Antitrust and the New Economics

Lee Loevinger

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PROTECTION of the public against the economic power of those in control of property or trade is one of the oldest, if not the oldest, principles of law. The earliest code of which any substantial written record exists is that of Hammurabi, dating from the twenty-first century B.C. One of the most remarkable features of this code is the extensive provisions it contains fixing prices and charges for services and seeking to protect the people against scarcity and overreaching. An edict of the Roman Emperor Zeno in the year A.D. 483 prohibited any price fixing combination or monopoly whether under claim of a royal grant or otherwise, and provided as punishment forfeiture of all property and perpetual exile. An early penal code of China provided that any one guilty of monopolizing or otherwise restraining the market in rice to gain an exorbitant profit should be punished with eighty blows on the back for each offense. The earliest reported English case condemning restraint of trade was in 1415; it was held that a contract seeking to diminish competition by binding one party not to engage in a particular trade was void. Although this was a civil case, according to existing reports, the judge emphasized the view he took of the matter by remarking, “Per dieu! If the plaintiff were here, he should go to prison until he had paid a fine to the king!” In 1602 the English courts declared that all monopolies were contrary to law—a decision which required considerable courage in view of the fact that the monopolies then being asserted consisted of royal grants of exclusive trading privileges.

*Member of the Minnesota Bar.
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3. Ibid.
4. Id. at 9; The Dyer’s Case, 6 Year Bk. 5, 2 Hen. V, pl. 26 (1415).
5. Id. at 11. The Case of the Monopolies, Darcy v. Allen (1602) 8 Coke 125; Noy 173; Moore 673; 11 Coke 84.
The reasoning of the court in 1602 in interesting for its contemporary relevance. All monopolies are bad, the opinion held, for three reasons: "(a) That the price of the same commodity will be raised for he who has the sole selling of any commodity may and will make the price as he pleases. (b) That after the monopoly granted, the commodity is not so good and merchantable as it was before, for the patentee (monopolist), having the sole trade, regards only his private benefit and not the commonwealth. (c) It tends to the impoverishment of divers artificers and others, who before, by the labor of their hands in their art or trade had maintained themselves and their families, and who now will of necessity be constrained to live in idleness and beggary." The court noted that the grant of monopoly recited that it was done for the public weal. However, since the court had demonstrated that the monopoly was not in the public interest, it followed that the queen must have been deceived in granting the monopoly, and therefore it was void.

Shortly after this, in 1623, Parliament enacted the Statute of Monopolies specifically declaring all grants of monopoly void, with the exception of patents to inventors giving them a monopoly of their inventions for a period not exceeding fourteen years. By the time of Blackstone's Commentaries, monopolizing and any combination to raise prices were recognized as offenses against the public trade, along with forestalling, regrating, engrossing, cheating and usury. Blackstone stated the common law to be that monopolies were punished by the award of treble damages and double costs to those who might be injured by them.

The rivalry of the European nations to establish colonies in America, as Adam Smith pointed out, arose largely from the desire to establish a monopoly of trade with the colonies for the benefit of the "home" industries. The profit gained by the colonizing country, was, of course, at the expense of the colony; and this led to hostility, opposition, and, finally, revolution. The "Boston Tea Party" was an expression by the colonists of opposition to a monopoly of the sea trade by the British East India Company.

6. St. 21, James I, c. 3 (1623).
7. IV William Blackstone, Commentaries on the Laws of England (4th ed., 1769) chap. 12. The offense of "forestalling" was buying merchandise on the way to market, or directing it from the market, for the purpose of raising the price. The offense of "regrating" was buying of victuals in a market and selling again in the same market at a higher price. The offense of "engrossing" was getting possession of substantial amount of victuals with the intent to sell them at a profit. Blackstone states that, "Monopolies are much the same offence in other branches of trade, that engrossing is in provisions. . . ." (page 159).
Probably the greatest single cause of the American Revolution was resentment against economic exploitation and opposition to monopoly.9

**The Classical Theory of Antitrust**

The rule outlawing monopoly and restraint of trade was well established in the common law by the time of the American Revolution. However, like the many similar rules of earlier legal systems, it was a practical response to the felt necessities of economic living, and had little, if any, theoretical rationalization. But at the very time that the American colonies were declaring their independence of Britain and struggling to throw off the shackles of its mercantile monopolies, the theory of a free economy was also being announced.

It was in 1776 that Adam Smith published his great treatise, *An Inquiry into the Nature and Causes of the Wealth of Nations*. Quickly acclaimed by scholars and men of influence, this work has probably been more influential in shaping both the thinking and the conduct of men since its publication than nearly any other book. Smith covers the whole area of what has since come to be dealt with as the field of economics, drawing upon extensive observation of actual conditions, using a wealth of illustrative example, engaging in close analysis of economic cause and effect, and, finally, constructing a comprehensive theory of economic behaviour. It is a measure of the greatness of his achievement that practically all economic analysis since that time, even that of Marx and the socialists, has taken his theories as a point of departure; either building upon, modifying, or "refuting" them.

The wealth of a nation, Smith says, is the product of its total annual labor which, in turn, is the fund which originally supplies the nation with all that it consumes, consisting either of produce of that labor or purchase from other nations out of the produce. The productivity of labor, which differentiates wealthy from poor nations, depends upon the division of labor and its employment in the most efficient tasks and manner. This, in turn, depends upon the establishment of an efficient system of exchange whereby those whose labor is engaged in producing a single commodity may be able to secure commodities produced by those engaged in other kinds of production. The system of exchange is the familiar one of trading labor and goods for money which will purchase other labor and goods.

