

COMMENTARY

ECONOMIC CONCENTRATION AND THE ANTITRUST LAWS*

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A prime American ideal is, with important exceptions, that competition, not government regulation, should be the determinant—the regulator of market forces. To most of us it appears obvious that the ideal is becoming increasingly weakened by the forces of reality. Private business monopoly, tariffs, government subsidies, and, above all, regulation by government commissions have increasingly acted as substitutes for competition. Since Americans will not permit private monopoly to act as the market determinant, unchecked or unsupervised by government, it seems clear that increased economic concentration will result in increasing government regulation. This trend poses a major dilemma: in many industries competition has not worked as the determinant of market forces, and government regulation is not working either.

In the balance of these remarks, I propose to review current definitions of monopolization, including some of the newer definitions advanced in the law books and by the Antitrust Division, but not yet adopted by the courts. Then I shall outline the leading proposal for legislative reform of the law of monopolization and venture some personal doubts and questions on the wisdom of the legislation. Next, I shall consider some of the reasons why the Sherman Act has not succeeded in dissolving what has been perceived by many to be excessive or undesirable economic concentration. I shall conclude with some suggestions for a somewhat more workable deconcentration policy for America.

* The text of this Commentary was first presented as an address to the Metropolitan St. Louis Bar Association, Feb. 14, 1975.

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I

It is hornbook law that section 2 of the Sherman Act defines three separate offenses: single firm monopolization, single firm attempt to monopolize, and multi-firm combination or conspiracy to monopolize.¹ There is an intriguing theory that a single firm that results from an amalgamation of competing firms having the requisite market power is a combination to monopolize, as long as the combination continues to exist. The failure of this theory to persuade courts to order dissolution does not warrant extended discussion.² We should note also that section 7 of the Clayton Act prohibits certain kinds of corporate acquisitions if the effect may be to tend toward a monopoly. In *United States v. E.I. du Pont de Nemours & Co.*,³ the Supreme Court held that an acquisition by du Pont of General Motors' capital stock, which probably had the effect of tending toward monopoly, remained unlawful even though many years had passed since the acquisition was made. In considering the concentration problem, therefore, we can not ignore the impact of section 7 on corporate acquisitions, even those made sixty years ago when the Clayton Act was enacted. This is particularly important because the usual remedy for section 7 violations is divestiture of the legally acquired stock or assets.

The opinion of Judge Wyzanski in *United States v. United Shoe Machinery Corp.*⁴ contains the best judicial review of the law on monopoly, even though the opinion is now over twenty years old. Recounting Judge Learned Hand's opinion in *United States v. Aluminum Co. of America (Alcoa)*,⁵ Judge Wyzanski stated that

an enterprise had "monopolized" if, regardless of its intent, it had achieved [control of a market by acts that] were not economically inevitable, but were rather the result of the firm's free choice of business policies.⁶

This definition, which was expressly approved by the Supreme Court in *American Tobacco Co. v. United States*,⁷ requires first a determina-

1. *American Tobacco Co. v. United States*, 328 U.S. 781, 788-89 (1946).

2. See, e.g., *United States v. American Can Co.*, 230 F. 859 (D. Md.), *petition for dissolution denied*, 234 F. 1019 (D. Md. 1916). For discussion, see text accompanying notes 28-30 *infra*.

3. 353 U.S. 586, 596-607 (1957).

4. 110 F. Supp. 295, 341-45 (D. Mass.), *aff'd per curiam*, 347 U.S. 521 (1953).

5. 148 F.2d 416, 427 (2d Cir. 1945).

6. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 341 (D. Mass. 1953).

7. 328 U.S. 781, 814 (1946).

tion of the appropriate market, then a calculation of the share the putative monopolist controls in that market, and finally an analysis of how the firm obtained that share.

Definition of the appropriate market is not easy in that it does not lend itself to any brief, pithy, verbal formula. The concept is a flexible one and may require economic studies of cross-elasticity of demand, thus involving an elaborate investigation of customer behavior in the alleged market.⁸

On the issue of market control, Judge Hand found that Alcoa, doing ninety percent of the business in an appropriate market, had control and then said, "it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not."⁹ Notice that he did not use the round number sixty-five percent.

