Speak Your Piece: Antitrust Law Peverted

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The worries about the power of Wall Street have their roots in rural America. More than 120 years ago, rural Grangers and Populists were warning about concentrations of business power. Maybe it's time we listed to our rural forebearers.

By C. Robert Taylor

When Nebraska farmers in the 1880s saw that their economic future was being controlled by large businesses, they didn't occupy Wall Street. They built a new political party. Here is a picture of the Nebraska People's Party convention of 1890, meeting in Columbus, Nebraska.

Current socioeconomic issues are not unlike they were in an earlier time in America's history, the late 1800s and early 1900s. The "Farmers Revolt" against the "Robber Barons" led to formation of the Grange. The platform of the Grange was simple:

"We are opposed to such spirit and management of any corporation or enterprise as tends to oppress the people and rob them of their just profits. We are not enemies to capital, but we oppose the tyranny of monopolies."

The Granger's declaration of 1874 went further,

"We meet in the midst of a nation brought to the verge of moral, political and material ruin. Corruption dominates the ballot box, the Legislatures, the Congress, and touches even the

ermine of the Bench. The people are demoralized...the newspapers are largely subsidized or muzzled, public opinion silenced, business prostrated, our homes covered with mortgages, labor impoverished, and the land concentrating in the hands of the capitalists.

The urban workmen are denied the right of organization for self-protection; imported pauperized labor beats down their wages ... The fruits of the toil of millions are boldly stolen to build up colossal fortunes, unprecedented in the history of the world, while their possessors despise the republic and endanger liberty. ... The land, including all the natural sources of wealth, is the heritage of the people and should not be monopolized for speculative purposes, and alien ownership of land should be prohibited."

Wow! Rural Americans are now voicing many of the same concerns. Occupy Wall Street activitists have a similar mantra.

The Farmers Revolt and the Grange became the precursor to the Peoples' Party, the Populists. The Populist notion of antitrust took hold in response to the 'robber barons' — resulting in the Sherman Antitrust Act in 1890, the Clayton Act in 1914, court-ordered divestiture of the meat packer cartel in 1920, the Packers & Stockyards Act (PSA) in 1921, and the Capper-Volstead (agricultural cooperative) Act of 1922 that made agricultural cooperatives a limited exception to antitrust so farmers and ranchers could cooperate to countervail market power.

The Populist notion of antitrust law focused on broad goals emphasizing "free and fair competition." The intent was to protect "the people" from bigness and from fraudulent, unfair business practices.

The Populist need for antitrust laws was based on common sense economics.

Industry tends to become highly concentrated and integrated when giant firms have lower unit production costs that smaller firms, or when giant firms can use predatory market power to gobble up smaller firms.

Concentrated economic power often leads to concentrated, disproportionate political power.

Disproportionate political power may be used to influence legislation or subtly influence court interpretation of existing law in favor of the powerful.

Monopoly power can thus be strengthened and further entrenched, leading to monopoly inefficiency and a widening chasm between income and wealth of the powerful few and the rest of society, the people. Populists backed legislation to enact antitrust laws intended to keep a democracy from being turned into a corportocracy.

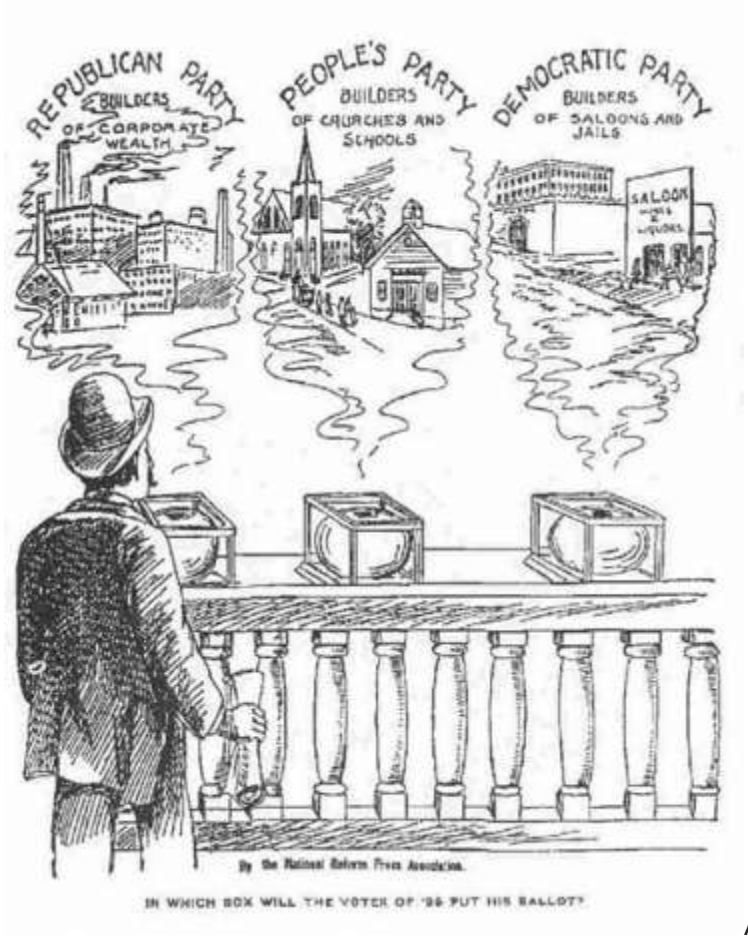
In the first substantive decision interpreting the 1890 Sherman Antitrust Act, Supreme Court Justice Peckham wrote:

[I]t is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man . . . into a mere servant or agent of a corporation … having no voice in shaping the business policy … and bound to obey orders issued by others.