The great contribution to theory made by Smith was in his

model of the functioning of this system of exchange. The most widely held view prior to publication of the *Wealth of Nations* was that prices should be established by government, or by the semigovernmental mercantile guilds, at a "just" level, and that it was improper and probably illegal to sell or buy at any other price. Smith argued that prices should be determined solely by the force of competition in a free market. This, he said, would tend to achieve the balance of production and consumption and the best distribution and division of labor. The natural price of any product is that amount which is just sufficient to pay the rent of the land, the wages of the labor and the profit of the capital employed in producing it. The market price may be either above or below this natural price, but it always gravitates toward or tends to approximate the natural price. The market price is regulated by the relation of supply and demand. If more is offered in the market at a certain price than is demanded by those willing to pay that price, then in order to sell all of the supply it will be necessary to offer some at a lower price in order to induce others to purchase. This will result in lowering the price of the commodity in general since competition among sellers will force them all to sell at approximately the same price. On the other hand, if the amount offered in the market is less than the demand at the price prevailing at any time, then competition among the buyers will drive some of them to offer a higher price, and the price of the commodity in general will rise. Smith was careful to point out that the important consideration is not the unexpressed desires of consumers, but the economically effective demand. That is, the desire for goods plus the ability and willingness to buy them at a particular price is the determinative force.

Over any substantial period of time these market forces will operate to secure such distribution of labor and capital that supply and demand will tend to be equal for most commodities. Scarcity of a commodity will result in prices high enough to attract new producers into the field. Surplus of a commodity will depress prices so that some will be driven out of that field and into the production of other commodities which are more desired.

Smith was well aware that many factors might operate to disturb this natural balance of economic forces. Such interference with the proper operation of the competitive market was in all cases undesirable, and in the long run, could not prevail. He recognized the influence of monopoly and condemned it in unqualified terms:

"The price of monopoly is upon every occasion the highest
which can be got. The natural price, or the price of free competition, on the contrary is the lowest which can be taken, not upon every occasion indeed, but for any considerable time together. The one is upon every occasion the highest which can be squeezed out of the buyer, or which, it is supposed they will consent to give: The other is the lowest which the sellers can commonly afford to take, and at the same time continue their business.

"The exclusive privileges of corporations, statutes of apprenticeship, and all those laws which restrain, in particular employments, the competition to a smaller number than might otherwise go into them, have the same tendency, though in a lesser degree. They are a sort of enlarged monopolies, and may frequently, for ages together and in whole classes of employment, keep up the market price of particular commodities above the natural price, and maintain both the wages of labour and the profits of the stock [capital] employed about them somewhat above their natural rate.\[10\]

"Monopoly, besides, is a great enemy to good management, which can never be universally established but in consequence of that free and universal competition which forces everybody to have recourse to it for the sake of self-defense."\[11\]

Many of the concepts employed by Smith were relatively vague and remained to be sharpened and clarified by his followers. To some extent this was due to his assumption that his meanings were clear and required no great elaboration. It is evident that the competition envisioned by Smith was the striving of a substantial number of buyers or sellers for the same commodity in one market. He thought of the competitive price as one that is anonymously established in the sense that no single buyer or seller can significantly control it by his own action. Monopoly, in contrast, was the situation in which a single seller had complete or nearly complete control of a market and thus was able effectively to influence the price by his own action. Even the monopolist could not set any price he chose to extort, but the limits on his actions were those set by the ability and tolerance of the buyers, not by the natural laws of competition. In absence of government assistance to maintain a monopoly, the force of competition seemed bound to prevail and to drive the market price of any commodity toward an approximation of the natural price.

The views of Smith were elaborated, refined and applied in the writings of dozens of economists in the century and a half following the publication of the Wealth of Nations. Among the best

11. Id. at 147.
known and influential of Smith's followers were Jean Baptiste Say, David Ricardo and Alfred Marshall. Say was the principal continental exponent of Smith's theories, publishing his exposition of them in 1803. He promulgated what has been known as Say's Law of Markets, which was the assertion that the act of producing goods provided the requisite purchasing power for buying them, thus maintaining an invariable equivalence between what was produced and the purchasing power necessary to secure consumption of that production. Thus, according to Say's law, in the operation of the economy the aggregate of the demand for all goods must always equal the total supply.

Ricardo worked out the purest and most rigorous formulation of Smith's system. His greatest work, The Principle of Political Economy and Taxation, was published in 1817. Among other things, he formulated what has been characterized as "the iron law of wages," stating, "The natural price of labour is that price which is necessary to enable the labourers, one with another, to subsist and to perpetuate their race, without either increase or diminution." Further, an increase in wages cannot raise the price of commodities, but will simply lower profits. If the prices of commodities generally are raised, this will have no effect changing the value of the medium in which both prices and profits are estimated.

The theories of the classical school of economists stemming from Adam Smith were given their most adequate and mature presentation in the writings of Alfred Marshall, whose Principles of Economics was published in 1890. He is generally conceded to be the most representative, and probably the leading economist of his era (1842-1924). Marshall stated that competition would indeed produce those forms of business enterprise best adapted to their environment, although this did not necessarily mean those that were most beneficial to their environment. He had no doubt, so he said, than an economic order operated by virtuous men co-operating actively with one another would be superior to the best forms of competition, but doubted that such a co-operative idea could function in the present world.