The third ingredient of the offense of monopolization is more subtle and elusive. Some have said the third ingredient requires proof of an "element of 'deliberateness.'"¹⁰ According to Judge Wyzanski, Justice Douglas' position in *United States v. Griffith*¹¹ was that "it is a violation of § 2 for one having effective control of the market to use, or plan to use, any exclusionary practice. . . ."¹² Attempts to define the phrase "exclusionary practice" suggest Justice Stewart's comment about obscenity: he couldn't define it but he knows it when he sees it. Judge Wyzanski suggested that Justice Douglas may have meant to go further and adopt the Hand approach, which was that one who acquires an overwhelming share of the market "monopolizes whenever he does business,"¹³ unless the putative monopolist can show that he owes his position solely to his superior skill, better products, natural advantages, patents on his own inventions, and the like.¹⁴

Although there are doubtless some monopolies that are not the result of monopolizing, that is to say, not the result of a deliberate effort to gain or maintain market control, my view is that the superior skill de-

8. See *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).

9. *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

10. See REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANITRUST LAWS 55 (1955).

11. 334 U.S. 100, 106-07 (1948).

12. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 342 (D. Mass. 1953).

13. *Id.*, citing *United States v. Aluminum Co. of America*, 148 F.2d 416, 428 (2d Cir. 1945).

14. 110 F. Supp. at 342.

fense will rarely be a winner for anything other than the pocketbooks of the antitrust defense lawyers who endeavor to prove it. I doubt also that a defense based on the assertion that the Government has erroneously defined the market will be successful very often, though that defense did save du Pont in the *Cellophane Case*.¹⁵ IBM hopes the defense will succeed in the current trial of the Government's allegations that IBM monopolizes the business of general purpose digital computers.¹⁶ In my opinion, any single manufacturer supplying two thirds or more of the national output of any identifiable product is probably (though not certainly) violating section 2.

If I am correct in this view, Western Electric has no defense on the merits in the recently filed section 2 case against it and AT&T.¹⁷ It would do well to rely on the 1956 consent decree as a defense, and, if it loses on that, it had better talk about infeasibility and loss of efficiency if the Government's prayer for relief in the case were to be adopted. In fact, that seems to be the strategy of AT&T, if I correctly interpret its current public relations campaign. In his November 26, 1974, letter to shareholders, AT&T's board chairman, John D. Debutts, said:

[W]e have made no secret of our conviction that the public interest is not served by the introduction of competition in a business that owes its progress . . . to the principle of undivided responsibility for service to the public.

After making that astounding admission, how the company can hope to defend on the ground that Western Electric has not monopolized eludes me.

To summarize: section 2 of the Sherman Act appears to be an adequate tool for exposing single-firm monopolists to court-ordered relief. (In a moment we shall consider the efficacy of the antitrust laws, once liability is established, in restoring competition to monopolized markets.) Section 7 of the Clayton Act is probably adequate to deal with any corporation that possesses significant market power, though less than the power required to exclude *all* competitors. The provisos must

15. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).

16. *United States v. International Bus. Mach. Corp.*, Civil No. 69-200 (S.D.N.Y., filed Jan. 16, 1969); see BNA ANTITRUST & TRADE REG. REP. No. 677, at A-13 (Aug. 20, 1974).

17. *United States v. American Tel. & Tel. Co.*, Civil No. 74-1698 (D.D.C., filed Nov. 20, 1974); see BNA ANTITRUST & TRADE REG. REP. No. 690, at AA-1, D-1 (Nov. 26, 1974).

be added that the significant market power has to have been achieved by acquisition of another corporation's capital stock (if the acquisition occurred between 1914 and 1950) or as a result either of corporate stock or asset acquisitions subsequent to 1950 when the Clayton Act was amended to prohibit certain asset acquisitions.

II

Let us now consider why the antitrust laws are widely regarded as insufficient to deal with the problem of concentration in American industry. Preliminarily, I should note that there are many reasonable people in America who do not believe that new legislation is needed to deal with deconcentration. These Americans appear to fall within one of three groups. One group says that "the only purpose of antitrust law is to promote efficiency"¹⁸ and the dominant producers in many concentrated industries are more efficient. Thus, this group does not think economic concentration is a serious problem. A second group believes that concentration is a problem that can be dealt with under existing, judicially approved theories. The third thinks it is a serious problem that should be dealt with by pervasive government intervention, including government regulation of wages and prices.¹⁹ Readers who share any of these points of view need not read further because, to them, nothing I shall say hereafter could possibly be sensible.

