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Book Reviews

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BOOK REVIEWS

The Case Against Oligopoly: A New Perspective

ECONOMIC CONCENTRATION: STRUCTURE, BEHAVIOR AND PUBLIC POLICY. By John M. Blair. New York: Harcourt Brace Jovanovich, Inc., 1972, Pp. xix, 742. $16.95.

Since the face-off between the robber barons and the muckrakers in the Nineteenth Century, Americans have confronted industrial size with alternating moods of hostility, awe, disgust, and veneration. The worker who blasts dehumanizing assembly lines stands fascinated with the horsepower and rpm's of the automobile he uses to get to and from the plant. An unsatiated appetite for whatever comes off the assembly line of the corporate giants is balanced by the uneasy feeling that in fact the products feed a shallow lifestyle fashioned by martini-guzzling New York hucksters. Those committed to reform read with approval the newspaper account of the most recent Nader attack before thumbing with trepidation to the latest stock market quotations on General Motors and ITT.

Campaigns of corporate aggrandizement have always attracted a wide assortment of camp followers, with politicians and academics among the most persistent. To the politician, corporate size is a convenient and headline-provoking punching bag (and, during election time, a plentiful source of funding), while many a professor has established a reputation—and made money—by criticizing, extolling, or analyzing its various components. In a series of public hearings, the Senate Subcommittee on Antitrust and Monopoly, with Dr. John Blair as chief economist, produced a subdued blend of both callings. Drawing heavily but not exclusively from the record of these hearings,[1] *Economic Concentration: Structure, Behavior and Public Policy* is Blair's statement on corporate size.

Blair argues that the factors that once constituted the *raison d'etre* for corporate size—efficiency, technology, innovation, and managerial economics—are either inoperative, at the point of di-

1. Blair's chief source material comes from reports and records of hearings conducted during the years 1957-1971. J. BLAIR, ECONOMIC CONCENTRATION: STRUCTURE, BEHAVIOR AND PUBLIC POLICY, Appendix 1 (1972).

minishing returns, or outright debilitating. In the face of this erosion, the drift towards an oligopolized market structure in which a few corporations control most of an entire industry continues unabated. In identifying reasons for the movement, Blair points an accusing finger at the past and continuing trend of acquisitions, the increasing instances of non-price methods of competition, particularly television advertising, the reliance by corporations on various forms of predatory conduct, and a cross-purposes intrusion into the marketplace by government. The consequence of these developments is a poorly performing economic system characterized by noncompetitive pricing and an unresponsive allocation of resources.

Dr. Blair has put together an encompassing profile of the prevailing arguments against industrial concentration. While the arguments and the sources are familiar, the blend is distinctively the author's. What emerges is a multi-dimensional view of the issues and counterarguments concerning economic concentration—a mixture of statistics, economic theory, history, and even a measure of industrial sociology from self-styled business authority and best-selling author, Robert Townsend. In a field susceptible to emotionalism and fanatical prejudice, Blair makes an effort to maintain an even balance by acknowledging a number of competing points of view.

Any effort, however, to touch all bases of a complex and controversial subject like concentration runs a high risk of leaving gaps of superficiality. While maintaining for the most part maximum levels of thoroughness, *Economic Concentration* does not escape without instances of "thin" treatment. One example is Blair's case supporting the assertion that advertising—particularly television advertising—"is among the most important causes of concentration . . . ."[2] The vital threshold issue whether television has a superior capability over the other forms of media in grabbing hold of consumers is brushed aside by Blair with the remark that "this is one of the issues that need not be resolved here."[3] Having made this quick assumption, he further assumes—without convincing support—that the effectiveness of television advertising is best measured by the level

2. *Id.* at 308.

3. *Id.* at 312. He continues: "Suffice it to say, as compared to the trends for the other media, the upward movement in the use and costs of TV advertising makes it clear that it has come to be regarded by manufacturers of branded and trademarked consumer products as the preferred form of advertising. The preemption by large firms of the medium whose supply is fixed and which, in addition, has the greatest pulling power should make higher concentration almost a certainty." *Id.* at 312-13.

of cash expenditures placed in the medium by advertisers. Referring to statistics showing a correlation between increased expenditures for television advertising and enhanced concentration, Blair then jumps to the conclusion that television advertising is one of the prime contributors to oligopolization.