Marshall's concept of free competition was considerably more realistic than that of his theoretical predecessors. Competition did not assume or require complete knowledge of the market by all

12. David Ricardo, The Principles of Political Economy and Taxation, chap. III on Wages. A convenient condensation of this work may be found in Masterworks of Economics (Doubleday 1946).
competitors or perfect mobility of the factors of production. It re-
quired only the use of such information and faculties as might be
possessed by the average well informed man, and a reasonable
mobility of labor and capital. Marshall noted a number of factors
tending to restrict the freedom of markets including law, custom,
trade union regulations, inertia, sentiment, geographical extent or
isolation, the immobility of fixed capital and the time lag involved
in any substantial market change. He suggested that the rapid
increase in capital and the drive toward specialization tended to
courage monopoly and constitute a threat to the freedom of eco-
nomic action. On the other hand, he saw an element of monopoly
in every competitive business and thought that the power of
monopolies was of "uncertain tenure" because of the factors of
present or latent competition, the development of new instruments
of competition, greater consumer information, more emphasis upon
trade morality, and government intervention in business affairs.
Throughout his work he emphasizes the continuing power of com-
petition as a regulator of economic activity. A freely competitive
market is one of his basic assumptions and he is confident that in
the end the power of competition will establish equilibrium between
the forces of production and consumption.

These were the dominant economic ideas of the nineteenth cen-
tury (and indeed, of at least the first quarter of the twentieth).
During most of the nineteenth century such theories seemed accu-
ately to mirror the economic life of the country and to work out
well enough in practice. The common law rules against combinations
in restraint of trade were adequate to deal with such intentional
conduct as posed an undue threat to free competition in the market
place.

Beginning about 1880 however, a new movement in American
business forced itself into the public consciousness. Starting with
the formation of Standard Oil in the petroleum industry, great
national combinations of previously competing businesses were
formed. These combinations were originally clothed in the form
of "voting trusts," hence they came to be known popularly as
"trusts," although the term has long since lost any technical sig-
nificance. The power, rapacity and ruthlessness of the trusts created
a popular demand for more effective laws to curb them, and in 1890

14. Loevinger, The Law of Free Enterprise 16 et seq. (1949); Stocking
Stocking and Watkins, Cartels or Competition 14 (1948). Also see Stocking
and Watkins, Monopoly and Free Enterprise, chapter 2 on "The Changing
Structure of the American Economy" (1951).
the Sherman Act, the first Federal antitrust law, was enacted. In 1914 the Sherman Act was strengthened by passage of the Clayton Act, and the Federal Trade Commission Act set up the FTC to assist in enforcement of the antitrust policy. Since then there have been a number of amendments and additions to the antitrust laws, but no fundamental changes have been made.

Senator Sherman, in urging support of the proposal to enact an antitrust law, clearly invoked the theories of the classical economists. "This bill," he said, "does not seek to cripple combinations of capital and labor, the formation of partnerships or of corporations, but only to prevent and control combinations made with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer." The Clayton Act itself was even more explicit. It prohibited particular practices only if they tended to lessen competition or create a monopoly. The purpose of the antitrust laws was obviously the protection of competition and the maintenance of a competitive economy. The theory of the antitrust laws was clearly the theory of the classical economists.

The Discrepant Criticisms of Antitrust

The antitrust laws have been the object of criticism almost since the day of first enactment. During the years the overwhelming weight of the criticism has been that the laws were too feeble and ineffective. The 1914 passage of the Clayton and FTC acts was in response to an insistent demand for strengthening the Sherman Act. In recent years a new note has been struck: the antitrust laws are attacked on the one hand because they have not been effective in preventing the growth of big business and on the other hand, because they are an undue hindrance to the development of big business! The two schools presently engaged in attacking the antitrust laws are irreconciliable in both their assumptions and their conclusions. The anti-big group points to the growth of giant business concerns and the increase in the concentration of economic power since the passage of the antitrust laws as evidence of their ineffectiveness, takes this as proof of the decline in the effectiveness of competition and infers that economic collectivism is thus increasing and that socialism or nationalism in some form is the inevitable result. The pro-big group points to our increasing ma-

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terial wealth and prosperity, correlates this with the growth of big business, takes this as proof that our welfare depends upon the development of big business, notes the antipathy of antitrust advocates to big business and then, either directly or indirectly, suggests that the rigor of the antitrust laws should be relaxed in order to encourage the development of big business. (I know that "pro-" and "anti-big" are poor terms to describe these viewpoints, but it is convenient to have some names and these are the best I can think of.)