Although, to repeat, section 2 appears adequate to deal with the single-firm monopolist, most concentrated industries are dominated by two, three, or four firms. Economists label such concentrations "oligopolies," sometimes more felicitously labeled "shared monopolies." Writing in 1969, Professor Donald Turner stated that he had changed his mind and no longer believed new legislation was required to dissipate the power of shared monopolists. He said:

Where oligopolists sharing monopoly power have engaged in restrictive conduct lacking any substantial justification, they may appropriately be said to have unlawfully attempted to monopolize. Where it appears that their decisions to carry on particular exclusionary practices are interde-

18. See, e.g., Posner, *Exclusionary Practices and the Antitrust Laws*, 41 U. CHI. L. REV. 506, 507 (1974); *Policy Director Questions FTC Priorities; Urges Reform of Agency Policies, Programs*, BNA ANTITRUST & TRADE REG. REP. No. 692, at A-10, A-11 (Dec. 10, 1974). The Policy Director's (Mr. Liebeler) views are contained in FTC OFFICE OF POLICY PLANNING AND EVALUATION 1976 BUDGET OVERVIEW, reprinted in part in BNA ANTITRUST & TRADE REG. REP. No. 692, at E-1 to E-13 (Dec. 10, 1974).

19. See, e.g., J. GALBRAITH, *ECONOMICS AND THE PUBLIC PURPOSE* (1973).

pendent, where one would not have carried on the practice unless the others had gone along, they may also be charged with a conspiracy or combination to monopolize. Finally, where each of the companies effectively sharing monopoly power has engaged in possibly justifiable conduct that nevertheless has unnecessary exclusionary effects, it seems logical and appropriate to me to charge each with having individually "monopolized" in violation of section 2. Each has obtained and maintained monopoly power—real, though shared—to which factors other than skill, foresight, industry, and the like have contributed.²⁰

The Antitrust Division's pending cases against Goodyear and Firestone apparently represent an effort to test the Turner doctrine.²¹ These cases allege that each company has attempted to monopolize the replacement tire market. Each is charged with having used, independently of the other, similar methods to suppress competition. Specifically, Goodyear and Firestone are said to have lowered their prices to drive out competition and to have arranged tire, battery, and accessories sales plans with oil companies for the same purpose. Moreover, the complaints charge that each of the defendants has purchased competing tire manufacturers as well as wholesalers and retailers of replacement tires. The prayer asks for the divestitures necessary to dissipate the effects of the violations alleged. Until these cases are decided by the Supreme Court, one cannot be sure that new legislation is necessary to deal with the problem of oligopoly, if, that is, one believes that oligopoly is a problem.

Senator Hart and other senators and representatives apparently believe that amendment of the Sherman Act is required if an effective anti-monopoly policy is to be implemented. The so-called Hart bill, or Industrial Reorganization Act, would establish an industrial commission and an industrial court to handle the oligopoly problem.²² The com-

20. Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1230-31 (1969). For a critical analysis, see Cooper, *Attempts and Monopolization*, 72 MICH. L. REV. 373, 409-18 (1974).

21. United States v. Firestone Tire & Rubber Co., Civil No. C-73-836 (N.D. Ohio, filed Aug. 9, 1973); United States v. Goodyear Tire & Rubber Co., Civil No. C-73-835 (N.D. Ohio, filed Aug. 9, 1973). For explanation of the complaints in these cases, see *Justice Charges Goodyear and Firestone with Attempted Monopolization and Illegal Acquisitions*, BNA ANTITRUST & TRADE REG. REP. No. 626, at A-1, D-1 (Aug. 14, 1973); 5 CCH TRADE REG. REP. ¶ 45,073, at 53,539 (1975).

22. S. 1167, 93d Cong., 1st Sess. (1973) [hereinafter cited as Bill], reprinted in H. GOLDSCHMIDT, H. MANN, & J. WESTON, *INDUSTRIAL CONCENTRATION: THE NEW LEARNING* 444 (1974) [hereinafter cited as GOLDSCHMIDT], reprinted in part in 5 CCH TRADE REG. REP. ¶ 50,166 (1973).

mission to be established would be charged with devising means of eliminating industrial concentration. It would give top priority to reorganizing seven industries: chemicals and drugs, electric computing and communication equipment, electrical machinery and equipment, energy, steel, autos, and nonferrous metals.²³ The bill provides that there shall be a rebuttable presumption of monopoly power if any one of three conditions is present in an industry: First, if the average rate of return of any corporation is in excess of fifteen percent of net worth for five consecutive years; secondly, if there has been no substantial price competition among two or more corporations in any line of commerce for three consecutive years; thirdly, if four or fewer corporations in any line of commerce account for fifty percent or more of sales in any year.²⁴ If one or more of these conditions are found to obtain, reorganization is to be achieved through the Industrial Commission's prosecution of members of concentrated industries before the new Industrial Court.

