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COMMENT

THE IMPACT OF ANTITRUST*

JOHN PERRY MILLER**

I. INTRODUCTION

The functions of the antitrust laws have never been well articulated. Some proponents of the law emphasize the economic benefits of competition, *i.e.*, incentives to economic efficiency and growth. Others emphasize the political and social advantages of minimizing the concentration of economic power. A review of the history and present status of antitrust suggests that both these views play a part. The Sherman Act prohibitions of "restraint of trade" and "monopolizing" suggest concern that entry into an industry shall not be barred by arbitrary restraints and that decisions of various firms shall be arrived at independently. This is not the same as requiring "competition" in the economist's sense, whether perfect competition or monopolistic competition with free entry. The Robinson-Patman Act, Fair Trade Laws, Judge Learned Hand's decision in the Alcoa case and the Celler Anti-Merger Amendments to section 7 of the Clayton Act all indicate concern for the social and political effects of protecting the weak against the strong and perpetuating several firms in an industry, even at the expense of economic efficiency. No one can understand the role of antitrust policy in the United States without understanding the interplay of these two objectives.

II. SCOPE

Dr. Simon Whitney has undertaken to appraise by the case method the impact upon business of the existence and application of American antitrust legislation. "It is a practical study of industry and national policy in action" and not "a theoretical study of monopoly or competition."¹ The focus is upon the economic impact of antitrust, *i.e.*, the role which antitrust legislation has played in the present competitive status of some twenty industries rather than upon its social and political significance. Although he has not emphasized the point,

* This paper is a review of Dr. Simon Whitney's *Antitrust Policies: American Experience in Twenty Industries*. (Two volumes. New York: The Twentieth Century Fund, 1958. Vol. I, xxxiii, 560; vol. II, x, 541. \$10.00. Hereinafter cited WHITNEY.)

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1. 1 WHITNEY at 13.

Dr. Whitney's concern is with the effects of changing legislation enforced with varying administrative vigor and legal interpretation. He is not concerned with the potential impact of a fixed interpretation of our antitrust legislation, ideal or otherwise, vigorously enforced. The choice of industries was designed to provide "an unbiased sample." It includes "the two largest mineral industries—bituminous coal and petroleum—and the industry with the largest sales in each of six broad classes into which the Census of Manufactures could logically be divided."² These latter include meatpacking, cotton textiles, paper, chemical manufacturers, steel and automobiles. To these eight studies were added twelve industries which have been involved in notable antitrust decisions: cast iron pipe, tobacco products, anthracite coal, aluminum, shoe machinery, motion pictures, tin cans, farm machinery, corn refining, cement, pullman cars and insurance.³

III. ANALYTICAL FRAMEWORK

The problem posed by Dr. Whitney is a narrow but difficult one: the effect of antitrust policies on the structure and behavior of industry. The central question is not whether an industry is "workably" or "adequately" competitive or whether alternative applications of antitrust might have led to improvement in the structure or performance of the industry, although there are many *obiter dicta* about these matters,⁴ but simply how industry differs because of antitrust. It is presumably this narrow focus of the problem which accounts for the absence of a general statement of Dr. Whitney's views of the nature of competition and monopoly and the kinds of evidence which are significant in indicating the effects of antitrust policies. The absence of some analytical framework reduces the value and conclusiveness of the individual studies. It is only by indirection that one gathers Dr. Whitney's views on the significance of structure, behavior and performance as guides to public policy.

While I am thoroughly sympathetic with eclecticism in the selection of evidence, it is useful to specify what one is collecting evidence about. One thinks immediately of structural characteristics such as the number and characteristics of firms and the ease of entry and of performance characteristics such as the allocation of resources, distribution of income, and the rate of economic progress. While these matters are all touched upon at points in the individual studies, the issues are not clearly defined. The volumes would have been more useful had the analytical framework been explicit. I sense that Dr.

2. *Id.* at 12.

3. *Id.* at 13.

4. See particularly the "Summary" and "In Brief" statements at end of each case study.

Whitney is skeptical about the use of economic analysis. He believes that the case method has "the advantage of setting forth the facts in orderly fashion and, it is hoped, clarifying the important issues even if not resolving all of them."⁵ But a "setting forth of facts in orderly fashion" depends upon some definition of *order*. It is precisely here that the body of economic analysis is useful. As a result of Dr. Whitney's caution in the use of economic analysis he misses many opportunities to point out the significance of his data, to clear the air of specious arguments and to aid the reader in choosing between conflicting interpretations of particular circumstances.

