

BOOK REVIEWS

The Federal Antitrust Policy: Origination of an American Tradition. By Hans B. Thorelli. Baltimore: Johns Hopkins Press, 1955. Pp. xvi, 658. \$8.00.

For the second time in this generation we are indebted to a Swedish scholar for an encyclopedic treatment of a vital American problem.¹ Mr. Thorelli, who holds degrees in law, economics and political science, is the author of a Swedish Government publication on our antitrust laws, and represented his country on the Committee on Restrictive Business Practices of the United Nations Economic and Social Council. The present work is the result of two periods of study in the United States, from 1946-47, at Northwestern University and in 1951-52 in the Library of Congress and the National Archives.

As the subtitle of the book indicates, it is a historical study which begins with the common law on restraints of trade and monopoly and ends with Theodore Roosevelt's first term. The first chapter analyzes in detail the "common law background" of the Sherman Act in England and America. The English development is traced from the 16th century prohibitions against forestalling, engrossing and regrating and the American story surveys the case law from the colonial period to the passage of the Sherman Act.² The author refers to the origin of the perplexing "rule of reason" as applied to contracts in restraint of trade and to the significance of state court decisions in the last half of the 19th century invalidating combinations formed with the purpose of restricting competition. But, of course, in the absence of any federal law and of "coordinated and aggressive public prosecution" at a time of "growing integration of the economic life of the nation"³ these common-law doctrines were inadequate to cope with the problems created by the "unprecedented industrial expansion"⁴ which began after the Civil War.

The second and third chapters discuss the "Economic, Social, Constitutional and Political Background" of the Sherman Act. The rise of large corporations, foremost among them the railroads, is described in detail. This could not have occurred without simultaneous development of commercial and investment banking which secured the capital needed for the equipment of ever-growing operations. Mass production was advocated because of the "belief in a direct

¹ The first was, of course, Gunnar Myrdal's *An American Dilemma: the Negro Problem and Modern Democracy* (1944).

² Pp. 36-50. The same material has recently been treated by Letwin, *The English Common Law Concerning Monopolies*, 21 *U. of Chi. L. Rev.* 355 (1954) and Dewey, *The Common-Law Background of Antitrust Policy*, 41 *Va. L. Rev.* 759 (1955).

³ P. 53.

⁴ P. 160.

and universally applicable proportionality between size and efficiency."⁶ And this, in turn, led to various forms of combinations by simple agreements, pools, trusts and holding companies covering all major segments of industry. The history of the Standard Oil Trust furnished only one example among many of the predatory practices which were frequently used to force independents to join combinations or to drive out of business those unwilling to do so. Indeed, Standard Oil is particularly significant because of its close relationship with the railroads: Corrupt practices, rate wars, extortionate rates and rate discrimination were rampant in the railroad industry and provoked the so-called Granger movement which resulted in the sixties and seventies in pioneer state legislation regulating public carriers and grain elevators.

All this is familiar history. But not so familiar, at least in such comprehensive presentation, are Mr. Thorelli's revelations under the heading of "Ideological Background" of the "Growth of Opposition to the Trusts."⁶ The writings of all important economists and social scientists prior to 1890 are put under the microscope. There was, first, the school of "Social Darwinism" represented by Herbert Spencer in England and William Graham Sumner in this country and echoed in the writings of Andrew Carnegie. This school, steeped in laissez faire traditions, was apparently convinced that combinations were increasingly necessary and inevitable, because the biggest were also the fittest; nevertheless, it was believed that competition, at least potential competition, would survive. Opposed to this dogma were the "Social Gospellers" who wished "to counteract injuries wrought by the survival of the fittest"⁷ through socialization of railroads, telegraphs and utilities and encouragement of producers' and consumers' cooperatives. Mr. Thorelli concludes with the finding that "of the several university-affiliated economists and political scientists setting forth their views on the trust problem in writings published before 1890 apparently no one favored the enactment of general antitrust legislation of the specific preventative-prohibitory type represented by the Sherman Act."⁸ There were, however, proposals for specific legislation outlawing railroad practices of secret rebates and rate discrimination.