Moreover, there is another part of the Hart bill that is very significant. Section 2 of the Sherman Act has been rather consistently interpreted to provide that two or more corporations are guilty of conspiring to monopolize commerce if through consensual action they achieve and maintain the power to exclude competitors or to fix prices. Consensual action means some sort of agreement or understanding. The other part of the Hart bill proposes, in effect, to add the offense of possessing monopoly power to the offenses already created by section 2.²⁵ No evidence that two or more corporations have agreed on anything is necessary to prove the offense. Thus, the bill declares it to be unlawful for "two or more corporations, whether by agreement or not, to possess monopoly power."²⁶ The word "monopolize" was not defined in the original Sherman Act, and "monopoly power" is not directly defined in the Hart bill. As I have already noted, however, those industrial characteristics sought to be prevented *are* defined in the bill in the terms creating a rebuttable presumption that the offense has occurred.

For those who believe that the degree of concentration in some U.S. industries warrants reform, this portion of the Hart bill may offer a reasonably acceptable solution. The mood in Congress for vigorous anti-monopoly action seems strong. A proposal to enact this portion of a

23. Bill § 203.

24. *Id.* § 101(b).

25. *Id.* § 101(a); see GOLDSCHMIDT 340ff.

26. Bill § 101(a).

revised Hart bill, as an amendment to section 2, might capture that mood. By making it clear that proof of an agreement is not necessary to proof of the offense, the amendments, in effect, would redefine conspiracy or combination to monopolize to eliminate the requirement that there be proof of consensual action. Thus, in a sense, the amendment would substitute the economist's definition of combination to monopolize for the lawyer's.

The economist looks at economic performance. For example, if new entrants are foreclosed from entering the tire manufacturing business, it makes no difference to the economist that each of three corporations produces twenty-five or thirty percent of all replacement tires and does so without agreeing on anything with the other two. To the lawyer, however, it makes all the difference in the world because, so far, section 2 of the Sherman Act has not been interpreted to prohibit control by a single firm of less than sixty-five percent of a market, absent either a specific purpose to gain control of the market or consensual arrangements with competitors to eliminate competition.

If only this portion of the Hart bill were enacted, however, it would not hit at the central problem of relief. The courts would still be left with the problem of providing a remedy to destroy or at least to limit the power of the adjudicated oligopoly. This is where the remainder of the Hart bill might work a revolution by substituting for the Anti-trust Division and the federal district courts a commission and a specialized court with a mandate to reorganize concentrated industries.

Though I find the problem agonizing and the answers far from clear, I think I would vote against this part of the Hart bill. In the first place, the regulatory commissions, on the whole, simply have not worked as intended.²⁷ For one thing, they take too long to do their work. For another, traditionally they have not insulated themselves from the industries they regulate; accordingly, they are subject to intellectual corruption. So are some federal judges, to be sure, but my observation is that most federal judges are able to insulate themselves from the unseemly pressures placed upon the commissioners. Certainly, most federal judges manage to project a greater air of detachment.

A second category of objections to the Hart bill arises from what might be called its statistical Procrustean bed. If I may mix three

27. See, e.g., *Regulatory Reform Commission Bills Supported by Broad Public, Private Spectrum*, BNA ANTITRUST & TRADE REG. REP. No. 690, at A-17 (Nov. 26, 1974).

metaphors, by placing statistical triggers on the deconcentration gun, the bill gives a good reason to fear that concentrated corporations would pull their competitive punches in order to avoid the firing squad. Of course, the statistics only give rise to rebuttable presumptions of monopoly power—but the presumptions are there nonetheless.