The problem was not formulated nor the issue joined between these viewpoints until the 1930's, for the facts were either unknown or unrecognized prior to then. The first clear statement of the situation was in 1932 with the publication of the now famous study by Berle and Means, The Modern Corporation and Private Property. Based upon careful research and analysis by an economist and a lawyer, this study drew attention to the astonishing degree of control which a relatively few corporate enterprises had secured in the economy of the country. The two hundred largest non-banking corporations were said to control approximately one-half of the corporate wealth in the United States.\(^{20}\) The authors stated:

"Corporations have ceased to be merely legal devices through which the private business transactions of individuals may be carried on. Though still much used for this purpose, the corporate form has acquired a larger significance. The corporation has, in fact, become both a method of property tenure and a means of organizing economic life. Grown to tremendous proportions, there may be said to have evolved a 'corporate system' —as there was once a feudal system—which has attracted to itself a combination of attributes and powers, and has attained a degree of prominence entitling it to be dealt with as a major social institution."\(^{21}\)

"The corporate system has done more than evolve a norm by which business is carried on. Within it there exists a centripetal attraction which draws wealth together into aggregations of constantly increasing size, at the same time throwing control into the hands of fewer and fewer men. The trend is apparent; and no limit is as yet in sight. Were it possible to say that circumstances had established the concentration, but that there was no basis to form an opinion as to whether the process would continue, the whole problem might be simplified. But this is not the case. So far as can be seen, every element which favored concentration still exists, and the only apparent factor which may end the tendency is the limit in the ability of a few human beings effectively to handle the aggregate of property brought under their control."\(^{22}\)

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ct seq. (1932).
21. Id. at 1.
22. Id. at 18.
Such conclusions, well buttressed by supporting data, led Thurman Arnold, then a law school professor and later one of the most effective of "trust-busters," to declare that the antitrust laws were merely ceremonial parts of our folklore which, so far from hindering the formation of monopolies, actually created an environment in which concentrations of economic power could flourish. In 1937 Arnold wrote:

"The actual result of the antitrust laws was to promote the growth of great industrial organizations by deflecting the attack on them into purely moral and ceremonial channels. The process was something like this: since the corporation was a person, mere bigness could not make it a bad person. One cannot condemn his neighbor simply because he is big and strong. Therefore, the courts soon discovered that it was only 'unreasonable' combinations which were bad, just as any court would decide that a big, strong neighbor should not be incarcerated so long as he acted reasonably. In various other ways the actual enforcement of the antitrust laws was completely emasculated by the courts, not because the courts were composed of wicked and hypocritical people, anxious to evade the law, but because such a process is inevitable when an ideal meets in head-on collision with a practical need. The process is just as unconscious as was the toleration of speak-easies in dry communities during prohibition. In this way the antitrust laws became the greatest protection to uncontrolled business dictatorships."23

Shortly after writing this Mr. Arnold became the Assistant Attorney General in charge of antitrust enforcement. Whether for this reason or by coincidence, President Franklin D. Roosevelt on April 29, 1938, sent a message to Congress calling attention to the growing concentration of economic power and the decline of competition.24 The President said that the choice was between the diffusion of economic power and its transfer to government; big-business collectivism compels an ultimate collectivism in government. The existing antitrust laws were called inadequate, but the President said it was not proposed to abandon but to strengthen them. He called for a "thorough study of the concentration of economic power in American industry and the effect of that concentration upon the decline of competition."

In response to this request, Congress created a Temporary National Economic Committee composed of congressmen, senators and representatives of numerous executive departments and ad-

ministrative agencies. Some two years and nine months, 552 witnesses and eighty volumes later the TNEC rendered its final report. Undoubtedly this represented the composite views of a larger and more various group of eminent and distinguished men than any other single expression on this subject. In general, the report declared the country's faith in a competitive economic system on the classical model, noted the gradual attrition of competition that had taken place and recommended specific legislative measures principally designed to strengthen the antitrust laws, as methods of securing the continuance of our economic and political system. The committee reported:

"It is generally agreed . . . that competition must be maintained as the principle of our economy, for everyone seems to acknowledge that the alternative to competition is some of concentrated government authority which might easily destroy democracy. . . .

"The American ideal of living has not changed, but the forms of our economic life have changed and most radically. The new forms of industrial organization are such that competition has become a vastly more difficult status to maintain, and the American ideal of free living for people is not nearly so easy of achievement as before organizations superseded men in the economy. . . .

"The American system is based on the maintenance of a free market wherein the products of farm and factory are offered for sale in competition which insures the movement of the greatest quantity of goods at the lowest possible price. Many restraints on the free market have developed which impair the functioning of the economy and burden consumers with unwarranted charges. Consequently, the Temporary National Economic Committee recommends the removal of these hindrances as well as the adoption of measures which will increase the competitive activity of the market place. . . .

"It is important that it be made clear at this point that the recommendations hereinafter made are all premised on the proposition that the public policy evidenced by the Sherman Act and by the Clayton and Federal Trade Commission Acts holds as good today as it did when this legislation was enacted. All of this committee's recommendations are in furtherance of that public policy, and in this connection it is significant that in all the hearings held before this committee no witness so much as suggested any substantive change in the basic philosophy of those laws. . . .

"It will avail us nothing to carry a gigantic defense program

25. An excellent account and summary of the formation, investigations and data gathered by the TNEC may be found in David Lynch, The Concentration of Economic Power (1946).

to a successful conclusion if in so doing we lose sight of the basic philosophy of our American economy—a competitive system of private capitalism.