This survey of academic writings is supplemented by a thoroughly documented study of "Public Opinion as Evidenced in Publications and Press" of the pre-1890 period.⁹ Although the *New York Times* "was the first newspaper to declare war against Trusts,"¹⁰ other papers and magazines frequently discussed the problem in terms of "popular or editorial fear, suspicion or disapproval of trusts and monopolies."¹¹ Indeed, an "overwhelming majority" of "the most influential papers, regardless of political affiliation," were of the opin-

⁶ P. 71.

⁶ Pp. 108-60.

⁷ Hofstadter, *Social Darwinism in American Thought, 1816-1915*, 90 (1949), as quoted on p. 118.

⁸ P. 121.

⁹ Pp. 132-43.

¹⁰ Donald, *Trusts in the United States*, 57 *Contemp. Rev.* 829, 833 (1890), as quoted on p. 139.

¹¹ P. 142.

ion "that industrial monopoly would have to be curbed in whatever form it appeared."¹² By 1888 these views were reflected in the planks of all political parties. Significantly, farm-labor groups were responsible for enactment of some of the first state antitrust laws which preceded the Sherman Act. Thus, public concern "had become serious enough to make federal action against the trusts a clear desideratum, if not an absolute necessity."¹³

Chapter 4 contains an exhaustive and fascinating report of the legislative history of the Sherman Act, including day-by-day accounts of the debates in committees and on the floor.¹⁴ It is true that the bill which emerged from the House Judiciary Committee and became law on July 2, 1890, was not drafted by Senator Sherman;¹⁵ nevertheless, Sherman appears as the guiding spirit behind the Act. In fact, it was Sherman who set the legislative machinery in motion in July 1888 by the introduction of a resolution directing the Senate Finance Committee to inquire,

in connection with any bill raising or reducing revenue . . . [into appropriate] measures . . . to set aside, control, restrain, or prohibit all arrangements, contracts, agreements, trusts, or combinations between persons or corporations, made with a view, or which tend to prevent free and full competition in the production, manufacture, or sale of articles of domestic growth or production, or of the sale of articles imported into the United States, or which, against public policy, are designed or tend to foster monopoly or to artificially advance the cost to the consumer of necessary articles of human life. . . .¹⁶

Sherman's first antitrust bill, which was also referred to the Finance Committee, declared all such arrangements "unlawful and void," gave to persons injured thereby the right to sue for double damages and provided that any corporation taking part in such arrangements was to forfeit its corporate franchise; proceedings for such forfeiture were to be brought by United States Attorneys. In September 1888 this bill was amended by making it applicable only to combinations dealing with imported articles or domestic articles competing with similar articles upon which a duty is levied by the United States or articles transported from one state to another. The charter forfeiture was deleted and participation in an unlawful combination was made a criminal offense. In this form the bill was reintroduced in December 1889 in the Fifty-First Congress, reported from the Finance Committee with amendments, and referred, after lengthy debate, to the Judiciary Committee, which substituted the bill which became law.

Mr. Thorelli brilliantly elucidates the reasons behind this tortuous path through the Congress. Certainly, it was not, as has sometimes been thought, indifference on the part of John Sherman who exhorted his fellow senators to

¹² *Ibid.*

¹³ P. 163.

¹⁴ Pp. 166-210. The same ground is ably covered by Letwin, *Congress and the Sherman Antitrust Laws: 1887-1890*, 23 *U. of Chi. L. Rev.* 221 (1956).

¹⁵ As to the authorship of the Act consult pp. 210-14.

¹⁶ 19 *Cong. Rec.* 6041 (1888), as quoted on p. 166.

heed the voters' appeal for action against economic giants "or be ready for the socialist, the communist and the nihilist."¹⁷

The difficulty was, rather, the conviction held by him and others that regulation of trusts could constitutionally be accomplished only on the basis of the taxing power of Congress, which explains why legislative consideration started in the Finance Committee. This seems strange when viewed from today's perspective. But in 1890 the sweep of the commerce clause was not yet explored; indeed, in the first Sherman Act case which reached the United States Supreme Court, *United States v. E. C. Knight Co.*,¹⁸ the Government suffered a crushing defeat on the later discarded theory that monopoly control through acquisition of sugar refining plants related to local manufacture and not to commerce.¹⁹

To be sure, the ultimate transfer to the Judiciary Committee of the bill reported by the Finance Committee and the substitution of an entirely new bill by the former represented a victory of those who felt that antitrust legislation should be based on the commerce power. Yet, "the newness of the entire idea of federal regulation of business" provided "a sufficient explanation of the extended arguments over constitutionality."²⁰

An at least equally important factor in the search for the most effective approach to antitrust legislation was the general pre-occupation with the tariff problem. It was widely believed that "when foreign competition has been shut out and competition becomes acute and severe between American manufacturers they come together and create these combines at the expense of the consumer in order to enhance their own profits."²¹ Hence, removal of the high protective tariff on articles competing with those manufactured by the trusts was repeatedly advocated as a beneficial and perhaps—because of commerce clause misgivings—the only constitutional remedy.

