BOOK REVIEWS

THE STRUCTURE OF AMERICAN INDUSTRY. Some Case Studies. New York: MacMillan Co., 1950, pp. x, 588. $4.75. Edited by Walter Adams.*

The Structure of American Industry, in the words of Professor Walter Adams, editor of the collection of industry studies published under this title, "is designed to present a representative, comprehensive and up-to-date view of American industry—its diverse forms of market structure and multifarious types of market behavior."[1] To accomplish the designated objective, twelve economists and a lawyer contributed studies written in accordance with a common plan. Each discussed the origin and development of an industry, characteristics of its market and price policy, and public policy questions posed by its structure and behavior. These industry studies each comprise a single chapter: I) *cotton textiles,* "which, until recently, closely approximated the model of 'pure' competition"; II) *bituminous coal,* "in which competition has often degenerated to the cut-throat level"; III) *agriculture,* "which is competitive only within the limits permitted by a government price-support program"; IV) *residential construction,* "which illustrates market organization ranging from monopolistic competition to local monopoly"; V) *steel;* VI) *chemicals;* VII) *cigarettes;* VIII) *motion pictures,* "which show the functioning of various types of oligopoly"; IX) *fluid milk,* "which evidences elements of oligopoly, bilateral monopoly and government price fixing"; X) *tin cans,* "which approach a duopoly structure"; XI) *glass containers,* "which until very recently, were the prime example of patent monopoly"; XII) *ocean shipping;* and XIII) *air transport,* "which exemplify the operation of regulated industries."[2]

The industries studied have given rise to public policy questions that have been aired in legislative hearings, before regulatory agencies and in litigation. Notwithstanding their synoptic character, these single-chapter studies do illuminate some aspects of the problems involved in anti-trust cases. For example, the chapter on the bituminous coal industry discusses depressed industry conditions leading to the *Appalachian Coals* case[3] and the Bituminous Coal Act.[4] The chapter on the chemicals industry considers problems of size, integration and inter-industry cooperation which have been set forth in various cases involving cartels, patent pooling and other manifestations of collusion among some of the largest corporations in the country. The chapter on steel,

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1. P. v.
2. *Ibid.*
3. Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933).
4. 50 STAT. 72 (1937), as amended, 55 STAT. 134 (1941).

with its discussion of size and integration and summary of the arguments for and against the basing point system of pricing considers the issues involved in the *Columbia Steel*[5] and *Cement*[6] cases. Chapters on motion picture and cigarette industries bring economic analysis to bear on the problem of oligopoly and "conscious parellelism" with which the court was concerned in the *Interstate Circuit*[7] and second *American Tobacco*[8] cases.

The structure of American industry as outlined in these studies appears to fall into three broad divisions: competitive, oligopolistic, and monopolistic. In the competitive, "unsatisfactory results of free market pricing" have brought about governmental intervention; in the oligopolistic, drastic reorganization is urged in the interest of competition; and in the monopolistic, public regulation is imperative.

Professor Adams' views, however, are not set forth most forcefully in the one chapter—a study of the steel industry—contributed by him; nor are they strongly presented in the editorial comment on the chapters contributed by his associates. They are, however, set forth in some detail in the Hearings before the Subcommittee on study of Monopoly Power of the Committee on the Judiciary of the House of Representatives. On appearing before the Subcommittee, Professor Adams announced the forth-coming publication of *The Structure of American Industry,* and called attention to "a concentration of economic power unparalleled in our history."[9] The trend toward concentration, "accelerated in recent years," had brought about a state of affairs which could only be dealt with by governmental action, to wit:[10]

> In industry after industry, a handful of concerns enjoy an exclusive position or are sufficiently dominant so as to enforce conformity among their smaller competitors. Whether we turn to steel or aluminum, to automobiles or petroleum, to motion pictures or cigarettes, to chemicals or tin cans, there is the same sad tale of overwhelming size and entrenchment in strategic economic position. . . . What we are confronted with today is technically referred to as oligopoly which denotes a type of market structure where a few sellers are dominant. Under this type of market organization, the entry of newcomers is effectively barred, deterred—not so much by the threat of economic reprisals as by the size and entrenched power of existing firms. Under oligopoly, moreover, a seller no longer can afford to be independent in pursuing a given price policy. He must, of necessity, take the reaction of his rivals into account. Thus a firm knows that price-cutting will inevitably cause its large competitors to follow suit with the result that the market is shared as it was before—only at a lower level of prices and profits. It is this certainty that price cuts will eventually be met, it is this fear of retaliation, that

