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ANTITRUST ENFORCEMENT IN THE UNITED STATES: MARKET STRUCTURE VERSUS MARKET CONDUCT

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I. INTRODUCTION

A reassessment of antitrust policy in the United States may not appear particularly relevant in an economy beset by stubborn inflation and a constitutional crisis. But the American economy is well into the 1970's and structural patterns are now emerging that merit the attention and consideration of public policy-makers. The economy is experiencing a gradual shift from the production of goods to the provision of services.¹ The top 200 corporations find their positions increasingly stabilized over time.² The multinational corporation has become an institutional given.³ Regulated utilities are diversifying into nonregulated activities.⁴ Horizontal and vertical mergers are once again the dominant form of corporate expansion, after being temporarily supplanted by the conglomerate binge of the 1960's.⁵ Amidst these

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The opinions expressed herein in no way reflect the policies of the Federal Communications Commission.

1. See D. BELL, *THE COMING OF POST-INDUSTRIAL SOCIETY* 108 (1973). See generally N. JACOBY, *CORPORATE POWER AND SOCIAL RESPONSIBILITY* (1973).

2. This phenomenon is illustrated by examining the compilation of the 500 largest American corporations, which appears annually in *Fortune* magazine, for the period 1963-1973.

3. See R. VERNON, *SOVEREIGNTY AT BAY* (1972); *A Special Report—Multinational Corporations in a Changing Environment*, *FORTUNE*, Aug. 1973, at 52.

4. See Irwin & Stanley, *Regulatory Circumvention and the Holding Company*, 8 J. ECON. ISSUES 395 (1974). See generally NATIONAL ASS'N OF REGULATORY UTILITY COMMISSIONERS, *REPORT OF THE AD HOC COMMITTEE ON NON-UTILITY INVESTMENTS* (1972).

5. See FEDERAL TRADE COMMISSION, *CURRENT TRENDS IN MERGER ACTIVITY* (1971).

changes it is appropriate to ask: Will the antitrust laws be effectively enforced? Can they be enforced? Is the Sherman Act⁶ a declaration of economic freedom or does the statute merely reflect the rhetoric of a bygone era?

The answers to these questions depend, of course, on one's philosophy of market competition and one's view of corporate behavior. We will argue that public and private antitrust enforcement has seriously shortchanged the fundamental purpose of the American antitrust laws, namely, to protect, police, and, if necessary, rehabilitate competitive market structures in the economy.⁷ First, we will review the basic tenets of the two underlying "schools" of antitrust policy, the structuralist and conduct/performance Schools. Secondly, we will survey the records of both private and public antitrust enforcement and review the advantages and disadvantages of each. Thirdly, we will argue that an alternative to present antitrust enforcement responsibilities and practices is necessary, and suggest that establishing a Federal Industrial Reorganization Commission may be the only effective means to ensure that economic competition, diversity, and dynamism prosper and prevail in the decades ahead. Such a solution is currently before Congress in the proposed Industrial Reorganization Act (Hart Bill).⁸

II. THE TWO SCHOOLS OF ANTITRUST THOUGHT

Understanding the deficiencies of present antitrust enforcement requires an appreciation of the respective policies advanced by the two

6. Ch. 647, 26 Stat. 209 (1890), *as amended*, 15 U.S.C. §§ 1-7 (1970).

7. *Northern Pac. R.R. v. United States*, 356 U.S. 1, 4 (1957):

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

For discussion of the legislative intent of the Sherman Act, see W. LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* (1965); H. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* (1955); Bork, *Legislative History of the Sherman Act*, 12 *J.L. & ECON.* 118 (1966).

8. S. 1167, 93d Cong., 1st Sess. (1973).

dominant schools of antitrust thought—the structuralist school and the conduct/performance school.⁹

A. *The Structuralist School*

The structuralist school holds that the environment in which a firm operates is the critical determinant of that firm's pricing, output, innovation, and investment decisions. Structuralists assert that the factors which constitute that environment—and thus the critical determinants of market performance—are the number of firms in the industry, the size of the firms, the difficulty or ease of market entry, and the differentiation of the firm's products or services. Structuralists argue that a firm in a competitive environment lacks discretionary control over market prices and, therefore, is forced to operate at optimum cost and efficiency by adjustments of its production and output. To the extent that the pursuit of profit maximization produces optimum efficiency and innovation, competition literally disciplines the firm to conduct itself in a socially desirable manner. The structuralist school asserts that noncompetitive industry structure suborns anticompetitive market conduct. An industry's structure determines that industry's economic performance as well as its economic conduct.

The structuralist school emphasizes the "game"—the competitive process—rather than the individual players. To the extent that a dominant firm emerges in a market and the vitality of the competitive process deteriorates, public policy must restructure or rehabilitate the game. If the health of the game requires harsh therapy such as divestiture or divorce, such medicine is accepted as the means to serve a higher end: economic efficiency and consumer satisfaction.

If the imperative of efficiency or economies of scale render the game unworkable or inefficient, then competition is discarded as the optimal means of stimulating and policing economic activity. But in that event, some form of accountability must be imposed on the firm. Usually that accountability takes the form of utility-type regulation.¹⁰

9. See generally J. BAIN, *Barriers to New Competition* (1956); R. CAVES, *American Industry: Structure, Conduct, and Performance* (1964); A. PHILLIPS, *Market Structure, Organization, and Performance: An Essay on Price Fixing and Combinations in Restraint of Trade* (1962); F. SCHERER, *Industrial Market Structure and Economic Performance* (1970); Mason, *The Current Status of the Monopoly Problem in the United States*, 62 *HARV. L. REV.* 1265 (1949); Mueller, *The New Antitrust: A "Structural" Approach*, 1 *ANTITRUST L. & ECON. REV.* 87 (1967).

10. See generally M. GLAESER, *Public Utilities in American Capitalism*

In the United States, the "natural monopoly" solution translates into utility regulation. Such regulation, however, tends to be the exception rather than the rule. And even when public policy selects the natural monopoly-public regulation solution, such government regulation as a substitute for the competitive market should not or cannot be ordered into perpetuity. One must not forget that a "natural" monopoly today may well evolve into a competitive industry tomorrow.