This connection between the trust and tariff problems was not only constantly debated prior to the passage of the Sherman Act, but agitation for abolition or reduction of the tariff on trust-controlled goods continued thereafter. Viewed against this background it becomes understandable why Congress inserted in the Wilson Tariff Act of 1894 provisions similar to those of the Sherman Act.²² Section 73 of that Act declares void and illegal "every combination, conspiracy,

¹⁷ P. 180. The statement quoted in the text was made on March 21, 1890, one month before the twentieth birthday of Lenin, then a law student at Kazan University, "where he began the systematic study of Marx and met the members of the local Marxist circle." 13 *Encyc. Britannica* 911 (14th ed., 1955).

¹⁸ 156 U.S. 1 (1895).

¹⁹ Compare the Knight case with *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 229, 230 (1948), holding invalid as violative of the Sherman Act an agreement among California sugar refiners to pay uniform prices to local growers of sugar beets, to get the full impact of the change from the historic to the modern interpretation of the commerce power.

²⁰ P. 218 et seq.

²¹ 21 *Cong. Rec.* 2, 463-67 (1890), as quoted on p. 187.

²² 28 *Stat.* 509, 570 (1894), 15 U.S.C.A. § 8 (1951).

trust, agreement, or contract . . . when the same is made by or between two or more persons or corporations either of whom is engaged in importing any article from any foreign country into the United States, and when . . . intended to operate in restraint of lawful trade . . . or to increase the market price in any part of the United States of any article . . . imported or intended to be imported. . . ." It thus becomes apparent that the relationship between and the interdependence of domestic and foreign commerce was, from the very beginning, considered as a crucial problem of antitrust and it may be important to keep this in mind even though the international difficulties of the nineties, limited as they were to restrictions on imports, appear relatively unsophisticated when compared with present worries about exports, world-wide divisions of markets and American business operations abroad.²³ Yet, the 1950 decree which required the controlling shareholders of Aluminum Company of America to "dispose of their stock interests either in Limited [Alcoa's Canadian affiliate] or in Alcoa"²⁴ is a modern illustration of this same policy not to permit dominant American firms to perpetuate their dominance by foreclosing the American market to competing imports.

Chapters 5 and 6 contain a panorama of "Economic, Social and Political Trends" from 1890 to 1903. There was considerable economic expansion, interrupted by the panic of 1893 and the ensuing three years of depression. After the return of prosperity in 1896, the country was swept by the "consolidation craze" and "merger waves"²⁵ which, by the turn of the century, provoked such constant and sustained public discussion as to make the trust problem "one of the two or three items at the head of the nation's agenda."²⁶ In short, feelings about the trusts seem to have been more intense than prior to 1890. Of particular interest are the reports of the proceedings of the Chicago Conferences on Trusts held in 1899 and 1900. The first of these gatherings, called by the Civic Federation, was attended by more than 700 delegates; among them were leaders of commercial, industrial and labor organizations, state governors, attorneys-general, journalists and economists. William Jennings Bryan urged enactment of a federal law requiring federal licensing for corporations doing business outside their state of incorporation. Such licenses were to be granted only "upon conditions which will, in the first place, prevent the watering of

²³ See *United States v. Timken Roller Bearing Co.*, 341 U.S. 593, 599 (1951). Judge Frank's suggestion that the Sherman Act was not intended to apply to exports (*Adams-Mitchell Co. v. Cambridge Distributing Co.*, 189 F. 2d 913, 921 [C.A. 2d, 1951]) has never been accepted. His argument that the exhaustive treatment of imports in the Wilson Tariff Act excludes exports would seem to overemphasize negative implications not otherwise supportable. Moreover, section 6 of the Sherman Act refers to exported articles.

