MONOPOLIES AND MONOPOLISTIC PRACTICES*

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I

THE desires and ingenuity of man, and our changing environment, create ways of life that are only roughly and inaccurately described by such words as individualism and collectivism. Increasing freedom in marriage, including freedom of divorce,¹ may increase the vitality and strength of the successful marriage; and it is quite consistent with the population control required by biological and economic conditions, and the needs of the modern state.² Besides his family, a man's other great concern is of course making a living; and here too freedom and control occur in forms and combinations which adapt themselves to changing conditions, and the needs of national and international communities.

Freedom of association among farmers and workers, relatively weak members of our economic organization, has been commonly regarded as consistent with the traditions of freedom characteristic of the United States. On the other hand, the freedom of the common man has been protected against the consequences of unlimited freedom of association among owners. Freedom of association has been limited in manufacture and trade by the Anti-Trust Acts; and even in such an industry as railroad transportation, it seems that a limit on association, together with regulation by a Commission, is provided for by the Transportation Act.

In such industries as bituminous coal, crude oil, and lumber, the practical need for enlarged freedom of association has long been urged. In industry generally, from the relatively disorganized cotton textile industry to the relatively highly organized steel industry, a need for enlarged freedom of association seems to many to have been disclosed by the depres-

* This paper deals again with a theme discussed in Sharp, *Movement in Supreme Court Adjudication*, 46 Harv. L. Rev. 361, 391-399, 611, note 250 (1933). It was completed September 22d, and is based largely on personal observation. For the writer's background, and his views at another period, see a comment in 1 Univ. Chi. L. Rev. 320 (1933). The experience there referred to has been supplemented by observation during the winter and spring of 1934, and work as a special consultant in the summer of 1934, in the Recovery Administration. The discussion here deliberately errs, if at all, in the direction of the Utopian.

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¹ Cf. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (2d ed. 1914) lxxix, 43-44, 345-348, 384-387.

² Cf. *Buck v. Bell*, 274 U.S. 200 (1927).

sion. The world is of course still full of poverty, and the incentives to increase the common wealth, which are the best features of free capitalism, should be preserved in any system or substitutes with the same effect discovered. At the same time, the various groups concerned in the production of wealth may in co-operation be able better to cope with current conditions. They may in time—perhaps after two or three more depressions—learn to control depressions, which exhibit poverty and insecurity in their worst modern form; and which are a social scourge comparable only to war.

II

In a bold effort to combine the tradition that association of owners must be limited and checked, with an increased freedom of co-operative association, made effective by government protection, the National Industrial Recovery Act was passed and the Recovery Administration created.

One recognition of the soundness of the essential feature of the tradition embodied in the Anti-Trust Acts is contained in the provisions of the Recovery Act prohibiting "monopolies" or "monopolistic practices" on the part of associations authorized and protected by the Act, and by authorized approval by the President. The principles enacted by the Sherman Act, and developed by its interpretation, are thus significant for the interpretation of the Recovery Act; and will doubtless be significant for the interpretation of any permanent succeeding Act. A brief re-examination of these principles, in the light of current developments, may be of some use.

Two conceivable interpretations of the Sherman Act and related provisions of other Acts must be regarded as untenable in the light of the decisions; and two other interpretations must be recognized as arguably correct, in view of the opinions of the Supreme Court.

In the cases arising in the first fifteen or twenty odd years of the existence of the Sherman Act, a strict and "literal" interpretation of the Act was approved in the opinions expressed by a majority of the Court. "Every" contract or combination in restraint of trade, "every" monopoly, is condemned by the Act. Any contract, it was objected, restrains trade, and a "literal" construction would condemn an agreement to purchase an entire output, or a partnership, even in a highly competitive industry or trade, if—for example in cities separated by a boundary river—the parties were engaged in interstate commerce. A sensible use of a concept of specific intent to restrain free trade would perhaps have disposed of this objection, and permitted a strict interpretation of the Act. The argument in favor of freedom of contract urged by dissenting justices finally pre-

ailed, however, and it was decided that only attempts and conspiracies to combine, and combinations in unreasonable restraint of trade, are condemned by the Sherman Act.³