Recent experiences in the cigarette industry following the congressional ban on radio and television advertising shake, if not undercut, Blair's judgment on the superior "pulling power" of television advertising. After imposition of the ban, cigarette consumption defied conventional wisdom by *increasing* three percent.[4] Not only was there an upswing, but it occurred in the face of an overall thirty percent reduction in the industry-wide advertising budget. As one observer conservatively summarized, "[t]here are a couple of obvious conclusions": television is not the fantastic advertising medium it is supposed to be and the power of advertising itself has been substantially overstated.[5]

The point registered by the cigarette experience—and one into which Dr. Blair does not delve—is that cash expenditures constitute an unreliable indicator of the efficacy of advertising. As John Wanamaker once lamented, "I know half the money I spend on advertising is wasted, but I can never find out which half."[6] There is a wide range of reasons for Wanamaker's dilemma. One problem is classification: is, for example, packaging considered advertising? Would the costs of a consummable package be considered an advertising expenditure? Quaker Oats intends to print an educational program for pre-school children on the back of its Life brand cereal packages[7]—is this advertising? Another example is the use of premiums which in some industries, including breakfast cereals, is the primary ingredient in the marketing mix.[8] Again the question arises whether this is an advertising expense.

Another problem with relying indiscriminately on the statistics of the advertising budget is that the cross-utilization by advertisers of intuition, creative instinct, and refined technique produces an uneven performance chart that may not be consistent with the supporting budget. Cash expenditures fail, for instance, to represent the payoff from "positioning," or advertisements directed toward a

4. Gartner, *Bring Back Cigaret Commercials*, Wall Street Journal, Feb. 28, 1972, at 12, col. 4.

5. *Id.*

6. *Quoted in* M. MAYER, MADISON AVENUE, U.S.A. 259 (Cardinal ed. 1959).

7. Cleveland Plain Dealer, June 18, 1973, at 11-A, col. 4.

8. *See* Dougherty, *Battle of the Breakfast Table*, N.Y. Times, Oct. 22, 1972, § 3, at 1.

particular portion of the market.[9] The "successful" ad and the "bomb" look the same on an expense sheet.[10] Unpredictable tools like motivational research may achieve results far in excess of their expenses or may be a total waste of resources—whatever happened to the Edsel?

These and other non-quantifiable variables constitute the elusive mainstream of advertising. Conditioned by a long-standing commitment to the mathematical purity of statistics, many economists are instinctively repelled by the dark currents of the unfathomable, and thus opt to stay close to the more conceptually-manageable cash expenditure figures of the balance sheet. This is unfortunate; tunnel vision inevitably produces myopic solutions such as Blair's proposal to provide small firms with equal access to television or to allocate advertising time by lottery. Access to television by chance (What if Procter & Gamble hits a lucky streak?) or by regulatory decree is meaningless unless the advertiser can afford the talents of a top-flight advertising agency. Of course, this problem can be solved by extending the scope of Blair's proposal to include access to the services of ad agencies by decree or lottery as well. Moreover, without tailored time scheduling, access alone would by no means assure a payoff; it would be a waste of money for a bra manufacturer to advertise during the Saturday morning children's cartoons. In brief, any effort to ration television access to an undefined and open-ended classification of "big" and "small" firms in the face of finite time limitations would result in exponential chaos.

As a frame of reference for remedial action against concentration, Blair points to the free enterprise ethic, a process "guided by the 'unseen hand' of competition,"[11] and evolving with appropriate but minimal interference by government. The proposed remedies to correct present imperfections are intended to revive the impersonal allocative forces in the market place: deoligopolization, embargoes on merger activity by large firms, equal access to television advertising for small firms, strict enforcement of antitrust laws, revision of government buying policies to the detriment of dominant companies, repeal of tariff restrictions, and amendment of tax laws to benefit small companies.

The New York Times Book Review Section critically surveyed

9. *See* Kwitny, *'Positioning' Ads*, Wall Street Journal, Dec. 13, 1972, at 1, col. 1.

10. *See General Foods Is Five Billion Particulars*, FORTUNE, Mar. 1964, at 163.