Lastly, there is a more subtle objection. The very generality of the Sherman Act gives wide room for the exercise of that indefinable quality we call judgment; to some degree, the Hart bill would remove room for the exercise of judgment and would substitute statistics. This approach arises out of desperation about the seeming inability of either the law-enforcing establishment or the judiciary to come to grips with the monopoly problem. Although our judiciary generally has not failed to recognize a monopolist when it has seen one, judges and the Attorney General have shrunk from their task of proposing, adopting, and imposing effective relief upon adjudicated monopolists.

III

Writing in 1916 in the first *United States v. American Can Co.* antitrust case, Judge Rose in Baltimore found that the company was a combination in restraint of trade in the production and sale of tin cans.²⁸ In one sentence, the judge foreshadowed at least one important reason why section 2 has not worked as a weapon against industrial concentration. He said: "I am frankly reluctant to destroy as finely adjusted an industrial machine. . . ."²⁹ He declined to order that the company be dissolved, but in a subsequent opinion retained jurisdiction with leave to the government to seek dissolution or other relief if future developments warranted.³⁰

Judge Rose's opinions in *American Can* have been neglected by antitrust legal scholars; they are instructive, however. He opened his first opinion by noting that the defendant had called 516 witnesses, the government, 346, that over 1,500 exhibits were filed, and that the record covered more than 8,700 printed pages. Judge Rose then said: "Nevertheless, an ordinary collision case on the admiralty side of the court . . . would raise more issues of fact."³¹ Little has changed in

28. 230 F. 859 (D. Md. 1916).

29. *Id.* at 903.

30. *United States v. American Can Co.*, 234 F. 1019, 1022 (D. Md. 1916).

31. 230 F. at 860-61.

the past sixty years. Antitrust prosecutors continue to confuse monopoly power with its exercise and fear that district judges can only be persuaded to grant effective relief if they are angered at the abuse of the power. Therefore, the prosecutors throw into the record every document that may persuade the trial court of the defendant's wickedness. And counsel for the defense follow the same tactic in reverse.

Ever since 1892, when the president of National Cash Register wrote in a company publication that "[w]e do not buy out [opposition]; we knock out,"³² government trustbusters have hoped to find the equivalent of the Comstock Lode in defendants' files. When will they learn that the true Comstock Lode is to be found in Learned Hand's opinion in *Alcoa* and in subsequent opinions in monopolization cases in the Supreme Court? I cannot resist pointing out that the famous National Cash Register memorandum resulted in a prison sentence for its author. On appeal the sentence was reversed by a court perhaps grateful for the author's intervening charity in helping Dayton, Ohio, recover from the terrible flood of 1913. Moreover, the Government's subsequent civil case seeking dissolution was settled by consent decree containing only injunctive relief.³³

We are now witnessing massive efforts by the Antitrust Division and AT&T to discover documents in the files of the other. The Government's discovery seems designed, in part at least, to prove the obvious. One of the Government's requests is for all documents since January 2, 1930, regarding suggestions or directions to the Bell companies to purchase equipment from Western Electric. The Bell System has over eighty percent of the telephone market; thus, there can be hardly a doubt that the Government makes out a prima facie case of monopolization of equipment when it establishes that Western supplies the Bell System members with all their telephone equipment needs. Indeed, as I mentioned earlier, AT&T has virtually admitted, not to say boasted, that Western Electric has a monopoly of the manufacture of telephone equipment. Yet Government lawyers are engaged in a massive effort to prove the obvious, instead of relying on a relatively few interrogatories to AT&T, the answers to which would accomplish the same objective.

32. *Patterson v. United States*, 222 F. 599, 633 (6th Cir. 1915), quoting National Cash Register Co., internal publication (May 1, 1892).

33. See CCH TRADE REG. REP., Ct. Dec. Supp. III, ¶ 3130.

Since Government lawyers are not stupid, I presume that their purpose is to obtain documents from the defendants that would imply or express the Bell System's evil intent, particularly following the entry of the consent decree almost twenty years ago. As I read the law of monopoly, evil intent is irrelevant.

Here again the old *American Can* case is instructive. Judge Rose took only forty pages to review the mass of evidence in that case. He began the section of his opinion containing his conclusions with the following statement:

One who sells only one-half of the cans that are sold does not, of course, possess a monopoly in the same sense as he would if he sold all of them or nearly all of them. Yet he may have more power over the industry than it is well for any one concern to possess. . . .