5. United States v. Columbia Steel Co., 334 U.S. 495 (1948).
6. Federal Trade Commission v. Cement Institute, 333 U.S. 683 (1948).
7. Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).
8. American Tobacco Co. v. United States, 328 U.S. 781 (1946).
9. *Hearings before House Subcommittee on Study of Monopoly Power of the Committee on the Judiciary,* 81st Cong., 1st Sess. 337 (1949).
10. *Id.* at 338.

leads to conservative and nonagressive price policies in our oligopolistic industries.

The "basic policy of the government must be one of coping with the fundamental problem of size—horizontal, vertical, conglomerate,"[11] Professor Adams told the Committee. Though "more vigorous enforcement of our antitrust laws and the imposition of stiffer penalties"[12] would be helpful in dealing with the monopoly problem, something more was needed. The problem of excessive size, he maintained, might better be dealt with by an administrative commission using a "case by case approach" on an experimental basis.[13] At the committee chairman's request,[14] Professor Adams drafted a proposed statute embodying his recommendations for dealing with the problems arising out of "multiple-firm monopoly or so called oligopoly." The proposed statute, modelled on the Public Utility Holding Company Act of 1935, was subtitled "An Act to privide for the deconcentration of certain industrial units for the maintenance and encouragement of effective competition, for the furtherance of industrial and economic efficiency and for other purposes."[15] It would require corporations controlling "ten per cent or more of the supply of a good or service moving in interstate commerce" or with assets in excess of twenty-five million dollars to register with the Securities and Exchange Commission. The Commission would hold hearings to ascertain "whether the interests of the investors and consumers, the public interest and the maintenance of effective competition are adversely affected by the corporate structure of the firm, the firm's position in the industry, and the business policies and practices pursued by such firm."[16] The SEC would be empowered under the Act to "issue an order dissolving the company into its component parts or requiring the divestiture thereby or divorcement therefrom of a portion of such company's assets or securities." However, dissolution, divorcement, or divestiture could be avoided if the company could demonstrate "that its conduct—though essentially anticompetitive—was nevertheless in the public interest, because it contributed to technological progress, passed on any savings in cost to consumers, provided enough capacity to fill consumer demand and actually utilized such capacity to the fullest, earned a normal rate of profit as compared with competitive industries, and did not dissipate resources in the form of wasteful advertising and spurious product differentiation rather than benefiting consumers by price reductions."[17]

11. *Id.* at 349.
12. *Ibid.*
13. *Id.* at 353.
14. *Ibid.*
15. *Id.* at 1600.
16. *Id.* at 1313.
17. *Id.* at 1314.

However, monopoly is not the only problem requiring governmental intervention. The basic problem in the first four industries discussed in *The Structure of American Industry* appears to be the exact opposite of "overwhelming size and entrenchment in strategic position." For example, we are told that "the existence of high degree of competition does not assure a desirable state of affairs"[18] in agriculture, the country's largest industry; that "public policy in the bituminous coal industry should recognize that unregulated private competition has not been successful";[19] that "the problems of the textile industry invite comparison with those of bituminous coal and agriculture";[20] and that "the basic problem in residential construction perhaps is that firms are too small for efficient operation."[21] In sharp contrast to those industries where the maintenance of competition requires reduction or elimination of size—"horizontal, vertical, conglomerate"—residential construction, in the words of Professor Adams,[22]

> is an industry which lacks the mass production techniques, the vertical integration, the efficiency which often accompanies 'rationalization'—an industry in short which lacks the prerequisite for pricing its product attractively enough so as to reach the many layers of untapped demand. Here is an industry whose shortcomings are largely responsible for the fact that 'one-third of the nation is ill-housed.'

Where the presence of numerous firms make for competitive conditions, the editor and authors seem to believe that competition has been weighed in the balance and found wanting.