"The extended study of the concentration of economic power made by this committee leads inevitably to recommendations to strengthen the enforcement of the antitrust laws. No hope of preventing the increase of evils directly attributable to monopoly is possible, no prospect of enforcing and maintaining a free economic system under democratic auspices is in view, unless our efforts are redoubled to cope with the gigantic aggregations of capital which have become so dominant in our economic life."27

Shortly after this report was issued the United States became involved in World War II, and even such pressing matters as the structure of our internal economy were forgotten in the heat of the immediate struggle for survival. However, the problem of the distribution of economic power was in no way diminished by the war. Some committee or subcommittee of Congress has been concerned with the matter in each post-war session. No investigation approaching that of the TNEC in scope has been undertaken, though in 1947 a study was made by a staff under Congressman (now Senator) Kefauver of the effectiveness of government efforts to combat economic concentration.28 Mr. Kefauver himself reported:

"The record shows an alarming picture of the inadequacy of present methods in combating further increases in concentration. Concentration of economic power is a constantly moving, powerful force which can only be fought by an aggressive and consistent Federal legislative program, followed up by a steadily continuing active enforcement of antitrust laws by the executive agencies."29

The staff took a similar view:

"Previous investigations have reported that from 1900 to the present time our 'free enterprise economy' has been slipping away from us through steadily increasing concentration of economic power. It is surely obvious that as an increasing percentage of the Nation's business becomes controlled by a relatively few large companies, this trend, if allowed to continue, can only result in the Government regulating our economic life. . . .

"Inasmuch as concentration has increased steadily for the last 50 years, the imprint of failure is present everywhere. . . .

29. Id. at ix.
Until recently the enforcement of the Sherman Act was largely a matter of a policeman looking the other way.

"Each year that economic concentration increases makes a maintenance of the competitive-enterprise economy increasingly difficult. The stronger monopolistic forces become, the more insistent are the arguments that really effective antitrust action will dislocate business.

"Either we must believe in, and take the steps necessary to make possible, a competitive-enterprise system, or we must give it up, bit by bit, year by year." 50

Over the years a number of popular writers, many of them drawing from these official sources, have expressed similar views. A few competent economists have sought to make technical and detailed analyses of the problems. Most discussion of the subject has proceeded from the facts disclosed by these investigations to generalities regarding the failure of the antitrust laws in the past and fervid declarations of the necessity for their resuscitation and vigorous enforcement in the future. A study of "Monopoly and Social Control" published in 1952 may be taken as characteristic. 51

With little explicit consideration of economic theory, the doctrines of classical economics are obviously taken as fundamental assumptions. The control of monopoly is stated to be our major social problem, and our failure in this endeavour is the root of our major social ills. Monopoly has come upon us in the form of big business and our hope for the future depends upon our willingness and ability to cut it down to manageable size. In the author's words:

"The problem of monopoly is almost as old as organized society. It appears throughout man's history in various forms, depending upon the determining factors of a given economic stage. In a feudal economy it assumes the form of control of land by feudal lords; in the present day industrial countries it manifests itself as private control of channels of trade, the means of industrial production, and financial facilities." 52

"That we have allowed monopoly to reach its present proportions means that we were thwarted in the past in our aspirations to control our social environment." 53

"The advantages of mass production were nullified by the use

30. Id. at 1, 3, 4, 11.
31. Henry A. Wells, Monopoly and Social Control (1952). Wendell Berge, former Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, and a well qualified author and critic in the field, says in an Introduction that this book is "the most illuminating document written in our time", and "the most penetrating analysis of the economics of competition which I have read." These statements are obvious hyperbole. Mr. Berge's comments may be taken to indicate that the book is a competent statement of a viewpoint with which Mr. Berge agrees.
32. Wells, op. cit. supra note 31 at 1.
33. Id. at 7.
of power inherent in the concentrated private control of economic resources to subordinate public welfare to considerations of private interest."\(^3\)

\(^3\) . . . the courts arrived at the formulation of the monopoly problem in terms of size at a time when the concentration of economic power had attained such a magnitude that the task of enforcing the Sherman Act loomed already as a formidable problem. While the process of the concentration of economic power had been taking place all these years, the legal, judicial and to a large extent the economic thinking had been unimpressed by the popular concept of the relation between size and economic abuses. . . . Whatever the personal views and doubts of the politicians, the danger in size—big business—was understood by the rank and file.\(^3\)

\(^3\) . . . an economic crisis is the consequence of the action of monopolistic forces whose responsibility in the curtailment of opportunities for capacity production and full employment is seldom, if at all, realized by the majority of the people . . . the ever-increasing progress of the monopolization of economic resources . . . (is) revealed in chronic unemployment in times of peace...\(^3\)

\(^3\) "Antitrust legislation embodies the thought of a logical and reasoning effort to prevent monopoly from dominating our economic structure. The fact that monopoly has attained the proportions of major significance in our economy means that, as in the court room so in our economic life, logic and reason tend to be beyond the reach of social action."\(^3\)

\(^3\) "Antitrust legislation and adequate enforcement appear as the media which can counteract the pressure of fatalistic economic forces in the only possible way consistent with the American tradition and the American outlook on life."\(^3\)

In the face of these unqualified denunciations of monopoly it would be natural to expect that there should be some among the objects of such obloquy who would rise in their own defense. However, as the TNEC reported, among the hundreds of witnesses from big business who testified before it not a single one suggested that the basic philosophy of the anti-trust laws was faulty or should be changed. All of them denied that their business was, or approached being, monopolistic; but big business, like its critics, accepted the classical theories of the competitive economy and admitted the evils of monopoly without question or challenge.