²⁴ *United States v. Aluminum Co. of America*, 91 F. Supp. 333, 395-99, 417, 418, 419 (S.D. N.Y., 1950).

²⁵ P. 306. Consult the tables on "Tight Industrial Combinations," pp. 294-303, and on "Sixteen Industries Illustrating Concentration into Larger Scale Establishments," pp. 288-89. As to "Prevalence of Combination" consult pp. 285-308.

²⁶ P. 342.

stock; in the second place, prevent monopoly in any branch of business, and third, provide for publicity as to all the transactions and business of the corporation."²⁷ The second conference, which was sponsored by several senators, congressmen and governors, discussed proposals favoring public ownership of public utilities, restriction or abolition of patent legislation and recommendations for more vigorous enforcement of the Sherman Act.

The call for reforms of corporation and investment banking laws and practices during this period is especially significant because it places antitrust in its proper setting among closely related problems of economic organization. The tendency toward concentration and mergers was accelerated by the activities of promoters, underwriters and bankers; hence, it is not surprising that there were many suggestions for national incorporation laws.²⁸ The need for "publicity" through full disclosure of corporate affairs—the very basis of the Federal Securities legislation of the early nineteen thirties—was constantly emphasized as an essential weapon against monopolistic abuses.

These anguished cries for "publicity" were thus due not only to fear of fraudulent and predatory practices but to the need for continuous study of the structure of industry and of corporate affairs and practices, and the need for making such studies available to the government and to consumers, competitors, and the general public. "Publicity" in this sense would seem to be an indispensable foundation for a fair and sound relationship between government and business, and the insistent demand for it in this early period of that relationship is a tribute to realistic statesmanship. Hence, Mr. Thorelli correctly attaches the utmost importance to the creation in 1903 of a permanent federal fact-finding and investigating agency in the Bureau of Corporations, the predecessor of the Federal Trade Commission. The current proposal to combat the "consolidation craze" of our days by requiring ninety days advance notice to that Commission of mergers proposed by corporations whose combined assets exceed ten million dollars²⁹ is thus thoroughly consistent with traditional "publicity" postulates.³⁰

Chapter 7 recounts in considerable detail the history of Sherman Act

²⁷ P. 337.

²⁸ Pp. 316, 320, 324, 336, 337, 357, 513, 515, and 529. The recommendations of the Temporary National Economic Committee, in its Final Report of March 31, 1941 (77th Cong. 1st Sess.), p. 29 [for "a national law which would prohibit interlocking directorships . . . make . . . directors trustees in fact as well as in law . . . raise a barrier to business dealings by corporation officers and directors for their own personal profit with the corporations they manage . . . would clearly define the scope of subsidiary corporations and . . . standardize intercorporate financing . . ."] were, thus, anything but new inventions.

²⁹ H.R. 9424, 84th Cong. 2d Sess., introduced by Rep. Celler on Feb. 20, 1956. The bill, which would have authorized the Federal Trade Commission to seek preliminary injunctions against such mergers, was passed by the House in April, 1956, but failed to pass the Senate. CCH Cong. Index 5599 (84th Cong., 1955-56).

³⁰ These postulates are also reflected in the Supreme Court's approval of statistical and price reporting plans by trade associations which are widely publicized. "Free distribution of knowledge" is not inconsistent with the Sherman Act. *Maple Flooring Manufacturers Ass'n v. United States*, 268 U.S. 563, 583 (1925).

enforcement during the administrations of Presidents Harrison, Cleveland, McKinley and Theodore Roosevelt until 1903. Mr. Thorelli demonstrates that no administration before Theodore Roosevelt supplied the necessary leadership and that this was due to a variety of reasons, among which the absence of funds specifically earmarked for Sherman Act enforcement was, perhaps, the most potent. Indeed, the initiative for filing of cases came from a few enterprising United States Attorneys; one of them even hired an assistant counsel at his own expense in the *Trans-Missouri Freight Association* case.³¹ Other factors were doubts about the constitutionality of the Act, the lukewarm attitudes of the three Presidents who preceded Theodore Roosevelt and the pro-business bias of all but one of the Attorneys-General of the period.³² The exception was Judson Harmon of Ohio, who served during the last two years of the second Cleveland administration. He urged the Congress to grant special antitrust appropriations, to create investigative facilities outside the Department of Justice and to pass an immunity provision which would prevent witnesses from refusing testimony on the ground of self-incrimination. These recommendations were enacted into law in 1903;³³ Harmon also recommended that acquisitions or mergers of competitive units in different states should be made prima facie evidence of an attempt to monopolize, thus putting "the parties to the necessity of explanation. . . ."³⁴ The above mentioned bill requiring advance information of merger plans thus merely seeks to accomplish in 1956 what Harmon considered essential in 1896.