11. J. BLAIR, *supra* note 1, at 615.

Blair's list of remedies with the comment that "[t]here is nothing really objectionable about the proposals, but they do suggest a certain naivete about the resourcefulness of the American entrepreneur."[12] Businessmen will do what they have always done: find some way to subvert government efforts to restrict them. A more critical deficiency was seen in Blair's failure to cut through surface issues like economic concentration to reach the fundamental problem of "the inequitable distribution of income in America."[13] Even if Blair's remedies successfully restore "free enterprise" in the United States, society will be only imperceptively better off.[14] Thus Blair's handling of the causes and consequences of concentration is not in issue; what is questioned is his use of the free enterprise model as a frame of reference for evaluating and guiding the aspirations of the economic system. The Times review thereby cuts through to the dominant issue in contemporary economic thought—the growing disenchantment with the leadership and teachings of the free enterprise model.[15]

Blair takes a conventional free enterprise view of the economic ideal: under the most productive conditions, prices respond freely to a competitive interplay of supply and demand. Except to ensure that abnormal deviations do not blunt or interfere with the deterministic self-correcting pressures of the system, government's primary role is to remain generally aloof. Blair obviously feels that industrial concentration is the most egregious deviation from ideal conditions and that the distortion is now of such dimension as to be completely invulnerable to private self-correcting forces. Implicit in this view is the assumption that atomization and the consequent revival of the ideal will produce a socially beneficial allocation of resources, including an equitable distribution of income.

The attack on the use of free enterprise as a model comes in two strains. A popular theme is that the imperatives of modern technol-

12. Lee and Passell, *Economic Concentration,* N.Y. Times, Sept. 10, 1972, § 7 (Book Review), at 32.

13. *Id.* at 34.

14. "Total elimination of monopoly profits, even if every penny were diverted to poor people, would do relatively little to alter the lives of the bottom quarter of the population. For that matter, competitive markets offer no such redistribution. Most monopoly-power profits are transfers from middle class consumers to wealthy stockholders; the virtues of forcing the price of a Buick down by $200 would he entirely lost on Mississippi sharecroppers." *Id.*

15. As one observer concludes, "[T]oday the costs of competition may well be under the heaviest scrutiny since the Industrial Revolution." Brodley, *Massive Industrial Size, Classical Economics, and the Search for Humanistic Value,* 24 STAN. L. REV. 1155, 1174 (1972).

ogy have irreversibly wrenched the economy from the conventional assumptions of self-correction. Madison Avenue, upon orders from the technocrats in industry and government and aided by sociologists and psychologists, has appropriated consumer sovereignty. The guiding force behind the invisible hand in Blair's model—profit maximization—has been seduced by the sirens of the technostructure and the planning functions in society.[16] If the free enterprise model has any vitality left, it is to serve as a placatory symbol to the Consciousness II types who "babbitize" each other at the Rotary and Kiwanis.

Other critics take a less benign view of the free enterprise model. What disturbs them is not the patent disengagement of the model from reality, but instead the conscious use of it by capitalists as a facade for evil purposes. The notion that the marketplace is susceptible to an automatic self-correcting process is seen as a deluding cloak used to justify and explain away dehumanizing assembly lines, poverty, racial discrimination, and rape of the environment. A repugnant feature of the system is the perpetuation of a morally corrupt ethos that debases the human spirit with the constant exhortation to man to outdo his neighbor in producing and consuming superfluous products. In an attack of intense vigor equal to, if not exceeding, the reaction to social Darwinism, critics plead for a new spiritually-aware economic system in an evangelistic tone strikingly similar to the characters in Arthur Koestler's *Call Girls*; the cry goes out for "multidimensionality,"[17] for Consciousness III,[18] and for anticonsumption.[19]

Skirting these attacks in his work is perfectly consistent with Dr. Blair's assumptions regarding the continued integrity of the conventional model. On the other hand, it is likely that had he confronted some of these controversies, he would have been alerted to the pertinent compromises carved into the competitive model that render his set of remedies incomplete.

First trespassed by a phalanx of New Deal legislation, then subjected to the embellishments of the Fair Deal, the Great Society, and others, free enterprise now tags precariously in a state of emaciation on the coattails of a market system mongrelized by myriad instances of public intervention. Recognizing that many of the nor-

16. The leading proponent of this view is J.K. Galbraith. *See* J. GALBRAITH, THE NEW INDUSTRIAL STATE (1967); J. GALBRAITH, THE AFFLUENT SOCIETY (1958).