B. *The Conduct/Performance School*

The conduct/performance school, by contrast, de-emphasizes the size of the firms in an industry, their number, and their distribution. In short, the conduct/performance school dismisses the significance of firms' market power, either individually or collectively, to control price or exclude competition. To proponents of the conduct/performance school the acid test of the business enterprise is economic behavior. It matters little if firms in a market are subsumed by identifiable categories of competition, oligopoly, or monopoly. The critical standard is firm conduct, not market power. The conduct/performance school's guideline thus is, "By their fruits, ye shall know them."

The conduct/performance school dismisses the structuralists' theory that market structure determines market performance and conduct. Rather, this school argues that each firm or industry must be judged on its own merits. Conduct/performance proponents claim that generalizations should be resisted. Indeed, competitive industries may yield low progressivity and indifferent economic performance; concentrated industries may yield excellent progressivity and unmatched economic performance. To evaluate market behavior and results, the conduct/performance school argues that each industry must be studied and evaluated on an ad hoc basis.

Not surprisingly, antitrust policy is often caught in the ideological debate between the structuralist and conduct/performance schools. If the record of antitrust enforcement is any test, the conduct/performance school has undoubtedly won, notwithstanding the tendency of the conduct/performance school to dismiss a large body of economic theory and documentation supporting the direct relationship between market performance and market configuration.¹¹ In resisting

(1957); D. PEGRUM, PUBLIC REGULATION OF BUSINESS (1965); C. WILCOX, PUBLIC POLICIES TOWARD BUSINESS (1955).

11. See, e.g., W. ADAMS, THE STRUCTURE OF AMERICAN INDUSTRY (4th ed. 1971); <https://openscholarship.wustl.edu/law-lawreview/vol19/4/iss17/>

this body of received doctrine, the conduct/performance school essentially posits a “yes-but” approach: Yes, competition may be desirable, but note the exceptions—exceptions that define away the significance of market structure. A search of the literature dealing with the synthetic fiber, chemical, aircraft, and drug industries, for example, finds conclusions claiming these industries to be exceptions to the structuralists’ theory that market structure governs market conduct and performance.¹²

The conduct/performance apologists inevitably counsel, “Don’t make waves,” do not indulge in structural reform. In an imperfect economic world, respectable, second-best performance is not all that bad. In some ways the conduct/performance approach is reminiscent of Santayana’s chicks, who peck at “indigestible” pebbles rejected by their parents.¹³

The conduct/performance school is also afflicted by problems of circularity. To measure efficiency or market innovation, for example, students of economic policy are counselled to examine historical and empirical data. But that exercise is not without its frustrations. How can one render an assessment of such factors as profits, prices, cost,

J. BAIN, *supra* note 9; J. BAIN, *INDUSTRIAL ORGANIZATION* (1959); J. BAIN, *THE ECONOMICS OF THE PACIFIC COAST PETROLEUM INDUSTRY* (1945); J. BLAIR, *ECONOMIC CONCENTRATION: STRUCTURE, BEHAVIOR AND PUBLIC POLICY* (1972); J. JEWKES, D. SAWERS & R. STILLERMAN, *THE SOURCES OF INVENTION* (1958); E. MANSFIELD, *THE ECONOMICS OF TECHNOLOGICAL CHANGE* (1968); W. MUELLER, *A PRIMER ON MONOPOLY AND COMPETITION* (1970); J. SCHMOOKLER, *INVENTION AND ECONOMIC GROWTH* (1966); W. SHEPHERD, *MARKET POWER AND ECONOMIC WELFARE* (1970); H. WALKER, *MARKET POWER AND PRICE LEVELS IN THE ETHICAL DRUG INDUSTRY* (1971); L. WEISS, *ECONOMICS AND AMERICAN INDUSTRY* (1961); *Hearings on Economic Concentration Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 89th-91st Congs., pts. 1-8A (1964-1970); *Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 85th-86th Congs., pts. 1-10 (1957-1960).

12. See J. BACKMAN, *CHEMICAL PRICES, PRODUCTIVITY, WAGES, AND PROFITS* (1964); J. MARKHAM, *COMPETITION IN THE RAYON INDUSTRY* (1952); A. PHILLIPS, *TECHNOLOGY AND MARKET STRUCTURE: A STUDY OF THE AIRCRAFT INDUSTRY* (1971); *Hearings on Competitive Problems in the Drug Industry Before the Senate Select Comm. on Small Business*, 90th Cong., 1st Sess., pt. 5 (1967).

13. G. SANTAYANA, *Tipperary*, in *SOLILOQUIES IN ENGLAND* 99, 101 (1922):

As it is, we live experimentally, moodily, in the dark; each generation breaks its egg-shell with the same haste and assurance as the last, pecks at the same indigestible pebbles, dreams the same dreams, or others just as absurd, and if it hears anything of what former men have learned by experience, it corrects their maxims by its first impressions, and rushes down any untrodden path which it finds alluring, to die in its own way, or become wise too late and to no purpose.

investment, and innovation in the absence of outside benchmarks? Invariably the conduct/performance school is driven back to the premise it initially rejects, namely, an examination of alternative structures, alternative firms, and alternative performances: in short, competition.

Finally, the conduct/performance school, for whatever reason, tends to ignore the evidence of industry studies compiled over time—studies that over and over again establish the strong relationship between market performance and market structure.¹⁴ The conduct/performance school appears intent to redefine, re-examine, and rediscover old verities, as if somehow to prove that corporate planning and control should preempt the impersonal mechanism of the market place; that at heart, most corporations' incentives approximate the altruism of the United Fund and are blessed with the benign creativity of Leonardo da Vinci.

It should be clear that we find the conduct/performance school of antitrust evasive and unpersuasive. We submit that market structure is the key variable in understanding the conduct of a business firm and in assessing its price, output, and investment decisions. We are persuaded that a "standard that would have the antitrust authorities and the courts assign greater weight to a defendant's 'efficiency' and 'progressiveness' than to an inordinately large share of a highly concentrated, entry-barricaded market is in reality no standard at all; it is simply a vote of 'no confidence' in a competitive economic system."¹⁵ With this structural frame of reference we examine American antitrust policy as enforced by the Department of Justice and private litigants.

