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# ELIMINATION OF THE CONDUCT REQUIREMENT IN GOVERNMENT MONOPOLIZATION CASES

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## INTRODUCTION

On July 12, 1978, Professor John Flynn of the University of Utah Law School urged the National Commission for the Review of Antitrust Laws and Procedures (National Commission or NCRALP) to consider recommending that Congress amend section 2 of the Sherman Act to permit the government to challenge persistent and substantial monopoly power without showing that the monopoly power was acquired or maintained through objectionable conduct.<sup>1</sup> In Professor Flynn's view, eliminating the prevailing conduct requirement in certain government monopolization cases would expedite litigation and produce more effective remedies, two of the National Commission's central objectives.<sup>2</sup> In hearings on the proposal, a

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\* Mr. Dougherty (J.D., George Washington University Law School, 1970) is the Director of the Bureau of Competition at the Federal Trade Commission and previously was a partner in the Washington, D.C. law firm of Hogan & Hartson. This article is adapted from testimony Mr. Dougherty presented to the National Commission for the Review of Antitrust Laws and Procedures on October 17, 1978. The article does not express the views of the Federal Trade Commission or of any individual Commissioner.

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<sup>1</sup> Statement of John J. Flynn, National Comm. for the Review of Antitrust Laws and Proc. (July 12, 1978). Although Professor Flynn is a consultant to the FTC, he was presenting his personal views in this testimony.

Section 2 of the Sherman Act states:

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 felony, and, on conviction thereof, shall be punished by a fine not exceeding one million dollars if a corporation, or if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or both said punishments, in the discretion of the court.

15 U.S.C. § 2 (1976).

<sup>2</sup> The National Commission for the Review of Antitrust Laws and Procedures (NCRALP or National Commission) was established by Presidential Executive Order, December 1, 1977. Section 2 of that Order charged NCRALP with studying and making recommendations on two subjects: (1) complex antitrust cases; and (2) antitrust exemptions and immunities. With

number of other distinguished economists and legal scholars advocated similar changes.<sup>3</sup> In addition, the Bureau of Competition of the Federal Trade Commission also recommended an amendment to section 2 to achieve this same result.<sup>4</sup> Finally, the Federal Trade Commission itself

respect to the former, the National Commission was to consider:

- (a) "revision of procedural and *substantive* rules of law needed to *expedite* the resolution of complex antitrust cases,"
- (b) "development of proposals for making the *remedies* available in such cases more effective. . . ."

Exec. Order No. 12022, § 2(a)(1), 3 C.F.R. 155, 156 (1977)(emphasis added).

<sup>3</sup> Professor Phillip Areeda of the Harvard Law School and Walter Adams, Professor of Economics at Michigan State University, testified before NCRALP on September 13, 1978. Additionally, Oliver Williamson, Professor of Economics and Social Science at the University of Pennsylvania; Professor Louis Schwartz of the University of Pennsylvania Law School; and Professor Harvey Goldschmid of the Columbia Law School, appeared with Mr. Dougherty in support of the Bureau of Competition's no-conduct monopolization proposal. Professor Robert Bork of the Yale Law School, Professor Thomas Kauper of the University of Michigan Law School, and Judge Frederick Lacey (U.S.D.C., N.J.) testified in opposition to various aspects of the proposal.

<sup>4</sup> The Bureau of Competition submitted the following outline of a proposal for amending § 2 of the Sherman Act.

#### OUTLINE FOR PROPOSED SHERMAN ACT SECTION 2A

##### I. PURPOSE

Sherman Act Section 2A would permit the government to institute an expedited proceeding seeking structural (or other) relief where persistent, substantial monopoly power is not justified by patents or efficiencies of scale.

##### II. NATURE OF PROCEEDINGS

- A. Proceedings could be instituted only by designated Federal agencies.
- B. The proceedings would be equitable in nature.
- C. Neither criminal sanctions nor civil penalties would be appropriate as remedies.

##### III. LIABILITY

To establish that a firm has substantial, persistent monopoly power, the government would have to demonstrate that:

- A. The firm has had monopoly power in a properly defined relevant market for the five years preceding the filing of the complaint; and
- B. Sales in the relevant market exceeded \$500,000,000 in the year immediately preceding the filing of the complaint.

##### IV. REMEDY

A. After a finding of substantial, persistent monopoly power, the ordinary remedy would be structural relief sufficient to create as much competition as is feasible without substantial loss of efficiencies of scale.

- 1. Structural relief would include such remedies as:
  - (a) Dissolution, including divestiture and spin-off;
  - (b) Patent licensing; and
  - (c) Trademark licensing or cancellation.
 Dissolution would be the preferred remedy (if feasible and constructive).
- 2. Efficiencies of scale would be limited to those efficiencies which

formally endorsed the no-conduct monopolization concept and urged that Congress enact legislation based upon it.<sup>5</sup>

In its final report, the majority of the National Commission concluded that a no-conduct monopolization approach would "represent a logical solution" to several problems that hinder current monopolization practice.<sup>6</sup> The National Commission recognized that: "[T]he chief aim of government litigation under Section 2 of the Sherman Act is the dissipation of persistent monopoly power. Proof of bad conduct is simply not central to such a proceeding."<sup>7</sup> In NCRALP's view, an evaluation of past conduct is relevant only to the extent it would illuminate the key issues:

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would be reduced or lost through operation of the structural relief under consideration.

B. Under certain circumstances, monopoly power attributable to patents would be temporarily protected.

1. Original patents - During the life of a patent which led to the original establishment of monopoly power, the running of the five-year period of persistence would be tolled.

2. Improvement patents - The acquisition of a patent which prolongs the monopoly power conferred by an original patent would not toll the running of the five-year period of persistence, except in the case of a displacement patent.

3. Displacement patents - A displacement patent is a patent so radically different from the original patent that it, in effect, confers a new monopoly. A displacement patent would be treated as an original patent.

Statement of Alfred F. Dougherty, Jr., National Comm. for the Review of Antitrust Laws and Proc. (October 17, 1978).

The Bureau of Competition continues to favor legislative adoption of the general approach reflected in this proposal. Specific details of this approach, however, may be modified as new evidence and analysis become available. Indeed, on the basis of recent analysis, the Bureau would now provide some protection for significant, recent, unpatented innovation and require a longer period of persistence than the five years suggested in this proposal.

<sup>5</sup> Statement of the Federal Trade Commission, with a Separate Statement of Commissioner Dixon, to the National Commission for the Review of Antitrust Laws and Procedures, November 17, 1978.

<sup>6</sup> NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, 158 (Jan. 22, 1979) [hereinafter cited as NCRALP REPORT], reprinted in 897 ANTITRUST & TRADE REG. REP. (BNA)(Special Supp.) at 47.

Three basic positions emerged among NCRALP's members. One group favored legislative revision of the Sherman Act to permit the government to challenge persistent monopoly power without proving the defendant engaged in anticompetitive conduct. *Id.* at 157, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 45. A second group, reflecting the majority position, favored the adoption of a judicial presumption that persistent monopoly power is caused by culpable conduct. *Id.*; see *United States v. Grinnell Corp.*, 236 F. Supp. 244 (D.R.I. 1964), *aff'd except as to decree*, 384 U.S. 563 (1966). Although the government need not demonstrate anticompetitive conduct as a part of its case-in-chief, when courts apply this presumption, a defendant could introduce conduct evidence to rebut it. *Id.* Finally, a third group of Commissioners favored retention of the current conduct requirement as an element of the government's prima facie case. *Id.* at 161-62, 897 ANTITRUST & TRADE REG. REP. (BNA)(Special Supp.) at 49.