As everybody knows, Theodore Roosevelt launched an "enforcement program of unprecedented dimensions"³⁵ which began with the filing of the cases against the Northern Securities Company³⁶ and the Beef Trust,³⁷ and also produced the crucial 1903 legislation already mentioned, to which should be added the Expediting Act³⁸ and the Elkins Act;³⁹ the latter not only forbids payments of rebates by common carriers to shippers, but makes any departure from published rates an offense. Significantly, the Act represented a retreat from general anti-price discrimination proposals.

Chapter 8 contains useful summaries of all Sherman Act cases decided up

³¹ 58 Fed. 58 (1893), rev'd 166 U.S. 290 (1897), as reported on pp. 377-78.

³² Consult pp. 379, 387-88, and 406 as to official indifference to private complaints addressed to the Department of Justice. Consult, also, pp. 385-89 (Cleveland's first Attorney-General, Richard Olney, thought the law was "no good").

³³ As to investigating facilities see pp. 551-54, 614, 32 Stat. 827 (1903), repealed by 60 Stat. 1037 (1946), 15 U.S.C.A. 175 (1951); as to special appropriations and immunity for witnesses see p. 612, 32 Stat. 904 (1903), 15 U.S.C.A. § 32 (1951).

³⁴ P. 395.

³⁵ P. 426.

³⁶ *United States v. Northern Securities Co.*, 120 Fed. 721 (D. Minn., 1903), 193 U.S. 197 (1904).

³⁷ *United States v. Swift & Co.*, 122 Fed. 529 (N.D. Ill., 1903), 196 U.S. 375 (1905).

³⁸ 32 Stat. 823 (1903), 15 U.S.C.A. § 28 (1949).

³⁹ 32 Stat. 847 (1903), 49 U.S.C.A. §§ 41-43 (1948).

to 1904. Chapter 9 deals with "The Trust Problem in Congress, 1890-1903," and the last chapter, under the heading "Antitrust Institutionalized," gives a "Summary, Conclusions and Appraisal." An appendix contains statutory texts and a valuable and seemingly exhaustive bibliography.

The foregoing report is intended to persuade the reader to accept Mr. Thorelli as his guide in the exploration of the history and early period of the Sherman Act, and of what it means for us. Some additional observations may be appropriate to remind us that "what is past is prologue."⁴⁰

The early years of the Sherman Act saw a considerable number of prosecutions against labor unions. In fact, of the eight cases instituted during the second Cleveland administration four were directed against labor. The most important of these involved the Chicago Pullman Strike, which Mr. Thorelli describes in detail,⁴¹ adding the pungent conclusion that the Pullman Company came out of that strike "stronger than ever, largely due to the intervention of the Government," although the Company itself "would have constituted an eminently proper target for antitrust action."⁴² Since that time, the status of labor unions has remained a subject of controversy in spite of Section 6 of the Clayton Act of 1914⁴³ which exempted labor from the Sherman Act.⁴⁴ The present state of the law is epitomized by *Allen Bradley Co. v. Local No. 3*⁴⁵ holding invalid under the Sherman Act a combination of labor unions and manufacturers formed for the purpose of denying entry into the New York City area to competing manufacturers doing business outside that area. The Supreme Court, referring to "the difficulty of drawing legislation primarily aimed at trusts and monopolies so that it could also be applied to labor organizations without impairing the collective bargaining and related rights of those organizations," concluded that only business monopolies were to be outlawed and that union participation in such a monopoly was a violation of the Sherman Act.⁴⁶ Hence, the injunction against the Union was limited to proscribe only activities in which the Union engaged in combination with non-labor groups.