III. PUBLIC ANTITRUST ENFORCEMENT

The Federal Trade Commission and the Antitrust Division of the Department of Justice are charged with the responsibility of enforcing the federal antitrust laws: the Sherman, Clayton,¹⁶ Federal Trade Commission,¹⁷ and Robinson-Patman¹⁸ Acts. Section 2 of the Sher-

14. See note 11 *supra*.

15. Mueller, *supra* note 9, at 105.

16. Ch. 323, 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 12-27, 44 (1970).

17. Ch. 311, 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-51 (1970).

18. Ch. 592, §§ 1-4, 49 Stat. 1526 (1936), as amended, 15 U.S.C. §§ 13-13b, 21a

(1970).

man Act¹⁹ prohibits monopolization and attempts to monopolize; its enforcement is entrusted both to the Justice Department and to private parties. Section 2 is the fundamental weapon in the federal antitrust arsenal to dissolve and reorganize offensive, anticompetitive concentrations of market power. Public antitrust suits are, of course, a double-edged sword, featuring both advantages and disadvantages.²⁰

A. *Advantages*

An important advantage of Justice Department antitrust suits is that the Antitrust Division has the public standing and responsibility to prosecute and to reform markets victimized by disproportionately large concentrations of economic power. If successfully prosecuted, offending firms may be forced to divest former acquisitions²¹ or may be declared monopolies on the basis of their existing market share.²² The structural remedies proposed by the Antitrust Division are those of a public agency which presumably intends to rehabilitate formerly anticompetitively structured markets so that the resulting benefits redound to the advantage of the general public, not simply to particular competitors.²³ Courts have been willing to differentiate between the possession of market power by a firm or group of firms acting collectively

19. 15 U.S.C. § 2 (1970) provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

20. Although § 7 of the Clayton Act is also an effective weapon to enjoin prospective mergers producing increased market concentration as well as to force divestiture of consummated mergers which can be shown to have "substantially lessened" competition, it is the Justice Department's antitrust record which deserves emphasis because of its exclusive § 2 powers within the federal government. Aside from § 7 and the FTC's exclusive authority under § 5 of the Federal Trade Commission Act (the latter which has been long neglected as a structural antitrust weapon), and, of course, § 2 of the Sherman Act, the balance of the federal antitrust statutes are directed to the prosecution of anticompetitive conduct ruled violative by the courts and of business practices explicitly proscribed by the statutes themselves.

21. *United States v. DuPont & Co.*, 366 U.S. 316 (1961). See also *Ford Motor Co. v. United States*, 405 U.S. 562 (1972).

22. *United States v. Aluminum Co. of America*, 44 F. Supp. 97 (S.D.N.Y. 1941), *aff'd in part and rev'd in part*, 148 F.2d 416 (2d Cir. 1945).

23. See Breit & Elzinga, *Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis*, 86 HARV. L. REV. 693 (1973).

and the exercise of that market power.²⁴ That distinction was explicit in the Supreme Court's decision in the 1946 case, *American Tobacco Co. v. United States*:²⁵

[T]he material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so "It is undoubtedly true . . . that trade and commerce are 'monopolized' within the meaning of the federal statute, when, as a result of efforts to that end, such power is obtained that a few persons acting together can control the prices of a commodity mov-

24. See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966):

The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident. . . . In *United States v. du Pont & Co.* [351 U.S. 377, 391 (1965)] we defined monopoly power as "the power to control prices or exclude competition." The existence of such power ordinarily may be inferred from the predominant share of the market.

The district court in *Grinnell* had observed:

2. To succeed in a Section 2 case plaintiff must prove that the putative monopolist or monopolists sought to achieve or achieved the economic power, even though unexercised, to control prices or production in a relevant market, or to exclude competition therefrom. Proof may be direct or indirect.

3. One indirect method to prove the requisite power is to show defendants' occupancy of an overwhelming (but not mathematically definable) percentage of the market, unless that position, — or, as it is called, "share of the market", — is shown by the supposed monopolist to be attributable exclusively to his skill, efficiency, foresight, or like affirmatively laudable business conduct. Unless he maintains the burden of proving himself within the exception, the occupant in the dominant position stands condemned.

United States v. Grinnell Corp., 236 F. Supp. 244, 257 (D.R.I. 1964), *aff'd*, 384 U.S. 563 (1966). In *United States v. Griffith*, 334 U.S. 100, 106-07 (1948) (footnotes omitted), the Court said:

For those things which are condemned by § 2 are in large measure merely the end products of conduct which violates § 1. . . . But that is not always true. Section 1 covers contracts, combinations, or conspiracies in restraint of trade. Section 2 is not restricted to conspiracies or combinations to monopolize but also makes it a crime for any person to monopolize any part of interstate or foreign trade or commerce. So it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised. For § 2 of the Act is aimed, inter alia, at the acquisition or retention of effective market control.

See also *United States v. Aluminum Co. of America*, 148 F.2d 416, 428-29 (2d Cir. 1945); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 342-43 (D. Mass.), *aff'd per curiam*, 347 U.S. 521 (1953); Hale & Hale, *Market Power: Size and Shops Under the Sherman Act*, 43 ILL. L. REV. 745 (1949).

25. 328 U.S. 781 (1946).

ing in interstate commerce. It is not necessary that the power thus obtained should be exercised. Its existence is sufficient."²⁶

A second virtue of the public suit is that presumably the Department of Justice possesses the resources necessary to prosecute monopoly power and market control. If the Department's personnel believe that its resources are inadequate to discharge the Antitrust Division's responsibilities, they can present their request for additional resources to Congress.²⁷ To our knowledge no Assistant Attorney General in charge of antitrust has resigned because of lack of funding for the Antitrust Division. Perhaps the real problem is the setting of priorities and the effective allocation of funds within the Antitrust Division.²⁸

A third advantage of public suits is the Department of Justice's antitrust win/loss record. That record is indeed enviable. Since 1910, there has not been a five-year period in which the Department

26. *Id.* at 811, quoting *United States v. Patten*, 187 F. 664, 672 (S.D.N.Y. 1911), *rev'd on other grounds*, 226 U.S. 525 (1913). See also THE CLOSED ENTERPRISE SYSTEM: THE NADER STUDY GROUP REPORT ON ANTITRUST ENFORCEMENT 296-301 (M. Green ed. 1971) [hereinafter cited as NADER REPORT]; C. KAYSAN & D. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 20-21 (1959); Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567 (1947).

