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Laurence E. Gesell

Martin T. Farris

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ANTITRUST IRRELEVANCE IN AIR TRANSPORTATION AND THE RE-DEFINING OF PRICE DISCRIMINATION

LAURENCE E. GESELL*
MARTIN T. FARRIS**

I. INTRODUCTION

TO SOME airline analysts it may seem that the failure of airline deregulatory policy and the subsequent consolidation of the airline industry into an oligopoly has enhanced the need for effective antitrust enforcement. This article suggests otherwise. In oligopoly markets, price and output decisions are made while anticipating the reactions of rivals.¹ This interdependency means that oligopolistic firms will not reduce prices to increase sales because, as others will match the price, such action is fruitless. Restated, prices in an oligopoly tend only to rise, ostensibly above marginal cost, and "competition" is achieved through alternative means of production and marketing (or "nonprice competition"). Consequently, the existence of only a few large scale competitors serves

* Associate Professor of Aerospace Technology at Arizona State University, B.A., Upper Iowa University, 1976, M.P.A., University of San Francisco, 1982, Ph.D., Arizona State University, 1990.

** Regent's Professor of Business Administration at Arizona State University, B.A., University of Montana, 1949, M.A., 1950, Ph.D., The Ohio State University, 1957.

¹ F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 134-35 (1970). Conversely, monopolies have no rivals and therefore may price unchallenged above marginal cost. E. GELLHORN, *ANTITRUST LAW AND ECONOMICS*, 73-74 (1981). It follows that predatory behavior is free to roam in monopoly markets.

as a check on predatory behavior.² Antitrust law is therefore irrelevant in an oligopolistic market because interdependent sellers³ cannot engage in the type of predatory pricing of a monopolist. What is needed instead is new adaptive law to protect the consumer from unfair price discrimination.

II. EVOLUTION OF ANTITRUST LAW

Economic concentration evolved in the late nineteenth century as a "rational" mechanism against excess competition in the marketplace.⁴ At its root was a desire to escape the rigors and uncertainties of competition and to rectify a market that business leaders could not otherwise control. Corporate growth was an attempt to stabilize and integrate the economy in such a way that would allow corporations "to function in a predictable and secure environment permitting reasonable profits over the long run."⁵

² Oligopoly does not, however, serve as a check on pricing above marginal output. This high pricing is only compounded when competitors are able to share information. In the airline industry today, for example, pricing information is instantly shared through computer reservation networks, the use of which seems tantamount to price setting. L. GESELL, AIRLINE RE-REGULATION 67 (1990).

³ E. GELLHORN, *supra* note 1, at 73.

⁴ See M. WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 186, 333-34 (1947) [hereinafter M. WEBER, THE THEORY OF SOCIAL]; M. WEBER, ECONOMY AND SOCIETY 85-86 (1978) [hereinafter M. WEBER, ECONOMY]; see also Giddens, *Introduction* M. WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM at 25 (1958); J. INVERARITY, P. LAUDERDALE & B. FELD, LAW AND SOCIETY: SOCIOLOGICAL PERSPECTIVES ON CRIMINAL LAW 104 (1983) [hereinafter INVERARITY]. In Weber's perspective on capitalism (and the modern institutional order), the free market economy is dependent upon rational-legal authority, not only internal to the organization in its "bureaucracy," but also externally, upon the "rationality of economic action." As Anthony Giddens interprets Weber, "[M]odern rational capitalism has need, not only for the technical means of production, but of a calculable legal system and administration in terms of formal rules." INVERARITY, *supra*, at 104. By "rational," Weber was referring to marketplace efficiency; the most rational means of orienting economic activity. As Inverarity explains, rationality does not mean "reasonable" in the colloquial sense, but rather, is used in the technical sense to mean rules and procedures. *Id.* See M. WEBER, THE THEORY OF SOCIAL, *supra*, at 333. M. WEBER, ECONOMY, *supra*, at 85-86.

⁵ G. KOLKO, THE TRIUMPH OF CONSERVATISM 3 (1963), quoted in INVERARITY, *supra* note 4, at 223-25.

As it turned out, the anti-competitive tactics of the giant national corporations, coupled with their sheer size, created as many political and legal problems as the economic problems they solved. The behavior of the railroad companies, in particular, became a test of Adam Smith's *laissez-faire* philosophy.⁶ Lacking competition, the railroads set rates as they pleased, thus discriminating particularly against farmers as a group. Reaction to the railroads' price discrimination became the basis for the consumer revolt by the National Grange, an agrarian society formed in 1867. The Granger movement of the 1870's demanded state regulation of railroads, grain elevators and public warehouses.⁷ As a result of this movement, Congress passed the Act to Regulate Commerce in 1887, followed by a subsequent string of economic regulatory laws (including the "antitrust laws") during the Progressive Era and beyond.

The Granger movement is of significance in the evolution of government regulation because it was the first time that American society regulated an industry by setting up a regulatory structure outside of the courts and the common law.⁸ The discriminatory rate practices of the railroads were specifically targeted by this movement. Unfortunately, early in the evolution of regulatory law, the focus shifted from the "behavior" of the industry, manifested as discriminatory pricing and other abuses, to concerns about size and corporate (monopolistic) "structure." Originally, it was assumed that a direct causal link existed between monopoly and consumer abuse, but this is not necessarily true.

Nevertheless, monopolistic abuses by 1872 were a nationwide problem, and a special committee was established in the United States Senate to study the issue.⁹ The

⁶ L. GERTSON, C. FRALEIGH & R. SCHWAB, *THE DEREGULATED SOCIETY* 23 (1988) [hereinafter GERSTON].

⁷ R. ROBERTSON, *HISTORY OF THE AMERICAN ECONOMY* 283 (1973).

⁸ R. SAMPSON, M. FARRIS & D. SHROCK, *DOMESTIC TRANSPORTATION PRACTICE, THEORY AND POLICY* 212-13 (1990) [hereinafter SAMPSON].