IV. MAJOR CONTRIBUTIONS

It is not feasible to do justice to the studies of twenty individual industries presented in substantial detail and with much care. Although these studies depend in substantial part on secondary sources, Dr. Whitney has in several cases undertaken original research by questionnaire or field surveys to determine the effects of particular antitrust decrees. While many will differ as to the judgments of the author, the adequacies of his theoretical structure and the conclusiveness of his evidence, all students of antitrust matters will find in these volumes useful summaries of the structure and behavior of the industries involved, and of antitrust proceedings therein. The footnotes provide valuable bibliographical material.

Dr. Whitney clearly believes that our antitrust laws have made a significant contribution to the competitiveness of American society and that this competitiveness is desirable. However, he believes that the greater productivity and progress of the American economy arises only in part from the policy of competition. He mentions five other factors as being of significance: our natural resources; the size of the home market; the political policies and traditions which have protected property and contract and otherwise facilitated business; the relative freedom from wars and devastation of war; and psychological and social factors conducive to enterprise and competition.⁶

In two summary chapters, Dr. Whitney comments on various economic characteristics of the twenty industries and ventures cautious generalizations about the effects of antitrust policy upon them. His comments on such problems as administered prices, non-price competition, advertising, interlocking directorates, and vertical integration are brief and on the whole not very penetrating. For example, on the subject of vertical integration he points out that in the opinion of some commentators the legal attack upon vertical integration is

5. 1 WHITNEY 12.

6. 2 *id.* at 434-35.

misplaced since the danger to the nonintegrated firm arises only when there is some horizontal control in one market. He notes that others argue that since some horizontal controls cannot be broken, control of vertical integration is the only solution. He then comments: "If that is so, such an assault would first require a careful balancing of possible losses to competitors from integration against possible gains to consumers."⁷ But these conflicting views suggest the need for analysis, and one might expect that the case studies would illuminate the problem. Granted that in most industries there is some degree of market power exercised by many firms, under what conditions and in what sense does vertical integration strengthen this policy? The discussion of vertical integration does not get very far unless one distinguishes between the effects of integration upon the allocation of resources, the number of independent firms, the number of points of initiative and the incentives to innovation. Those who have minimized the effects of vertical integration are clearly concerned with the problem of the extension of monopoly power in the sense of the power to effect the allocation of economic resources. Others have been more concerned with the protection of independent firms and the encouragement of their survival. This interest may arise from pre-suppositions concerning the processes of innovation or from a concern for the survival of smaller independent firms per se. Dr. Whitney has little if anything to say on these issues. Yet in fourteen of the industries studied, vertical integration has been an important issue, and in eight of these industries there has been court action affecting integration in one way or another.⁸ Is this paucity of light an inherent limitation of the case method? I think not. But it does suggest the need for placing the case studies in proper perspective by more detailed analysis of the competitive process.

Dr. Whitney presents several interesting conclusions, however, concerning the effects of antitrust action. Collusive agreements with respect to prices or output have been attacked in sixteen of the industries studied. Dr. Whitney believes that enforcement of the antitrust laws has not only been effective in eliminating these agreements but has discouraged agreements in other industries as well. While he believes that they have discouraged cartelization such as has "done so much to fetter competition in several European countries," he believes that "agreements would usually tend to break down in a country with the individualistic traditions of the United States."⁹ I conclude that he believes our policy toward collusive agreements

7. *Id.* at 406.

8. *Id.* at 405-06.

9. *Id.* at 394.

is on the whole desirable, an opinion which most American students of the subject share. But one might ask why it is important to prohibit them if they are likely to break down anyway? In Great Britain and Europe many have argued that restrictive policies may in some cases do substantial good. It is disappointing that these issues are not explored.