27. NADER REPORT 129-30. See also W. SEYMOUR, WHY JUSTICE FAILS 187-89 (1973); Baker, *Section 2 Enforcement—View From the Trench*, 41 ABA ANTITRUST L.J. 613 (1972); Shepard, *The Economics: A Pep Talk*, 41 ABA ANTITRUST L.J. 595 (1972).

28. See Shepard, *supra* note 27, at 598.

The Antitrust Division has occasionally allocated some resources to attempt to restructure some of the most offensively structured industries, only to retreat from the necessary litigation. For example, in hearings in February 1974 before the Senate Subcommittee on Antitrust and Monopoly it was disclosed that the staff of the Antitrust Division had prepared a suit at the direction of the Assistant Attorney General in charge of antitrust, Donald F. Turner, to restructure the automobile industry. Although the complaint was prepared by 1966, the staff attorney responsible charged that "Turner never made a recommendation to [Attorney General] Clark and, in fact, 'totally refused to address himself' to the issue" of automobile industry structural reform. However, "Eight weeks after resigning, Turner urged his successor . . . to file a civil suit" attacking the shared monopoly of General Motors, Ford, and Chrysler. Mintz, *Big 3 Suit Eyed in 1966: U.S. Auto Antitrust Inaction Disclosed*, *Washington Post*, Mar. 1, 1974, § A, at 2.

Another example is the Antitrust Division's attack on the American Telephone and Telegraph Company's manufacturing monopoly, Western Electric. Although the Justice Department filed a § 2 suit in 1949 seeking divestiture of Western Electric from AT&T, the suit was settled by an anemic consent decree in 1956 which left the structure of the telecommunications equipment industry intact and dominated by AT&T's subsidiary, Western Electric.

failed to prevail in over one-half of the cases it prosecuted.²⁹ Between 1960 and 1964, for example, and again between 1965 and 1969, the Department won 85% and 96% of its cases, respectively.³⁰ It must be added that possibly that record is a result of judiciously prosecuting only those suits in which the Department believed the probability of success outweighed that of failure. If that is the case, the statistics may not be as telling as they appear at first reading. But it is noteworthy that Justice Stewart observed in his dissent in *United States v. Von's Grocery Co.*³¹ that when Antitrust Division cases are decided by the Supreme Court, the Justice Department "always wins."

B. Disadvantages

On the other hand, Government antitrust suits are not without their disadvantages. First, the number of Justice Department suits prosecuting monopoly and excessive market power has declined while the number of suits prosecuting anticompetitive conduct has increased. Between 1890 and 1969, the Antitrust Division filed a total of 1551 antitrust actions. As shown by Table I, 370 of these 1551 cases involved charges of monopolization:

TABLE I³²

CLASSIFICATION OF JUSTICE DEPARTMENT ANTITRUST
ACTIONS AND TYPES OF RELIEF OBTAINED

	1890- 1969	1940- 1944	1945- 1949	1950- 1954	1955- 1959	1960- 1964	1965- 1969
1. <i>Total Charges Filed</i>	1551	223	157	159	195	215	195
a. horizontal conspiracy	989	179	114	122	122	104	75
b. monopolization	370	65	60	62	45	40	11
2. <i>Total Number of Cases in Which Significant Divestiture or Dissolution Was Carried Out</i>	32	1	7	5	0	2	0
a. national or large regional monopolist	24	1	6	3	0	2	0
b. local or small regional monopolist	8	0	1	2	0	0	0

29. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & Econ. 365, 381 (1970) (Table 2) [hereinafter cited as Posner].

30. *Id.*

31. 384 U.S. 270, 301 (1966).

32. Data are from Table 23, "Topical Classification of Department of Justice Antitrust Charges," and Table 29, "The Use of Dissolution or Divestiture Decrees in Department of Justice Monopolization Cases," Posner 398, 406.

Since 1940 the incidence of monopoly suits has decreased, notwithstanding the persistence of market concentration in many American industries.³³

In contrast to the 370 antimonopoly cases filed between 1890 and 1969, the Antitrust Division filed 989 horizontal conspiracy cases, 240 cases involving illegal boycotts, 194 cases challenging acquisitions, 140 cases charging exclusive dealing, 123 cases involving price discrimination, and 165 cases involving new patents and copyrights.³⁴ As confirmed by these statistics, the emphasis on prosecuting anticompetitive conduct clearly outweighed prosecuting anticompetitive structure. The conduct/performance school clearly triumphed over the structuralist school.³⁵

A second problem is that even when the Government prevails in an antimonopoly suit, the structural remedies prescribed by the courts are often misconceived or inadequate.³⁶ In only 32 of the 370 monopolization cases prosecuted between 1890 and 1969 was any significant remedy of divestiture or dissolution ordered.³⁷ Stated differently, only about two percent of the Antitrust Division's total antitrust cases brought between 1890 and 1969 achieved the goal of significant restructuring of the particular industry under indictment.³⁸

33. UNITED STATES BUREAU OF THE CENSUS, *Value-of-Shipment Concentration Ratios By Industry*, in ANNUAL SURVEY OF MANUFACTURERS, 1966, at 8 (1968); UNITED STATES SENATE, CONCENTRATION RATIOS IN MANUFACTURING INDUSTRY: 1963 (1963).

34. Posner 398 (Table 23). The FTC's structural antitrust enforcement record is even more disheartening. From 1915 to 1969 the FTC filed a total of 1305 antitrust actions, only 60 of which charged monopolization and only 31 of which were filed after 1941. *Id.* at 408 (Table 31).