⁹ *Id.* at 214.

product of the Senate Committee was the Windom Report¹⁰ which concluded that the railroads were, indeed, imposing unfair discrimination and extracting extortionate charges. It is of note that the focus of the Windom Report was upon the "effects" of consumer abuse rather than its supposed "structural" causes. Still, the Windom Report did recognize that although the "invisible hand" of competition¹¹ might be the ideal regulator, private competition, the Report said, "invariably ends in combination."¹²

To address the sort of widespread price discrimination uncovered by the Windom Report, the Senate and the House of Representatives separately drew up their own versions of regulatory bills.¹³ The two houses became deadlocked, however, over their different approaches to the issue. To break the impasse, another special committee, the Cullom Committee, was appointed to investigate the railroad problem.¹⁴ In 1886, the Cullom Committee reported the existence of discriminatory abuses by the railroads, emphasizing not consumer rights and the effects of the abuses, but the assumption that the abuses resulted from monopoly power. The Report altered the course of regulatory social control by shifting the focus from the individual victim of discrimination and other consumer abuses to concerns about controlling what the committee viewed as the fundamental structural cause of the abuse — monopolistic concentration.¹⁵

III. THE CONSUMER IDEAL

"Consumer-oriented" regulation was the idealism of legislation adopted during the Progressive Era. During this time, the government, through its administrative

¹⁰ *Id.* at 10.

¹¹ See generally A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (R. Canaan rev. ed. 1937).

¹² Sampson, *supra* note 9, at 214.

¹³ *Id.* at 10.

¹⁴ *Id.* at 215.

¹⁵ *Id.*

powers, began increasingly to regulate and "control" business organization and the consumption of commodities.¹⁶ Rather than attempting to protect the consumer at the individual level, government intervention sought to stabilize the economy (and business) against "cutthroat" competition¹⁷ and the "evils" of monopoly. The shift from behavioral to structural control masked the fundamental ideology of consumer protection.

Social control at the organizational level, if it could be compared with economic theory, is analogous to "supply side economics," which attempts to encourage capital investment (traditionally through tax incentives), with the expectation that in turn jobs might be created and individual spending might expand the economy.¹⁸ The objective of antitrust law is to assure a "competitive" economy, based upon the belief that through competition individual consumer wants will be satisfied at the lowest (i.e., economically efficient) price.¹⁹ However, a "competitive" airline market (meaning a laissez-faire market with many competitors) no longer exists.²⁰ Nevertheless, and irrespective of the market concentration that has already occurred, it should be recognized that choices other than reliance upon a competitive economy to protect consumer welfare are still available.

IV. GOVERNMENT AND INDUSTRY COLLUSION

Unfortunately, government regulation has at times been at the behest of and in close cooperation with big business.²¹ Antitrust law, for example, transformed into administrative law by the Federal Aviation Act of 1958,²²

¹⁶ INVERARITY, *supra* note 4, at 164.

¹⁷ *Id.* at 233-34, 237.

¹⁸ M. FARRIS & S. HAPPEL, MODERN MANAGERIAL ECONOMICS 10-12 (1987) [hereinafter M. FARRIS].

¹⁹ E. GELLHORN, *supra* note 1, at 40-41.

²⁰ L. GESELL, *supra* note 2, at 42-50.

²¹ Pillai, *The CAB on Travel Regulation*, in THE MONOPOLY MAKERS, 160-66 (M. Green ed. 1973).

²² Pub. L. No. 89-796, 72 Stat. 731.

is designed to protect the airlines, not the consumer.²³ In fact, consumers have been denied standing to file complaints or to participate in enforcement proceedings.²⁴ Similarly, the Civil Aeronautics Board (CAB) was created for the airlines to address an overly competitive market. The CAB, while possessing enormous powers over air transportation to protect the public's right to travel, functioned instead to rationalize the marketplace for industry. By the 1970's, deregulation proponents perceived that, rather than protecting the consumer, an "imperfect cartel" had been created to satisfy the air carriers, even to the detriment of the travelling public.²⁵ Ironically, governmental regulation served to collude industry with government.²⁶

The Progressive Era was indeed marked by hegemony that effectively muted any articulation of "real" consumer interests.²⁷ "Hegemony" exists when the working class in advanced capitalistic society believes that the ruling class interest is the same as the interest of the larger society.²⁸ The hegemony of the Progressive Era is perhaps best expressed in the "trickle down" economic theories of Andrew Mellon who said: "[t]he property of the middle and lower classes depends upon the good fortunes and the light taxes of the rich."²⁹ Ultimately, "competitive capitalism" was transformed into "corporate capitalism," and the laissez-faire economic marketplace envisioned by

²³ *Regulatory Reform in Air Transportation: Hearings before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong., 1st Sess. 404 (1977) (statement of Ralph Nader, consumer advocate) [hereinafter Nader].

²⁴ *Wolfe v. Trans. World Airlines*, 544 F.2d 134, 136 (3d Cir.), cert. denied, 380 U.S. 248 (1976); *Polansky v. Trans World Airlines*, 523 F.2d 332, 337 (3d Cir. 1975); cf. *Nader v. Allegheny Airlines*, 512 F.2d 527, 542-43 (D.C. Cir. 1975), rev'd on other grounds, 426 U.S. 290 (1976).

²⁵ Pillai, *supra* note 22, at 160.

²⁶ Fellmeth, *The Regulatory-Industrial Complex*, in *THE CONSUMER AND CORPORATE ACCOUNTABILITY* 218 (R. Nader ed. 1973).

²⁷ M. NADEL, *THE POLITICS OF CONSUMER PROTECTION* 16 (1971).

²⁸ A. GRAMSCI, *SELECTION FROM THE PRISON NOTEBOOKS* 12 (1961); see also Lauderdale, *A Power and Process Approach to the Definition of Deviance*, in *A POLITICAL ANALYSIS OF DEVIANCE* 9 (P. Lauderdale ed. 1980).

²⁹ L. LOENIG, *THE CHIEF EXECUTIVE* 269 (1981).