<sup>7</sup> *Id.* at 158, 897 ANTITRUST & TRADE REG. REP. (BNA)(Special Supp.) at 48. See also *id.* at 162, 897 ANTITRUST & TRADE REG. REP. (BNA)(Special Supp.) at 49.

the existence of persistent monopoly power, and the availability of competition-enhancing remedies to dissipate it. Elimination of the conduct requirement would free litigants and courts from lengthy and expensive retrospective evaluations of behavior. Moreover, the NCRALP majority felt that an efficiencies defense - a feature of many no-conduct proposals - would focus additional, needed attention on the process of fashioning a remedy that preserves rather than ignores efficiencies.<sup>8</sup>

Thus, the National Commission endorsed many of the most important principles underlying the no-conduct monopolization approach. Although the National Commission could not recommend congressional enactment of this approach without further study of certain key issues, NCRALP urged Congress to "undertake an inquiry aimed at strengthening the ability of the Sherman Act to deal with persistent monopoly power,"<sup>9</sup> and to take as a starting point for this inquiry the fundamental principles that the National Commission had endorsed.

The Commission's conclusions are consistent with the analysis in a growing body of academic commentary supporting the no-conduct monopolization approach. For example, in recent years, several distinguished lawyers and economists have recognized that appraising past conduct is seldom necessary to identify and remedy monopoly power. These commen-

<sup>8</sup> See note 7 *supra*.

<sup>9</sup> NCRALP REPORT, *supra* note 6, at 141, 897 ANTITRUST & TRADE REG. REP. (BNA)(Special Supp.) at 40. The full text of NCRALP's second recommendation states:

The appropriate Congressional committees should undertake an inquiry aimed at strengthening the ability of the Sherman Act to deal with persistent monopoly power. Such an inquiry should be based on the following principles:

(a) the chief goal of the Sherman Act monopolization provision is the dissipation of persistent monopoly power;

(b) persistent monopoly power can be presumed to be maintained through deliberate conduct that would violate traditional Sherman Section 2 standards;

(c) the current litigation process under Sherman Section 2 does not effectively remedy persistent monopoly power, in part because the need to prove culpable conduct leads to much evidence not relevant to the proof of monopoly power or the nature of effective relief and creates strong incentives for the government to focus its resources on the liability stage of a monopolization proceeding rather than relief;

(d) the adoption of a standard enabling the government to obtain structural relief on a showing of persistent monopoly power without the need to prove culpable conduct would rationalize monopolization litigation in accordance with the preceding principles, but would also raise the following issues, which should be examined by Congress before any specific statutory change is enacted:

(1) the definition of monopoly power to be applied in using the standard;

(2) the type and scope of defenses to be permitted and the stage of the litigation at which they should be permitted;

(3) whether efficiency considerations should be permitted to affect the availability of structural relief where anticompetitive conduct has created or maintained the monopoly; and

(4) the advisability of adopting a conduct-free liability standard in view of possible disincentives to business growth or public perceptions of unfairness.

*Id.* at 141-42, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 40.

tators have recommended, therefore, that such an evaluation should be eliminated as a legal requirement in monopolization cases. For instance, Professor Oliver Williamson had argued that governmental intervention may be appropriate, whether or not reprehensible conduct is shown, whenever substantial, unjustifiable market power is unlikely to be eroded by market forces within a reasonable period of time.<sup>10</sup> Senator Philip Hart recommended similar changes as part of the Monopolization Reform Act of 1976.<sup>11</sup> Additionally, Professors Areeda and Turner advocate a similar approach in their new treatise.<sup>12</sup>

A generally accepted proposition, basic to all these proposals, is that substantial, persistent monopoly power, unjustified by patents or efficiencies, is undesirable. The propensity of monopoly power to restrict output, raise prices, and redistribute income from producers to consumers is undisputed.<sup>13</sup> The tendency of such power to retard innovation, tolerate slack and inefficiency, and adversely affect other economic and social goals of competition policy is less a matter of consensus, but remains a matter of real concern.<sup>14</sup>

The controversy over a no-conduct standard, therefore, does not concern the undesirability of substantial, persistent monopoly power. Rather, the disagreement concerns the appropriate requirements of identifying and dissipating such power. Opponents of the no-conduct approach contend that it is vital to prove that monopoly power was acquired or maintained through some form of undesirable conduct rather than through normal or even superior business behavior.<sup>15</sup> We believe, however, that proof of objectionable conduct is neither vital nor desirable in every government monopolization case. On the contrary, in the limited circumstances in which a no-conduct action would be appropriate, using such an approach should both advance the broad economic (and social) goals of competition policy and promote the two more specific objectives of particular concern to the

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<sup>10</sup> See Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations*, 85 HARV. L. REV. 1512 (1972) [hereinafter cited as Williamson].

<sup>11</sup> S. 3429, 94th Cong., 2d Sess., 122 CONG. REC. 13872 (1976). No hearings were held on this bill. Although separate and distinct proposals, the Bureau of Competition's proposal and another of Senator Hart's proposals, the Industrial Reorganization Act, S. 1167, 93rd Cong., 1st Sess. (1973), share the virtue of making the appraisal of past conduct largely unnecessary in a proceeding directed at significant market power.

<sup>12</sup> 3 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶¶ 614-23 (1978) [hereinafter cited as AREEDA & TURNER.]

<sup>13</sup> See R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 179 (1977) [hereinafter cited as BORK]; R. POSNER, *ANTITRUST LAW: AN ECONOMIC ANALYSIS* 79 (1976) [hereinafter cited as POSNER]; Demsetz, *Two Systems of Belief About Monopoly in INDUSTRIAL CONCENTRATION: THE NEW LEARNING* 164, 166 (H. Goldschmid, H. Mann & J. Weston eds. 1974) [hereinafter cited as *INDUSTRIAL CONCENTRATION*].

<sup>14</sup> See generally W. SHEPHERD, *THE TREATMENT OF MARKET POWER* (1975); *INDUSTRIAL CONCENTRATION*, *supra* note 13.

<sup>15</sup> See McKinney, *The Case Against No-Conduct Monopolization*, 37 WASH. & LEE L. REV. 73 (1980). For a detailed exposition of the current conduct requirement, see L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 94-132 (1977) [hereinafter cited as SULLIVAN].

National Commission.

First, a no-conduct standard would lead to faster, more efficient proceedings. Conduct issues appear to consume a significant proportion of the resources devoted to government monopolization cases.<sup>16</sup> Yet, litigation of these issues rarely is necessary to a determination of the real issues: the existence of substantial, persistent monopoly power and the availability of effective, beneficial remedies.<sup>17</sup>

Second, eliminating the conduct requirement should produce more effective remedies. The central purpose of no-conduct monopolization proposals is to shift the focus of concern of government monopolization proceedings from a retrospective appraisal of a defendant's conduct to a prospective inquiry concerning the availability of effective, beneficial remedies for monopoly power.<sup>18</sup> Such proposals seek to achieve this shift not only by eliminating the conduct requirement, but also by expressing a strong preference for structural remedies (where feasible and constructive), and by making several procedural changes designed to expedite and improve the litigation of remedial issues.<sup>19</sup> In the remainder of this article, we will present in greater detail the reasons underlying these two particular conclusions, and in the process, address the key issues highlighted by the National Commission.