A second possible meaning of the Act, construed to contain the "rule of reason," would justify fatal objections to the rule of reason itself. It might, perhaps, conceivably be held that any reasonable combination, reasonable in the light of such considerations of operating efficiency, high quality of product and service, low prices, as would justify it on economic grounds, is permitted by the Act.⁴ Such a construction of legislation applying to classes of economic activity much more varied and in many instances more complicated than local public utilities or railroads, and untouched by the expert services of specialized commissions, would impose an impossible burden on the Courts. It would give the Courts a function which it would be difficult to describe as "judicial." The Act, by such a construction, would impose on business men who could hardly be well advised in advance about the lawfulness of proposed conduct, the danger of serious penalties; and so would violate one of the elementary requirements of decency in legislation contained in the due process clauses of the Constitution.⁵

Finally, though both contemporary history and the older history of the words used, make the Act difficult to interpret, the controlling purpose of the Act seems fairly clear. It was to preserve competition; even though there were objections to competition and strong arguments in favor of other methods of industrial organization.

Accordingly, in the past twenty years, two possible interpretations of the Sherman Act, and related provisions of other Acts, have been outlined in the opinions and decisions of the Supreme Court.

One view is that if new units are free to enter into competition, undeterred by natural conditions or unfair practices such as boycotts or local underselling, a combination is not illegal no matter how large a share of a market it controls. Except in case of combinations whose strength is based on control of limited natural resources, or something comparable, present market control and unfair competition are both essential elements of the complete offenses condemned by the Act. The pressure of new investment, free and always ready to come into a profitable industry, is all the

³ In *Northern Securities Co. v. United States*, 193 U.S. 197 (1904), one member of the majority and the four dissenting justices relied on the rule of reason, which was finally established in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

⁴ Cf. *United States v. United Shoe Machinery Co.*, 247 U.S. 32 (1918), which seems, however, to be best explained by a construction of the patent laws as then understood.

⁵ *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927).

competition necessary as a spur to increased production, efficiency, good quality and service, and low prices. It is all that is protected by the Act.

It is perhaps still arguable that combinations in the nature of "mergers," involving substantial managerial and financial unification, are governed by this interpretation of the Act; though it has seemed increasingly clear that such combinations as trade associations are governed by a different test. Moreover, the application of such a test to any combination is not required by the decisions of the Supreme Court.⁶

The second view, which may be applicable to all combinations and seems clearly applicable to trade associations, is that only if a combination leaves substantial present competition, is it on the safe side of the line drawn by the Sherman Act. A combination which would otherwise be legal, may be an attempt or conspiracy by reason of its use of unfair practices; and this is the only significance of the discussion of unfair practices contained in the cases. Unfair competition is never an essential feature of the complete offenses condemned by the Sherman Act. A combination which eliminates present effective competition is illegal.⁷

It seems indeed that the maintenance of effective present competition is the test that is being evolved for all offenses under the Sherman Act and related legislation, by the decisions of the Supreme Court.

Moreover, it seems that questionable forms of business conduct, which are nevertheless not within the established classifications of torts or crimes or closely related classifications, will not be held condemned by the Federal Trade Commission Act or related legislation, unless the unit or combination which engages in the conduct approaches a control of its market by the elimination of effective present competition.⁸

The common man, producer and consumer alike, is thus not protected against every combination or every practice which may adversely affect

⁶ *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 62 (1911) is the strongest expression of judicial approval of such a test, in a majority opinion of the Supreme Court. Cf. *United States v. United States Steel Corporation*, 251 U.S. 417 (1920); *United States v. International Harvester Co.*, 274 U.S. 693 (1927), both consistent with a stricter test. For an argument in favor of the test described, see *Watkins, Mergers and the Law* (1929), sceptically reviewed in 19 *Am. Econ. Rev.* 471 (1929).