Adam Smith was replaced by imperfect competition and the concentration of capital into fewer and fewer companies in any given market.³⁰

V. THE REGULATORY IDEAL

There is an obvious tension between the ideals of competitive capitalism and corporate capitalism. The former model promotes the individual economic freedom of the consumer by providing him with many competing suppliers and thereby ensuring that price is determined by supply and demand, rather than the marginal cost of the sellers.³¹ Corporate capitalism, on the other hand, is founded on the concept of rugged individualism which often leads to the submersion of the individual in the collectivism of economic concentration.³²

Regulatory policy has historically vacillated from one regulatory ideal to the other.³³ Until the 1960's most regulation was directed toward control of the economy.³⁴ From the mid 1960's to the mid 1970's, however, the focus shifted to "social regulation," providing increased protection for the environment, the consumer, and the worker.³⁵ Social regulation "represented a fundamental shift in priorities from narrow oversight of selected industries to broad control over basic objectives, and from concern with efficient production to promotion of the public good."³⁶ Social regulation then proceeded to a third regulatory ideal, resistance.³⁷ Business people and economists attributed this third regulatory ideal to be the cause of the economic slump of the late seventies. Deregulatory

³⁰ INVERARITY, *supra* note 4, at 169-70.

³¹ H. WELLS, *MONOPOLY AND SOCIAL CONTROL* 149 (1952).

³² *Id.* at 151.

³³ L. GESELL, *supra* note 2, at 13-15.

³⁴ GERSTON, *supra* note 7, at 27; *see also*, S. TOLCHIN & M. TOLCHIN, *DISMANTLING AMERICA: THE RUSH TO DEREGULATE* (1983); L. GESELL, *supra* note 2, at 139-43.

³⁵ Gerston, *supra* note 7, at 32. Some theorists have referred to this period as the "New" Progressive Era.

³⁶ *Id.*

³⁷ *Id.* at 35-36.

policies were employed to remedy the sluggishness.³⁸ The resulting deregulation mania plagued the eighties as well.

Currently, the "pendulum" is moving back toward some form of re-regulation, particularly of the airlines. The structural model in Figure 1, described as a "synergistic loop," in which the wisdom and experience gained from the past regulation of the market serve to educate Congress for future control over the aviation industry. The air transportation market begins in competitive capitalism; is rationalized by industry into the corporate capitalism of the Progressive Era; is re-rationalized by the government through economic regulation into corporate capitalism in the form of a public utility (and monitored by the CAB); is then deconstructed by government deregulation in hopes of returning to a form of competitive capitalism; is then re-rationalized into corporate capitalism once again by finance entrepreneurs; and finally, is left dangling with Congress in the process of looking for ways of deconstructing the latest form of corporate capitalism.³⁹

The synergistic loop of Figure 1 may be used to explain social evolutionary patterns and to predict the new wave of regulation. In stating that the airline industry ought to be re-regulated, the new regulatory model ought to conform to the pattern of the synergistic loop, which departs from one concept of regulation to another in favor of a new social regulatory model (see Figure 2). Rather than trying once again to regulate the industry by centralizing the absolute character of the regulatory process, more efficient regulation might flow from a more "natural" process of social control.

As Alfred Kahn concedes, the brand of deregulation he originally supported must undergo re-regulatory reform through the intervention of competition supplementing

³⁸ *Id.* "Unreasonableness" and "cost" became the rallying cries for business leaders opposed to social regulation.

³⁹ L. GESELL, *supra* note 2, at 13-15, 118-25.

FIGURE 1
THE EVOLUTION OF MARKET RATIONALIZATION

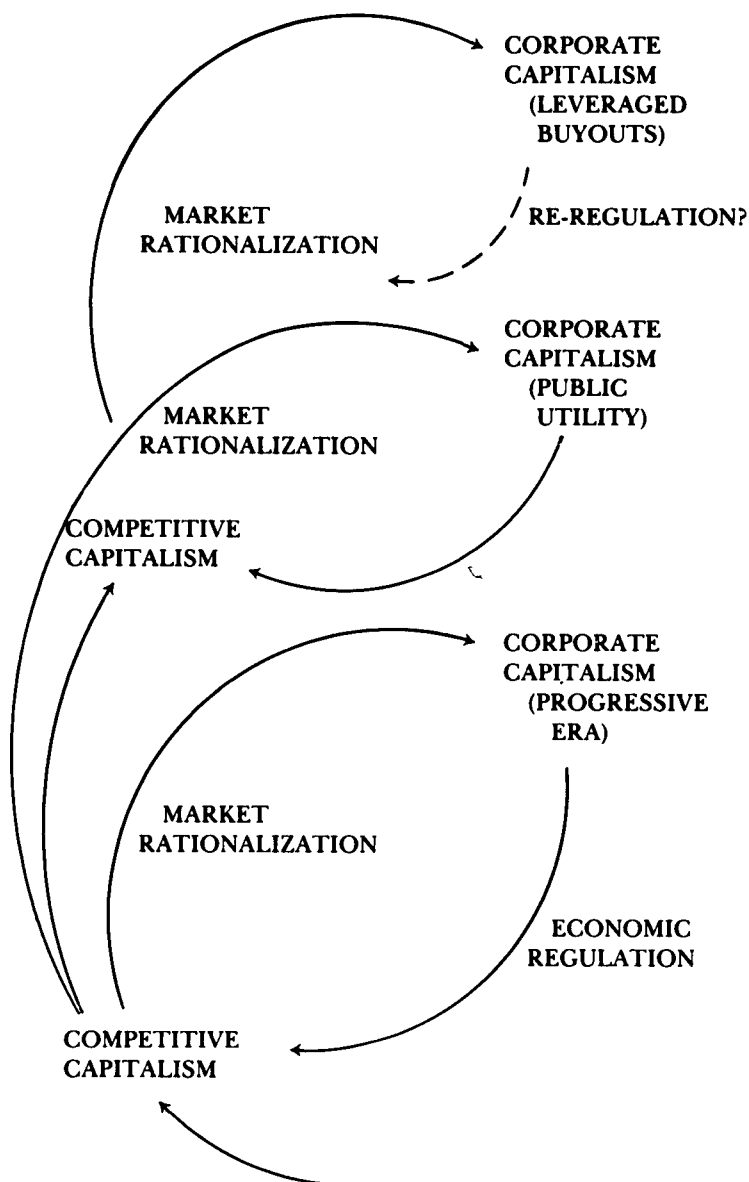
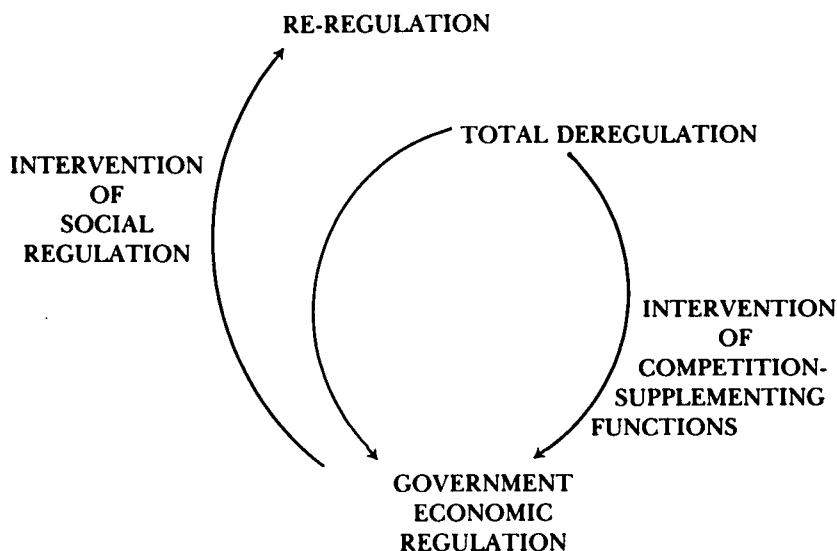