## I.

### MORE EFFICIENT AND EXPEDITIOUS PROCEEDINGS

#### A. *Litigation of conduct issues is costly and time consuming*

As part of an empirical study chartered by NCRALP, Professor Peter Gerhart attempted to determine the proportion of the litigation time devoted to various substantive issues.<sup>20</sup> His data is based on interviews with persons responsible for the litigation of three ongoing monopolization cases: *United States v. International Business Machines Corp. (IBM)*,<sup>21</sup> *Berkey Photo, Inc. v. Eastman Kodak Co.*,<sup>22</sup> and *SCM Corp. v. Xerox Corp.*<sup>23</sup> Professor Gerhart estimated that less than 10% of trial time in *IBM* concerned market power, approximately 45-50% of the trial time involved market definition, and 40% pertained to conduct.<sup>24</sup> In *SCM*, damage issues

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<sup>16</sup> See text accompanying notes 20-29 *infra*.

<sup>17</sup> See text accompanying notes 30-80 *infra*.

<sup>18</sup> See note 4 *supra*.

<sup>19</sup> See note 4 *supra*.

<sup>20</sup> NCRALP REPORT, *supra* note 6, vol. 2 at 95-96.

<sup>21</sup> 69 Civ. 200 (S.D.N.Y. 1969)(three year trial of government's affirmative case).

<sup>22</sup> 73 Civ. 424 (S.D.N.Y. 1973)(six month trial). See *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *aff'g in part and rev'g in part*, 457 F. Supp. 404 (S.D.N.Y. 1978).

<sup>23</sup> See *SCM Corp. v. Xerox Corp.*, 463 F. Supp. 983 (D. Conn. 1978).

<sup>24</sup> NCRALP REPORT, *supra* note 6, vol. 2 at 95. Conduct here includes intent. Professor Gerhart told us that he found that a surprisingly large proportion of time, particularly in discovery, was devoted to issues of improper intent, even though such issues may not have

appeared to comprise 40-50 % of the litigation time, 3-5% concerned market power, market definition consumed 20-25%, and conduct inquiries exhausted 30-40% of the time.<sup>25</sup> Finally, Professor Gerhart estimated that damage issues involved 15-20% of litigation time in *Berkey*, determining market power took 3-5%, market definition consumed 15-25%, and conduct issues comprised the remaining 45-60% of trial time.<sup>26</sup> These estimates indicate that significant amounts of time and resources, amounting to well over one-third of the total litigation efforts, were devoted to the trial of conduct issues in each case. Professor Gerhart's results are not only internally consistent but also are in complete harmony with Professor John Flynn's estimates that between one-third and one-half of the length and expense of several other major monopolization cases reasonably could be attributed to litigation of conduct issues.<sup>27</sup> Further study may show that additional government monopolization cases also fit this pattern.<sup>28</sup>

The timesaving impact of any no-conduct proposal is unlikely to be great in terms of sheer numbers of cases. The estimates of Professors Gerhart and Flynn indicate, however, that such proposals may nevertheless save considerable resources. Major government monopolization cases consume the efforts of scores of private and government attorneys and their staffs for years at a time. The public and private financial resources necessary to support these cases runs into the millions, and perhaps hundreds of millions of dollars. It would be an extraordinary achievement if one-third of the effort and expense of every major government monopolization case could be saved without serious substantive sacrifice, and perhaps with

been strictly relevant in any of the cases.

Professor Joseph Brodley of the Indiana University Law School pointed out to us that Professor Gerhart's finding is consistent with the observations of those who studied earlier monopolization cases. For example, Professor Kaysen emphasized the large role intent evidence played in the trial of *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). In his monograph on the case, Professor Kaysen declared:

[I]t is no exaggeration to say that an overall view of the market and United's position in it hardly emerged from the Government's presentation of its case at all, so heavily was it pointed toward "intent." United, likewise used most of its presentation for material of the same kind. . . . Material of these types filled up perhaps two-thirds of the record of oral testimony.

C. KAYSEN, UNITED STATES V. UNITED SHOE MACHINERY CORPORATION 335-36 (1956).

<sup>25</sup> NCRALP REPORT, *supra* note 6, vol. 2 at 96.

<sup>26</sup> *Id.*

<sup>27</sup> Professor Flynn formed this impression after reading the records in: *Standard Oil v. United States*, 221 U.S. 1 (1911); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); and *United States v. United Shoe Mach. Co.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954); and while serving as an advisor to the counsel for the plaintiff in *Telex Corp. v. International Bus. Mach. Corp.*, 367 F. Supp. 258 (N.D. Okla. 1973), *aff'd in part, rev'd in part*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975).

<sup>28</sup> For a list of cases which may warrant further investigation, see Letter from Professor Flynn to Wendell B. Alcorn, Jr., Special Counsel to NCRALP (Oct. 2, 1978).



tangible benefits.<sup>29</sup>

Opponents of the proposed no-conduct standard commonly argue, however, that litigation of conduct issues is substantively necessary to the monopolization offense. In this regard, there are three distinct, substantive concerns. The first consideration involves the internal efficiency of the defendant firm as an affirmative defense to a monopolization charge. A second issue concerns the potential disincentive effects on firms attempting to avoid litigation under the proposal. Finally, the third dispute involves the fairness of applying a no-conduct standard to the defendant's stockholders, creditors, and employees. We believe that none of these concerns justifies rejection of the no-conduct approach.

### 1. Protection of internal efficiencies

In his testimony before NCRALP, Professor Robert Bork argued that litigation of conduct issues is essential to enable a court to identify monopoly power based on efficiency.<sup>30</sup> According to Professor Bork, there are only three causes of persistent monopoly power: mergers, predation, and superior efficiency.<sup>31</sup> Because mergers are covered by other laws, the principal purpose of a monopolization case, the argument proceeds, is to characterize the defendant's conduct either as predatory or as an expression of superior efficiency. In Professor Bork's view, eliminating the conduct standard would prevent a court from appraising a defendant's efficiency and thus would create a serious risk of breaking up a monopolist who was simply more efficient than his rivals.<sup>32</sup>

The Bureau of Competition's no-conduct proposal, however, presents little risk of a serious efficiency loss to defendants.<sup>33</sup> To the contrary, as a prerequisite to imposition of relief under the Bureau's proposal, courts must determine that the proposed relief will not result in a substantial loss of efficiencies. Any category of efficiency would be recognized, including engineering, marketing, managerial, or other efficiencies.<sup>34</sup> This inquiry

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<sup>29</sup> It is possible that these numerical estimates may overstate the timesaving potential of the Bureau of Competition's proposal, since scale efficiencies issues were not litigated fully or at all in some of the cases analyzed and since some conduct evidence may have been appropriate in some of the cases. In addition, the private cases cited may have involved more conduct evidence than similar government civil cases would have involved. Private cases, unlike government civil cases, tend to be tried to juries who may have greater relative interest in conduct evidence. Moreover, a private plaintiff must prove that illegal conduct was responsible for his asserted damages. On the other hand, Professor Gerhart has provided separate estimates for the damage portions of the private cases which he studied. Even if the Bureau of Competition's proposal requires litigation of additional issues and consideration of some conduct evidence in some cases, litigation of the entire case should be expedited and substantively improved by the procedural devices and changed incentives built into it.