⁷ *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

⁸ *Federal Trade Commission v. Gratz*, 253 U.S. 421, 427, 438 (1920); *Federal Trade Commission v. Sinclair Refining Co.*, 261 U.S. 463 (1923); *Federal Trade Commission v. Raymond Bros. Clark Co.*, 263 U.S. 565 (1924); *International Shoe Co. v. Federal Trade Commission*, 280 U.S. 291 (1930). Cf. *Federal Trade Commission v. Beech Nut Packing Co.*, 257 U.S. 441 (1922); *United States v. General Electric Co.*, 272 U.S. 476 (1926); *Federal Trade Commission v. American Tobacco Co.*, 274 U.S. 543 (1927). The distinction between price fixing and commercial policy control on the one hand, and measures to preserve competition on the other, is illustrated in *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 1 (1927).

competitive conditions. He is protected against such attempts, conspiracies, and practices as threaten, and such combinations as actually effect, the elimination of the pressure of substantial present competition.

Effective rigid control of production and agreement on prices are the characteristic forms in which the elimination of competition appears. If efficient and inefficient units alike are prevented from increasing their proportionate shares of production or business in any occupation, the incentive to increase volume by increasing efficiency which is the characteristic feature of competition, is seriously limited or destroyed.⁹ Agreement on what is to be given or on what is to be received in return, or both, is of course only another way of effecting the same result; and eliminating that impulse to technical and administrative progress which is given by competition.¹⁰ On the other hand, it would seem that industrial units might preserve a substantial and effective degree of competition among themselves, and still unite to control some of the ill effects of competition, consistently with the Anti-Trust Acts.¹¹

III

Prohibitions against "monopolies" and "monopolistic practices" are combined with provisions authorizing and protecting associations to attack the wage, price, and employment demoralization characteristic of the depression, in the Recovery Act. Similar provisions for the preservation of competition seem likely to be combined with similar provisions for association in a continued effort to improve industrial organization, in any succeeding Act. J. M. Clark's article in the *March American Economic Review*,¹² seems a particularly useful treatment of the possible benefits of arrangements for association, designed and administered with reasonable skill. Some further discussion of methods of organization may be useful.

The problem of the small enterprise may first be distinguished from the problem of competition and monopoly. Labor costs may in some cases

⁹ Cf. *American Column and Lumber Co. v. United States* 257 U.S. 377 (1921); *Maple Flooring Manufacturers Association v. United States*, 268 U.S. 563 (1925); *Cement Manufacturers Protective Association v. United States*, 268 U.S. 588 (1925).

¹⁰ *Federal Trade Commission v. Pacific States Paper Trade Association*, 273 U.S. 52 (1927); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). Cf. *Paramount Famous Lasky Corporation v. United States*, 282 U.S. 30 (1930); *United States v. First National Pictures Inc.*, 282 U.S. 44 (1930).

¹¹ *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918); *Standard Oil Company v. United States*, 283 U.S. 163, 176 (1931); *Appalachian Coals v. United States*, 288 U.S. 344, 367-368 (1933).

¹² See Clark, *Economics and the National Recovery Administration*, 24 *Am. Econ. Rev.* 11 (1934).

have been increased too drastically, in view of the necessity for adjustment and recovery, and an effort made to control too many minor industries, by the Recovery Administration. In these respects, efficient and inefficient small businessmen alike may have an economic case against the policy of the Administration; though the case is much weakened by the care with which the Administration has acted, for example in dealing with applications for special treatment in particular instances. On the other hand, there is little evidence that small enterprises have suffered in any substantial degree from the commercial provisions of important codes. Indeed, the protection of inefficient small, medium and large enterprises alike would require the use of just such devices as come closest to those which would be condemned as monopolistic. It is only the efficient enterprise of any size which, with its workers and available new workers and the consumers it serves, gains advantages by the preservation of a considerable degree of competition. The subject of these observations is not the problem of the small enterprise, but the problem of competition and monopoly in relation to control.

In many situations, the competition of substitutes, the pressure of new production, the existence of small units, and the competition of units from large territories, protect the buyer and preserve competition at the same time that they create obstacles to effective organization and control. Even in a fairly compact and well-organized industry, serving a fairly well-defined market, there are constant stresses between efficient and inefficient producers which it would be difficult to eliminate by any form of organization. Price cuts seem to be partly the healthy result of such stresses in the steel industry, as organized under the steel code. In this respect, most industries differ from the simple local monopolies of necessities which furnish familiar examples of the relations of industry and government.