Unsatisfactory conditions in the industries characterized by "multi-firm monopoly" are attributed in part to maladjustments existing between such industries and the rest of the economy. Not even the most drastic proposals for dealing with "multi-firm monopoly," however, promise to eliminate such maladjustments. "On purely economic grounds," a co-author of Professor Adams concludes "there does not appear to be a strong case for reform of the [highly concentrated] cigarette industry."[23] The author of the chapter on the chemicals industry finds "the growth of big business units has been, in part, a response to technical imperatives, has resulted in superior efficiency, and has also in some ways increased competition in the industry."[24] The author of the chapter on the tin can industry fears that the dissolution of two corporations accounting for over four-fifths of the industry sales "might have undesirable repercussions upon competition in related industries."[25] With respect

18. P. 61.
19. *Ibid.*
20. P. 21.
21. P. 108.
22. P. 109.
23. P. 262.
24. P. 221.
25. P. 375.

to the industry which he studied, Professor Adams writes: "While we must resign ourselves to the reality that competition in steel can never be as effective as in wheat or cotton, we may nevertheless expect to achieve a greater degree thereof than we now have."[26] The student of the construction industry, on the other hand, finds that residential construction suffers from a lack of what steel and some of the other industries are believed to have too much of—large scale units and vertical integration.[27]

Where the line is to be drawn between too much and too little competition is not clear, either from *The Structure of American Industry* or from Professor Adams' testimony before the Subcommittee on Study of Monopoly Power; nor is it clear just what is meant by competition. This term is used by the several authors to describe widely differing market situations. Professor Adams' conclusion that "competition in steel can never be as effective as in wheat or cotton," but may nevertheless be greater than now exists, apparently involves the use of the term competition in two senses: 1) as a synonym for less concentration in steel and 2) as descriptive of the market situation in wheat and cotton wherein the individual producer is powerless to affect market price. The proposal for a major surgical operation on steel presumably is based on the assumption that the largest companies in the industry can be transformed into a sufficient number of independent companies to make oligopoly pricing less likely. Any deconcentration short of this would amount to a redistribution of assets within the oligopoly without necessarily bringing about a change in market strategy or price policy. If no firm were permitted to hold more than say ten per cent of an industry's net capital assets, only two in the steel industry, U. S. Steel with 28.6 per cent and Bethlehem with 13.4 per cent, would be adversely affected.[28] The eight firms which presently hold 69.3 per cent of the industry's assets could continue to do so or even increase their holdings under such a ruling. However desirable this might appear to be as an alternative to the present situation, such a reduction in concentration within an oligopoly would still leave us with oligopoly pricing.

The testimony of Professor Adams before the Subcommittee on Monopoly Power concerning the accelerated trend toward concentration of

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26. P. 189.

27. P. 118.

28. FTC, REPORT ON THE CONCENTRATION OF PRODUCTIVE FACILITIES, 1947 [TOTAL MANUFACTURING AND 26 SELECTED INDUSTRIES] 17 (1949). The steel industry, to paraphrase this report, illustrates "high (though not extreme)" concentration, i.e., an industry in which sixty per cent of the net assets are controlled by five or six companies, or about twice as many as in the "extreme" group where sixty per cent control is attained by not more than three companies.

Data submitted by the United States Steel Corporation to the Subcommittee on Monopoly Power shows that the company's proportion of all steel ingots produced in the United States declined from approximately sixty-six per cent in 1901 to thirty-three per cent in 1949. *Hearings before House Subcommittee on Study of Monopoly Power of the Committee on the Judiciary,* 81st Cong., 1st Sess. 594 (1949).

economic power in recent years and the prevalence of "multi-firm monopoly" suggests that it is immaterial whether an industry is dominated by one or several companies, the reduction in relative importance of an industry leader being more than made up by the increasing size of other firms within the oligopoly. The objection to "multi-firm monopoly," in particular industry domination by the "Big Three's and Big Four's," appears to be based on the circumstance that the market strategy of each will necessarily be determined by his estimate of the others' reaction thereto and that the result, "conscious parallelism," is the same as collusion. This seems to be the obverse of the position taken by Brandeis in his dissenting opinion in the *American Column & Lumber* case[29] where collusion among producers controlling approximately one-third of the hardwood business would have been permitted as a desirable alternative to substantial market control by a single firm. However, both Brandeis and his present day disciples look to market results, the former approving cooperative action to achieve results which if undertaken by a single firm would be unlawful, and the latter favoring dissolution of enterprises whose continued existence would perpetuate market results that would have been illegal if achieved through collusion.