<sup>30</sup> Statement of Robert H. Bork, National Comm. for the Review of Antitrust Laws and Proc. (Sept. 13, 1978) [hereinafter cited as Bork Statement].

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See note 4 *supra*.

<sup>34</sup> Typically, efficiencies of scale will be of most concern in evaluating a proposed remedy

replaces, and is more appropriate than, the backward evaluation of firm conduct that Professor Bork would prefer.<sup>35</sup>

Consider a firm with substantial, persistent monopoly power in a relevant market. Professor Bork would allow the firm to prove that it obtained and preserved power, not by engaging in predatory conduct, but by offering, for example, a better product, at a lower price, and with superior service than its rivals. If structural relief would not result in higher prices, however, why would it be important to know whether or not the firm historically had charged lower prices than its rivals? On the other hand, if structural relief would substantially impair the firm's future performance (e.g., lead to higher prices or inferior service), then structural relief should not be ordered. Accordingly, this proposal can preserve the defendant's internal efficiency by assessing the likely impact of relief, yet at the same time it can secure the benefits of eliminating unnecessary litigation of conduct issues.<sup>36</sup>

A second reason that the Bureau of Competition's no-conduct proposal would not impose serious efficiency losses on defendants rests on a more theoretical plane. Whereas Professor Bork asserts that sustained monopoly power must be due to superior efficiency (absent predatory conduct or mergers),<sup>37</sup> we believe that a variety of other factors remain that also may create or preserve monopoly power. Thus, the lack of predatory conduct in a non-merger monopolization case does not necessarily imply that the monopoly power in question is based on efficiencies worth protecting. For example, as Professor Williamson convincingly argues, dominance may arise through pure chance events or through the ineptitude of the monop-

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of dissolution, the preferred remedy under the no-conduct approach. Thus, in this article, we often speak in terms of efficiencies of scale. In some circumstances, however, non-scale efficiencies (e.g., quality control with trademark licensing remedies) may also be at issue. Of course, where non-scale efficiencies are involved, they must be considered and protected like scale efficiencies.

<sup>35</sup> Certain limiting principles would apply to this efficiencies defense. First, a showing of substantial scale efficiencies at one level of production or distribution in a vertically integrated enterprise would not be a bar to structural relief applied at another level (absent substantial efficiencies traceable to the vertical integration of the enterprise). Second, structural relief could not be defeated on the ground that an existing firm's size was necessary to bargain effectively with large customers or suppliers, a purely redistributive concern.

<sup>36</sup> A collateral argument for allowing the litigation of conduct issues is the claim that, without an appraisal of conduct, the litigation process cannot reliably assess the likelihood that a proposed remedy will induce substantial efficiency losses. In essence, this argument concedes that although examining the effect of the proposed remedies on firm performance is theoretically the correct approach, it cannot be carried out in practice with sufficient certainty to be used alone. See Statement of Thomas Kauper, National Comm. for the Review of Antitrust Laws and Proc. (Sept. 13, 1978). We would reject this argument, as applied to most cases, for two reasons. First, as shown above, allowing a retrospective appraisal of firm conduct is very expensive in terms of litigation time and resources. Second, as noted below, reasonably accurate methodologies for measuring efficiencies of scale do not seem to exist, and the incentives for expedition built into the proposal should make the trial of these issues tractable. See note 59 *infra*.

<sup>37</sup> Bork Statement, *supra* note 30.

list's rivals.<sup>38</sup> Firms also may grow large and powerful because rivals, although not inept, chose not to compete vigorously or pursue expansionist policies, giving primacy to goals other than relentless profit maximization.

Even when a firm acquires monopoly power as a result of a better product or a superior method of production, that power may persist for an unacceptably long period of time after those original competitive advantages have ceased to exist. Still, the monopolist may remain unchallenged. For example, while potential rivals may be as efficient as the monopolist, actual rivals may be inept, insufficiently motivated, or unable to challenge the monopolist because of higher costs. Furthermore, even equally efficient actual or potential rivals may be unable to mount an effective challenge to the monopolist because of barriers to entry or expansion. Product differentiation and capital requirements in some circumstances may constitute such barriers to the entry or expansion of equally efficient rivals.<sup>39</sup>

Substantial technological, marketing, personnel, and other requirements also can make challenges to monopolistic markets a lengthy and risky proposition, even in the absence of true entry barriers. As Professor Bork recognizes, entry will not immediately erode a monopolist's market position in such circumstances. It takes considerable time to build production facilities, refine management, production, and marketing techniques, develop experienced personnel, and achieve brand recognition and acceptance.<sup>40</sup> Entry is also an especially risky endeavor because of the possibility that unfavorable chance events (e.g., unpredictable changes in product technology, product demand, or supply costs) will intervene before the firm has acquired sufficient size and experience to survive. Accordingly, even equally efficient firms may hesitate to enter a market characterized by

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<sup>38</sup> Williamson, *supra* note 10, at 1517-23. Professor Williamson has pointed out to us that the chance event argument can be elaborated. He notes that there is a difference between a well-working and a perfectly-working enterprise system, just as there is a difference between well-working and perfectly-working systems of other kinds. Perfectly-working assembly lines, for example, might be described as those yielding no defective outcomes: all output is faultless. Presumably a perfectly-working enterprise system produces only efficient outcomes.

Despite best efforts, however, perfectly-working assembly lines do not exist. Some defective inputs may have been received; some workers may have erred; some unusual events may have occurred. If a few final products are found to be defective for which an *ex post* remedy is feasible, it is surely appropriate to take the corrective measures. This does not imply, however, that the system is defective. Rather, complex systems predictably produce occasional outliers and, when the outlier appears, corrective action is taken. This argument also applies to an enterprise system, in which uncertainty is a basic operational feature. Although chance events commonly even out, occasionally an unusual sequence of such events will appear and produce an outlier outcome. Thus, although competition can normally be expected to perform self-policing functions effectively, rivalry of a small numbers kind can result in occasional breakdowns, and the establishment of persistent monopoly power.

<sup>39</sup> For a review of the recent theoretical and empirical literature on product differentiation barriers due to heavy advertising, see Comanor & Wilson, *The Effect of Advertising on Competition: A Survey*, 17 J. ECON. LIT. 453 (1979). For a discussion of capital requirements barriers, see Scherer, *Economics of Scale and Industrial Concentration*, in INDUSTRIAL CONCENTRATION, *supra* note 13; *id.* at 105-12.

<sup>40</sup> Bork, *supra* note 13, at 310-11.

large capital or other entry requirements simply because of the risk and uncertainty involved.

The uncertainty generated by these features is compounded by the uncertainty surrounding the established firm's reactions. Will it cut price drastically in an effort to root out the entrant immediately? Will the established firm cut price a little and wait to see how the entrant fares? Will the monopolist accept the new entry and restrict output to avoid a price war? The potential entrant cannot be certain, and it may choose to forego entry altogether where the established firm has developed a reputation for meeting entry aggressively. As Professor Williamson has observed: "When potential market share can be secured only at the expense of the dominant firm, there is an especially high risk of economic reprisal."<sup>41</sup> Thus, past predatory or exclusionary conduct by an established firm may create a significant entry barrier.<sup>42</sup>

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<sup>41</sup> Williamson, *supra* note 10, at 1522.

