

## THE SCOPE AND LIMITS OF CONGRESSIONAL LEGISLATION AGAINST THE TRUSTS

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IN this discussion the word "trust" is accepted as meaning any aggregation of capital in corporate hands, so large as to be an important factor in any branch of industry. This is an abuse of the word, and has its origin in the fact that the earliest attempts to combine competing masses of capital which excited public apprehension were organized in the form of trusts, in which trustees controlled a plurality of corporations by holding the legal title to most of their stock. The application of familiar principles of the common law by the courts proved fatal to this form of organization. Individual corporations, however, soon arose, representing aggregations of capital as great or greater than any of the trusts had controlled, and the name of "trust" is indiscriminately applied to them in popular language. It is freely used by careless or prejudiced minds with the implication of illegality, which properly applies to the trust organization. But it is impossible to restore the term to its correct use, and with this explanation we must accept it.

A tendency to form these vast aggregations of capital has been singularly active of late. About five years ago began an extraordinary awakening of the spirit of enterprise throughout the civilized world. There had been a long period of comparative stagnation in most branches of industry, limiting invention, experiment, new construction, and the activity of speculation in general. But under the stimulus of overwhelming accumulations of saved capital in all markets seeking profitable investment, of new discoveries and large production of the precious metals, of revolutionary invention, especially in developing and applying electric power, there was a rapid and almost sudden outburst of speculative energy in Europe and America. It was natural that its forms should be profoundly impressed with that spirit of association which is the basis of civilization. This tendency had been foreshadowed in the social and political life of all civilized countries through the last half of the

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Nineteenth Century. The most characteristic feature of universal history during that period has been the combination of States and nations into vast empires, of divided races into political units conscious of their kindred, of factions into parties, of workingmen within their industries into differentiated and interdependent groups, and outside of these industries, into Unions with vast aims and impulses; in short, the great inventions by which the barriers to intercourse were broken down had been the symbol of the entire social life of civilized humanity, from the diplomatic and administrative forces of government down to the parody upon true combination which is represented by the schools of Socialism.

Accordingly, it is a simple truth of social science that the formation of the trusts under this spirit of association is simply the application in the industrial world of the true law of progressive civilization. I cannot here justify this assertion in detail. It is, however, admitted by all intelligent students of the subject that the so-called "trusts" have already taken their place among the most beneficent forces of our industrial and commercial life. No measure can be made of the degree in which they have economized production, cheapened commodities, raised the average standard of comfort in life, organized intellect in all departments of practical work, opened new ways to ability and honorable ambition, and contributed to adjust the relations of labor to employers. But in each of these ways a work so important as to be revolutionary has been begun under their influence, and none can question that the natural tendency of their development, unless some counter-acting forces be found which fatally interfere with it, must be steadily to increase the obligations to them of society at large.

How, then, are we to account for the widespread hostility felt toward the trusts? What is there in them, or in their influence and tendencies, to justify apprehensions of danger from them, either to the economic or to the moral and political interests of society? The hostility to them rests largely on an undefined dread which seems to have its origin in the vague declamations of demagogues, or in the prejudice of minds which are rebellious towards the entire organism of our industrial society. The cry of "Monopoly!" against the trusts is repeated and emphasized in a thousand forms and has great influence in exciting such prejudice. Yet no