At this point it is necessary to remember that union activities are regulated and limited by the Labor-Management Relations Act of 1947,⁴⁷ popularly known as the Taft-Hartley law. Nevertheless, to many this is not enough. In fact, the Attorney-General's National Committee to Study the Antitrust Laws

⁴⁰ Shakespeare, *The Tempest*, Act II, Scene I, Line 261. Consult, also, Professor Turner's review of Thorelli's book in 65 *Yale L.J.* 903, 905 (1956), with the conclusion that the book contains little of current importance.

⁴¹ Pp. 389-94. See *In re Debs*, 158 U.S. 564, 600 (1895), summarized on pp. 448-51.

⁴² P. 394. The Government waited almost fifty more years until it sued, and obtained dissolution of, the Pullman monopoly. *United States v. Pullman Co.*, 50 F. Supp. 123 (E.D. Pa., 1943), *aff'd* 330 U.S. 806 (1946).

⁴³ 38 Stat. 731 (1914), 15 U.S.C.A. § 17 (1951).

⁴⁴ For an excellent account of these developments consult Gregory, *Labor and the Law*, Chapters VIII and X (1946).

⁴⁵ 325 U.S. 797 (1945).

⁴⁶ *Ibid.*, at 811.

⁴⁷ 61 Stat. 136 et seq. (1947), 29 U.S.C.A. § 141 et seq. (1947).

recently recommended new legislation which "should cover only specific union activities which have as their direct object direct control of the market, such as fixing the kind or amount of products which may be used, produced or sold, their market price, the geographical area in which they may be sold, or the number of firms which may engage in their production or distribution."⁴⁸ Other recent proposals go much further. In 1952 the House of Delegates of the American Bar Association recommended an amendment to Section 1 of the Sherman Act which would make that section applicable to labor organizations "insofar as they engage in combinations, contracts, or conspiracies in restraint of trade . . . where the purpose or effect . . . is to restrain commercial competition."⁴⁹ The recent merger of the American Federation of Labor with the Congress of Industrial Organizations will, most likely, revive interest in this or similar suggestions.

In view of all this it is significant to note that, apparently, most of the members of the Fifty-First Congress, including John Sherman himself, were convinced that the antitrust proposals they were considering had nothing whatever to do with labor organizations. Indeed, many of the bills introduced in the House contained specific exemptions of labor, and the bill reported by the Senate Finance Committee included an amendment by Sherman providing that the bill was not applicable to combinations "made with a view of lessening the number of hours of labor or of increasing their wages."⁵⁰ These were deemed to be the traditional union activities. Of course, the substitute bill which emerged from the Senate Judiciary Committee contained no labor exemption. Yet, Mr. Thorelli suggests that, "in the light of previous bills and debates," this omission "can not legitimately be taken to mean that Congress intended 'traditional' . . . labor union activities to be covered by the Sherman Act."⁵¹ Adherents to a literal school of interpretation will reply that if Congress had agreed with the exemption it would have kept it in the final bill. On the other hand, Mr. Thorelli's evidence strengthens the supposition that the exemption was deemed inherent in "the very nature of things."⁵² This view finds additional support in the statement by Attorney-General Richard Olney in his Annual Report for 1893 that he considered the application of the Sherman Act to striking labor unions as "perversion of a law from the real purpose of its authors";⁵³ however, this did not prevent Mr. Olney from bringing suits against labor unions once the courts had given their blessing to the "perversion" and the interests of the Government seemed to require resort to it.

What, then, is the lesson of history for our day? It reaffirms, I believe, the

⁴⁸ Report of March 31, 1955, p. 304. For a critical discussion of the chapter of the Report dealing with labor and of other similar proposals consult Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. of Pa. L. Rev. 252 (1955).

⁴⁹ 77 A.B.A. Reports 479 (1952).

⁵¹ P. 232.

⁵⁰ P. 231; consult also pp. 176, 193, 194.

⁵² *Ibid.*

⁵³ P. 386. The statement referred to *United States v. Workingmen's Amalgamated Council of New Orleans*, 54 Fed. 994 (E.D. La., 1893), *aff'd* 57 Fed. 85 (C.A. 5th, 1893).

correctness of the conclusion reached by Mr. Justice Black in *Allen Bradley* and by leading writers that the concept of "restraint of trade" is not an appropriate tool for regulation of labor activities because it is so vague and broad as to embrace within its sweep those activities of organized labor which today are not merely traditional, but expressly or implicitly sanctioned by statutory guarantees of the right to bargain collectively.⁵⁴ The Attorney-General's Committee apparently recognized this by emphasizing that in the drafting of any new legislation "greatest care should be given to protecting" labor's freedom of association and self-organization for bargaining purposes.⁵⁵ Consequently, the approach of the American Bar Association is clearly wrong; *if* anything need be done, it should, as the Attorney-General's Committee suggests, "cover only specific union activities,"⁵⁶ and, as Professor Walter Adams points out, it should be included in the labor-management code and not in the antitrust laws.⁵⁷ In the meantime, it remains to be demonstrated that the doctrine of *Allen Bradley* actually requires legislative reinforcement and expansion.