35. See Brodner, *Monopolization and Attempts to Monopolize: Whatever Happened to Section 2?*, 41 ABA ANTITRUST L.J. 589, 591 (1972); Cox, *Competition and Section 2 of the Sherman Act*, 27 ABA ANTITRUST L.J. 72, 76 (1965); Fortas, *Part II: Portents for New Antitrust Policy*, 10 ANTITRUST BULL. 41 (1965).

36. After studying the *American Tobacco* and *Alcoa* decisions, Walter Adams concluded that the "[Justice Department] has not been able to secure the kind of remedy which would dissipate the effects of monopoly and encourage the restoration of a more competitive industrial structure; . . . the Government, therefore, has won many a law suit but lost many a cause." Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories*, 27 IND. L.J. 1, 31 (1951). See also Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J.L. & ECON. 43 (1969); Pfunder, Plaine & Whittemore, *Compliance with Divestiture Orders Under Section 7 of the Clayton Act: An Analysis of the Relief Obtained*, 17 ANTITRUST BULL. 19, 134-35 (1972); Rostow, *supra* note 26, at 589.

37. Posner 405 (Table 28).

38. Kaysen and Turner recommended in 1959 that Congress establish a special
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A third problem inherent in the Antitrust Division's enforcement experience is its penchant for consent decrees. True, consent decrees often expedite the resolution of cases which might require protracted litigation. But the advantage of releasing resources for the prosecution of other cases pales beside the fact that consent decrees are often negotiated in private between the Antitrust Division and the defendants,³⁹ often complicating treble damage recovery by other parties injured by the defendants' anticompetitive actions in the market.⁴⁰ The

Economics Court to hear all § 2 cases as well as all others in which divestiture or dissolution relief was sought. C. KAYSEN & D. TURNER, *supra* note 26, at 252, 268-69. However, for a contrasting opinion asserting that the federal district courts are an adequate and effective forum for resolving divestiture and dissolution issues, see Celler, *The Trial Court's Competence to Pass Upon Divestiture Relief*, 10 ANTITRUST BULL. 693 (1965).

Finally appreciating the direct relationship between structure and conduct, the Justice Department now is seriously considering reforming its policy concerning antitrust remedies. Assistant Attorney General Thomas Kauper said recently:

[T]he traditional forms of relief requested and secured in Government civil cases attacking agreements among competitors under section 1 . . . is conduct-oriented, and the injunction provisions seek to dissolve whatever arrangements the defendants have made to effectuate their agreements and to prevent repetition of the challenged practices. I am becoming convinced that this may be too narrow a view of effective civil relief in such cases, and that we must explore the relation between illegal conduct of firms in an industry and that industry's structure. Certainly in a concentrated industry where the same types of illegal agreements among competing firms have been discovered and prosecuted more than once, it seems appropriate to me to examine carefully whether the industry structure necessarily contributes in some way to the recidivism of the firms in the industry. If that question can be convincingly answered in the affirmative, then structural relief—including divestiture—may be appropriate.

Address by Thomas E. Kauper before the Practising Law Institute, in Washington, D.C., Dec. 7, 1973.

39. Note, *The ITT Dividend: Reform of Department of Justice Consent Decree Procedures*, 73 COLUM. L. REV. 594, 595-602 (1973).

Thurman Arnold disapproved of the rationalization that consent decrees are in the public interest because they maximize the Justice Department's scarce resources: "It is an appealing theory, but my experience since I came in the Antitrust Division leads me to believe that consent decrees are irresponsible regulation of business which in 9 cases out of 10 will put a semi-government approval upon a way of doing business which is actually antithetic to the antitrust laws." *Hearings on the Role of Private Antitrust Enforcement in Protecting Small Business Before a Subcomm. of the Senate Select Comm. on Small Business*, 85th Cong., 2d Sess. 165 (1958).

40. It is important to note that if a consent decree is consummated prior to the taking of any evidence, private parties seeking treble damages and charging violations identical to those in the Justice Department's suit are precluded by § 5 of the Clayton Act from using the consent decree as prima facie evidence. See *Hearings on Nolo Contendere and Private Antitrust Enforcement Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. (1966). See

consent decree has certainly dominated the resolution of cases filed by the Antitrust Division. Between 1890 and 1969, 76% of all Antitrust Division cases were settled by consent decree.⁴¹ For the period 1960 to 1964, and again from 1965 to 1969, 81% and 90% of the Division's cases respectively were settled by consent decree.⁴²

A fourth problem arises from the role of the courts in public enforcement of antitrust. In many ways the courts have engaged in judicial legislation when applying the Sherman Act in Justice Department cases. The "rule of reason"⁴³ has left a legacy of judicial preoccupation with corporate conduct rather than with market power, with corporate performance rather than with disproportionate corporate size.⁴⁴ Even in *United States v. Aluminum Co. of America*⁴⁵ the court was unwilling to break Alcoa into several competing firms. The courts have often confused the public interest with the defendants' private interest;⁴⁶ in doing so they render meaningless the thrust and intent of the Sherman Act.

The real indictment of public antitrust enforcement is its failure to address and resolve successfully the problems of disproportionate firm size in markets dominated by one or several giant firms. That antitrust effectiveness can be and has been thwarted by tax laws, subsidy grants, and congressional immunization from foreign competition is all too apparent.⁴⁷ But one waits patiently for the Antitrust Division to apply its resources to the persistence of market power in the steel, auto-

also S. GOLDBERG, *THE CONSENT DECREE: ITS FORMATION AND USE* (1962); E. TIMBERLAKE, *FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS* 246-74 (1965).

41. Posner 375 (Table 5).

42. *Id.*

43. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); see W. LETWIN, *supra* note 7; B. TWISS, *LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT* (1942); Corwin, *The Antitrust Acts and the Constitution*, 18 VA. L. REV. 355 (1932); Dishman, *Mr. Justice White and the Rule of Reason*, 13 REV. POLITICS 229 (1951); M. HANDLER, *The Judicial Architects of the Rule of Reason*, in *ANTITRUST IN PERSPECTIVE: THE COMPLEMENTARY ROLES OF RULE AND DISCRETION* 123 (1957).

44. See A. KAHN & J. DIRLAM, *FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY* (1954); A. NEALE, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA* (1960). See also Brodner, *supra* note 35; Cox, *supra* note 35; Fortas, *supra* note 35; Rostow, *supra* note 26.