serious student finds any foundation for a legislative attack upon large combinations of industrial capital in a real apprehension of monopoly. In fact, the popular and political tendency to respond to the denunciations of the great corporations as monopolists is certainly a temporary phenomenon, which is already beginning to disappear, and which must give place to more serious grounds of opposition if hostility to their existence is to be the permanent policy of any enlightened people. Students of high authority, however, have discovered and emphasized evils which have been associated with the recent growth of the great corporations. These are presented by public men claiming to be statesmen as a sufficient reason for indiscriminate attacks upon all corporations of this class. These evils are described in great detail as seen from different points of view, but for our purposes they may be summed up as substantially covered by two heads: first, improper discriminations in price of service by public service corporations between great industrial combinations and private shippers, resulting in the aggrandizement of the trusts at the expense of smaller and independent industries. Indeed, in several instances it is asserted with apparent reason that these discriminations have been the principal means of building up the power of certain trusts. Secondly, an evil which has essentially characterized the movement towards combination during recent years is commonly indicated by the word "over-capitalization," which really is used to point out all kinds of dishonest practices in the formation of trusts, by which their shares have been given to the public at inflated values, and promoters vastly enriched at the expense of investors. In short, the word commonly implies all the swindling processes in the production and manipulation of securities, which are facilitated by the vast volume of these combinations, in connection with the carelessness, the want of intelligence, and especially the low moral standard which are so general among investors and in the mercantile community at large.

These are the realities under the vague and often shadowy complaints which are made of the trusts. But careful reflection shows that all these evils really lie, not at all in the nature of the trusts themselves, but in the nature of the people who control them and deal with them. These forms of wrong have existed

as long as commercial immorality itself, and have become conspicuous in connection with the trusts solely because they become greater and more dangerous when perpetrated on so large a scale as that which has been opened to them in these combinations.

It is the business of government to prevent evils of these classes. Holders of a public franchise must administer it with equity, respecting the equal rights of all citizens. The police power of the government is as much bound to compel this course and to prevent unjust discrimination as it is to protect any form of private property against robbery. Fraud by direct or indirect misrepresentation of value, by deception wrought on a large or small scale, through forms of organization or falsehoods of bookkeeping, must be prevented, and, if perpetrated, must be punished with all the energy of which the strong arm of society is capable. Whether such wrongs are wrought in the handling of small or of great affairs makes no difference in principle; it is one of the first duties of organized society by its governments to suppress such wrongs, and if it fails to do so the fault lies in itself. But it must be carefully kept in mind that these classes of wrongs, like all other crimes against property, are and have been from the first direct violations of laws long established, and which it is the recognized duty of the courts to enforce. There is absolutely nothing in the nature of a large corporation to affect in any degree the character of these acts. There is nothing in the extent of the combinations of capital which have arisen in recent years to make these wrongs more dangerous in their nature, or more frequent. The growth of wealth, of course, holds out to fraud a greater promise of reward, and by increasing the temptation to wrong increases the necessity of vigilance against it, and of a thorough enforcement of the laws; but it has no tendency to make any new principles of law necessary. Fraud of every kind, in the organization and administration of the greatest of conceivable corporations, is in its nature the same as fraud in the most trivial dealings between individual citizens. If by reason of the great interests with which it deals it excites apprehension lest it be found impossible to suppress it, the reason must lie in a fear lest the government be too weak to execute the laws against the rich and powerful.

That an agency can be abused is not sufficient reason for

destroying it. Railroads, if mishandled, may be instruments in many ways, not only of fraud, but of danger to life. This proves the obligation to regulate them and to hold their administrators rigidly to their duty, but not to tear them up. Equally true is it that the trusts, which are becoming the great means of facilitating the advance of industry and improving the industrial organization of society, may be abused. In many instances, doubtless, the process of their formation and development has been tainted with fraud, and their organization has sometimes been controlled by interests not in harmony with the good of society at large. But what they need is regulation, and not destruction. Let all unfair discrimination be suppressed, let misrepresentation and fraud in the financial conduct of these great masses of capital be prevented, and the sources of just reproach against them will be stopped. They will then be recognized as beneficent and potent agents in the development of all national wealth and of social organization.