Within the last decade however, big business has found a few spokesmen who were willing to throw down the gauntlet before those who spoke of the "curse of bigness." In 1945, James Truslow

34. Id. at 116.
35. Id. at 122.
36. Id. at 123.
37. Id. at 147.
38. Id. at 156.
Adams, a man of real literary ability although no obvious qualifications as an economist, undertook to examine the place of "Big Business in a Democracy." He begins by a few animadversions on how far modern man has come from the savage state. Next he reminds his readers of the benefits and advantages of living in America. He does not attribute the superior position of the modern American over the caveman entirely to big business, but he does suggest that it is at least due to "business." Thus he says:

"But I think the biggest thing business or the hope of gain ever did for the commonalty of the entire human race was the quest of Columbus, by a new route, for the treasures of the Far East." 3

Finally Mr. Adams undertakes a detailed examination of General Motors as a prototype of big business, and finds that it is efficient, progressive, democratic and benevolent. It is not, however, monopolistic; and the demonstration that General Motors possesses the virtues attributed to it depends upon the premise that it operates in a competitive situation. Mr. Adams indicates some views concerning monopoly and competition in such discussions as this:

"It may be noted also that in a competing democratic market a company cannot become big and remain so merely by deciding to do this. Its size will, apart from other factors of management, and so on, be determined, infallibly and primarily, by the number of satisfied customers in the market for its products." 4

"The second [totalitarian] system, that of stifling competition by one big business or group, used to be tried under former conditions and under the old ideas of what 'Big Business' meant. It seems to me to be becoming more and more impossible, and I say that with full realization of all the hullabaloo about cartels and other forms of control, and with some knowledge of business." 1

"In my opinion, if you do not have competition the result is stagnation. If somebody is perfectly sure of controlling a market he is not going to work very hard to vary or improve his product, and I do not think it makes any difference whether 'he' is a government bureaucrat or an old-fashioned private-business autocrat. Now the soul of competition in these days of science and vastly expanded range of possible goods and methods is research, . . . . Competition helps to build up research, and the results of research help to stimulate competition." 2

"We have spoken of the value of competition, and we believe in it, but there is a competition of the dog-eat-dog, or even of the wolf-eat-wolf type, and there is a sane competition, with

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4. Id. at 194.
5. Id. at 195.
6. Id. at 202-203.
value to the public in the back of its head, which may result in a friendly and nationally wholesome co-operation. That is what has been happening in American Big Business."\textsuperscript{43}

The "co-operation" referred to here appears to be the exchange and sharing of personnel, material and production ideas that occurred as part of the war effort. It is not quite clear whether Mr. Adams regards this as appropriate to peacetime "competition" or not.

A year later, Peter Drucker, an author of less literary distinction but considerably more economic learning than Mr. Adams, similarly undertook to examine the position of the large corporation in modern society, also using General Motors as the prime example.\textsuperscript{44} Mr. Drucker agrees with the classical economists that social advantage is served by competition and subverted by monopoly:

"It should therefore be asserted uncompromisingly that a monopolistic enterprise or a monopolistic industry always impairs social stability and economic efficiency. This effect of monopoly is inherent in its nature—simply because absolute power always means abuse of power. The 'enlightened monopoly' is a myth..."\textsuperscript{45}

However, Mr. Drucker argues that the theory of monopoly pricing of the classical school is quite wrong under modern conditions. The classical theory is based upon the assumption that supply is limited while demand depends upon the price and therefore is, in effect, unlimited. On these assumptions, it becomes most profitable to sell at a price which is higher than the "natural price" and at a level where demand will take so much of the supply as to return the greatest profit. There is, accordingly, an economic incentive to monopoly. "But under modern industrial conditions, it is not supply that is limited, but demand; supply in modern mass-production industry has, by definition, no practical limitations."\textsuperscript{46} It follows that the maximum profit is to be obtained by maximum production at the minimum cost. In other words, even with a monopoly of the market, a modern mass production business can obtain its maximum profit by producing enough to satisfy the market demand entirely and by doing so in the most efficient manner and at the lowest cost. Nevertheless competition still has a function to serve:

"Under modern mass-production conditions maximum profitability depends on maximum efficiency; In a monopolistic business, competitive market standing is eliminated as a measure

\textsuperscript{43} Id. at 254.
\textsuperscript{44} Peter F. Drucker, Concept of the Corporation (1946).
\textsuperscript{45} Id. at 216.
\textsuperscript{46} Id. at 219.
of efficiency; and we have seen in the preceding chapter that without the yardstick of the market, the objective checks of efficiency function very poorly, if they function at all. In other words, under modern mass-production conditions, a business will realize the highest rate of profit on its invested capital only if it is subject to that check of the competitive market which a monopolistic business eliminates.\(^4\)

Mr. Drucker concludes that one of the “five pillars on which an economic policy for a free-enterprise society rests” must be government regulation which is in the interest of free enterprise itself—that is, in the prevention of monopoly.\(^4\) He warns of the necessity in such action of differentiating between monopoly, which is always antisocial, and bigness, which can be made into a social asset through decentralization; and between monopolistic practices and attempts on the part of business to promote social stability through long term price, sales and employment policies.

Up to 1952 the arguments of the pro-big school were chiefly in the nature of “character references” for big business. The virtues, including efficiency and benevolence, of big business were lauded, the necessity of maintaining a competitive economy was duly noted, and it was suggested that bigness was not only efficient and virtuous but essentially irrelevant to the problem of monopoly.