On the other hand the pressure of substitute and potential competition and the internal stresses which are constantly at work to disrupt industrial combinations have not been considered sufficient, at least in the case of trade associations, to satisfy the law governing restraint of trade and monopoly in the United States. Moreover, efforts to limit new capacity, as well as to control production and price, have recently been made; and may be required in some instances in the future. Have any methods appeared by which simple active competition may be effectively combined with capacity, production, and price control?

Capacity control has appeared and presumably will appear commonly in connection with production and price control. Except perhaps in some

particularly demoralized industries and markets, it should be accompanied by provisions giving new enterprises a reasonable opportunity to prove their ability to compete with existing enterprises. A new enterprise may for example be guaranteed, on showing minimum stated qualifications, a trial period with a trial quota or trial machine hour limits, in an industry which depends on quota or machine hour control.

Production control in the form of fixed quotas, determined only by the past performance of units in an industry would appear to be the characteristic form of "monopoly" and "monopolistic practice" if extended over any substantial period of time. Competitive incentives to a technical and administrative organization to improve its relative position in an industry, are removed by such a device. A simple machine hours limitation system gives some incentive to the efficient producer to increase his output in the allotted hours; and for this purpose to increase his sales by improving his product and lowering its price. Of the production control devices thus far tried, the machine hours limitation appears to be the soundest and perhaps the most effective in administration.

At the same time, it seems likely that the pressure of consumers and their allies, the workers, available workers, and owners in efficient enterprises, will over any considerable period of time lead to the discovery of new devices to stimulate competition in any arrangements for production control which gain public approval in the United States. Our poverty in the best of times is a sufficient reason for encouraging constantly increasing production with constantly increasing real wages and constantly lowering real prices. Certainly not until every farmer has the house of his choice, adequately supplied with electricity and electrical appliances, and two Rolls-Royces, will it begin to be time to talk of anything remotely resembling general absolute overproduction. A consideration of real wages at their peak for this century is a sufficient demonstration, if one is needed, that the poor cannot as yet readily obtain the goods which they may legitimately desire, and which progressive industry may yet supply them. No one seriously proposes a close limit on increase in productive efficiency as a satisfactory remedy for such evils as technological and cyclical unemployment.

Moreover, too rigid a system of production control is likely to defeat the very purposes which may justify some measure of production control. Experience abroad, and already to some extent here, seems to indicate that rigid production control may interfere with an effort to keep production and effective demand reasonably well adjusted over long periods. The effect may be produced in at least two ways. The development of

substitutes and new capacity, if not independently controlled, may be overstimulated by rigid production or price control. On the other hand, protection to inefficient high-cost units, and refusal to provide for their orderly liquidation, may lead to a situation in which an oversupply of obsolete capacity produces the very lack of adjustment which it is the object of control to prevent.

Devices have indeed been suggested which make it seem likely that a high degree of competition may be combined with production control, if the administrative ability of industrial and government leaders will undertake to create the necessary arrangements. A competent executive in the paper industry has expressed a considered opinion that a system of shifting quotas could be made to operate effectively in some divisions of the industry. Production or sales quotas could be based on figures derived by weighting both the past performances and the current unfilled orders of members of the industry, at given significant dates in the business year. The weights to be given to the progressive factor and the retarding factor would be determined by the judgment of the industry, as to its proper rate of growth; checked by the judgment of approval of a public agency like the Recovery Administration or the Federal Trade Commission. Authority to adjust the resulting formula, within set limits, might be given to the industry's governing body, containing representatives of buyers and consumers; and with further authority, in case the system should occasion abuse, to suspend or stop its operation.