FIGURE 2
SOCIAL REGULATORY MODEL.



functions by the government.⁴⁰ In stating that the airlines ought to be re-regulated, it may seem that the industry would be taken full circle from regulation to deregulation and back again to regulation. Mr. Kahn, however, points out that "the proper metaphor is not a full circle, which would take us back to where we started, but to a spiral which takes lessons learned from the past and gives them new direction."⁴¹

VI. CORPORATE STRUCTURE VERSUS BEHAVIOR

The synergistic model of regulatory reform might also be useful in predicting a revised model of antitrust law. Just as tension between competitive and corporate forms

⁴⁰ A. Kahn, *Deregulation: Looking Backward and Looking Forward*, Paper presented at the Fiftieth Anniversary Session of American Economic Association/Transportation and Public Utilities Group (Dec. 28, 1989).

⁴¹ *Id.* Restated, we must learn from our former mistakes. Such a view clarifies the meaning of synergistic loops.

of capitalism has existed, there has equally been a long-standing disagreement between "structuralists" and "realists" over the effect of corporate size.⁴² In the structuralist view, large corporate size automatically spells undue power.⁴³ This same perspective is applicable to high concentration as well, simply because it predisposes the "ability" to abuse the marketplace.⁴⁴

Section 4 of the Sherman Act provided the remedy of either divestiture, dissolution, or divorcement to relieve the consumer from the noncompetitive situation of a concentrated market.⁴⁵ This structural relief, however, has not been effective.⁴⁶

To realists, size and concentration alone are insufficient tests of whether or not corporate activities are competitive. It is the actual "behavior" of the corporation rather than its size which determines market competitiveness.⁴⁷ The solution, then, is to impose behavioral remedies such as reducing barriers to entry and the threat of retaliation.⁴⁸ The position of U.S. courts on this issue has gone through a complete cycle: from a behavioral interpretation to a structural one and back. The evidence which follows provides credence to the behavioral approach.

In at least one industry, the airlines, sufficient data exists to empirically test the relationship between concentration and its impact upon consumer welfare. In the first decade of airline deregulation, federal deregulatory policy has taken the airlines from a highly concentrated industry, moved it in the direction of the competitive capitalistic ideal by encouraging entry by new airlines, and then allowed even greater concentration to occur than before deregulation.

⁴² Bock, *Consistency and Change in Antitrust in the United States: An Introduction*, in TOWARD A NATIONAL ANTITRUST POLICY 39, 41 (1976).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ D. WALDMAN, ANTITRUST ACTION AND MARKET STRUCTURE 1 (1978).

⁴⁶ *Id.*

⁴⁷ *Id.* at 21.

⁴⁸ *Id.*

Functioning within the free enterprise paradigm,⁴⁹ the Department of Transportation adopted a policy for ease of entry as a key factor in its analyses of potential anti-competitive effects in merger cases. Between 1985 and 1987, DOT approved 25 mergers with remarkably few restrictions. Critics charged that DOT had taken an "anything goes" approach to airline mergers. The result by 1987 was to effectively reconcentrate the industry to pre-deregulation levels.

By December 1986 the airline industry market share, measured in revenue passenger miles (RPM), indicated that the top four airlines (United, American, Eastern and Delta) shared just under fifty percent (48.3%) of the domestic market.⁵⁰ With the continuation of airline mergers in the first five months of 1987, the top four airlines (Texas Air/Continental/Eastern, United/Pan American Pacific, American/Air Cal, and Delta/Western) shared 61.2% of the market. At year's end, there were 31 scheduled air carriers serving the domestic market. Of those 31 carriers, 10 had cornered 88.2% of the market.⁵¹ Enplanement data for the subsequent year reflected a similar pattern, although individual market shares had shifted among carriers, with the smaller carriers showing slightly increased shares, and the total for the top ten domestic

⁴⁹ The Free Enterprise paradigm is explored in Berman, *Consumerism and the Regulatory System: Paradigms of Reform*, 1 POL'Y STUD. REV. 454 (1981-82). Berman describes the free enterprise paradigm as a system which most of the contemporary business community identifies with Adam Smith and the laissez-faire market place. *Id.* In a continuum of consumer interests, the free enterprise paradigm is at one extreme. It assumes that there should be little, or no, intervention in the marketplace by government—that consumers are individuals responsible for their own actions. It is a market place where risk is assumed and where a "caveat emptor" attitude might prevail. *Id.* It is a marketplace advocated by the libertarian perspective, where individuals should be at liberty to conduct business without government intervention and where the consumer, as an individual, should be held responsible for his or her own market decisions. *Id.* It is a marketplace where the capitalist has no social responsibilities, only the responsibility to make money. See also M. Friedman, *The Social Responsibility of Business is to Increase Its Profits*, in *ETHICAL ISSUES IN BUSINESS: A PHILOSOPHICAL APPROACH* 191 (T. Donaldson & P. Werhane eds. 1979).