The results of collusion and conspiracy, in the opinion of Professor Adams, are an inevitable concomitant of a particular type of market structure. This, coupled with the belief that the restrictive practices with which so many antitrust suits have been concerned, are "merely superficial symptoms of the disease," leads him to reject the Sherman Act as an effective instrument for dealing with the problem of "oligopoly which achieves the purposes and effects of monopoly."[30] The concept of "conscious parallelism" is particularly troublesome. "What, for example," he asks in his introduction to the chapter on the cigarette industry, "is the difference between the common sense meaning of collusion, on the one hand, and the economics of parallel action in an oligopoly framework, on the other? Is 'rational' oligopoly behavior tantamount to illegal conspiracy? If so, is the attack on the conspiracy itself not futile? Furthermore, if conspiracy in the legal sense is merely symptomatic of an oligopolistic market structure which confers illegal power, can such a conspiracy be interpreted as being a deliberate violation of the law?"[31]

Can it be said that "conspiracy in the legal sense is *merely* symptomatic of an oligopolistic market structure which confers illegal power" when the oligopolistic market structure, as in cigarettes, is the *result* of the activities of several combines, each so large that anything it does or refrains from doing will affect the market price of cigarettes? To be sure, the concept of con-

29. American Column & Lumber Co. v. United States, 257 U.S. 377 (1921).
30. *Hearings before House Subcommittee on Study of Monopoly Power of the Committee on the Judiciary.* 81st Cong., 1st Sess. 1321, 1324 (1949).
31. P. 232.

spiracy has been interpreted since the *Interstate Circuit* case to include "the participation of businessmen in a common course of action with knowledge of the parallel and similar conduct of their competitors."[32] But whether rational oligopoly behavior may therefore be defined as conscious parallelism and equated to illegal conspiracy in the absence of formula pricing or other persuasive evidence of collusion remains to be seen. If the Sherman Act could be invoked against the most prevalent form of monopoly only upon proof of conspiracy or predatory practices, it might well be, as Professor Adams suggests,[33] a blunt and ineffective instrument for keeping the channels of trade and commerce free from monopolistic restraints.

Conspiracy or predatory trade practices have been important elements of the offense in most antitrust cases, but their presence is not essential to anti-monopoly action. Section 2 of the Sherman Act condemns all monopolizing or "attempts to monopolize" whether by individuals or groups. Preoccupation with the legal concept of conspiracy on the part of the enforcement authorities and courts, accompanied by comparative neglect of the non-conspiratorial provisions of Section 2, may well have contributed to the development of close-knit organizations which have exercised, with impunity, a greater, and more effective, degree of market control than their component parts could ever have achieved by agreement. Because rational behavior of a single firm may contribute to the same market results as the collusive activities of a number of firms, it does not follow that action under the Sherman Act is dependent upon a finding of conspiracy in both cases. Since conspiracy to monopolize is an offense in itself, proof of its presence enables the courts to deal with "would-be" as well as actual monopolists.[34] The fact that conspiracy may be

32. Statement of Milton Handler, *Hearings before House Subcommittee on the Study of Monopoly Power of the Committee on the Judiciary,* 81st Cong., 1st Sess. 536 (1949). When government counsel in the *Investment Bankers* case stated that the antitrust charges would be supported by "proof of a conspiracy which can be inferred by a course of conduct," Judge Medina is reported to have commented that the government would have to prove a real conspiracy and not one that is "phoney, synthetic or imaginary." New York Times, Feb. 1, 1951, p. 41, col. 2.

33. *Hearings before House Subcommittee on Study of Monopoly Power of the Committee on the Judiciary,* 81st Cong. 1321, 1324 (1949).