. . . [O]ne of the designs of the framers of the Anti-Trust Act was to prevent the concentration in a few hands of control over great industries. They preferred a social and industrial state in which there should be many independent producers. Size and power are themselves facts some of whose consequences do not depend upon the way in which they were created or in which they are used.³⁴

Yet, for reasons already noted,³⁵ the judge balked at ordering dissolution.³⁶

It is not just judges who have deep-seated doubts that the answer lies in horizontal dissolution of adjudicated monopolists. No court has ordered wholesale dissolution—breakups—of adjudicated monopolists in major industries since 1916 when Judge Hand ordered dissolution

34. 230 F. at 901 (D. Md. 1916). Compare the statement of Judge Hand in the *Alcoa* case, *United States v. Aluminum Co. of America*, 148 F.2d 416, 427 (2d Cir. 1945):

It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few.

35. See text accompanying note 29 *supra*.

36. In the same month, June 1916, that Judge Rose finally refused to dissolve the *Can Company*, Judge Hand ordered that *Corn Products Refining Company* be dissolved pursuant to a plan to "be filed with the Federal Trade Commission as master in chancery, under section seven of the Federal Trade Commission Act." *United States v. Corn Prod. Ref. Co.*, 234 F. 964, 1018 (S.D.N.Y. 1916). The FTC never got the case because *Corn Products*, after dismissing its appeal to the Supreme Court, *Corn Prod. Ref. Co. v. United States*, 249 U.S. 621 (1919), consented to a decree requiring it to sell two of its glucose mills. See 2 S. WHITNEY, *ANTITRUST POLICIES* 262-63 (1958). For a description of subsequent antitrust developments in the can industry and an evaluation of their economic impact and results, see *id.* at 201-26.

in *United States v. Corn Products Refining Co.*³⁷ There have been repeated divestitures in section 2 cases, with some even by consent; however, there has been no divestiture by a monopolist of a major industry comparable to the split-up of the Standard Oil and American Tobacco trusts. Perhaps it is poignant to some trustbusters today to note that we are still grappling with the antitrust problems of the petroleum industry. Nevertheless, it cannot be gainsaid that today we have about twenty major oil companies rather than one Standard Oil trust.

Until recently at least, with the possible exception of the days of the great depression, Americans generally have admired business, and big business in particular. It has given us, or at least two-thirds of us, those things we seem to want: cars, television sets, touch-tone dialing, automatic washers and driers, frostfree refrigerators, and leisure time. Big business is mysterious to most of us; each of us works in such a limited part of the total industrial process that we marvel at how the process meshes to produce the ultimate consumer goods. These facts and others give rise to the fear that dissolution might kill the goose that has laid so many golden eggs. The writing of most federal district judges reflects this fear. Who am I, they say, to tell a successful businessman how he must reorganize the business he heads. Judge Wyzanski said it most clearly in his *United Shoe Machinery* opinion in refusing to dissolve that company:

[A] trial judge is only one man, and should move with caution and humility.

. . . In the antitrust field the courts have been accorded . . . an authority they have in no other branch of enacted law. . . . They would not have been . . . allowed to keep such authority . . . if courts were in the habit of proceeding with the surgical ruthlessness that might commend itself . . . to those aiming at immediate realization of the social, political, and economic advantages of dispersal of power.³⁸

37. 234 F. 964 (S.D.N.Y. 1916), *appeal dismissed*, 249 U.S. 621 (1919); see note 36 *supra*. Extensive vertical divestitures have been ordered. See, e.g., *United States v. E.I. du Pont de Nemours*, 353 U.S. 586 (1957) (separation of manufacturer of automotive supplies [du Pont] from its principal customer [General Motors]); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) (separation of distributor from exhibitor of motion pictures). Compare *Standard Oil Co. v. United States*, 221 U.S. 1 (1919), with *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), and *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass.), *aff'd per curiam*, 347 U.S. 52 (1953). See generally Note, *Trust Dissolution: "Atomizing" Business Units of Monopolistic Size*, 40 COLUM. L. REV. 615 (1940).

38. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 348 (D. Mass. 1953).