The executive in question expressed the opinion that substantial competition with respect to quality, service and specific prices would be encouraged by the device of considering unfilled authentic orders. The difficulty of making sure that orders are in fact authentic, for example with the aid of a central office to which orders must be sent, does not appear inevitably more insuperable than other difficulties which have been overcome in the administration of codes. In industries in which costs are adequately known, costs instead of orders might be used as the progressive factor in a formula similarly designed to make quotas shift in favor of efficient producers. Such an arrangement, supplemented by labor safeguards, should insure a steady increase in consumption or use, production, employment, wages and total income in an industry; and at the same time provide for the orderly liquidation of high cost producers and the adjustment of production to effective demand over long periods.

Some such device has been urged in the lumber industry; and it has been objected that any such arrangement would be too clumsy for use in the industry. This may well prove to be the case in many industries; and

a more useful suggestion may be one that emerges from the position taken by certain efficient producers in the cotton textile and lumber industries. These producers suggest the possibility of further refinements in the device of machine hours limitation, to combine effective competition with control. A producer may be authorized to operate at a stated rate above that prevailing in the industry in case he pays wages at a stated rate above that prevailing in the industry. It seems likely that such a producer, even with higher wages, would normally have lower labor costs than other producers; and so would be able, and have an incentive to exert some pressure in the direction of lower prices. Again, the degree of advantage given to such a producer would depend on the best available judgment as to the proper rate of growth and liquidation in the industry. The adherence of efficient producers, even of "substitutes," to an industrial organization, would be encouraged by an assured opportunity to compete effectively.

It might be found necessary to combine with such a device measures to protect creditors and to insure a division between workers and consumers of the benefits of efficiency. If so, the device might prove too complicated to be practical. The proposals just discussed may indeed all be impractical to these forms; but it seems likely that something of the sort can be devised by the ingenuity of economists and business men.

Some observers think that the best suggestion for combining competition with control, is a proposal appearing in the automobile industry and elsewhere for a simple limitation on the accumulation of inventories of goods for sale.

It is possible indeed that the periodical revision of quotas required in any quota scheme could regularly be made with rough reference to wages, costs, unfilled orders and similar indications of efficiency, under the observation of representatives of buyers and the government. Low cost units commonly have an advantage in bargaining for quotas which must in any case be respected if a quota system is to last. It would seem desirable, in the interests both of consumers and effective administration, that the rules governing the game between producers should be stated as far in advance and as completely as possible. On the other hand, it may be sufficient if the bargaining advantage of efficient producers is explicitly recognized with approval in an industry's governing instrument; and provision made for its protection where necessary by representatives of the public.

Opportunities for new producers to compete and for existing producers to improve their relative position should thus be combined with any arrangements for capacity and production control in American industry.

Recognition of the soundness of this principle, and experience in its application, may enable American industrial associations to achieve a more marked success than the German cartels. The principle is required by the tradition created by our anti-trust laws, which seems almost as well established as any constitutional tradition. It may even be required by the due process clauses of the Constitution;¹³ even if these clauses are construed, as they may well be, to permit considerable freedom of association for purposes of self-government; and to authorize safeguards for the rule of majorities in industries in the form of sanctions furnished by state and national governments.

A recognition of the soundness of the principle in question is found in the treatment of price control devices by the Recovery Administration. Production and price controls are of course only two means of accomplishing the same result. Price control in some forms perhaps requires more delicate adjustments, and is more difficult to administer. Price-fixing schemes, including prohibitions against selling below cost, have from the beginning presented troublesome puzzles to the Recovery Administration; and there has been an increasing tendency to require special justification for the approval of any scheme of the sort. On the other hand the limited forms of price control applied in open price systems, after being subjected to useful criticism and improvement, seem to have found an approved place in the organization of industries working with the Administration.