45. 148 F.2d 416 (2d Cir. 1945).

46. See Adams, *supra* note 36; Rostow, *supra* note 26.

47. See Gray, *Supplemental Action to Reinforce Antitrust*, in *Administered Prices: A Compendium on Public Policy, Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 140 (1963).

mobile, and telecommunications equipment industries, to name a few.⁴⁸ The Antitrust Division must do more than exist in order to prove its vitality and necessity. Its promises must be translated into action. Little wonder economist John Kenneth Galbraith, viewing the Justice Department's antitrust enforcement record, dismissed antitrust enforcement as an anachronistic charade.⁴⁹

IV. PRIVATE ANTITRUST ENFORCEMENT

If public antitrust enforcement has been emasculated by the conduct/performance philosophy, has the private antitrust litigant compensated for this lack of structural enforcement? The Sherman Act has always provided an incentive for private enforcement by permitting private parties to seek treble damages for anticompetitive injuries caused by defendants. That incentive is now embraced by section 4 of the Clayton Act. The treble damage suit has been regarded as an ingenious device to promote private enforcement of the antitrust laws.⁵⁰ Like the public suit, the private suit offers both virtues and infirmities.

A. *Advantages*

Neither the volume nor thrust of private antitrust litigation is governed solely by the Justice Department's antitrust budget or enforcement policies. Private antitrust litigants have recently become much more active than ever before.⁵¹ Table II shows the increase in private cases filed between 1967 and 1971:

48. NADER REPORT 293-308.

49. J. GALBRAITH, *THE NEW INDUSTRIAL STATE* 197 (1967).

50. Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167 (1958).

John Scott, a Washington, D.C. antitrust lawyer, claims that "this is the golden age of the antitrust bounty hunter. Today the private plaintiff packs a harder wallop than either the Justice Department or the Federal Trade Commission." Jerrold C. Van Cise, a prominent antitrust attorney in New York City, states that "the private [antitrust] plaintiff seems destined to play an even more prominent role in the future [of antitrust enforcement]." *Wall Street J.*, Jan. 18, 1972, at 1. *See also* *Wall Street J.*, June 22, 1966, at 32; *Wall Street J.*, Nov. 29, 1973, at 1; *BUSINESS WEEK*, May 12, 1973, at 120; *BUSINESS WEEK*, Aug. 12, 1972, at 51-54; *FORBES*, Oct. 1, 1973, at 53.

51. Carruth, *The Legal Explosion Has Left Business Shell-Shocked*, *FORTUNE*, Apr. 1973, at 69.

TABLE II⁵²

THE RECENT INCREASE IN PRIVATE ANTITRUST LITIGATION

<u>Year</u>	<u>Number of Private Cases Filed</u>
1967	543
1968	659
1969	740
1970	877
1971	1445

The 877 suits filed in 1970 represent an increase of 334 over the number filed in 1967. The increase from 877 to 1445 between 1970 and 1971 was even more dramatic. This increase has prompted some observers to argue that the private suit is, in fact, enforcing the antitrust laws.⁵³

Certainly the private suit performs an important role in supplementing public antitrust enforcement efforts, enabling the Government to narrow and concentrate its resources on crucial cases. John W. Gwynne, former Chairman of the Federal Trade Commission, stated that private suits unburdened an already stretched Commission staff by "saving money for the Department [which] enables the Federal Trade Commission to concentrate on hard core cases to the greatest possible public benefit."⁵⁴

A third advantage of the private suit is that it is just that, private. Private plaintiffs are likely to possess considerable expertise in their particular trade or commerce.⁵⁵ They know how the market game is played, they suffer the consequences of offensive market power, and

52. Data are from Collen, *Procedural Directions in Antitrust Treble Damage Litigation: An Overview of Changing Judicial Attitudes*, 17 ANTITRUST BULL. 997, 1000 (1972).

53. See note 50 *supra*.

54. J. GWYNNE, *THE ROLE OF PRIVATE ANTITRUST ENFORCEMENT IN PROTECTING SMALL BUSINESS* 1175 (1958). See also *id.* at 141 (statement of Victor Hanson, Assistant Attorney General in charge of the Antitrust Division, Department of Justice); Bicks, *The Department of Justice and Private Treble Damage Actions*, 4 ANTITRUST BULL. 5 (1959).

55. The private plaintiff's intimacy with a particular industry probably accounts for the significant role of the private litigant in prosecuting anticompetitive patent practices. A 1952 Note in the *Yale Law Journal* assessing the impact of private antitrust litigation concluded that "[i]ts most striking solo accomplishment has probably been in patent cases, where private suits have continued the government trend toward restricting the scope of the patentee's monopoly." Note, *Antitrust Enforcement By Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010, 1061 (1952).

they know the questions to ask. The *Control Data/IBM* suit⁵⁶ is a case in point. Control Data, in its Sherman Act sections 1 and 2 suit against IBM, assembled a computerized data and document index deemed so valuable that IBM, as part of its settlement with Control Data, bargained for the index' destruction.⁵⁷ In contrast, the Government's section 2 suit against IBM, filed not long after Control Data's, has not been noted for its expedient prosecution. The difference may be explained in Control Data's lower start-up costs in comprehending the complexities of the computer industry.⁵⁸

B. *Disadvantages*

Private antitrust suits are not without their problems, however. Private litigants tend to prosecute anticompetitive conduct, seeking treble damages attributable to the defendants' allegedly anticompetitive behavior. But note the emphasis on conduct. To the extent that private suits emphasize corporate market behavior, such suits prosecute anticompetitive symptoms rather than causes. Professor Posner's study of antitrust enforcement notes that private litigants primarily file suits attacking price fixing and other anticompetitive practices rather than monopoly and excessive market power itself:

TABLE III⁵⁹

CLASSIFICATION OF PRIVATE ANTITRUST SUITS

<u>Type of Suit</u>	<u>Number of Cases Reported 1965-1969</u>
1. monopolization	52
2. price fixing	132
3. exclusive dealing	36
4. tying contracts	28
5. price discrimination	92
6. other vertical restraints	33
7. acquisitions	27
8. boycotts	74
Total	474

56. *Control Data Corp. v. IBM*, Civ. No. 3068-32 (D. Minn. 1968).