34. The way of the transgressor is hard, whether monopolist or otherwise. Even if the Antitrust Division overlooks his transgressions, the way of the aspiring monopolist is beset with difficulties. A monopoly price for his product may be just the incentive needed to bring a substitute on the market. Aside from statutory monopolies—public utilities, patents and copyrights—we have had very few private monopolies in the sense of single sellers. Aluminum, probably the most publicized, began as a patent monopoly. Alcoa, by various means set forth in the antitrust case, succeeded in maintaining its position as the sole domestic producer of primary aluminum for a number of decades, but as aluminum-made products wore out, secondary or scrap aluminum came on the market in sufficient quantities to depress the price of the primary metal. Meanwhile the developments in the chemical industry increased the supply of by-product magnesium beyond what Alcoa could use as a minor ingredient in aluminum alloys. Thus, an even lighter metal became available as a substitute for aluminum, thanks to an increasing demand for chemicals. And, as if this were not enough, war-time needs for light metal in quantities greater than the most farsighted management could anticipate, brought

inferred from a common course of action among a few sellers (as in the *Second American Tobacco* case) or that a firm may conspire with a subsidary (as in the *Yellow Cab*[35] case) to monopolize through controlling successive stages of manufacture or distribution does not mean that in the absence of conspiracy the government is powerless to deal "with the fundamental problem of size—horizontal, vertical, conglomerate."

The Sherman Act is probably a more effective instrument for dealing with such problems than any administrative agency could possibly be. Under Professor Adams' proposed deconcentration statute, the SEC would be primarily concerned with market results. The courts in applying the Sherman Act also look to market results. The decisions in the *Aluminum* case[36] and in the *Second American Tobacco* case have been hailed as steps toward the adoption of an economic concept of monopoly.[37] Under the Sherman Act, the government need not wait until a planned monopoly has materialized. For example, the consolidation of enterprises engaged in earlier or more advanced processes of manufacture or distribution does not constitute monopolizing in an economic sense unless, prior to their integration, one or more of the firms was dominant in the area in which it operated. If, however, such vertical integration is a step in a plan to monopolize, it may, like any other attempt to monopolize be attacked under Section 2 of the Sherman Act. Nor need the government be concerned with the difficult problem which Professor Adams envisions for the SEC-determination of whether an industry is operating efficiently. The Sherman Act does not distinguish between efficient and inefficient monopolists. "The problem of monopoly is," to quote the president of the General Electric Company, "indisputably covered very fully by the Sherman Act."[38] Moreover, as the Twentieth Century Fund's Committee on Cartels and Monopoly concluded after its study of proposals for bringing antitrust enforcement within the exclusive jurisdiction of an administrative agency, "the traditional procedures of anti-trust are more likely than any others to be permitted to do their work."[39]

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two other large firms into the aluminum industry and a tremendous expansion in magnesium which, emancipated from its by-product state, is now produced for itself alone.

35. United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947).

36. United States v. Aluminum Co. of America, 148 F.2d 416 (1945).

37. MUND, GOVERNMENT AND BUSINESS 175, 177 (1950); STOCKING AND WATKINS, MONOPOLY AND FREE ENTERPRISE 288 *et seq.* (1951); Timberg, *Some Justification for Divestiture,* 19 GEO. WASH. L. REV. 28 (1950); *The Sherman Act and the Enforcement of Competition,* Papers and Proceedings of the Sixtieth Annual Meeting of the American Economics Association (Dec. 1947).

38. Statement of Charles E. Wilson, *Hearings before the House Subcommittee on Study of Monopoly Power of the Committee on the Judiciary,* 81st Cong., 1st Sess. 1159 (1949).

39. STOCKING AND WATKINS, MONOPOLY AND FREE ENTERPRISE 560 (1951). The Committee suggests, at p. 553, that the Sherman Act "might be amended to establish a rebutable presumption that concentration exceeding a specified percentage of the market for any product, or related group of products, was prejudicial to the public interest."

Whether one thinks political advantages associated with small-scale production would warrant a sacrifice in efficiency, if necessary,[40] it is unlikely that any conscious sacrifice in efficiency would be tolerated. In times of crises we are reluctant to make changes and doubts are being expressed as to whether we will emerge from crises in our time. During World War II, antitrust prosecutions were deferred on the ground that they might interfere with the war effort. And now the Defense Act of 1950 provides for industry cooperation with the approval of the Government.