17. W. WEISSKOPF, ALIENATION AND ECONOMICS (1971).

18. C. REICH, THE GREENING OF AMERICA (1970).

19. A. LINDBECK, THE POLITICAL ECONOMY OF THE NEW LEFT: AN OUTSIDER'S VIEW (1971).

mal by-products of free enterprise such as temporary unemployment and corporate bankruptcy generate adverse public reactions with obvious policitcal ramifications, Congress is in a constant process of pacification through laws designed either to soften the self-correction process or eliminate its causes. The business sector benefits from forms of friendly and supportive legislation while other laws hedge against unemployment or dislocation. Self-correction is continually being preempted by plans for dealing with externalities such as the environment. Likewise, the list of statutory exemptions from antitrust grows—newspapers today,[20] bottle makers tomorrow.[21] Non-statutory intervention abounds in the form of regnlatory agency protectionism[22] such as the Interstate Commerce Commission and the trucking industry, restraints couched in not-so-subtle political pressure, as with the bank lending prime rate,[23] and various forms of subsidization—one recent example is the Navy's investment in one of its floundering defense contractors.[24] To compound present conditions, a new interventionalist constituency is emerging from the "new" reform groups who advocate a grand design of anti-establishment governmental intervention.[25]

To be sure, Blair is cognizant of the distortive and counter-productive effects from capricious government intervention. He condemns the anti-competitive effects of protective tariffs, regulatory somnabulism and favoritism, procurement policies that stifle technology, and counter-productive patent laws. The harmful consequences of his list cannot be disputed. It is, however, a short list constituting page one of a many-page dossier. Even if Blair's recommendations were followed to the letter, it would be mainly a token gesture at reviving the old system. Fundamentally at issue—and in doubt—is the existence of a political will and public support of

20. 15 U.S.C. § 1803 (1970). *See* Large, *Newspapers as a (Favored) Business,* Wall Street Journal, Aug. 4, 1969, at 20, col. 3.

21. Under a bill approved by the Senate soft drink companies are free to establish exclusive territorial arrangements for the manufacture, distribution and sale of trademarked soft drink products. N.Y.L.J. 1, (July 16, 1973).

22. *See* Panel Discussion, *Return of the Invisible Hand: The New View of Economic Regulation,* 9 COLUM. J.L. & SOC. PROB. 1 (1972).

23. Wall Street Journal, Oct. 20, 1971, at 4, col. 2.

24. TIME, Jan. 15, 1973, at 70, col. 3.

25. For conflicting views on this see Green and Moore, *Winter's Discontent: Market Failure and Consumer Welfare,* 82 YALE L.J. 903 (1973); Green and Nader, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man, id.* at 871; Winter, *Economic Regulation vs. Competition: Ralph Nader and Creeping Capitalism, id.* at 890.

sufficient strength to unhinge so many vested interests that have achieved a self-serving private accomodation with self-correction.

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The Austrian-German Arbitral Tribunal—A Model for Conflict Resolution

THE AUSTRIAN-GERMAN ARBITRAL TRIBUNAL. Ignaz Seidl-Hohenveldern. Syracuse: Syracuse University Press, 1972. Pp. xv, 261. Index. $15.00.

A noted Austrian jurist now teaching in Germany feels so strongly that the two Germanic states have discovered a useful new procedure for dispute resolution that he has chosen to describe the system in full, to report and interpret the decisions produced by it, and to write all of this in English so that the non-Germanic world can profit by an experience little known outside of Central Europe.

The development of the procedure is difficult to follow because the circumstances under which it was created are complex. Much of the explanation relates to the property settlements between Germany and Austria following the Second World War. Under the Austrian State Treaty, executed in 1955, Austria received from the Allies the German assets in Austria that the Allies had seized in victory. In order to prevent a renewed German predominance of the Austrian economy, Austria pledged in the treaty that the bulk of these assets would never be returned to German control. While the Soviet Union demanded payment by Austria for assets it transferred, the Western powers, including the United States, made their transfers free of charge. Germany was required to compensate its own nationals for the property in Austria that they had lost, and Austria was asked to waive on behalf of itself and its nationals those claims against Germany arising after German entry into Austria in 1938. The scheme was devised to reduce the possibility of tension generated by claims crossing state lines.

Despite this effort to reduce conflict, Austria and Germany foresaw persisting problems in claim settlements, and to settle them they executed the Property Treaty on June 15, 1957. Both governments believed it necessary to the future of property ownership in Europe that the principle of the inviolability of private property be reaffirmed, but they faced the seemingly contradictory provisions of the State Treaty under which Austria held large amounts of German property. To establish a balance between the sanctity of property and the respect due treaties, the Property Treaty regarded the German assets transferred to Austria as a special fund against which Austrian small property owners might claim full restoration or reimbursement for their losses. Additionally, the treaty provided that former German owners could require their creditors to proceed against the fund if, absent the transfer dictated by the State Treaty, their former Austrian assets would have been available to satisfy their debts.