The more we reflect upon the conditions now confronting our industrial society and the period of transition through which it is passing, the more profoundly we shall be convinced that the essential defect is in the government itself, and is of a two-fold character. In the first place, it fails in its aims. It is an unquestioned fact that selfish aims, personal interests, class preferences, have to an extraordinary extent submerged statesmanship in our politics. So true is this that if in any public position a man appears whose actions and speech indicate an unreserved devotion to the public interests, with entire independence of local or class preferences, he is wondered at as a strange phenomenon. Such a man is noted as a theorist, a sentimentalist — as anything but a practical politician. It is hardly conceivable that a man of this stamp could obtain leadership in any party, or even a position as a representative candidate of any great political group. In the second place, government is defective in the misdirection of its efforts, through prejudice. Nothing more illogical, nothing more inconsistent with the principles of our institutions can well be imagined than the statutes by which trusts have been assailed in our State and National Legislatures; unless it be the curious absurdities of legislation which have not yet been adopted, but are strenuously advocated by many public men.

It would be interesting to review these in detail, but it is enough for our present purpose to point out that the most familiar of such statutes, those which have attracted the most attention—the Inter-State Commerce Act of Congress for the regulation of railroads and the so-called Sherman Law for the control of great industrial corporations, are of an essentially political character. Each of them is an undisguised bid for popular support on the part of a political faction. That is to say, it is an appeal to prejudice and ignorance, rather than an expression of constructive statesmanship. In the case of neither of these laws had the authors any conception of its real meaning, as that meaning has been evolved by the courts, nor of its ultimate effect. They did not know what they had done in passing them. The report of the Attorney-General of the United States presented to Congress in 1893 remains to this day one of the most important documents in the history of the subject. It stands in pointed contradiction to the work of Congress, as followed up by logical compulsion in the courts, from that day until now; but in its statesmanlike grasp of the real conditions of the questions before us, it has not since been equalled, and its fundamental positions have not been answered. It is as true to-day as it was then, that Congress has no power to limit corporations or citizens in the amount of property which they may acquire; that it has no power to make a crime of any act which is done by a corporation or a citizen under the sanction of the State, in the management of property which has been lawfully acquired; and that contracts in unreasonable restraint of trade are void at common law. Everything which has been done or attempted in violation of these principles, or in extension of them, by acts of Congress, and by judgments of the courts in pursuance of these acts, has served but to confuse the subject and to divert the intelligence of the country and the energies of the government from the proper work of enforcing the principles of the common law and preventing fraud.

The statement of what the evils to be apprehended from the trusts really are is enough to point out the direction in which the remedy is to be sought. It is the enforcement of the principles of the common law, which are nothing more nor less than the rules of business honesty, which is needed. The salient obstacle to this

enforcement in any case is the difficulty of obtaining legal evidence of fraud. This difficulty arises wholly from the fact that the wrongful transactions are carried on in secret. It would be impossible for a public-service corporation to discriminate unjustly between patrons, if every contract for its service were public. Complete publicity governing all the circumstances and all the business relations of such corporations would put an end to improper discrimination. Notwithstanding the many devices and tricks by which this kind of favoritism is sometimes disguised, it cannot be successfully concealed from experts who have access to truthful records of all the dealings. Objections are often urged to such publicity as improperly exposing business affairs to competitors. The objection has little application to corporations enjoying and operating public franchises. But whatever force there is in it in any case may be removed by fixing a limit of time within which the disclosure shall not be required. There is no good reason why any corporation, commercial or industrial, should not at any given date disclose without reserve every transaction which was closed upon its books not less than a twelve month before that date. Legislation designed to make it certain that such disclosure will be complete, unreserved and truthful, would have a definite and proper aim. It would be auxiliary to the enforcement of the principles of common law, and would in no sense be anti-trust legislation, as distinguished from legislation against fraud in general. But were it efficient, the apprehension of certain exposure in the near future would be a potent preventive of unjust discrimination and of kindred wrongs.