<sup>42</sup> Arguably, a monopolist's prospective reaction would not deter an equally-efficient rival, since if the monopolist does react aggressively, it could be sued and enjoined for predatory conduct. But present laws may not afford the entrant a cause of action. Suppose efficiencies of scale were exhausted at a market share of just 10%, and an otherwise equally-efficient new entrant was prevented from expanding to that share due to a price reduction on the part of the established firm. Since the established firm enjoys a market share far greater than 10%, it can afford to lower its price enough to halt the entrant's expansion without incurring losses itself. And, because the monopolist's price would still be a profitable price, it would not be characterized as predatory by the Areeda-Turner test, even though it would effectively exclude an equally-efficient rival. For a restatement of the test, see 3 AREEDA & TURNER, *supra* note 12, at ¶¶ 710-23. Several court decisions have expressed an inclination to follow the Areeda-Turner test, at least in some circumstances; in these courts, the entrant may not have a cause of action. See, e.g., *Pacific Eng'r & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); *Hanson v. Shell Oil Co.*, 541 F.2d 1352 (9th Cir.), *cert. denied*, 429 U.S. 1074 (1976); *International Air Indus. v. American Exel. Co.*, 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1977).

Of course, the trouble may lie with the Areeda-Turner test. If the correct test for predation were applied, arguably, no equally-efficient firm would be deterred from challenging a monopolist's position. The problem is in specifying the correct test for predation. Several distinguished economists have disagreed with the Areeda-Turner approach and proposed various tests of their own. See Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869 (1976); Schmalensee, *On the Use of Economic Models in Antitrust: The ReaLemon Case*, 127 U. PA. L. REV. 994 (1979); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284 (1977); Williamson, *Williamson on Predatory Pricing II*, 88 YALE L.J. 1183 (1979); BAMMOL, *Quasi-Permanence of Price Reductions - A Policy for Prevention of "Predatory Pricing"*, Apr. 1978 (unpub. manuscript). See also *In re Borden, Inc.*, 92 F.T.C. 669, 799-805 (1978); *id.* at 820-24 (Pitofsky, Comm'r, concurring).

The source of the controversy appears to be the tension between a rule simple enough to be workable and one sophisticated enough to strike a tolerable balance between the immediate public interest in low prices and the long-run public interest in effective price and non-price competition. In light of the difficulties in resolving this tension, the best course for public policy may be ultimately to rely on structural relief rather than rules against predation to ensure that persistent monopoly power is eventually eroded. As Professors Areeda and Turner state: "Many markets capable of supporting greater competition appear to obstruct new entry with barriers resulting from behavior which the antitrust laws cannot readily reprehend." 3 AREEDA & TURNER, *supra* note 12, ¶ 618 at 42.

Consequently, there are a number of factors other than predatory conduct or superior efficiency that may explain why a monopolist's position has not been eroded within a reasonable period of time. Because of the variety of possible sources of persistent monopoly power, the most appropriate course for public policy is to focus the proceedings on whether persistent monopoly power exists. Should a court determine that a firm does possess such power, the focus then should shift to whether feasible, constructive remedies are available.

## 2. Incentives to Compete

According to some commentators, a no-conduct standard has undesirable disincentive effects, apart from any impact on the efficiency of the dispersed firm. These commentators argue that firms will restrain their competitive efforts to ensure that they are not subjected to antitrust proceedings under these standards.<sup>43</sup> Although current law also produces such disincentive effects, the Bureau of Competition's proposal purportedly would increase those effects because it would remove the existing opportunity for the defendant to prove that it acquired monopoly power through procompetitive rather than objectionable behavior.

The disincentive effects of our proposal, however, are probably no greater, and may even be smaller, than those under the existing law. As a practical matter, in government litigation, defendants may not be able to rely heavily on the existing procompetitive conduct defense. After all, the government has won the vast majority of the monopolization cases it has brought.<sup>44</sup> More importantly, defendants may have more to lose under present Sherman Act cases than under the no-conduct approach. If firms violate section 2 as it currently reads,<sup>45</sup> criminal sanctions are possible, and expensive, private, treble-damage actions are likely. Furthermore, the preoccupation of current law with deterring and punishing objectionable conduct means that dissolution, if ordered, is more likely to occur without adequate attention to scale efficiencies and the interests of shareholders, creditors, and employees.

By contrast, our proposal permits neither criminal penalties nor private enforcement of the statute.<sup>46</sup> The proposal's focus is not on punishing the

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Finally, even if ideal legal rules could be framed, so that in theory no equally-efficient rivals are deterred, entry may still be inhibited by transaction cost factors: the likelihood of litigation, the cost and delay of such litigation, and the risk of losing the case.

<sup>43</sup> See, e.g., Bork, *supra* note 13, at 196-97; Posner, *supra* note 13, at 94.

<sup>44</sup> See Posner, *supra* note 13, at 82-83. Some commentators assert that a judicial finding of objectionable conduct is virtually a foregone conclusion in government monopolization cases involving substantial, persistent monopoly power. See Blecher & Woodhead, *Bigness and Badness: A Review of the Requirement of "Deliberateness" in Monopolization*, 19 Sw. L. REV. 121 (1978); Wyzanski, *The Judicial View of Section 2 Litigation*, 19 Sw. L. REV. 45 (1978); Statement of John J. Flynn, National Comm. for the Review of Antitrust Laws and Proc. (July 12, 1978).

<sup>45</sup> See note 1 *supra*.

<sup>46</sup> See note 4 *supra*.

firm (or, indirectly, its shareholders) but on identifying substantial, persistent monopoly power and determining whether or not feasible, constructive remedies for dissipating that power are available. Because it places so much emphasis on formulating effective, beneficial remedies, the Bureau of Competition's proposal is in many ways more likely than prevailing law to protect the firm's efficiencies and the interest of its stockholders, creditors, and employees.<sup>47</sup>

Finally, our proposal would apply only to substantial, persistent monopoly power in a properly defined relevant market. It should not discourage pro-competitive, market-share-increasing behavior, unless that behavior were likely to result in monopoly power of both this magnitude and duration. Because the vast majority of competitive business behavior would not achieve such adverse results, however, the Bureau's proposal should not significantly affect such performance. In sum, as Professors Areeda and Turner explain, stringent requirements that the monopoly power be both substantial and persistent coupled with restrictions against private and criminal enforcement and an emphasis on constructive remedies, should reduce any disincentive effects of no-conduct proposals to tolerable levels.<sup>48</sup>

### 3. Fairness

Another common argument against a no-conduct standard involves the fairness of applying such a standard to firms that have not engaged in any reprehensible conduct. Such an argument might have considerable force if the remedies under the standard punished firms for acquiring and maintaining monopoly power. They do not. On the contrary, the no-conduct approach explicitly excludes remedies with punitive consequences and overtones, such as criminal sanctions and private treble damages.<sup>49</sup>

Nonetheless, it is arguable that dissolution remedies have harsh, if not punitive, consequences for certain groups. Individuals who have purchased the shares of a monopolistic firm at a price which includes the capitalized

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<sup>47</sup> Although effective structural remedies would deprive the firm of its monopoly profits, the stockholders, creditors, and employees may be more than adequately compensated by the increased output and internal efficiency stimulated by the resulting competition. And while it is certainly significant that the firm's top executives may suffer a decline in power and responsibility, it should be remembered that divisional heads and middle managers may benefit in greater numbers as they assume top positions in new entities created by the structural relief. Greater diversity in the industry might also lead to increased innovation, which in turn could lead to greater efficiency and enhanced performance throughout the industry.