⁵⁰ L. GESELL, *supra* note 2, at 39-41.

⁵¹ *Id.*

scheduled air carriers increasing to more than 90%.⁵²

The bottom line is that the airline industry has become an oligopoly. No longer subject to meaningful competition, the industry has managed to control (i.e., rationalize) the market, and therefore, is not required to push for higher profits through increased load factors. In fact, "high load factors to offset cost reductions no longer have the same importance to airlines where their ability to establish prices well above marginal costs can easily generate revenue sufficient to gain high returns."⁵³

In the "structuralist" perspective, the industry has returned to oligopoly. Airlines may now raise their fares relatively uncontested, especially at hubs where they are dominant. "Pricing behavior, once mandated and controlled by the CAB, has been replaced with price rigidity similar to that of the regulated era."⁵⁴ Thus, "[A]ir travelers can (or ought to) expect higher fares as the big fish in the airline industry keep gobbling up the little ones."⁵⁵

VII. CONSUMER WELFARE

By 1988 (when the market had been effectively concentrated into oligopoly), fares had increased significantly.⁵⁶ Although this might seem to validate structuralist concerns that a few competitors can price gouge, it is not necessarily size, per se, that negatively impacts welfare interest. The significant increase in the airline price structure may well have been justified by economic reality. While consumer welfare, in terms of paying higher fares, may have been adversely affected, price increase alone does not constitute "unfair" treatment. On the other hand, price discrimination does treat the consumer unfairly.

⁵² *Id.*

⁵³ E. Harraf & B. Cheek, *Deregulation — Oligopoly to Oligopoly*, (paper presented at the Airshow Canada Symposium (Aug. 8, 1989) (unpublished).

⁵⁴ *Id.*

⁵⁵ Kotten, *Increased Flights, Fewer Flights Are Likely Results of Airline Mergers*, Wall St. J., Sept. 17, 1986, at 31, col. 3.

⁵⁶ L. GESELL, *supra* note 2, at 39-40.

Through a quasi-experimental design, it may be demonstrated that it is not size but behavior which affects consumer interest. And, if it is the relative deprivation caused by price discrimination that causes the consumer to be treated unfairly, then it would seem that something ought to be done to correct corporate decision-making and pricing strategies, as opposed to enforcement of anti-trust laws which attempt to correct monopolistic "tendencies."⁵⁷

Part of the strategy to control the airlines has been to require a standard system of accounting so that business activities could be more closely monitored. Certificated air carriers are required by law to maintain records and to report to the Department of Transportation on a regular basis memoranda of the movement of traffic and of receipts and expenditures of money.⁵⁸ The prescribed format for airline accounting systems is the Uniform System of Accounting and Reporting, commonly referred to as "Form 41 Reports."⁵⁹ The federal government compiles the results of the Form 41 Reports and publishes them as a matter of public record. For this study, air carrier records were surveyed, compiled into a standard useable form, and then coded for entry onto a data base. Airline performance data were extracted from Federal records stored on microfiche published in the *American Statistical Index* for the years 1978 to 1988. These data included consumer complaint statistics, denied boardings, and passenger enplanement information.⁶⁰ For the test of size

⁵⁷ M. PASTIN, *THE HARD PROBLEMS OF MANAGEMENT: GAINING THE ETHICS EDGE* (1986) (Pastin suggests that although ethics has many meanings, good ethics is a matter of making right decisions. It follows, then, that the intent of law ought to be the encouragement of good decision-making).

⁵⁸ 49 U.S.C. § 407(a), (d) (1988).

⁵⁹ L. GESELL, *supra* note 2, at 88.

⁶⁰ Air carrier operations may vary from one company to the next, and the break between National and Regional categories is marked by dissimilar aircraft, route structures, size of operations and reporting of information. In order to consistently test the effect of corporate size upon consumer welfare, data was collected only for passenger carriers categorized as Majors or Nationals (or those which became major carriers after deregulation). Inasmuch as the domestic data alone

versus behavior, complaint and denied boarding data are assumed to represent consumer welfare interests. The enplanement data are a measure of business volume, and therefore reflects corporate size and/or concentration.

If, in the structuralist view, size predisposes "undue power," one would expect to find a correlation between the enplanement data (ENPLNMT) and both consumer complaints (COMPLNT) and denied boardings (DENDBD) — the latter, since one might assume there is a causal connection between a passenger denied of his reserved seat and then later complaining about it.⁶¹ The correlation matrix (see Table 1) shows the relationships between the variables. The results would seem to indicate that concerns over size alone are unjustified. The correlation between ENPLNMT and COMPLNT (-.03) is nearly non-existent. There is a stronger relationship between ENPLNMT and DENDBD, but it is a negative correlation (-.24), which would indicate just the opposite of the structuralist perspective. These results suggest that the smaller the airline, the more apt it is to deny a seat to a confirmed passenger.

From a more causal analysis (see Table 2), the regression of ENPLNMT on COMPLNT and DENDBD, the coefficient of determination (R^2) is relatively weak (.11),⁶² which suggests that size, per se, does not necessarily result in consumer abuse.⁶³ Restated, there is no correlation between airline size and consumer welfare.

were analyzed, the results relative to concentration and market share may differ from analyses reported by other airline analysts using more inclusive information.

⁶¹ See e.g., *Nader v. Allegheny Airlines*, 626 F.2d 1031 (D.C. Cir. 1980).

⁶² See G. BOHRNSTEDT & D. KNOKE, *STATISTICS FOR SOCIAL DATA ANALYSIS* 104-06 (1982) (Although the coefficient of determination is relatively weak, it is significant at the 95% confidence level. For the regression analysis, the probability level (alpha) for rejection of the null hypothesis is conventionally set at .05 to reduce the probability of making a false rejection error by setting alpha at the very low level such as .001).

⁶³ L. GESELL, *supra* note 2, at 252-59 (complete list of airline data).

