vary from one extreme of the lowest wage which could be justified on any ground for the lowest paid worker, to the other extreme of the lowest wage which would be acceptable to a worker of special skill and long experience.

It is apparent that if we are to revise the present anti-trust laws so that they may provide a means of carrying out a consistent national economic policy we face the need of redefining our objectives in the light of a long and rather sad experience and also of limiting our objectives to those which will have the vigorous support of well-established public opinion. Just to indicate the problem let me attempt a few dogmatic conclusions:

1. To maintain a competitive system we must prevent the acquisition or exercise of any monopolistic power to regulate prices or production, except where a public monopoly, or a private monopoly under public regulation, is found socially or economically desirable, as in the case of public utilities.

2. Large business operations are a natural development and, if not artificially supported by special privileges and political aid, or by unfair competitive practices, can usually be subjected to effective competition.

3. If size alone gives to large business operations monopolistic power, there are the alternatives of compelling reduction in size or requiring submission to such public supervision or regulation as may be necessary to require adequate service at reasonable prices. Neither alternative should be excluded by law, because in specific cases one may serve the public interest far better than the other.

4. Dominance in a trade or industrial field does not necessarily give monopolistic power because competition within the field or competition from other fields may maintain the reality of competitive incentives and correctives.

5. Agreements for cooperation within or between trades and industries to promote and maintain an actual and fair competition are in the public interest so long as openly made with the resulting cooperation subject to public scrutiny, so that a choice may be required between their abrogation, or revision, or an increase of public supervision, if such agreements are found at any time to be operating against the public interest.

6. Monopolies and monopolistic practices should be prohibited by statutes clearly defining what they are. These prohibitions should be applied to specific cases by an administrative commission authorized to issue restraining orders, with the statutory penalties made applicable to violations of such temporary or final orders, made in conformity with the procedural and substantive requirements of the law.

7. Without unduly postponing or denying any necessary resort to the courts to prevent and punish wrongdoing, every practical method should be employed to insure an administrative investigation and application of the law prior to judicial proceedings of a punitive or remedial character. This would not only relieve the courts of many undesirable responsibilities, but should also promote consistency and certainty in the obligations imposed on business.

8. Unfair competitive practices should be prohibited by statutes clearly defining them as to methods and objectives. These prohibitions should be applied and enforced by the administrative commission in the same manner as prohibitions of monopolistic practices.

9. The developing field of trade agreements should be supervised by an administrative agency charged with the duty of maintaining the laws against monopolistic and unfair trade practices, but authorized to sanction agreements clearly within the law or within any twilight zone, subject to the rights of public or private objectors to submit a complaint to the administrative commission for a decision, which like all commission orders would be subject to judicial review.

The meaning and application of these dogmatic conclusions might be clarified by many examples. But it is sufficient for the present purpose merely to point out the purposes of the substantive law outlined and the reasons for advising the enforcement procedures which are suggested.

In the first place, in this day of large business organizations and the inevitability of consolidations, interlocking controls, and cooperative agreements of infinite variety, there should be a clear legal distinction between mere size and actual monopolistic power, and also between the possession of power that may be abused and the actual abuse of power. It is, for example, illogical and indefensible to prohibit a corporation from absorbing a competitor, whereby the better integrated combination can more effectively compete with a powerful rival, and at the same time to sustain the right of this powerful rival to crush its competitors one by one by its financial power, its control of a natural resource or a patent, or by cutthroat and unfair competition. If we are seeking to prevent the growth of a monopoly we should not direct intelligent governmental action toward stopping any spade work and cultivation of the soil in which a monopoly *might* grow; but we

should direct our action against those who are actually raising a monopoly plant and against all the methods used for that purpose.

Such an effort can never be successful by attempting the judicial enforcement of the sweeping prohibitions of the Sherman Act[11]—nor even by supplementing that Act with prohibitions of interlocking directorates and price discriminations. Monopolistic practices can be observed and defined without great difficulty when we once accept the simple fact that we are seeking to maintain, and to prevent the destruction of, competition—an objective which, by the way, is not even mentioned in the Sherman Act.