The peculiar features of a particular situation which make price fixing a promising device in the bituminous coal industry are worth noting. Here it is thought that inefficient units, frequently small units, which come into production on price rises and subsequently demoralize employment and market conditions, can be limited in their operation by a steady and relatively low fixed price, subject to approval by representatives of the public. The production, employment, and income of relatively efficient units, many of them relatively large units, would thus be increased, conservation and efficiency promoted, employment steadied, the consumer protected, and the industry better organized to maintain its position in competition with producers of other fuels. If the analysis of leaders in the industry is correct, and the solution proves effectual, it is because competition does not operate "normally" in the industry; and the interests of consumers, workers, owners and the public require that the industry govern itself in a

¹³ Cf. *Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583 (1926); *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932). The significance of these cases may be considered in the light of *Borden's Farm Products Co. v. Baldwin*, 55 Sup. Ct. 187 (1934); *Panama Refining Co. v. Ryan*, U.S. L. Week., Jan. 8, 1935, at p. 5.

peculiar way. There seems to be little question in any quarter that the related industries producing bituminous coal and crude oil should be allowed every opportunity, and if necessary aided by special legislation, in improving their methods of self-control.

It seems not unlikely that the device of machine hours limitation developed in the cotton textile industry and used now in some divisions of the lumber industry, will—if it is modified—prove the one device needed in the lumber industry, and other industries as well. If so it will make unnecessary even the emergency cost protection price control provisions now operative in the lumber industry. Objections to proposed simple prohibitions against selling below cost were early pointed out, and recognized by the Administration. If such prohibitions operate according to their terms they prevent high cost units from meeting the prices of lower cost units even temporarily, while attempting to improve their operations. On the other hand, such experiences as those with cost-plus war contracts and Pittsburgh-plus, suggest the danger that such provisions may be used in an attempt to fix a price which will give extended and unwarranted protection to high cost units. Moreover, in the many industries in which costs are inadequately kept, such provisions are difficult to administer and leave considerable arbitrary discretion in the work of any administrative body. Accordingly the cost protection features of the original lumber code merely authorized the fixing of prices sufficient to cover the “current weighted average cost of production” in any division; and only specified items of cost, not including a return on investment, were to be counted. Moreover prices were to be fixed according to this formula only when the code authority “is satisfied that it is able to determine cost of production as defined.”

The formula in question provides adequately for competition; since the efficient unit is able by lowering its costs to exert a downward pressure on the average cost of production in the industry, and so on minimum prices. Such pressure should gradually result in an improvement in the relative position of low cost units and the gradual liquidation of high cost units. At the same time, some competent observers and leaders in the industry have doubted whether the formula in question could be soundly and effectively administered over any considerable period of time. Accordingly, as has been observed, there has developed a substantial body of opinion favorable to depending primarily on the relatively sound and workable machine hours limitation device in attacking the permanent problems of this chronically distressed industry. Moreover, the original price fixing provisions of the code have recently been replaced by emergency price fixing authority, limited as required by the present price policy of the Adminis-

tration. General scepticism about cost protection devices led to the recent announcement of a general policy favoring such devices only when designed to prohibit destructive price cutting below the costs of efficient units and then only in emergencies recognized as such by the Recovery Administration.

Like the furnace capacity limitation, which is unnecessary, and general authority for production control, which is not expected to be used, the minimum price fixing provisions are academic features of the original steel code. Authority to fix minimum fair prices was given in very general terms to the directors of the American Iron and Steel Institute, the code authority. Close questioning at the hearing on the original code, and elsewhere, indicated that the provision was probably unworkable and would not be used. Like the other provisions referred to, it was moreover made subject to supervision by the Recovery Administration. No effort has in fact been made to use the authority given by the provision. Its elimination recently at the expiration of the period of experiment with the code, as one of a number of amendments, was therefore significant only as an instructive expression of the new policy with respect to price-fixing announced by the Administration.

The practical commercial provisions of the steel code are the open price provisions, requiring adherence to published prices on the part of members of the industry. Somewhat similar open price arrangements have been held a violation of the Sherman Act by the Supreme Court.²⁴ They are however theoretically consistent with a very high degree of competition; and where they are accompanied by practical safeguards, and particularly as in the steel code by provisions for observation and supervision by representatives of the public, this competition may be given practical protection. There is as yet no sufficient evidence that the open price provisions of the steel code have been abused to any substantial degree. And there is some evidence, including price cuts, that freedom to publish any prices has been adequately protected.