TABLE 1
CORRELATION MATRIX

	DENDBD	ENPLNMT
COMPLNT	.43 **	-.03
DENDBD		-.24 **
N of cases: 272	1-tailed significance: ** = .001	

Where,
COMPLNT = Consumer Complaints
DENDBD = Denied Boardings
ENPLNMT = Passenger Emplanements

TABLE 2
REGRESSION ANALYSIS

	DENDBD	ENPLNMT
COMPLNT	.33 *	.05
DENDBD		-.32 *
R ²	.30 *	.11 *
N of cases: 272	* = significant at .05	

Where,
COMPLNT = Consumer Complaints
DENDBD = Denied Boardings
ENPLNMT = Passenger Emplanements

Nevertheless, the structuralist might still argue that size does presuppose the ability to abuse and to price discriminate. For the latter argument, there is some economic justification.

VIII. CONSUMER DISCRIMINATION

Price discrimination occurs when a firm charges two or more different prices for essentially the same product “for reasons other than cost differences.”⁶⁴ There are three conditions necessary for price discrimination to occur: the firm must possess some degree of monopoly power; the

⁶⁴ M. FARRIS, *supra* note 19, at 289-90.

firm must also be able to segregate or classify its customers into groups with different price elasticities; and, it must be able to prevent resale from one segment of the market to another (i.e., arbitrage).⁶⁵

Price discrimination in American society is common, and from a purely economic standpoint may be neither good nor bad, but merely a description of a price action. From a legal perspective, however, "discrimination" is the act of treating one differently from another;⁶⁶ that is, the act of unfairly, injuriously, and prejudicially distinguishing between persons or objects, where "economically" a sound and "fair" distinction does not exist.⁶⁷ "Discrimination" also means an arbitrary imposition of unequal tariffs for substantially the same service.⁶⁸ For our purposes, a carrier's failure to treat all alike under substantially similar conditions constitutes "unjust" discrimination.⁶⁹

Irrespective of precedents describing price discrimination as unfair or injurious, it may not be considered illegal under the antitrust laws unless there is an attempt to monopolize.⁷⁰ Furthermore, an attempted monopolization claim is encumbered by having to show: (1) a specific intent to monopolize a relevant market, (2) predatory or

⁶⁵ *Id.*

⁶⁶ *Wimberly v. Georgia S. & Florida Ry. Co.*, 5 Ga. App. 263, 63 S.E. 29, 31 (1908).

⁶⁷ *Morton Salt Co. v. Federal Trade Comm'n*, 162 F.2d 949, 954-95 (7th Cir. 1947); see also *Atlantic Pipe Line Co. v. Brown County*, 12 F. Supp. 642, 646 (N.D. Tex. 1939).

⁶⁸ *In re Public Util. Comm'n*, 268 P.2d 605, 616 (Or. 1954).

⁶⁹ *Kentucky Traction and Terminal Co. v. Murray*, 176 Ky. 593, 195 S.W. 1119, 1121 (1917).

⁷⁰ *Morton Salt*, 162 F.2d at 954-55.

'[D]iscrimination' within the meaning of the Clayton Act is not synonymous with harmless 'price differentiation'. . . . It is the act of unfairly, injuriously and prejudicially distinguishing between persons or objects, where economically speaking a sound fair distinction does not exist. It occurs as a matter of law only when section 2(a) of the Clayton Act . . . is in fact violated.

Id. Price discrimination may violate antitrust law if its effects may be "substantially to lessen competition or tend to create monopoly." *Id.* at 959 (J. Minton, dissenting).

anticompetitive conduct, and (3) a dangerous probability of success.⁷¹

There have been major difficulties in interpreting what constitutes price discrimination and whether competition was being lessened. Within the Clayton Act, price discrimination is not synonymous with "harmless differentiation," which arises from cost differences or price differences offered to the consumer in good faith to meet competition.⁷²

The fact that price discrimination is against the law only if it may substantially "lessen competition or tend to create a monopoly"⁷³ seems to be a fluke of legal evolution stemming from the interpretation of corporate abuse by the Cullom Committee.⁷⁴ The Cullom Report, coupled with the results of *Wabash, St. Louis & Pacific Ry. Co. v. Illinois*,⁷⁵ in which the Supreme Court held that the federal government alone had the power to regulate interstate commerce, led to passage of the Act to Regulate Commerce of 1887 (the Interstate Commerce Act)⁷⁶ which attempted to curb "monopoly", not rectify consumer abuse.

Claims of unfair price discrimination have long been unheeded by the courts because the typical corporate plaintiff could rarely demonstrate that there had been an attempt to monopolize. Moreover, individual consumers are denied standing altogether.⁷⁷ The difficulty in interpreting antitrust violations, coupled with the historical masking of consumer rights, indicates a need for revised antitrust legislation.

⁷¹ *Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1348 (9th Cir. 1986); *In re Passenger Computer Reservation Sys. Antitrust Litig.*, 694 F. Supp. 1443, 1468 (C.D. Cal. 1988).

⁷² M. FARRIS, *supra* note 19, at 311.

⁷³ Clayton Act, 15 U.S.C. § 13 (1988).

⁷⁴ See *supra* note 15-16 and accompanying text.

⁷⁵ 118 U.S. 557 (1886).

⁷⁶ 49 U.S.C. § 10101 (1988).

⁷⁷ See *supra* note 25, and accompanying text.

IX. ANTITRUST REFORM

Just as the construct of the "synergistic loop" was used to describe a potential (economic) re-regulatory model, it might be used here to predict a new form of antitrust legislation. In adopting the Sherman and Clayton Acts, Congress ostensibly intended to protect the consumer. The focus of the antitrust laws, however, has primarily been "structural," in that it attempted to correct abuses by prohibiting monopoly through the remedies of divestiture, divorcement or dissolution. The "structural" lessons learned ought to be pulled back through the original "behavioral" intent, and then re-defined as "anti-discrimination" law, in which the claims by individual consumers of "unfair" and "injurious" price discrimination might be addressed.⁷⁸

One could argue that the original position of the synergistic model is Adam Smith's ideal of American capitalism: a balance among the marketplace forces of capital, labor and the consumer⁷⁹ (see Figure 3). Smith best expressed the synergistic ideal in stating that, "by pursuing his own interest he (the individual) frequently promotes that of society more effectually than when he really intends to promote it."⁸⁰

This is also the underlying construct of the model described above as "social regulation."⁸¹ It is individual action which results in collective social control. It is the motivation which calls for a restatement of an antitrust law that is currently designed to protect the corporate entity, to re-define the law as "anti-discriminatory," and to provide the individual consumer with "access to the law"⁸² — with "standing."⁸³

⁷⁸ Nader, *supra* note 24, at 402. (Nader has suggested the creation of something like an "Office of Airline Public Counsel" to represent consumer interests).