57. Gardner, *IBM-CDC Settlement Cripples Justice Discovery Mechanism*, 19 *DATAMATION* 98 (Feb. 1973).

58. *Id.*

59. Posner 409 (Table 32).

Guilfoil's study of private antitrust enforcement between 1940 and 1963 determined that price fixing accounted for 50% of the private cases reported; refusals to deal—19%; monopolization—11%; price discrimination—6%; patent misuse—5%; and ex-

Secondly, the private litigant's record of success is anything but reassuring, despite the increasing number of private antitrust suits. Of the 157 private cases reported between 1890 and 1949, for example, private plaintiffs recovered in only 14 of such suits, prompting one observer to note: "If monopoly formed the crux of the plaintiff's complaint, he stood practically no chance of court recovery, plaintiff losses outnumbering victories by 42 to 1."⁶⁰ The record between 1940 and 1963 reflects little increase in plaintiffs' success. During that 23-year period plaintiffs won one monopolization suit for every 39 tried in the courts. Suffice it to note that as private plaintiffs' suits have increased in number, their success rate has not increased proportionately.⁶¹

A third disadvantage attending the private suit is that few plaintiffs possess the financial resources to engage in expensive heroics attacking entrenched and wealthy dominant firms in concentrated industries.⁶² Nor should the public expect private plaintiffs to do so. Sometimes the plaintiff's suit makes the point to the defendant when the case is filed;⁶³ the defendant, rather than risk time, expense, and bad publicity, agrees to an out-of-court settlement.⁶⁴ And the gap between

clusive dealing and tying contracts—2%. Guilfoil, *Private Enforcement of U.S. Antitrust Law*, 10 ANTITRUST BULL. 747 (1965).

60. Guilfoil, *supra* note 59, at 750.

61. *Id.* The private plaintiff's victory rates for charges other than monopoly were substantially better: exclusive dealing and tying contracts—5.3 to 1; price fixing—4.6 to 1; refusals to deal—3.3 to 1; patent misuse—3.1 to 1. *Id.*

Some commentators have observed that private antitrust suits are also an ineffective means of antitrust enforcement because victorious plaintiffs are not often awarded the damages to which they are entitled. *E.g.*, Parker, *Treble Damage Action—A Financial Deterrent to Antitrust Violations?*, 16 ANTITRUST BULL. 483, 505 (1971). *See also* Breit & Elzinga, *supra* note 23; Parker, *The Deterrent Effect of Private Treble Damage Suits: Fact or Fantasy?*, 3 NEW MEX. L. REV. 286 (1973).

62. Private plaintiffs' antitrust attorney Harold Kohn states that not only is antitrust litigation the most expensive type of suit, but there is no way to advise a potential plaintiff how expensive the suit may be. Kohn, *Evaluation of an Antitrust Claim, Prospective Cost of Litigation, Standing to Sue and Preparation of Suit*, 38 ABA ANTITRUST L.J. 7, 10 (1969). *See also* Alioto, *The Economics of a Treble Damage Case*, 35 ABA ANTITRUST L.J. 87, 92 (1966); Blecher, *The Plaintiff's Viewpoint*, 38 ABA ANTITRUST L.J. 55 (1969); Loevinger, *supra* note 50, at 169-70.

It is claimed that IBM maintained a legion of from forty to fifty lawyers in Oklahoma City devoted entirely to supporting IBM's trial staff in litigating Telex' anticompetitive conduct charges against IBM.

63. E. TIMBERLAKE, *supra* note 40, at 13.

64. For example, Sanders Associates, a manufacturer of computer display terminals, threatened IBM with antitrust action when IBM introduced its new 370 computer. IBM advised its potential customers already using Sanders terminals that the 370 re-

settlement and actual damages obviously works to the advantage of the defendant.⁶⁵

The *Control Data/IBM* settlement suggests that the aggrieved plaintiff is more interested in its income statement than some fine point of economics or antitrust law. Much to the anguish of the Department of Justice, the litigants negotiated a cash settlement, an exchange of some IBM assets, and the destruction of Control Data's computerized litigation index. In other cases, the settlement is more discreet; awarding subcontracts to plaintiffs has nipped at least one private case in the bud.⁶⁶ Whatever constitutes settlement seduction, the fact remains that many litigants reach their own private "consent decrees," satisfying their limited private interests. Yet the public interest often deserves adjudication of the charges at issue.⁶⁷

quired software which could accommodate only IBM terminals. According to Sanders' counsel, "IBM was very reasonable. . . . They said, 'Let's face it. We've got enough lawsuits.'" Wall Street J., Jan. 8, 1974, at 11.

Forbes claims that the "majority" of private antitrust suits are settled out of court. FORBES, *supra* note 50, at 54. Another study of private antitrust enforcement concluded that "[f]ew of the suits get past the procedural-issue stage, and many of these, even when won by plaintiffs, are settled out of court." R. CASSADY & R. CASSADY, *THE PRIVATE ANTITRUST SUIT IN AMERICAN BUSINESS COMPETITION* 56 (1964). Timberlake states, "All attorneys in this field are familiar with attempts to impose heavy burdens of discovery in the hope that the opponent will be forced to make a settlement." E. TIMBERLAKE, *supra* note 40, at 121. See also NADER REPORT 211.

65. Willard Mueller, a former Chief of the FTC's Bureau of Economics, claims that "[d]ue to the financial pressures dictating quick settlements, far too many antitrust cases are settled for much less than actual damages." Wall Street J., Jan. 18, 1972, at 25.

66. It is speculated that Potter Instrument Corporation terminated its antitrust suit against IBM when IBM awarded Potter a \$3.5 million contract for IBM "product-development" work. Wall Street J., Oct. 15, 1973, at 11. Eleven days later Potter announced a \$2,292,940 loss for fiscal year 1973. Wall Street J., Oct. 26, 1973, at 20.