A third treaty, the Finance and Compensation Treaty, was negotiated in 1961 to protect the claims of Austrian creditors against German pension institutes. Additionally, this treaty provided that Germany reimburse Eastern European ethnic Germans who were expelled from their homes at the war's end and who incurred personal expenses while relocating in Austria.

Both the Property Treaty and the Finance and Compensation Treaty established Arbitral Tribunals for determining the validity and amount of the claims—procedures essential whenever claims are involved. For claims arising under the Finance and Compensation Treaty, the negotiators relied on a "classic" arbitral tribunal to which cases could be submitted only by one of the states. In designing the dispute-settlement provisions of the Property Treaty, however, the drafters innovated, and it is with this innovation, seen as a useful model for others to follow, that the author is concerned.

In Dr. Seidl-Hohenveldern's view, the Property Treaty adds to the arbitral procedure two novel features of dispute resolution: the creation of a Conciliation Committee through which claims must filter before reaching arbitration; and the insulation of private claimants from the arbitral process. The treaty requires that any private litigant raising questions concerning its provisions submit the dispute to the Conciliation Committee before instituting proceedings in any German or Austrian court. This procedure has settled through conciliation rather than through adjudication nine-tenths of all claims covered by the treaty. If the Conciliation Committee fails to resolve the dispute, the private litigants are required to sue in their national courts, and these courts may then seek an opinion from the Arbitral Tribunal if they think that an interpretation of the Property Treaty is necessary to resolve the claim. The Treaty thus assures uniformity in the interpretation of its provisions, focuses the views of undoubted experts on issues raised under it, and stimulates compliance by domestic courts with international law under the ultimate supervision of the authorities on the Arbitral Tribunal. Further, Dr. Seidl-Hohenveldern asserts, this novel procedure is less offensive to sovereign prerogatives than is the classic arbitral tribunal: because individuals are not permitted access to the international tribunal but are limited to suit in domestic courts from which final enforceable judgments issue in ordinary course, the Property Treaty offers a valuable face-saving measure.

Experience shows that the work of this unique Arbitral Tribunal has not aroused interstate rivalry. Indeed, on no occasion have the Austrian and German arbitrators felt it necessary to call for an umpire to resolve a tie, the procedure permitted *in extremis*. While Dr. Seidl-Hohenveldern questions whether this circumstance resulted from the common language and similar legal systems in both countries, his presentation of the experience suggests that he thinks this common ground was unnecessary to the success of the venture.

Although Dr. Seidl-Hohenveldern urges that the experience of the Austrian-German Arbitral Tribunal offers for the rest of the world a new model for resolving disputes between property owners, his thesis may not withstand critical evaluation. In contrast to our overburdened court calendars, inevitable delays, high costs, and resulting injustices, the success of the Tribunal certainly suggests that we of the West have, perhaps, come to rely too heavily on litigation as the only means of conflict resolution in our societies. Nevertheless, parties do not always feel that conciliation is fair because pressures can be forced upon them to accept less than satisfactory resolutions. Indeed, some litigants prefer to fight from the outset and let an impartial judge determine the proper solution. Conciliation has its attractions, but it is not the panacea it might at first appear.

Moreover, the Property Treaty's insulation of the private citizen from the final arbiter flies in the face of much current thinking that would give the individual not only a place in international law but perhaps even the right to bring suits in the International Court of Justice. Some jurists and commentators have argued that the private claimant who must convince a national bureau to intercede on his behalf is handicapped because that bureau may for political reasons refuse to present his claim. While domestic courts rather than bureaucrats isolate the individual in the Austro-German scheme, even courts—especially those susceptible to the influence of a Ministry of Justice or a monopolistic political party—are not always free from political motives. Such arguments do suggest the value of direct access to the final interpreter of the law.

This reviewer believes that the Austro-German relationship may be unique and that a conflict resolution procedure modeled on the Property Treaty Arbitral Tribunal might be inappropriate for countries with different languages and different legal traditions. The real value of the procedure should first be tested between, perhaps, two common-law countries where the English language is used by both the parties and the arbitrators. If it succeeds there, the model could then be tried with disputants from different cultures, languages, and legal systems motivated by disparate ideologies.

Whatever the reader concludes concerning the ultimate utility of the Austro-German procedure for dispute resolution on a worldwide scale, he must applaud Dr. Seidl-Hohenveldern's treatment of the subject. Not only is the presentation exhaustive in its explanation of the circumstances under which the experiment was conducted, but the translations of the resulting decisions provide welcome additional materials that are necessary in charting developments in international law. This work certainly supplies valuable information in an area previously lacking sufficient sources.

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