⁷⁹ A. SMITH, *supra* note 12, at 56-62.

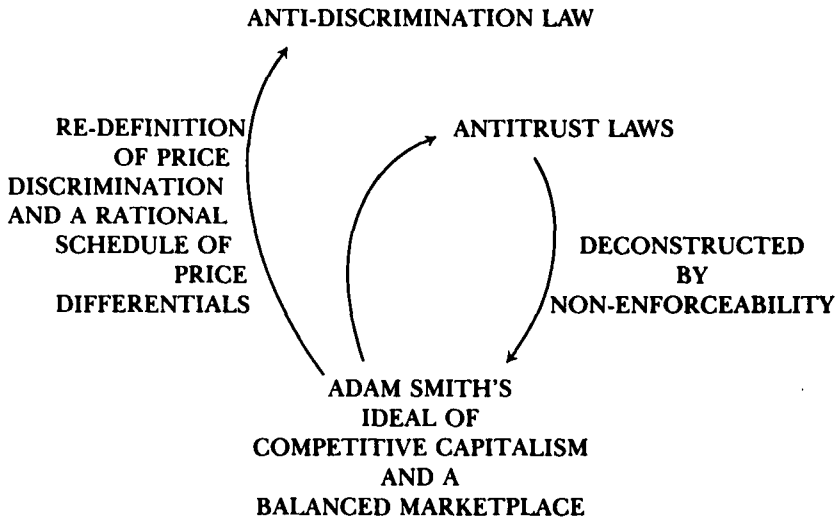
⁸⁰ *Id.* at 58.

⁸¹ L. GESELL, *supra* note 2, at 134-39.

⁸² L. NADER, NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM 3-49 (1980).

⁸³ See *supra* note 25 and accompanying text.

FIGURE 3
ANTI-DISCRIMINATION MODEL.



Adam Smith's philosophy epitomizes the ideology of individualism and the free market.⁸⁴ Even so, Adam Smith stated that government has the obligation of "protecting, as far as possible, every member of the society from the injustice of oppression of every other member of it."⁸⁵ In fact, in *The Wealth of Nations*, "Smith accused the business community of seeking to monopolize trade, inevitably conspire against the public, and direct the state in policies that serve their interests in conflict with the public good."⁸⁶ Although Adam Smith proposed a system of relatively unrestricted competition, he was not against meaningful regulation.

The antitrust laws evolved in response to an imbalance within the marketplace, to violations of consumer sovereignty in Adam Smith's ideal, and to the consumer protec-

⁸⁴ INVERARITY, *supra* note 4, at 69.

⁸⁵ A. SMITH, *supra* note 12, at 669.

⁸⁶ A. STONE, REGULATION AND ITS ALTERNATIVES 44 (1982).

tion ideology of the Progressive Era. However, the antitrust laws were misguided by a focus upon corporate structure.⁸⁷ Definition and interpretation have been difficult because of the sometimes inconsistent and often unpredictable models of economic theory.⁸⁸ Hence, in practice the antitrust laws have become nearly unenforceable. Revised legislation is therefore needed.

There are essentially three devices used in regulation: control of entry, control of service, and control of earnings/price.⁸⁹ The realities of corporate capitalism in the modern economic world, together with lessons learned from regulation and deregulation preclude controls over entry. Minimum levels of service, however, might be guaranteed through an altogether new "social regulatory" model that is conceptually grounded in the evolution of strict liability, modelled after worker's compensation, and undergirded by law that moves from the repressive to the restitutive.⁹⁰

In addition to regulation of the levels of service, the synergistic model presented in this article suggests that consideration might be given to the introduction of price controls into the social regulatory model as well. Such was the original behaviorial approach in the 1872 Windom Report.⁹¹ At a minimum, price oversight with the power to regulate where there is "unfair" or "injurious" price discrimination should be imposed. Further, where prevailing air fares might exceed reasonable industrywide parameters, a clear definition of prohibitory consumer price discrimination and permissible price differentiation is needed.

X. ANTITRUST OVERSIGHT

Economists seem generally to agree that concentration

⁸⁷ See *supra* notes 80-85 and accompanying text.

⁸⁸ M. FARRIS, *supra* note 19, at 353.

⁸⁹ *Id.* at 366-70.

⁹⁰ L. GESELL, *supra* note 2, at 140.

⁹¹ See *supra* notes 11-13 and accompanying text.

is the "natural" result of competition.⁹² Nevertheless, government and academics have underestimated industry's ability and resolve to control its economic environment.⁹³ The outcome of deregulatory policy has been greater concentration than previously experienced,⁹⁴ and unfortunately, the concentration process is not over in spite of government promises of antitrust oversight.

Under the provisions of the Civil Aeronautics Board Sunset Act of 1984, the authority to review airline mergers "cease(d) to be in effect" on January 1, 1989.⁹⁵ The Department of Transportation's authority to review mergers under section 408 of the Federal Aviation Act of 1958⁹⁶ did not transfer 408 authority to the Department of Justice or any other agency. Accordingly, the primary effect of the Sunset Act was to eliminate administrative approval of airline mergers.⁹⁷ Oversight authority over airline mergers is now vested with the Department of Justice Antitrust Division's investigative powers under the Hart-Scott-Rodino Act⁹⁸ and under the Civil Investigative Demand provision of the Antitrust Civil Process Act.⁹⁹

Shortly after the Department of Justice assumed its new found authority over airline mergers, Charles Rule, the Assistant Attorney General in charge of the Antitrust Division, gave assurances that whenever the Division was to hear of antitrust allegations it would "bring its full criminal investigatory arsenal to bear."¹⁰⁰ He stated that

⁹² See E. GELLHORN, *supra* note 1, at 19.