Poultry growers have become precisely what Justice Peckham opined the laws were intended to prevent, servants of corporations. Many other agricultural industries have travelled far down "The Road to Serfdom."

During the past century, the broad goals of antitrust have been stripped away, layer-by-layer. Chicago economist and Federal Judge Richard Posner's view that "the only goal of anititrust law should be to promote efficiency in the economic sense" now dominates case law.

Yet, the word efficiency is not to be found in the Sherman and Clayton Acts or the PSA. Not once. The word fair, which appears in the law numerous times, has been ignored. One wonders how some judges made it through law school on onto the bench with such poor reading skills.



A Populist cartoon from 1894. The Populist antitrust words “free competition” have been twisted to favor greed and a corporate “free market” dogma. Business dominated by a giant is not “free” of rules and regulations as the giant’s “rules” are imposed on smaller business. An industry ruled by a big gorilla is not a free market for anyone except the big gorilla.

For several decades now, the efficiency argument has been used to allow mergers and acquisitions, resulting in “too big to fail.” Many of these mergers would not have been allowed under the original intent of antitrust.

But the situation is worse.

While antitrust law applies to collusion in the marketplace, the Supreme Court has opined that it does not generally apply to efforts to influence legislation and courts interpretation of law. Under Supreme Court opinions collectively known as the Noerr-Pennington doctrine, private entities are immune from liability under the antitrust laws for attempts to influence the passage or enforcement of laws, even if the laws they advocate would have anticompetitive effects.

Furthermore, private entities are immune from antitrust even when they employ deceptive and unethical tactics to influence legislation. Corporations and individuals are treated equally under Noerr-Pennington. Corporations, individuals and their trade associations have essentially no limits on trying to influence legislation or the courts. Deception and lies are just fine, thank you!

But the situation is worse than worse.

Powerful special interests not only try to influence legislation in their favor, they seek appointment of judges who are politically and ideologically aligned, particularly to appellate courts. A 2004 Business Week magazine cover story titled "The Battle Over the Courts: How politics, ideology, and special interests are compromising the U.S. justice system" described the situation perfectly:

"When you get right down to it, all of the (judicial) trappings are designed to build faith in the core ideals of the American judiciary: that judges are fair, objective, principled, and nonpartisan. That's the theory. … So here's where things stand: Conservatives blame liberals for the current debauched state of judicial politics, and liberals fault conservatives.

The truth is that both sides are culpable – and seem to be racing to see who can capture lower ground. So long as the two sides remain locked in partisan warfare and the country's overall civic culture continues to degenerate into ever more antagonism, there seems little reason to hope that politics will soon loosen its tightening grip on the judiciary."

Has the dream of an independent judiciary envisioned by our Founding Fathers been hijacked? To paraphrase the Grange, has the tyranny of monopoly touched the ermine of the Bench? Sure seems that way to me.

We have recently witnessed the courts departing from the plain language of the PSA, followed by defeat of the proposed GIPSA Rules that were intended to better define "fair" markets. The Rules were defeated in part by intentional lies and political power, in my opinion.

French economist Frederic Bastiat observed in 1850 that the "law" might be diverted from its true purpose,

"The law perverted! The law, I say, not only turned from its proper purpose but made to follow an entirely contrary purpose! The law becomes the weapon of every kind of greed! Instead of checking crime, the law itself is guilty of the evils it is supposed to punish!"

In the words of Bastiat, our antitrust law and PSA have been perverted and made to follow an entirely contrary purpose.

In America we have the confluence of compelling political and economic forces as manifested in:

(1) The U.S. Supreme Court in Citizens United recently allowed unlimited political contributions by corporations;

(2) The Noerr-Pennington Doctrine that makes private entities legally immune for attempts to influence passage or enforcement of laws, even to the point of permitting outright lies and deception of legislators by corporations and trade associations, and;

(3) Re-interpretation of antitrust laws from broad social objectives to narrow economic efficiency objectives that do not necessarily nurture democratic values.

These forces threaten the very soul of American democracy and the American Dream.

Without corrective legislation refereed by a truly independent judiciary, these legal interpretations will continue to shape the economy, allowing it to become more integrated and concentrated, not just in the United States, but on planet Earth.

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