In commenting on the basing point system of pricing in the cement industry, the author minimizes the effect of the decision although he believes that "abolition of the formal pattern by which each firm's selling price was automatically determined by a pricing system is healthy."¹⁰ But it is his general belief that outlawing the basing point system while permitting individual freight absorption will have little effect upon the actual prices paid in many industries.¹¹ He believes, in short, that the Federal Trade Commission's great victory is likely to have little effect.¹²

In discussing the role of unfair competitive practices in the development of monopoly, he concludes that the experience since 1914 "indicates that their importance was very much exaggerated, and theory suggests that a firm not possessing monopoly power from some other cause to begin with has very limited ability to coerce suppliers or customers. The prohibitions of unfair competition, price discrimination and tying clauses put into the law under President Wilson are, nevertheless, valuable additions."¹³

Dr. Whitney believes that artificial barriers to entry have been rare in the industries he studied, though he notes increasing difficulties of entry arising from large capital requirements and other factors. Nevertheless, he concludes that although increasing difficulty of entry has lessened competitive protection to consumers, there have been compensations. "[T]he same development that reduced entry [*i.e.*, adoption of machine processes] has raised productivity."¹⁴ But are we sure that these giants are efficient? What of the wastes of competition between giants? Who benefits from this productivity—consumers, labor or investors? He also argues that the lower risks of established companies make it possible to attract funds more cheaply and is "thus associated with lower costs and lower prices."¹⁵ This is an appealing, plausible, but undocumented conclusion.

Perhaps most interesting are Dr. Whitney's comments on the role of dissolution in the promotion of competition. He notes a tendency for oligopoly to replace monopoly in those industries which were

10. *Id.* at 320.

11. *Id.* at 395.

12. See also comments on basing point system in steel, 1 WHITNEY ch. 5, 287.

13. 2 WHITNEY 399.

14. *Id.* at 408.

15. *Ibid.*

originally dominated by a single firm. Dr. Whitney credits dissolution with modest achievements. He notes that dissolution in the oil, tobacco and explosive industries proved beneficial but he also asserts "that failure to dissolve four other big trusts (tin cans, steel, farm machinery, aluminum) did not prevent these industries from developing in about the same way as the first three."¹⁶ He believes that "a dominant firm is not likely—if an industry's technology is free—to retain its original share of the market even if it is not dissolved by antitrust action."¹⁷ He attributes this not to the fact that small firms are more efficient but "that there are psychological, political and managerial obstacles that prevent a giant firm from growing at the same percentage rate as smaller firms. Even if a big concern is able to manufacture a product as cheaply as its competitors, it may shrink from trying to double its output and market, whereas any one or several of the smaller firms may struggle to accomplish this very thing."¹⁸ He explains the failure of competitors to the United Shoe Machinery Company to develop by "this firm's control over the whole technology of its industry."¹⁹ Although he believes that divorcement in anthracite, the *Pullman* case and motion pictures made for a more open market, he questions whether the practical benefits have been impressive. Yet he believes the corn refining, farm machinery and meat industries, despite modest divestitures and correspondingly modest results, have developed in a competitive fashion. For him, "dissolution under the antitrust laws has, then, served a useful function in some instances, by shortening the period needed for competition to assert itself against an original near-monopoly; but it has not achieved, and has not seemed likely to achieve, valuable results when used in oligopoly situations."²⁰ Should dissolution be pushed further? Dr. Whitney believes not. He rejects proposals that industry be fragmented by vertical and horizontal disintegration and other means because such industries "would not be dynamic or progressive . . . the hope of winning profits which certain kinds of monopolistic position provide is a driving force for both business firm and individual . . . not competition alone, but the combined force supplied by competition and by ambitions of a noncompetitive nature, will make a progressive economy."²¹ Referring to the contrary view of Walter Adams,²² he remarks that "no evidence was found that the

16. *Id.* at 390.

17. *Id.* at 387.

18. *Ibid.*

19. *Id.* at 388.

20. *Id.* at 390.

21. *Id.* at 438.

22. Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 5 *IND. L. J.* 1 (1951).

industries in which these 'Pyrrhic victories' occurred, or others containing big corporations that might seem ripe for dissolution under these principles, operate less efficiently for the public welfare than industries composed of many small firms."²³

It is clear that Dr. Whitney's test of public policy as applied to monopoly and oligopoly is "efficiency of operation for the public welfare," but one seeks in vain for a definition of "efficiency of operation" or "the public welfare." His comments on the role of the search for monopoly position are reminiscent of similar remarks by the late Joseph Schumpeter.²⁴ Although this position has been embraced by many in recent years, it is a view which is neither well articulated nor well documented. To recognize the inevitability and desirability of some monopolistic elements in an economic sense represents progress. That pure competition should be rejected as impossible and unrestrained monopoly rejected as undesirable, most would agree. But this poses a problem. What kinds of monopolistic positions should be permitted? What should firms in such monopolistic positions be permitted to do in furtherance of their objective of greater profits? Most would agree that vertical integration, tying and exclusive dealing contracts, and discrimination presuppose some element of monopoly power. One must assume that firms engaging in these practices believe that they will increase the value of their monopoly position by such practices. If we grant this, it is no longer possible to deal with a simple concept of competition. "Monopolistic competition" is multi-dimensional. The question is: what may firms do to expand and defend their "monopolistic" positions? Herein lies the problem of antitrust policy, to establish the rules for "monopolistic competition." Economic analysis provides some tools but these must be elaborated if we would understand the effects of particular policies in particular situations. But for any policy to be meaningful, its objectives must be specified.

V. CONCLUSION

The problem of assessing the effects of antitrust is a difficult one. Dr. Whitney has approached the problem historically with "an ordering of the facts" concerning antitrust action and the changing structure and behavior of industry. But it is difficult to unravel the effects of antitrust policy from the effects of other factors making for change. The handling of the steel industry is a case in point.²⁵ He reports on the merger of 1901. But at no point does he venture to indicate what effect the merger had on efficiency in the industry,

23. 2 WHITNEY 392.

24. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* (3d ed. 1950).

25. 1 WHITNEY ch. 5.

the level of prices and production, innovation, etc. Moreover, although he reports on subsequent mergers by other companies, he does not assess their significance. There is a widespread view that these mergers have had the effect of lessening competition and tending toward monopoly. But has this really been the effect? An alternative explanation of the merger movement in steel is that mergers were the least expensive way by which successful firms could invade new markets, a way by which successful management with capital could be utilized most effectively to expand capacity. Until recently antitrust policy has on the whole been lenient toward mergers. What has been the effect of this leniency in steel? Has it strengthened the monopolistic forces or has it strengthened competition? What were the effects of the steel decision in 1920 upon corporate policies in other industries? This decision is credited with establishing the principle that size per se is not illegal. Granting that this decision encouraged growth by mergers in other industries, was the effect to lessen competition or not?

As we clarify the law on various issues it is to be expected that firms not parties to legal proceedings will adapt their policies accordingly. Any attempt to assess the effectiveness of antitrust policies must be concerned, then, not only with the subsequent history of industries subject to litigation but also with the effect of this litigation upon the behavior of other industries.

What then can be done to throw more light on the effects of our antitrust policies? Further studies of particular industries are in order. But this calls for imaginative interpretation of the record. Indeed, it requires a good deal of informed speculation and judgment.

A second approach might be through comparative studies of the structure, behavior and performance of similar industries in different countries. There is an increasing body of information on industries in Canada, Great Britain and other countries. In some countries, such as Great Britain, public policy has been substantially different from ours. A comparison of the evolution of industries in various countries should be suggestive if not conclusive. And in the case of Great Britain, recent changes in policy with respect to restrictive practices afford an opportunity for historical analysis of the effects of the elimination of particular practices in that country. The value of international comparisons is limited because of the difficulty of disentangling the effects of antitrust policies from the effects of other factors such as the differences in the size of market, in the relative cost of factors of production, and in other social and political factors affecting entrepreneurial behavior. Nevertheless, this is a promising area of research.

A third approach designed to throw light on the effect of antitrust decisions in industries not party to such proceedings might be to consult key corporate legal advisers concerning the effects of particular decisions upon the behavior of their clients in other industries. It should be fruitful to follow up certain key decisions such as the basing point decisions and various decisions limiting the scope of patents to determine what effect these decisions had in other industries. What advice did counsel give their clients in the light of these decisions? What changes in pricing or other policies were made in such industries, and what have been their effects?

The untangling of the effects of antitrust policy is an important and challenging task. Dr. Whitney and the Twentieth Century Fund's Committee on Antitrust Policy recognize that his pioneering study represents only a beginning. For all its limitations, students of American industry and antitrust policy are deeply indebted to Dr. Whitney. I hope that others will carry on the task.