Freedom to publish prices is of course essential to the preservation of competition under an open-price system. A useful provision for the protection of this freedom is contained in one of the recent amendments to the steel code. "Using coercion or coercive means to induce a member of the Code to withdraw or change a base price for any product at any basing point" is declared an unfair practice; and so presumably made subject to the substantial penalties for violations of codes provided by the Recovery Act. "Coercion" is a word without any well-defined legal meaning; and

²⁴ *United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923).

it seems likely that the provision would be given a severe effect, in doubtful cases, in view of current opinion, by any court. It would perhaps be helpful, as the basic code form has done, to declare any price agreement an unfair practice, as well. In fact, the most effective safeguard of competition is the work of the code authority, with the participation, observation, and supervision provided for in the code, on the part of representatives of the Recovery Administration.

An open price system, properly safeguarded, is not only consistent with quality, service, and price competition. It may encourage intelligent and informed competition, and assure the equal treatment of customers, as well as promote stability. These advantages are of course obtained at the expense of some of the force of competition. There appears now however to be a considerable body of opinion favorable to the use of such systems, under the supervision of the Recovery Administration.

The multiple basing point system used by the steel industry and recognized and enforced by the code, presents an interesting special problem. Prices are published for products delivered at a considerable number of basing points, more or less near producing and using centers; and charged to include these prices and in addition rail freight to the point of delivery, the nearest point to the place of use, to the buyer. Authority to permit deductions from prices thus computed, in case shipments are made, for example by truck or water, at less than rail rates, is given the directors of the Institute. This authority has been exercised in a considerable number of cases; and should and doubtless will be exercised in more cases. The necessity for deductions of this sort is recognized by the form of one of the recent amendments to the code.

It seems likely that similar improvements in commercial practices may be accomplished by the concerted action of the industry and the government. It may be indeed that experience with the multiple basing point system in the steel industry will aid in the solution of basing point problems, like that which has arisen in the automobile industry, elsewhere.

Examples have now been given of some of the most important problems of competition which have been the concern of the Recovery Administration; and their solutions have been indicated, and the possibilities of improved solutions in arrangements for combinations of competition and control, which are constantly being explored by leaders in industry and the Administration. Other problems might be worth further discussion. The work of the Administration may lead to a more satisfactory solution of the resale price maintenance problem than any which has been possible heretofore. On the other hand, it has seemed necessary to limit efforts to

protect existing channels of distribution against the normal consequences of competition and evolution; and the vigilance of the Administration in this respect cannot be relaxed.¹⁵

The discussion thus far has indicated at every point that competition may exist in various degrees of intensity. Chamberlin's recent *Monopolistic Competition*¹⁶ is a theoretical account of the operation of elements of "monopoly," resulting for example from the location of urban commercial sites or the use of trade names, present in situations which are for all practical purposes sufficiently competitive. It seems that arrangements are practicable which will insure a sufficient degree of competition, combined with a considerable amount of control. The preservation of competition, and not necessarily the determination of "fair" prices and reasonable practices generally, must be the concern of bodies like the present code authorities, and particularly the representatives of the Recovery Administration. Competition and control, of a somewhat different sort, are as has been observed both provided for in the Transportation Act.¹⁷

Limits on competition are of course not desirable for their own sake; and it is the further function of industrial leaders and representatives of the Administration to accomplish the ultimate purposes of group control.

IV

Limitation of competition and the development of group control in their modern forms, are designed to promote industrial stability, and reasonable security of savings and employment.

A first object of the Agricultural Adjustment Administration and the Recovery Administration alike was to limit if possible the ill effects of demoralization in prices: the prices of farm products, the wages and earnings of labor, the prices of industrial products. It is possible that deliberate production and commodity price control cannot even aid in accomplishing this object. It may be that the immediate benefits of control will inevitably be cancelled, perhaps more than cancelled, by the ill effects of decreased effective demand. It may be that any deliberate stiffening of prices merely increases a rigidity of price structure which is an obstacle to healthy adjustment and recovery.

On the other hand, as the recent English report on Monetary Policy and

¹⁵ Cf. *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U.S. 600 (1914).

¹⁶ Chamberlin, *Monopolistic Competition* (1st ed. 1933). See also Mund, *Monopoly* (1st ed. 1933).