The reader of Mr. Thorelli's remarkable study cannot fail to be impressed by another historical fact of contemporary relevance: the relationship between railroad regulation and antitrust principles. State and federal regulation of railroads in some form was, of course, already in existence in 1890; indeed, socially harmful practices of railroads constituted a crucial factor in the great debates which led to the beginning of public regulation of business between the end of the Civil War and 1890. Hence, it is not surprising that the effect of the proposed antitrust legislation on the railroads was the subject of some discussion. In fact, a specific amendment outlawing agreements "entered into for the purpose of preventing competition in transportation of persons or property . . . so that the rates of such transportation may be raised above what is just and reasonable" was debated on the floor and in Conference Committee.⁵⁸ This amendment was opposed on the ground that it might make railroad rate agreements prima-facie valid; the controlling purpose, which should not be obscured, was said to be protection of the people by safeguarding competition between carriers as well

⁵⁴ *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797, 811 (1945); *McHugh v. United States*, 230 F. 2d 252 (C.A. 1st, 1956); *United States v. Employing Plasterers Ass'n*, 138 F. Supp. 546 (N.D. Ill., 1956); Shulman, *Labor and the Anti-Trust Laws*, 34 Ill. L. Rev. 769, 787 (1940); Cox, *op. cit. supra* note 48, at 253, 280-84.

⁵⁵ Report of the Att'y Gen.'s Nat'l Committee To Study the Antitrust Laws 305 (March 31, 1955).

⁵⁶ *Ibid.*, at 304.

⁵⁷ *Ibid.*, at 306 (dissent from the committee's report). The draft bill proposed by Professor Cox, *op. cit. supra* note 48, at 284, contains the best language yet devised for dealing with this problem. However, the draft seems to contemplate a separate statute rather than an amendment to the Labor-Management Relations Act. Professor Cox's bill declares it unlawful for labor organizations to enter into contracts which fix prices, limit the volume of production (otherwise than by establishing conditions of employment) and restrict the number of employers or other persons who may engage in any particular kind of business activity; strikes to compel an employer to enter into such a contract would be prohibited.

⁵⁸ Pp. 206, 207, 208.

as between merchants. Thus, the proposed antitrust law was to be based on the same principle as the Interstate Commerce Act: "that competition prevented extortion."⁵⁹ Under these circumstances, Mr. Thorelli's conclusion "that Congressmen in general believed that the railroads were within the scope of the antitrust law"⁶⁰ is inescapable. Indeed, the first victories in the battle for antitrust enforcement were won by the Government in the United States Supreme Court in *United States v. Trans-Missouri Freight Association*⁶¹ and *United States v. Joint Traffic Association*⁶² involving injunctions against agreements between railroads establishing rates and traffic regulations. The Government's subsequent victory in *United States v. Northern Securities Co.*⁶³ likewise struck down anti-competitive arrangements by railroads.

Many decades later, in the Carrier's Rate Bureau Act of 1948, Congress exempted railroad rate-fixing agreements from the antitrust laws, provided they were approved by the Interstate Commerce Commission in accordance with certain specified standards.⁶⁴ But in April 1955, the President's Advisory Committee on Transport Policy and Organization, without any reference to the Rate Bureau Act, recommended "[i]ncreased reliance on competitive forces of transportation in rate-making";⁶⁵ the same Committee now proposes to rewrite the declaration of national transportation policy in the Interstate Commerce Act "to encourage and promote full competition between modes of transportation" and "to reduce economic regulation . . . to reflect . . . full competitive capabilities. . . ."⁶⁶ Although the report of the Committee deals only with rate questions, the revision of the policy declaration, if enacted, may have a profound effect on the far wider problem of the role of competition in the industries subject to administrative regulation.⁶⁷

⁵⁹ P. 209. Consult, also, pp. 290-91 as to a comparison of the Sherman and Interstate Commerce Acts.