<sup>48</sup> See 3 AREEDA & TURNER, *supra* note 12, at ¶ 662. For a discussion emphasizing the substantial, procompetitive incentives provided by the requirement that the monopoly power be persistent (and as a result, that monopoly profits may be earned throughout the persistence period), see Williamson, *supra* note 10, at 1528-29.

<sup>49</sup> See note 4 *supra*. To the extent that current law allows the application of punitive remedies after only a perfunctory search for objectionable conduct, as some commentators have suggested, it may be the current law which is unfair. See note 44 *supra*.

value of that firm's future monopoly profits may have the strongest claim of unfairness. If dissolution or other equitable relief is effective in depriving the firm of monopoly profits, these shareholders would not realize monopoly returns on *their* investments, and their stock values arguably might decline. These shareholders realistically cannot be charged with the knowledge that a firm in which they invested possessed sufficient monopoly power to warrant dissolution. Yet, stockholders are in no better position under current law. They cannot know whether firms in which they currently invest possess both the market power and the record of reprehensible conduct sufficient to justify a Sherman Act section 2 challenge.<sup>50</sup> Moreover, stockholders have more to lose under the present statute, which allows both criminal sanctions and private treble damage actions, and which is probably less solicitous of the firm's own efficiencies.

More important, if past experience is a reliable guide, these equitable issues are unlikely to constitute real problems under either the Bureau's proposal or current law. The best available evidence indicates that stock prices have not declined, but have actually increased, following major dissolutions.<sup>51</sup> Perhaps the increased output and heightened internal efficiencies stimulated by dissolution more than compensated for the loss of expected monopoly profits. In any case, the historical record indicates that stockholders have actually realized gains through dissolution.<sup>52</sup>

#### B. *Litigation of conduct issues is not inevitable*

Even if litigation of conduct issues is not substantively necessary to protect efficiencies, to preserve incentives to compete, or to maintain fairness in monopolization cases, some commentators assert that such litigation is nonetheless inevitable as a practical matter. Conduct evidence will be introduced, they contend, regardless of whether the purpose of such evidence is to resolve key issues in a traditional monopolization case or to flesh out structural issues in a no-conduct case. For example, in testimony before NCRALP, Judge Frederick Lacey argued that elimination of the conduct requirement would not reduce the amount of conduct evidence discovered and introduced because existing standards of relevance would still govern proceedings.<sup>53</sup> Parties might use Rule 26 of the Federal Rules

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<sup>50</sup> Our proposal, of course, is designed to supplement rather than replace § 2. See note 4 *supra*. Nonetheless, the procedural and substantive benefits offered by the non-punitive no-conduct approach should lend the government and perhaps even the defendant to prefer it, where otherwise appropriate.

<sup>51</sup> See Baldwin, *The Feedback Effect of Business Conduct on Industry Structure*, 12 J.L. & Econ. 123 (1969); Brodley, *Industrial Deconcentration and Legal Feasibility: The Efficiencies Defense*, 9 J. Econ. Issues 365 (1975); Kovacic, *Is Breaking Up So Hard To Do? - The Feasibility of Implementing Corporate Reorganizations Pursuant to Congressionally-Ordered Deconcentration Measures* (Jan. 1978)(unpub. manuscript).

<sup>52</sup> Analogous arguments can be made in the cases of creditors and employees.

<sup>53</sup> Statement of Frederick B. Lacey, National Comm. for the Review of Antitrust Laws and Proc. (Sept. 13, 1978)[hereinafter cited as Lacey Statement].

of Civil Procedure, he pointed out, to obtain conduct evidence,<sup>54</sup> or invoke Rule 401 of the Federal Rules of Evidence, to introduce it.<sup>55</sup> According to Judge Lacey, these broad standards would permit introduction of the very evidence that a no-conduct standard seeks to exclude.<sup>56</sup>

Of course, the Bureau of Competition's proposal would not exclude conduct evidence from every case. In some cases, it may be impossible to satisfactorily resolve certain issues without limited resort to conduct evidence. But extensive discovery and litigation of conduct issues should be rare. There are methods of establishing each element of a monopolization case under our proposal within an intensive appraisal of firm behavior. Market definition, for example, may be established by examining such factors as: perceptions of the market's boundaries by the defendant, its customers, suppliers, and rivals; product characteristics and uses; patterns and methods of production, distribution, marketing, and consumption; relative prices, price elasticities, and cross-elasticities, of both supply and demand; and changes in these factors over time. Similarly, monopoly power could be demonstrated through evidence relating to: market shares, profitability, price-cost margins, price discrimination, price rigidity or price increases in the face of stable demand and declining costs, internal inefficiency, and trends in these factors over time.<sup>57</sup>

Formulation of a feasible and constructive remedy also could be accomplished without resort to conduct evidence. Our proposal encourages employment of structural remedies in the ordinary case. Dissolution is the

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<sup>54</sup> Rule 26(b)(1) of the Federal Rules of Civil Procedure provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

*Id.*

<sup>55</sup> Rule 401 of the Federal Rules of Evidence provides: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*

<sup>56</sup> Lacey Statement, *supra* note 53.

<sup>57</sup> The significance of these factors in establishing substantial, persistent monopoly power would, of course, vary with their size and duration. Moreover, as under current law, where market share persistently has been very high, it may be appropriate to find monopoly power without an inquiry into other factors. *See, e.g., United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (87% market share constitutes monopoly power; no examination of other factors). When market share has not been persistently very high, it would be appropriate to examine other factors, as current law permits. For a discussion of market share and other factors for proving monopoly power, see SULLIVAN, *supra* note 15, at 74-91. For a treatment emphasizing the importance of high price-cost margins and high profitability, see 3 AREEDA & TURNER, *supra* note 12, at ¶¶ 801-09.



preferred remedy (if feasible without a substantial loss of scale efficiencies), but licensing of trademarks or patents could be employed as alternative or supplemental relief if substantial efficiencies are not thereby sacrificed. Whether a licensing remedy should be considered would depend upon the extent of the price and cost advantages conferred by the firm's patents or trademarks. Determination of this issue generally could be accomplished through the same kinds of evidence used to establish market definition.<sup>58</sup>

If dissolution is being considered, a court must assess the resultant effects on scale efficiencies. Efficiencies of scale may be measured through a variety of means, including survivorship studies, statistical cost studies, and the so-called engineering method. Although each of these methodologies has shortcomings,<sup>59</sup> in many cases they should prove adequate.<sup>60</sup> Moreover, our proposal contains incentives for improving these methodologies. If enacted, the proposal's legislative history would place a heavy burden on the government agencies to carefully study the firm and industry before filing enforcement actions. An essential ingredient of this preparation would involve a thorough analysis of scale efficiencies within the particular

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<sup>58</sup> For example, evidence with respect to consumption patterns, and price elasticities and cross-elasticities of demand, could be used to show that a firm's principle trademark gives the firm a significant price advantage over its rivals. Of course, simply establishing that a trademark confers a significant advantage does not prove that trademark licensing would be a feasible and constructive remedy. Questions of quality control, possible disincentive effects, and likely reactions of consumers need to be addressed. But these questions ordinarily can be satisfactorily resolved without intensive appraisal of the firm's past conduct.