An administrative commission, guided by legislative standards and invested with the duty of preventing either the destruction of competition or the use of unfair methods of competition, should be expected to develop a body of legal restraints which, with judicial sanction, would eliminate monopolistic and unfair practices in trade and industry. But this should be accomplished without constantly impeding the natural growth of enterprises, and without hampering every effort of businessmen to increase the security of both capital and labor by eliminating needless wastes of competition, while moving steadily under competitive pressures toward the most efficient methods and mechanisms of production and distribution.

It can hardly be contended in this day that either the consumer or the worker has been benefited by the hopeless struggle of many small business units to survive against larger, more efficient enterprises. But on the other hand where the small unit is equally efficient, or has a service to perform of special value, and would survive in a field of fair competition, it needs and should receive protection against any oppressive or unfair practices of a more powerful competitor. Such protection cannot be obtained in the courts and must be sought from an administrative commission adequately empowered to render prompt and efficient assistance.

It will be noted that in the developing field of trade agreements I have suggested the supervision of an administrative agency to give a prima facie sanction to cooperative agreements. The question may naturally arise as to the need or wisdom of delegating this function to a separate agency, instead of conferring it upon the enforcement commission. This separation of functions is, however, to my mind vital in any comprehensive revision of our laws determining the relations between business and government. When business men approach their government for the purpose of promoting a cooperative program they should go to an agency primarily interested in promoting such cooperation. They should not be required to go to the prosecuting arm of government to obtain a promise of immunity. They should not be regarded as incipient wrongdoers inviting a rebuke and

11. 26 STAT. 209 (1890), 15 U. S. C. A. § 1 (1927).

a warning, or seeking to wheedle out of the prosecuting attorney an assurance that he will look leniently on their offense.

But it is inevitable, if such cooperative proposals are presented to the commission charged with the duty of prosecuting wrongdoers, that the commission must, in order to protect the integrity of its position in many pending cases, be exceedingly cautious in sanctioning any agreement that may be subsequently the cause of a complaint. Furthermore, later complainants will naturally feel that the case has been prejudged against them. Whereas if the complaint is sustained the parties to the agreement will be aggrieved at this apparent reversal of opinion by the body on whose approval they had relied.

For these and many other reasons, which will present themselves to any careful student of the problem, it is my strong conviction that there are three parts to any adequate program for revision of the anti-trust laws:

First: Rewrite the substantive law and procedure to express clearly a national economic policy that is consistent and sensible and appropriate for an industrial nation of the twentieth century.

Second: Establish an adequately implemented commission to apply and to enforce the law against monopolistic and unfair practices, with appropriate provision for judicial review of its orders.

Third: Establish an administrative agency authorized to apply the legislatively defined policy in encouraging and aiding business men to cooperate in improving the fairness and efficiency of industrial methods. Authorize this agency to give a temporary sanction to any such cooperative agreements which do not violate any of the legal prohibitions of monopolistic or unfair practices. Provide for the review of such sanctions by the enforcement commission upon complaint of the government, or of any competitor, or other person alleging injury as a result of the approved agreement.

In conclusion let me state that I do not believe that any law which has been enacted in the last fifty years, beginning with the Sherman Law [12] and including the National Industrial Recovery Act,[13] has provided any comprehensive or even temporarily adequate solution for the problem of regulated competition. We began with a sweeping prohibition of combinations and conspiracies in restraint of trade. The courts are still trying to interpret and apply that original law; and no one yet knows what it means, or what can or cannot be lawfully done under its vague commands. We have built a superstructure of unintelligible laws and confusing judicial opinions upon this original floating foundation.

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12. *Ibid.*

13. 48 STAT. 195 (1933), 7 U. S. C. A. § 607; 15 U. S. C. A. § 609 (b); 23 U. S. C. A. § 9 (b); 26 U. S. C. A. §§ 55, 901-903, 940 (a); 40 U. S. C. A. §§ 401-414 (Supp. 1935).

We experimented for two years with what some called "industrial self-government" and others called "governmental meddling", and long before the end we learned that neither business men nor government officials knew what they wanted to do, except that everybody wanted to do the other fellow good and wanted the other fellow to let him alone. We can go on floundering a few years longer—or we can take advantage of a period of comparative calm and security to counsel together and try to think part way through this most vital problem of the relations between government and business.