67. It is reported by sources in the computer industry that Telex' unprecedented \$259.5 million victory over IBM in the Tenth Circuit will be compromised by a private settlement: "It is becoming more and more apparent that IBM will eventually settle out of court with Telex, as the effects of that action (should it be upheld through all appeals) would be greatly magnified through other suits." COMPUTER INDUSTRY ASSOCIATION, *ON LINE*, Jan. 1, 1974, at 4. One can understand IBM's apprehension if it loses its appeal. Since the district court's September 1973 decision in the *Telex* case, six private plaintiffs have filed separate suits charging total damages of more than \$3.9 billion.

The public interest warrants complete adjudication of the controversy provoked by the *Telex* case. This resolution should be the product of the courts, not the private offices of IBM and Telex. At issue, essentially, is what standard the courts will apply when a dominant firm is charged with selectively adjusting its products' prices, always remaining above their respective costs, and manipulating its sale and lease arrangements

To summarize, it is true that the number of private suits is increasing dramatically, that such suits may indeed be the wave of the future. But closer inspection suggests that such suits may prove to be sunshine antitrust soldiers. These suits tend to be oriented toward corporate conduct, the odds against victory are long, and the parties often settle out of court, all leaving concentrations of excessive market power undisturbed. Not unlike Government suits, private antitrust actions are predominantly conceived and prosecuted in the conduct/performance tradition—it is predatory behavior which is prosecuted, not the possession of disproportionate market power responsible for that behavior.

V. CONCLUSION

Our reading of antitrust policy indicates that almost from the beginning, enforcement, whether public or private, succumbed to the siren call of market conduct. The question of market structure was either lost, neglected, or misplaced. Some economists contributed to the enforcement ambivalence by their appeal for an indulgent examination of market performance; and when other economists emphasized the superficiality of inquiring into market conduct they were brushed aside as excessively doctrinaire.

Any antitrust policy oriented toward a conduct/performance strategy is not without its consequences, however. For one thing the question of corporate power and corporate accountability remains elusive and unanswered. For another, any policy vacillation is bound to be filled by government intervention, government scrutiny, and government regulation. Administratively and politically the conduct/performance school invites an increasingly regimented economy.⁶⁸ The irony may be sweet but it is also costly.

so as to retaliate for the competitive encroachments of specific smaller competitors. The district court found that, although IBM had not engaged in what is traditionally considered "predatory pricing" (that is, pricing below cost with the intent to damage or destroy competition), "the sum total of all the evidence establishes that IBM undertook [specific product pricing actions] with the specific and predatory intent of suppressing and eliminating its competition and that such conduct taken pursuant to this anticompetitive purpose in fact suppressed and eliminated IBM's . . . competition to a substantial extent." *Telex Corp. v. IBM*, Nos. 72-C-18, 72-C-89 (N.D. Okla., Sept. 17, 1973). This particular concept of "predatory pricing" and its enforcement against dominant firms should be reviewed by the Supreme Court. It is a public policy issue which demands the highest adjudication, not private reconciliation.

68. See Mueller, *Monopoly and the Inflation-Unemployment Dilemma: Trustbusting or Administrative "Controls"?* 5 ANTITRUST L. & ECON. REV. 15 (1972).

With the evolution of an increasingly regimented economy, the policy dialogue concerning the direction and thrust of antitrust obviously shifts to another plane. No longer does the discussion turn on structure versus performance. Rather, the debate focuses on the degree of fine-tuning government intervention. The results come as no surprise: corporations become endowed with a quasi-utility status; government assumes greater regulatory power; and the enveloping world of Galbraith knows no bounds.

Perhaps the proposed Industrial Reorganization Act,⁶⁹ filed by Senator Philip Hart, represents our only hope for recapturing the economic dynamism quietly suffocating in the tightening grasp of market concentration. The Act contemplates formation of an Industrial Reorganization Commission and an Industrial Reorganization Court. The Commission would conduct research, gather information, launch investigations, and sue for remedial market structure reformation. Remedies would include divestiture of corporate assets, require patent licensing, and alter contracts and distribution methods unless unjustified by economic efficiency. The Act focuses on seven key industries, including automobiles, chemicals, computers, and telecommunications equipment and services. Interestingly enough, the proposal for an Industrial Reorganization Court rests on the assumption that economic matters require formation of a specialized court dealing exclusively with these matters.

This proposed reform in antitrust policy traces its roots to the persistence of industrial market concentration and the failure of public and private suits to attack disproportionate market power—legislation that traces its intellectual roots to the draft antitrust law proposed by Kaysen and Turner in 1959⁷⁰ and by the Neal Commission in its 1969 Report.⁷¹

69. S. 1167, 93d Cong., 1st Sess. (1973). See Hart, *Restructuring the Oligopoly Sector: The Case for a New "Industrial Reorganization" Act*, 5 ANTITRUST L. & ECON. REV. 35 (1972); Note, *The Industrial Reorganization Act: An Antitrust Proposal to Restructure the American Economy*, 73 COLUM. L. REV. 635 (1973).

70. C. KAYSEN & D. TURNER, *supra* note 26, at 266.

71. WHITE HOUSE TASK FORCE REPORT ON ANTITRUST POLICY (July 5, 1968).

The bill's concern with economic concentration is reflected in its creation of a rebuttable presumption that a corporation possesses unlawful monopoly power under three circumstances:

(1) by any corporation if the average rate of return on net worth after taxes is in excess of 15 per centum over a period of five consecutive years out of the most recent seven years preceding the filing of the complaint, or

It has been some twenty-four years since Congress passed any major antitrust legislation. The Industrial Reorganization Act is now on the policy agenda. The Act may not be perfect in all respects, but it does address fundamental questions we can no longer afford to ignore: whither goes our economy? What are the consequences of persistent market power concentration? And what is the impact of continuing to pursue the conduct/performance policy of antitrust enforcement?

(2) if there has been no substantial price competition among two or more corporations in any line of commerce in any section of the country for a period of three consecutive years out of the most recent five years preceding the filing of the complaint, or

(3) if any four or fewer corporations account for 50 per centum (or more) of sales in any line of commerce in any section of the country in any year out of the most recent three years preceding the filing of the complaint. . . .

S. 1167, 93d Cong., 1st Sess. § 101(b) (1973).

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