⁹³ L. GESELL, *supra* note 2, at 120; see generally Levine, *Airline Competition in Deregulated Markets: Theory, Firm Strategy, and Public Policy*, 4 YALE J. ON REG. 393 (1987).

⁹⁴ L. GESELL, *supra* note 2, at 54-60, 120.

⁹⁵ 49 U.S.C. app. § 1551(a)(7) (1988) (discussing airline mergers).

⁹⁶ P. BARLOW, AVIATION ANTITRUST: THE EXTRATERRITORIAL APPLICATION OF THE UNITED STATES ANTITRUST AND INTERNATIONAL AIR TRANSPORTATION 34-36 (1988) (discussing airline mergers).

⁹⁷ *Id.* at 35. This is the logical conclusion after the termination of the Department of Transportation's authority under Section 408.

⁹⁸ 15 U.S.C. § 1311 (1988).

⁹⁹ 15 U.S.C. § 1312 (1988).

¹⁰⁰ The Justice Department was reportedly investigating "price signalling," which, in turn, gave rise to a consolidated civil lawsuit against seven major air carriers and the Airline Tariff Publishing Co., the electronic clearing house for

"[r]egardless of the nature of the particular airline mergers that are produced in the future . . . the Antitrust Division could be counted on to examine each and every airline transaction."¹⁰¹ Doubt remains, however, as to what the division could accomplish since the antitrust laws are no longer effectual — particularly against the type of airline mergers which remain. The present trend in the airline industry and state of the economy are likely to aggravate this antitrust problem.

Concerns of industry analysts and of Congress have indeed pointed to the potential dangers of the high operating ratios that are the result of excessive debt, which in particular have resulted from leveraged buyouts, and which have financially weakened a number of the major airlines. The imminent threat of recession beginning in 1990 and rising fuel costs associated with the Persian Gulf crisis have caused severe economic downturn in air transportation.

Innovative management at the stronger airlines, having a compulsion to control the marketplace to its own advantage, should be expected to take advantage of the depressed economic situation and potentially to exploit the weaker carriers.¹⁰² However, the exploitation will probably not occur in traditional antitrust fashion. More likely, it will be masked as "survival" tactics to combat the economic threat of recession and rising costs.

As the weaker airlines begin to fail and strategize their own survival through cannibalization and the sale of valu-

tariff information. See Ott, *Civil Suit Filed in Wake of Federal Pricing Probe*, AV. WK. & SPACE TECH., Nov. 12, 1990, at 32. U.S. officials, however, said that investigators would be "hard-pressed to determine whether fares [were] competitive, retaliatory or predatory." *Id.* Legal analysts were seemingly of the consensus that the Justice Department was unlikely to move toward a conviction, and the "current judicial climate is fairly resistant to innovative theories of antitrust" in civil suits. *Id.*

¹⁰¹ Rule, *Antitrust and Airline Mergers: A New Era*, 57 TRANSP. PRAC. J. 66, 74 (1989).

¹⁰² See, e.g., *Continental Airlines Discusses Sale of Some Pacific Routes*, AV. WK. & SPACE TECH., Nov. 19, 1990, at 32 (an American Airlines official stated that American is "an acquirer of assets, and if someone offers us something, we're interested").

able assets,¹⁰³ the stronger carriers can be expected to pick up the pieces. In this scenario the Antitrust Division will be powerless, and may even support proposed mergers and acquisitions under the "failing company doctrine" as it did in the Muse Air/Southwest Airlines merger in 1985.¹⁰⁴

XI. CONCLUSION

Antitrust laws are no longer efficacious, at least not in the airline industry; but the industry has come to the advent of a re-regulatory reform movement. Included in that reform ought to be the revision of antitrust law, to redefine it as "antidiscrimination law," and to translate the law into a form which more closely mirrors the social evolutionary origins of antitrust law as a consumer-oriented ideal. In short, the behavioral approach to antitrust law originally employed by the Windom Report merits reexamination.

Oligopoly is a modern economic reality to which regulators may have to adapt. One has to wonder, however, what the outcome might be of enhanced, clearly defined, and more vigorously enforced antitrust law. What would happen if General Motors, for example, were forced to divest itself of its "competing" subsidiaries; to create an independent Chevrolet Corporation, a Pontiac Corporation, and so forth? Or, in the airlines, if there could be

¹⁰³ See, e.g., McKenna, *Airline Analysts Fear Big Loss Unless Fares Meet Cost Hikes*, AV. WK. & SPACE TECH., Oct. 22, 1990 at 30 (Midway Airlines agreed to sell 14 landing/takeoff slots at New York and Washington, D.C. to American Airlines); Velocci, *Mountain of Debt May Force Continental to Sell Assets*, AV. WK. & SPACE TECH. Oct. 29, 1990, at 26 (Financially troubled Continental Airlines reportedly would be forced to sell valuable assets and drastically cut costs to stay in business); *United Reaches Agreement On Pan Am Route Purchase*, AV. WK. & SPACE TECH., Nov. 19, 1990, at 29 (Pan Am agreed to sell international routes in Europe to United Airlines); Smith, *Pan Am Stock Soars on New Icahn Bid Despite Street's Doubts It Will Succeed*, Wall St. J., Dec. 18, 1990, at 4, col. 3 (Pan Am stock surged 20% in response to a takeover by TWA, but analysts expressed skepticism that anything would come of TWA's overture because of the weak financial conditions of both airlines).

¹⁰⁴ *Justice Department Supports Muse, Southwest Merger*, AV. WK. & SPACE TECH., May 27, 1985, at 33.

another Western Airlines, and an Ozark, a Piedmont, a Republic, a PSA?

If the synergistic model is truly reflective of reality, and if it provides insight into forthcoming regulatory developments, then "conglomerate deconstruction" may well be a "wave" of the distant future. But first it seems necessary to pass through "oligopoly acceptance" before the pendulum can swing back to what which might be called "divestiture law."

Comments