In 1952 the public was treated to the surprising spectacle of a new David appearing to champion Goliath. For the first time the suggestion was made explicit that the antitrust laws were an undue hindrance to big business, and that some change in the antitrust policy should be made in order to favor the development of big business. This most forthright defense of big business and attack upon antitrust was made by David Lilienthal, first in a series of articles in \(\text{Collier's}\), and later in somewhat expanded form in a book on \textit{Big Business: A New Era}. Mr. Lilienthal is almost lyrical in his praise of big business:

“My conviction about Big Business, as expressed throughout this book, is that it represents a proud and fruitful achievement of the American people as a whole; that in Big Business we have more than an efficient way to produce and distribute basic commodities, and to strengthen the nation’s security; we have a social institution that promotes human freedom and individualism.”\(^4\)

“This technique of production—and with it the equally important art of an ethical distribution of production—is a \textit{creative} thing, a combination of poetry and sweat. It calls for imagination,

\(^{47}\) \textit{Id.} at 220.

\(^{48}\) \textit{Id.} at 288.

\(^{49}\) David E. Lilienthal, \textit{Big Business: A New Era} ix (1953).
vitality, faith, as well as the skills of science, management, human relations and modern government techniques. This unfolding of American productive and social genius is the most exciting spectacle in the history of modern times."

In this view, American productive and distributive superiority over the rest of the world rests upon bigness in business, which is "our greatest single functional asset." The force of this assertion (it can hardly be called an argument) is somewhat weakened, if not wholly dissipated, by the confession, late in the book, that the author is using bigness "as a more or less convertible term for our industrial and technical civilization." Mr. Lilienthal implicitly recognizes that competition is desirable in arguing at some length that big business has engendered a New Competition which expresses itself in research, diversification, integration, internal rivalry and advertising. One of the criteria for measuring the beneficial effects of bigness is its success in stimulating competition between ideas, products or services. Conceding that conspiracies to fix prices, limit production or dominate the market are theoretically undesirable and illegal, it seems that in view of the New Competition any effect on consumers "would be largely irrelevant," and success in such an attempt would be extremely difficult if not impossible. Mr. Lilienthal cries for realism, common sense and a dropping of old prejudices and assumes that his viewpoint represents the result of such intellectual virtues. Speaking from this realistic, unprejudiced and sensible viewpoint, Mr. Lilienthal warns us against thinking that there is a relation between bigness and monopoly.

From these premises Mr. Lilienthal draws the inferences that our antitrust policy is fruitless and barren, unsuited to our present needs, and probably foredoomed to failure. On this he states his position plainly:

"This nation is confused, for we say one thing about size in business and we do another and almost the opposite thing. We distrust and inhibit and even threaten with criminal proceedings the very economic talent which is one of our sources of strength.

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50. Id. at 31-32.
51. Id. at 33.
52. Id. at 191.
53. Id. at 58, 68, 73, 81, 88, 91, 93.
54. Id. at 11-12.
55. Id. at 62.
56. Id. at 94.
57. Id. at xii, 3-4, 33, 159.
58. Id. at 41, 147.
59. Id. at 5.
60. Id. at 42, 77.
61. Id. at 116-117.
and freedom, our capacity for large-scale undertakings. Our basic economic law, the Sherman Antitrust Act, as it is more recently construed, symbolizes our distrust, giving concrete expression to a temperamental aversion to Bigness and to our belief in competition."62

"But no discussion of Bigness can ignore the antitrust laws. For the essential fact is that as these laws are now construed, the very Bigness upon which we all now depend may be illegal."63

There is, however, a curious ambivalence in Mr. Lilienthal's enthusiasm. Although he apotheosizes and capitalizes "Bigness," he concedes that there is such a thing as a "moderate and sensible Bigness," that the anti-big strictures have some basis "in the case of some very large enterprises," and that:

"Many (though not all) of the advantages of Big Business can probably be equally well achieved without going to extremes of size; greater efficiency, liveliness and speed of action are attainable where Bigness is not extreme."64

However, since General Motors and DuPont are among his exhibits as to the virtues of bigness, the reservations regarding "extremes of size" do little except add obscurity to some fairly fuzzy ideas.

Additional confusion is introduced into the discussion by Mr. Lilienthal's reliance on the government to control big business by some means other than the antitrust laws, in ways which he fails to specify. He says:

"It is government's changed and expanded role in economic affairs, notably since 1933, that in my opinion reduces to quite manageable proportions the abuses by Big Business: thus armed we can now safely promote and encourage Bigness rather than view its growth with apprehension."65

"Today the degree of actual control and 'absolutism' that remains in the hands of the directors and officers of the largest American corporations has changed almost beyond recognition."66

"To put it another way, the change in public accountability on the part of industrial management is a reflection of the effectiveness of the new checks and balances upon abuses of economic power. It raises sharply the question of how substantial and how relevant today are the traditional and historical fears of Big Business."67

The burden of the argument is that trust-busting does not make

62. Id. at 37-38.
63. Id. at 167.
64. Id. at 158.
65. Id. at x-xi.
66. Id. at 25.
67. Id. at 30-31.
sense today and that we should adopt a new approach. The closest we come to a specification of the new approach is this:

"The Sherman Act forbids 'restraint of trade'—a double negative. The new law, by contrast, should expressly foster the 'development of trade'—a double affirmative. It is my suggestion that we should not attempt a whole array of specific amendments to this and that section of the Sherman Act or the Clayton Act, but rather a broad declaration of public policy that the prime concern of Congress is not with competition, per se, nor with competitors, but with productivity and the promotion of an ethical and economic distribution of this productivity."