The same principle of enforced publicity applies with equal clearness, and without the necessity of any time limitation, in the organization of corporations, and especially of those which are planned to any extent as holders of the shares of other corporations. The moral sense of the community has been offended in many cases by the methods of promoters and organizers. It has become known that in the formation of several great corporations immense profits were obtained by the handling of securities at the expense of the ultimate shareholders, who invested their money in entire ignorance that such a disposition would be made of much of it. The laws of Great Britain in this respect are vastly superior

to those of any of the United States, though it is recognized that experience has revealed imperfections in them. But they point the way for an excellent system of control in providing that the promoters of every new enterprise of a corporate character shall make a complete and candid disclosure of their own relations to the corporation and of their interests and possible profits. Any concealment from those who are invited to invest in such properties of the cost of the machinery employed in the organization should be made impossible. It is so clearly a cover for fraud that it should be prohibited and punished as itself a fraud. This cannot be accomplished, of course, without the co-operation of a large number of State governments; but there are fields of jurisdiction belonging to the National government in which it might well set the example.

The prime need of the times is that the moral tone of the organized community be strengthened. At present our politics reflect, in its lowest and basest side, the moral character of the nation; our legislation is the least developed and least scientific expression of our social organization; our beautiful civilization, with its glorious aspirations, its education, its patriotism, its progressive elevation of thought and life, its advance in culture, in humanity, in benevolence, finding expression in science, in literature, in social life, and in active charity, finds as yet no corresponding fulfillment of itself in government. Apart from the courts of law, where the traditions of a lofty standard of thought and of conscience are still to a large extent controlling, every branch of our government is infected by the commercial spirit, which often holds a veto upon statesmanship that interferes with class interests or with certain personal ends. This degeneration of political life taints and impresses with its own feebleness the moral energies of the community everywhere. Statesmanship in our State governments is no longer expected by public opinion, and its appearance would strike the nation with amazement. Hence it is that when frauds are perpetrated, either in the organization or in the administration of the trusts, government has neither the virtue nor the intelligence to apply the remedy. Legislation has failed to add anything whatever to the principles of the common law, in its attempts to regulate these combinations. Let the old and accepted principles of law be applied and enforced, and the problem would be solved. But these rules of justice must



needs be applied alike to the greatest corporation and to the poorest laborer.

One serious obstacle to such enforcement lies in the division of jurisdiction under our Constitution. The nation and the individual State must have the limits of jurisdiction and of power defined for each of them. The fact that commercialism and corruption have obtained great influence in the States led public opinion to accept the National government as a refuge. This did much to throw the moral sense of the country on the side of centralizing power in Congress. The natural and necessary result has been rapidly to lower the character of our national legislation and administration, until they have approximated the level to which the State governments had fallen. But the tendency to centralize power in the national administration and in Congress has been fostered by other influences, and is in fact but a part of the general movement of the association and combination which is the chief characteristic of our contemporary civilization. It has now gone too far to hope than it can be checked, even if a check were desirable.

The ultimate appeal in every case which, like that before us, involves the future of our institutions and of our civilization, is to the public intelligence and conscience. The present situation, and especially the present degradation of our political life, must be clearly acknowledged, but it is no reason for despair of the problem before us. There are already indications that public opinion is slowly becoming enlightened upon the social as well as the economical principles which must control the question, and this enlightenment promises to be the first step to a thorough awakening of the public conscience to the duties of government in the regulation of capital, and in particular, to the absolute necessity of enforcing sound moral principles in dealing with great commercial forces. Important changes in the attitude of vast communities upon kindred subjects are not without precedent. A century ago the entire civil service of Great Britain was permeated with corruption. Offices of state were largely subjects of bargain and sale; every department of administration was hampered and enfeebled by influences which were wholly controlled in private interests, as distinguished from those of the nation at large. To-day the picture is reversed: the tone of public morality is changed from its foundation, and the abuse

of public office to private gain is as definitely a crime to the common mind as any form of vulgar theft. In several divisions of the German empire a similar change has taken place. In both these countries, there is now practically no question of the ability of the government to deal with any commercial or industrial power which has a prospect of existence. The moral strength of our republic may be somewhat slower to develop, but there are instances enough in our history of the capacity of the people for moral indignation, and for a wise expression of it in law and administration, to justify us in full confidence that a similar process will furnish in the end a complete and permanent solution of this problem also.