Let me cite two examples from my personal experience in the Justice Department. Former Attorney General Brownell and I publicly disagreed about the wisdom of the 1956 consent decree ending the suit to divest Western Electric from AT&T.³⁹ Mr. Brownell did not believe that the Sherman Act's mandate for dissolution of monopolies made sense as applied to AT&T and Western. For reasons never entirely clear to me, he thought those laws did make sense as applied to United Fruit's alleged monopolization of the banana business. United Fruit ended up consenting to some divestiture,⁴⁰ and I am told the result was lower banana prices. The national attitude toward deconcentration is mirrored in no small part by the two incidents I have just recounted. We are not of one mind and within each of us divestiture and dissolution of adjudicated monopolists sometimes does not appear to be worth the risks.

IV

Having said all this, it does not follow that we should junk dissolution as a remedy for concentration. It means simply that that remedy is not going to be widely used to restructure American industry or even that portion of it perceived by the majority of people as being too concentrated for comfort. What, then, are the remedies? First of all, section 7 should be vigorously applied to prevent or undo all acquisitions likely to lessen competition or to lead toward monopoly. Despite the Supreme Court opinion last year in *United States v. General Dynamics*,⁴¹ it is my judgment that the present Court stands ready to continue to apply section 7, as Congress intended, to stop any tendency to monopolize where that tendency results from corporate stock or asset acquisitions. The Government defeats last year in the two section 7 banking cases represent to me a veiled admonition to the Division to cease excessive preoccupation with competition in those markets Congress in its wisdom—or lack of it, if you prefer—has chosen to subject to extensive regulation, including regulation of entry.⁴²

39. See J. GOULDEN, *MONOPOLY* 100-01 (1968).

40. See *United States v. United Fruit Co.*, 1958 Trade Cas. 73,790 (E.D. La. 1958); *Fruit Company Seeks Court Approval of Divestiture*, BNA ANTITRUST & TRADE REG. REP. No. 587, at A-15 (Nov. 7, 1972).

41. 415 U.S. 486 (1974).

42. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974); *United States v. Connecticut Nat'l Bank*, 418 U.S. 656 (1974).

Secondly, the cases against Firestone and Goodyear⁴³ should be vigorously pushed to the Supreme Court to test the legal theories on which the complaints are founded.

Thirdly, the Antitrust Division should be bold in its prosecutions. Assistant Attorney General Kauper deserves our respect and admiration for his courage in filing the antitrust suit against AT&T.⁴⁴ The acquisitions of coal companies by oil companies in the late sixties were inexplicitly unchallenged under section 7 by then Assistant Attorney General Turner.⁴⁵ Those acquisitions should be reexamined in the light of the energy crisis and subsequent judicial opinions,⁴⁶ and suits seeking divestiture should be instituted where appropriate. This Congress contains many new members who will support a much more aggressive attack on the monopoly problem. While the discussion of section 7 in President Ford's October five-point antitrust program did not mention the AT&T action, I do not believe President Ford plans a fate for Tom Kauper similar to the exile of Dick McLaren threatened by former President Nixon.⁴⁷

Senator Kennedy has introduced a bill to require General Motors to confine itself to the manufacture of vehicles for one mode of transportation, presumably automobiles, and divest itself of the others, including buses and locomotives.⁴⁸ General Motors defends against this proposal by arguing that its buses and its locomotives are better and that it has done nothing wrong.⁴⁹ It seems to me that this defense misses the mark. The bill is based on an objection to the power of GM over alternative modes of transportation, not on its abuse of that power. Unless the Division is estopped by its prior dismissal and settlement of

43. See note 21 *supra*.

44. *United States v. American Tel. & Tel. Co.*, Civil No. 74-1698 (D.D.C., filed Nov. 20, 1974).

45. See Letter from Assistant Attorney General Turner to Senator Morse, March 31, 1967, reprinted in *BNA ANTITRUST & TRADE REG. REP.* No. 303, at A-11 (May 2, 1967) (concerning the acquisition by Continental Oil Co. of Consolidation Coal Co.). See also *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

46. *Kennecott Copper Corp. v. FTC*, 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974).

47. See *House Evidence Shows Nixon Ordered ITT Appeal Dropped, Threatened to Fire Antitrust Chief McLaren*, *BNA ANTITRUST & TRADE REG. REP.* No. 674, at A-26 to A-27 (July 23, 1974).