The Structure of American Industry focusses attention on problems with which economists, lawyers and public-policy makers are increasingly required to deal. It attempts to cover too much ground in too few pages, however, to be much of a guide to public policy formation either directly or through the intelligent laymen and students of economics and business administration to whom it is addressed. The timeliness and importance of its subject matter is attested by the activities of the Subcommittee on Study of Monopoly Power of the Committee on the Judiciary of the House of Representatives as well as by the Twentieth Century Fund's report on *Monopoly and Free Enterprise*.[41] It may be useful as an introduction to the study of industrial organization.

The interest in industrial organization on the part of economists, lawyers and public officials has grown apace since the world economic depression. Much has been written since 1934 when the Cabinet Committee on Price Policy noted the paucity of, and stressed the need for relevant materials for use in the formulation of public policy.[42] In addition to the materials made available by the TNEC and government agencies, a number of book-length industry studies and a greater number of articles on almost every phase of industrial organization have been published. None of them are all-purpose works, useful in their entirety to public-policy makers as well as to teachers of law and economics. So far as the teaching of law is concerned, the following observation of Professor Oppenheim is apt: "Whatever approach may be taken, it is

40. "True, it might have been thought adequate to condemn only those monopolies which could not show that they had exercised the highest possible ingenuity, had adopted every possible economy, had anticipated every conceivable improvement, stimulated every possible demand. No doubt, that would be one way of dealing with the matter, although it would imply constant scrutiny and constant supervision, such as courts are unable to provide. Be that as it may, that was not the way Congress chose; it did not condone 'good trusts' and condemn 'bad' ones; it forbade all. Moreover, in so doing it was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. These considerations, which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purposes." Judge Learned Hand in United States v. Alcoa, 148 F.2d 416, 427 (1947).

41. STOCKING AND WATKINS, MONOPOLY AND FREE ENTERPRISE 596 (1951).

42. HAMILTON, PRICE AND PRICE POLICIES vii (1938).

clear that in the last analysis the interested student should be encouraged to undertake individual inquiries into selected aspects of the allied social science material so that the structure of American industry may be better understood in dealing with the strictly legal aspects of the cases."[43] Knowledge of sources on industry data and facility in using them has become almost indispensable for lawyers in the field of trade regulation. Preparation of an antitrust brief, for example, often involves summarizing and analyzing the salient characteristics of an industry in terms of its products and their uses, the relative concentration of its productive facilities (financially, technologically, and geographically), and the principal factors in its structure, organization, and trade practices which may explain its "competitive" or "noncompetitive" character (e.g., technology, patents, marketing arrangements, relationship to principal raw material sources). Recognizing the lawyer's special need for knowledge of the basic facts of our industrial order, the 1948 Committee on Auxiliary Business and Social Materials of the Association of American Law Schools organized an editorial group to assemble such materials for use in courses on trade regulation.[44] After preliminary investigation disclosed a "surprising dearth" of suitable information, the Trade Regulation Editorial Group sponsored a series of industry studies which it is hoped will in part meet the need for economic data for use in connection with classroom discussion of the cases. A book such as the *Structure of American Industry* might well meet this need by doing a more thorough job on a smaller number of industries and devoting more attention to economic analysis. Professor Adams' "kaleidoscopic view of American business enterprise" however superior it may be to other collected industry studies still requires considerable supplementation.

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SECURITY, LOYALTY & SCIENCE. By Walter Gellhorn. Ithaca: The Cornell University Press, 1950. Pp. x, 300. $3.00.

Professor Gellhorn's volume is the first in a series dealing with civil liberties and security, to be published under the auspices of a group headed by Professor Cushman of Cornell. Subsequent volumes will include one on the House Committee on Un-American Activities and one devoted to the President's Loyalty Program.

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43. OPPENHEIM, CASES ON FEDERAL ANTI-TRUST LAWS 82 (1948). This method been followed since 1946 at the University of Chicago by Dean Levi in his classes in the Law of Competition and Monopoly. Each student is required to make a study of some industry or segment of an industry involved in an effort to explain industry behavior and evaluate the effects of judicial solutions of what are essentially economic problems.

44. HANDBOOK, ASSOCIATION OF AMERICAN LAW SCHOOLS 1370138 (1949).

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