<sup>59</sup> For an exposition and critique of each of these methodologies, as well as a summary of the existing evidence on scale efficiencies, see *INDUSTRIAL CONCENTRATION*, *supra* note 13, ch. 2. See also *REPORT OF THE [CANADIAN] ROYAL COMMISSION ON CORPORATION CONCENTRATION*, ch. 3 (1978); F. SCHERER, A. BECKENSTEIN, E. KAUFER & R. MURPHY, *THE ECONOMICS OF MULTI-PLANT OPERATIONS* (1975)[hereinafter cited as *MULTI-PLANT OPERATIONS*].

<sup>60</sup> Perhaps the greater concern is that the engineering method, which many consider to be the most precise and reliable, has not been used extensively to measure managerial efficiencies. Although in their major international study of multi-plant efficiencies, Scherer and his colleagues examined other sources of nonproduction economies such as research and development, advertising, and procurement, they did not systematically appraise managerial efficiencies. *MULTI-PLANT OPERATIONS*, *supra* note 59, at 321-25. In view of this record, it would be appropriate for courts to give greater weight to evidence on production efficiencies and to non-production efficiencies other than managerial efficiencies than to evidence on managerial efficiencies. Nevertheless, in our judgment, the problems of measuring managerial efficiencies are not insurmountable. To measure production economies, the engineering approach relies principally on interviews with experts in the design and operation of production complexes. Management and business consultants should be able to provide the same kinds of evidence with respect to managerial efficiencies. Moreover, many kinds of managerial economies are not true efficiencies of scale; they will be transferred not lost, through dissolution. For example, certain organizational innovations achieved by the monopolist should be disseminated rather than destroyed through division of the firm. As Professor Williamson has pointed out to us, to the extent there are managerial team economies, in most cases this requires only that management teams be assembled with care. There is sufficient experience and talent in most large firms to assemble several effective management teams.

firm and industry. Because the Bureau's proposal emphasizes the formulation of feasible and beneficial remedies to an extent unprecedented in antitrust litigation, both public and private litigants probably would devote considerable resources to this aspect of the proceeding. Consequently, the techniques available for measuring scale efficiencies should show steady improvement.

There are additional general incentives built into our proposal that would minimize the recourse to conduct evidence in specific cases. The government should not bring a case under our proposal unless it is reasonably certain of prevailing without significant resort to conduct evidence. Moreover, because defendants may have less to lose under our proposal, they should have less incentive to protract and confuse the litigation of essential issues. Finally, the costs and delay that accompany the use of conduct evidence would provide still further incentive for the parties and courts to avoid these issues, particularly in light of the difficulties of reliably appraising the intent and effects of firm conduct.

There are no simple rules, of course, which will enable every judge in every case to decide how much conduct evidence to consider. Nevertheless, this proposal would give judges, who traditionally are afforded considerable discretion in limiting discovery<sup>61</sup> and excluding evidence,<sup>62</sup> a powerful new tool to refine the focus and reduce the protraction of government monopolization cases. For most judges, this addition should be enough to achieve significant results.<sup>63</sup>

Lastly, an analogy to litigation experience with the *per se* rule against price-fixing<sup>64</sup> provides an intriguing indication that conduct evidence would not overwhelm proceedings under the Bureau of Competition's proposal. A major purpose of that rule is to make price-fixing litigation more manageable. Arguably, the *per se* rule would never achieve this objective, because characterization of practices as price-fixing, rather than merely as activities affecting price, must precede its application. Consequently, it could have been argued, a court would have to consider all of the evidence pertaining to the practice—including its history, business context, pur-

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<sup>61</sup> See, e.g., *LSL Corp. v. United States*, 503 F.2d 558, 559 (9th Cir. 1974). See also 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2006 at 34-36 (1970).

<sup>62</sup> Rule 403 of the Federal Rules of Evidence states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." See also *Estate of LeBaron v. Rohm & Haas Co.*, 506 F.2d 1261 (9th Cir. 1974); *Bowman v. General Motors Corp.*, 427 F. Supp. 234, 239-40 (E.D. Pa. 1977); *Vockie v. General Motors Corp.*, 66 F.R.D. 57, 60 (E.D. Pa.), *aff'd mem.*, 523 F.2d 1052 (3d Cir. 1975).

<sup>63</sup> Our proposal is not intended, however, as a substitute for the various procedural reforms recommended by the Commission. On the contrary, several of these suggestions (e.g., setting of strict trial dates and discovery periods, narrowing the scope of discovery, and selecting particularly qualified judges or panels to try unusually complex cases) - are complementary with this substantive proposal. See Kingdon, *The "Big Antitrust Case": Thoughts On Procedural Reform*, 37 WASH. & LEE L. REV. 25 (1980).

<sup>64</sup> See generally SULLIVAN, *supra* note 15, at 165-86, 192-97.

pose, and likely effect—to make a preliminary determination as to whether or not the activity constituted price-fixing. Significantly, that result has not occurred in most cases. Rather, the application of the *per se* rule has significantly expedited price-fixing litigation. Eliminating the conduct requirement in government monopolization cases should produce a similar result, particularly as actual experience with no-conduct litigation accumulates.<sup>65</sup>

## II. MORE EFFECTIVE REMEDIES

Not only would our proposal streamline the substantive phase of monopolization by eliminating the conduct requirement, it also would improve and expedite the litigation of remedial issues through several procedural changes. First, the legislative history of our proposal should indicate that the government enforcement agencies must conduct a thorough study of the industry and firm in question before filing a complaint. Such preparation should increase the probability of careful and expeditious litigation of remedy and scale efficiency issues. Second, litigation of scale efficiency issues would occur in the relief stage of a proceeding. This procedure should be beneficial because by this stage, both the firm and the investment community would expect that some form of structural relief is imminent. Delaying the proceedings would only prolong the period of uncertainty and any consequent disruption of the firm's relationships with its bankers and investors.<sup>66</sup> Finally, precluding criminal and private treble damage enforcement of a no-conduct statute provides an additional source of improvement, for with less at stake than under present law, firms would have less cause to protract and impede the proceeding.

Beyond these procedural benefits, our proposal should improve the effectiveness of government monopolization cases through its clear preference for structural relief where feasible, constructive remedies exist. In the past, courts rarely have awarded significant structural relief in monopolization cases. The law's conduct requirement has tended to focus judicial attention on conduct remedies and away from the generally more effective structural forms of relief. Our proposal would change this emphasis by expressly encouraging courts to use structural remedies. This approach is preferable and appropriate for several reasons.

First, as we have argued above, monopoly power may persist because of factors other than bad conduct or superior efficiency. Thus, where a monopolist's undesirable conduct is only tangentially related to his power, an injunction directed at conduct is unlikely to be effective.

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<sup>65</sup> For an interesting discussion of this point, see Sims, *No Fault Monopoly: A Pig in a Poke?*, *Legal Times of Washington*, Nov. 20, 1978, at 8.