48. S. 4131, 93d Cong., 2d Sess. (1974).

49. See *Kennedy Sponsors Bill to Force GM Divestiture of Bus, Rail Facilities*, *BNA ANTITRUST & TRADE REG. REP.* No. 685, at A-23, A-24 (Oct. 22, 1974).

cases against GM,⁵⁰ it should seriously consider beating Senator Kennedy to the punch by filing suit under the Sherman and Clayton Acts to get GM out of the business of manufacturing buses and locomotives on the theory that a concern that dominates production of automobiles has too much incentive to thwart or warp the development and sale of machines necessary for alternate modes of transportation. That GM has a monopoly of locomotives and buses seems almost obvious; let GM carry the burden in court of proving that it owes that monopoly solely to its own superior skill and foresight. In a recent fascinating article, economics professor Williamson argues that the mere fact that a corporation such as GM may have achieved its original dominance in locomotives solely through superior skill is not the decisive question.⁵¹ Rather, he suggests that before deciding that the corporation has not unlawfully monopolized, the court must determine that the corporation's superior skill has continued down to the time of suit and that the defendant owes its current monopoly position solely to the present exercise of superior skill.⁵² In brief, Professor Williamson can be said to be arguing for a what-did-you-do-for-me-lately approach to the superior skill defense. I think he is right.

Fourthly, and most important, our government should get out of the business of promoting concentration. The regulatory agencies, as Tom Kauper recently said so well, have

often pursued the common goals of restricting competition by means of price regulation, entry regulations, technology control and service quality limitations. . . . [We] can no longer afford . . . such wasteful government practices. . . . The need for elimination of economic waste is too urgent [to wait for the report of yet another government commission]. . . . We need change now.⁵³

The American automobile industry, which has always favored free international trade, is a prime example of the benefits of foreign competition in American markets. Volkswagen and other foreign car manufacturers introduced more competition in the market in a few years than decades of Sherman Act enforcement had been able to achieve.⁵⁴

50. See *Hart Committee Hears Auto Industry Break-Up Proposals*, BNA ANTITRUST & TRADE REG. REP. No. 653, at A-14, A-15 (Mar. 5, 1974).

51. Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations*, 85 HARV. L. REV. 1512, 1526-27 (1972).

52. *Id.*

53. *Regulatory Reform Commission Bills Supported by Broad Public, Private Spectrum*, *supra* note 27, at A-20 (Nov. 26, 1974).

54. See 1971 AUTOMOTIVE NEWS ALMANAC 25.

Lastly, President Ford's October 1974 speech announcing that he would require that "all major legislative proposals, regulations and rules include an inflation impact statement that certifies we have carefully weighed their effect on inflation"⁵⁵ should be vigorously implemented. The word "competition" should be substituted for "inflation" in his statement, and he should issue an executive order requiring adherence to his pronouncement.⁵⁶ Moreover, he should appoint an ombudsman with the power and prestige to see that it is carried out. Congress should require the so-called independent regulatory commissions to publish their own competitive impact statements prior to adopting anti-competitive regulations. I believe the courts would be hospitable to suits by public interest groups praying for injunctions against government actions not preceded by competitive impact statements required by an executive order.

V

Despite the demise of competition in much of the economy, we still adhere to the free competitive market as the American ideal. Until now the facts that the ideal was never attained, that it was riddled with exceptions, and even that the laws striving to make the ideal more nearly a reality were not rigorously enforced, have not been thought to be causes for abandoning the Sherman Act or the ideals behind it. Nevertheless, when the realities and the ideals of a society are antithetical, the ideals become suspect. Either the ideals change or the laws change. Normally, this is gradual. Under some circumstances, not altogether understood by historians, revolution results. I suggest that, whether by revolution or by lawful process, the next two years mark a turning point. Antitrust will be abandoned unless the present Administration, or that to come in 1977, and the Congress demand more pervasive antitrust enforcement and give the anti-trust agencies all the support they need. In addition, the Office of the President must take the lead in reviewing the activities of the executive establishment so that those programs and proposed programs that encourage market concentration may be curbed.

55. The speech is reported in full in *The Washington Post*, Oct. 9, 1974, § A, at 10, col. 1.

56. See Kramer, *Toward a More Effective Antimonopoly Program*, 23 AM. U.L. REV. 615, 624 (1974).

WASHINGTON UNIVERSITY LAW QUARTERLY

Member, National Conference of Law Reviews

VOLUME 1975

NUMBER 1

Edited by the Undergraduates of Washington University School of Law, St. Louis.
Published: Winter, Spring, Summer, and Fall with one special issue each May by
Washington University, St. Louis, Mo.

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