⁶⁰ P. 231.

⁶² 171 U.S. 505 (1898).

⁶¹ 166 U.S. 290 (1897).

⁶³ 193 U.S. 197, 326-27 (1904).

⁶⁴ 62 Stat. 472 (1948), 49 U.S.C.A. § 5(b) (1948). This Act, popularly known as the Reed-Bulwinkle Act, was passed in response to railroad pressure, following *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 456 (1945) which had resurrected from oblivion the early Sherman Act cases of the late nineties against railroad rate agreements.

⁶⁵ Report of the Committee: Revision of Federal Transportation Policy 7 (1955).

⁶⁶ *Ibid.*, at 8. For comments on the Report, consult Langdon, *The Regulation of Competitive Business Forces: The Obstacle Race in Transportation*, 41 Cornell L.Q. 57 (1955); *The ICC's Regulation of Rail-Motor Competition*, 41 Va. L. Rev. 559 (1955); *Hearings before Subcommittee on Report of Presidential Advisory Committee on Transport Policy*, 84th Cong. 1st Sess. (Sept. 19-22, 1955).

⁶⁷ Consult the Report of the Attorney-General's National Committee, *supra* note 48, at 261-93; Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 Harv. L. Rev. 436 (1954); Von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 Harv. L. Rev. 929 (1954); Jaffe, *Primary Jurisdiction Reconsidered. The Antitrust Laws*, 102 U. of Pa. L. Rev. 577 (1954); Adams and Gray, *Monopoly in America, the Government as a Promoter* 58-72 (1955).

In recent testimony before the Senate Subcommittee on Antitrust and Monopoly Professor Handler urged a re-examination of the various antitrust exemptions and of such questions as whether regulation adopted in place of competition has worked well or whether any of the regulated areas can be safely returned to the free enterprise system.⁶⁸ Extensive hearings on monopoly problems in the regulated industries commenced on February 27, 1956 before a Subcommittee of the House Judiciary Committee. Such reappraisal should not ignore the historical facts revealed by Mr. Thorelli; perhaps, they might contribute to bring about modification of present views which, at least in some situations, have given preference to the alleged advantages of combination and disregarded the public interest in competition.⁶⁹

On March 21, 1890 John Sherman said on the floor of the Senate that he was proposing a "bill of rights" and a "charter of liberty."⁷⁰ He, and others who later used similar language,⁷¹ meant to assert that antitrust is an expression of the dynamic way of life of a nation which has, to a greater extent than any other nation, accepted competition as a guaranty of equal opportunities and a barrier against absolute and unlimited power. In this sense it is fitting to compare antitrust, which symbolizes economic democracy, with the political democracy established by the Bill of Rights. Hence, antitrust, as Mr. Thorelli's great work shows, should be viewed as a source of strength which we surely need for the long economic struggle with a hostile system in the years to come.

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⁶⁸ A Study of the Antitrust Laws, Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 84th Cong. 1st Sess., Part 1, p. 48 (May and June 1955).

⁶⁹ See, for instance, *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944) (merger of seven large motor carriers approved); *ICC v. Parker*, 326 U.S. 60 (1945) (certificate for motor carrier service awarded to railroad subsidiary). The pending bill prohibiting bank mergers which would restrain competition between banks—a regulated industry—may also be mentioned in this connection, H.R. 5948, 84th Cong. 1st Sess., introduced by Mr. Celler, House Report No. 1417, passed the House in February 1956.

⁷⁰ P. 181.

⁷¹ One may wonder whether Mr. Chief Justice Hughes, when he referred to the Sherman Act as a "Charter of Freedom" (*Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359 [1933]) or Franklin Roosevelt, who likened the Act to the "due process" clause (in a letter to Cordell Hull, quoted as motto on the title page of Thorelli's book), were aware of Sherman's words.

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Control over Illegal Enforcement of the Criminal Law: Role of the Supreme Court. By Albert R. Beisel, Jr. Boston: Boston University Press, 1955. Pp. 112. \$2.75.

This little book consists of three lectures given by Professor Beisel at Boston University as the 1954 Gaspar G. Bacon Lectures on the Constitution of the