<sup>66</sup> Some disruption of normal business operations may be expected to result from the uncertainties caused by an antitrust challenge, whether under traditional or no-conduct monopolization theories. The no-conduct approach, however, seeks to reduce this uncertainty by providing more expeditious proceedings.

Second, even when the monopolist's power eventually would erode (in the absence of certain forms of misconduct), there are problems with injunctive relief. The challenged conduct may have both pro-competitive and anti-competitive aspects, making it difficult or impossible to frame an injunction that adequately discourages the undesirable aspects without unduly inhibiting the pro-competitive effects. In particular, judges may have difficulty writing orders which deal appropriately with subtle or complex forms of predatory conduct perhaps involving elements of pricing, capital expansion, product differentiation, and/or research and development expenditures. Yet, if the order is incomplete, the monopolist may preserve his power simply by turning to other, similarly effective forms of conduct that are beyond the province of the injunction.

Third, and perhaps most important, even when the injunction is relatively effective in preventing the monopolist from employing anticompetitive conduct to protect its position, an unacceptably long period of time may elapse before the monopoly power erodes. In the *United Shoe Machinery* case,<sup>67</sup> for example, Judge Wyzanski refused to order dissolution of the defendant's only shoe machinery manufacturing plant on the ground that dissolution was "impractical."<sup>68</sup> While he issued an injunction designed, *inter alia*, to remove the most anti-competitive features of United Shoe's long-term machinery leases, Judge Wyzanski would not order structural relief unless the injunction proved ineffective.<sup>69</sup> Ten years later, although United Shoe's market share had declined twenty-three percentage points, it still remained at sixty-two percent.<sup>70</sup> The Supreme Court found this slow pace of erosion unacceptable and ordered Judge Wyzanski to consider structural relief.<sup>71</sup>

Similarly, in 1936, the Supreme Court affirmed an order under section 3 of the Clayton Act<sup>72</sup> enjoining International Business Machines Corp. from requiring the use of IBM tabulating cards as a condition for leasing IBM punching machines, sorters, and tabulators.<sup>73</sup> The company had an eighty-one percent share of the market for tabulating cards, and derived substantial profits from that operation. These and other facts convinced

<sup>67</sup> *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

<sup>68</sup> *Id.* at 348.

<sup>69</sup> *Id.* at 346-51.

<sup>70</sup> *United States v. United Shoe Mach. Corp.*, 266 F. Supp. 328, 331 (D. Mass. 1967), *rev'd in part*, 391 U.S. 244 (1968).

<sup>71</sup> The Supreme Court stated:

If the decree has not . . . achieved its "principal objects," namely, "to extirpate practices that have caused or may hereafter cause monopolization, and to restore workable competition in the market" - the time has come to prescribe other, and if necessary more definitive, means to achieve the result. A decade is enough.

*United States v. United Shoe Mach. Co.*, 391 U.S. 244, 251-52 (1968), *rev'g in part*, 266 F. Supp. 328 (D. Mass. 1967).

<sup>72</sup> 25 U.S.C. § 14 (1976).

<sup>73</sup> *International Bus. Mach. Corp. v. United States*, 298 U.S. 131 (1936).

the Court that the tying clause in the leases tended "to create monopoly, and has in fact been a important and effective step in the creation of monopoly."<sup>74</sup> Twenty years later, however, the injunctive relief had not proved effective. In 1956, IBM signed a consent decree providing that, if certain injunctive provisions did not cause its tabulating card market share to fall below fifty percent in seven years, divestiture would be ordered.<sup>75</sup> Again, the conduct relief proved ineffective and, nearly three decades after the original decree, the court ordered divestiture of this subsidiary.<sup>76</sup>

A recent statistical study suggests that these cases typify a more general pattern.<sup>77</sup> Professor William Shepherd charted the market shares of 245 large firms over the period 1960-1969. Although he discovered a significant tendency for the market shares of these firms to decline, Professor Shepherd found that the rate of decay was very slow. On the average, it would take twenty to thirty years to abate a monopoly position. Moreover, Professor Shepherd observed that "there are major exceptions, in which dominant firms maintain high market shares and profit rates for many decades."<sup>78</sup> This evidence indicates that conduct relief may work, but at an intolerably slow pace in many cases, and perhaps not at all in some cases. In contrast, structural relief creates more competitive conditions in a market within a relatively short period of time.<sup>79</sup>

Finally, we note that the National Commission concluded, as we are asserting here, that courts should consider structural remedies as the primary mode of relief in monopolization cases. The National Commission effectively summarized its reasons as follows:

In essence, the effectiveness of structural relief in ending the illegal conduct, preventing its recurrence, curing the ill effects of the conduct, and depriving defendants of the benefits of their illegal conduct is more certain and brings the matter to a conclusion more

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<sup>74</sup> *Id.* at 136.

<sup>75</sup> *United States v. International Bus. Mach. Corp.*, [1956 Transfer Binder] TRADE REG. REP. (CCH) ¶ 68,245 (S.D.N.Y. 1956).

<sup>76</sup> *United States v. International Bus. Mach. Corp.*, [1963 Transfer Binder] TRADE REG. REP. (CCH) ¶ 70,628 (S.D.N.Y. 1963). For a discussion of a case in which an injunction against tying did have a rapid, marked effect on a firm's share of the market for the tied product, see the discussion of the 1954 Department of Justice investigation of Eastman Kodak Co. resulting in a consent decree breaking the tie between sales of Kodak film and film processing, in D. WALDMAN, *ANTITRUST ACTION AND MARKET STRUCTURE*, 143-50 (1978).

<sup>77</sup> W. SHEPHERD, *THE TREATMENT OF MARKET POWER* (1975).

<sup>78</sup> *Id.* at 125.

<sup>79</sup> The amount of actual competition created depends, of course, on the extent to which structural relief would cause a substantial loss of efficiencies of scale. Moreover, even if structural relief does tend to be more effective than injunctive relief, it may be more costly to implement, or impose greater costs on stockholders, creditors, and other third parties than injunctive relief. The best available studies on these issues, however, conclude that implementation costs can be adequately contained, and that shareholders, creditors, and others have tended to benefit rather than suffer through divestiture and corporation organizations. See note 51 *supra*.

quickly. Structural relief requires an immediate adjustment, but once it has been accomplished, the defendant firm regains control of its operations. With respect to third parties, structural relief is often preferable because its effects are clearer and more certain. For these reasons, the Commission concludes that structural relief should be the preferred remedy whenever a violation of Sherman Act Section 2 or Clayton Act Section 7 has been found.<sup>80</sup>

#### CONCLUSION

As NCRALP concluded, there is indeed a need to "rationalize monopolization litigation" by eliminating the significant effort and resources spent on the unnecessary appraisal of past firm behavior, and by making increased use of structural remedies to redress persistent monopoly power.<sup>81</sup> The Bureau of Competition's no-conduct monopolization proposal would promote both these objectives while advancing the major objectives of competition policy: dissipating monopoly power, preserving efficiencies, protecting incentives to compete, and insuring the fairness of the antitrust enforcement system.

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<sup>80</sup> See NCRALP REPORT, *supra* note 6, at 119, 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supp.) at 34.

<sup>81</sup> See *id.* at 157-58, 897 ANTITRUST & TRADE REG. REP. (BNA)(Special Supp.) at 47-48; note 8 *supra*.