¹⁷ 41 Stat. 480-482 (1920), 49 U.S.C.A. § 5 (1), (4), (8) (1926); *Nickle Plate Unification*, 105 I.C.C. 425, 437-440 (1926).

the Depression¹⁸ observed, the economic system has, perhaps, developed inevitable rigidity at certain points, which cannot by any means be entirely eliminated; and which is an element to be considered in framing policy and administering control. Experience may indeed indicate that if modified rigidity could be made more general, the result would be stability. It is not unlikely that at some low points in a depression, a deliberate stiffening of some demoralized prices, at least, will result, contrary to traditional economic opinion, in a lasting increase in demand, production and employment. The fear of and disadvantage in buying on a falling market may be factors which at certain points tend to prolong a depression.¹⁹

Observation of the operation of codes has led a considerable number of students and business men to think that this is probably the case. The uncontrollable variables in economic phenomena make it difficult to give the theory anything much like a scientific test. There is little doubt that collective control of this sort, if not carefully exercised, may defeat its own ends. Yet it seems likely that a substantial contribution to immediate improvement in the spirit and condition of business, was made by the work of the Recovery Administration; supplemented as it was by a skillful, if limited, monetary policy.

In the second place, the magnitude of the difficulties which threatened the country, made organization desirable for collaboration of the most extensive sort imaginable. In any new emergency, the existence of organization for securing the co-operation of groups of workers and owners on any scale necessary, may be relied on to carry us through more difficulties even than those which we have met.

Again, our new organization of industry facilitates the promotion of such large projects as the new renovation and building project, for purposes of relief and recovery. It suggests even the possibility of further development of collaboration among various industrial groups. Landlords may yet associate themselves, and assemble their properties, in corporations, to lease land for thirty years to subsidiaries of the Emergency Housing Corporation, for building purposes; reserving to themselves the option to cancel leases on giving security for the cost or rental value of buildings constructed. This enterprise, which has been considered in the course of the past year by responsible persons, would be another opportunity for co-operation between industry and government; and it might serve the

¹⁸ Group of the Royal Institute of International Affairs, *Monetary Policy and the Depression* (1933), 40-41, 49-52.

¹⁹ See Clark, *Studies in the Economics of Overhead Costs* (1st ed. 1923), c. xxi.

purpose of stimulating the employment of labor on substantial urban building projects, which are but slightly affected by present operations.

Such organizations as those which have been encouraged by the Recovery Administration may in time learn to control the maladjustments of supply and effective demand which make business cycles. Like great groups of agricultural producers, the coal, petroleum, and lumber industries have suffered for a long period from maladjustments which current reorganizations may help. Continued concerted attack on labor conditions in the clothing and textile industries may greatly improve the general position of those industries; and experience with machine hour limitation in the cotton textile industry may help other industries as well. It is in the industries concerned with the production of durable goods that overstimulation and inactivity occur in their most striking form.²⁰ Here it seems quite possible that workers and owners may agree on a program for spreading employment and business more evenly over long periods, which—with the co-operation of credit institutions—will in time lead to effective control of the business cycle. Persons associated in the construction, building materials, steel and automobile code organizations could well combine their efforts, for this purpose. The steel industry is indeed in a position to lead in the work. Even if they are not authorized to exercise any control of production or prices, industrial associations may be able to use the experience of the last fifteen years in a concerted effort for stability and security, in co-operation with credit institutions and government.

Finally, such developments as the world wheat marketing agreement, proposals of European workers for a European coal "code," and the negotiation of British and Japanese cotton manufacturers are the first rough efforts which indicate that in time this type of organization may aid in the development of world prosperity and peace.

If these proposals are impractical, the alternative here may be the development of a democratic and decentralized socialism, perhaps by the use of public corporations, fitted for the needs and conditions of the United States; accompanied by a comparable evolution abroad.

²⁰ See Clark, *Strategic Factors in Business Cycles* (1st ed. 1934), especially pages 27-47, 73-79, 101-102, 108-109, 119-121, 151-154, 187, 211-212, 222-224; and more particularly pages 191-199, 219, 226.