Considering the eminence of its author and the prominence of its publication, Mr. Lilienthal's book exhibits unbelievable confusion of thought. It manifests an almost total ignorance of legal tradition, of judicial interpretation of the subject, and of the literature in this field. Phrases and ideas are suggested as novel which have been current in the literature for decades. Mr. Lilienthal says it is dubious whether there has been an increase in the concentration of economic power in recent years, and cites aluminum, steel and oil as industries in which the dominance of a single concern has markedly declined. He fails to note that these are industries in which there has been notable antitrust activity, and that in at least two and perhaps all three cases, the diffusion of economic power that has occurred appears to be due primarily to antitrust enforcement. Although antitrust is preeminently a field in which the law is made by the United States Supreme Court, and although the whole burden of this book has to do with the putative present interpretation of the antitrust laws, there is no discussion or consideration of Supreme Court opinions. For legal authority one Supreme Court opinion is indirectly cited in a footnote, one dissenting opinion is referred to twice, and one circuit court opinion is cited twice.

Most important, the fundamental concepts employed in the book are undefined, confused and inaccurate. For example, in the course of the argument that bigness tends toward efficiency and is desirable it is said that it serves to conserve our natural resources. Mr. Lilien-

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68. Id. at 167, et seq.
69. Id. at 185.
70. Lilienthal informs us, at pages 25-26 and elsewhere, that as the result of changes in the last 20 years there has developed a "New Competition." Actually this phrase, with substantially the same connotation, has been in use for more than four decades. See American Column & Lumber Co. v. United States 257 U.S. 377, 392 (1921); Stocking and Watkins, Cartels or Competition 16 (1948); Stocking and Watkins, Monopoly and Free Enterprise 130 (1951).
71. Lilienthal, op. cit. supra note 70 at 25-26, 139-140.
72. Id. at 175.
73. Id. at 4, 173.
74. Id. at 50, 175.
thal reports that the 1950 census shows that the size of the average farm has increased to 215.3 acres, which is an increase of 42% over 1920, and observes:

"These large-sized farms—with a marked decrease in farms operated by tenants and share-croppers—are doing about the most intelligent job of land conservation ever achieved in America. . . . In my opinion, size has contributed in a salutary way in this progress of farm conservation and output."

To use such an illustration in the course of a discussion of big business is obvious nonsense. Any concept of bigness which is equally applicable to General Motors and an Iowa farm of 215 acres must, of necessity, be so vague as to be meaningless.

The suggestion that government encourage the development of trade rather than forbid its restraint is equally naive, meaningless and untenable. The whole tradition of political and economic freedom which has been developed over the course of centuries by our legal system postulates that anti-social conduct shall be forbidden, but that within the broad limits of such prohibitions each individual shall be free to seek his welfare and happiness as he pleases. To take the view that instead of forbidding what may not be done government shall prescribe what shall be done, would require that government assume a role of authoritarian paternalism which would be not only revolutionary but obviously intolerable to the American people. The most charitable understatement that can be made is that it would be most impractical for the courts to undertake to prescribe the methods and practices that might "develop" trade, rather than to strike down restraint and monopolies when they are discovered.

The latest entry in the lists of this debate takes a position diametrically opposed to that of Lilienthal on nearly every point. The author, T. K. Quinn, as a former vice-president of General Electric has somewhat more obvious qualifications than Mr. Lilienthal to speak on the subject. He relates his experiences of twenty-four years as an insider in big business in an anecdotal and slightly gossipy manner. However, where Mr. Lilienthal indulges in unsupported generalizations and abstract opinions, Mr. Quinn gives names, dates, places and events in profusion in support of his conclusions. Yet he does not hesitate to generalize as broadly as any:

"The grand proposition that a thing is not evil simply because it is big is being advanced by self-serving interests as

75. Id. at 123.
though they were dealing with harmless, static business giants, when in fact 'there ain't no such animal.'

"Historically, political freedom has never long outlived economic freedom, and our economic freedom is not being maintained.Posed against us are not only the old-world ideas of political collectivism, but also a rapidly developing internal economic collectivism which subordinates millions of Americans in monster-big corporations ruled by nonelected, self-perpetuating officers and directors exercising powerful influence—where it is not actual control—over the economy."

"Precisely as we cage tigers and elephants but allow cats and dogs to run loose, so must we come of economic age to the extent at least of recognizing that enormous size in artificial, self-interested, impersonal corporations is a threat to all of our freedoms and to the peace of the world.

Mr. Quinn believes in the value and necessity of competition in the classic sense including price competition. But competition is being destroyed by the growth of giant business enterprises, by mergers, and by "co-operation," gentlemen's agreements, price leadership, and mutual self-restraint. The growth of the business giants is not, as the pro-big apologists would have us believe, due to superior efficiency or competitive success. Rather it is the result of the tremendous advantages of large amounts of capital and of the ability to engage in extensive and expensive advertising. Manufacturing and operating costs of the smaller companies are actually less than those of the giants. Even in the field of research, usually cited as the special domain of big business, Mr. Quinn says that the greatest contribution comes from small business:

"For important inventions and progress we must look mainly to the many little people and not to the well publicized, huge research organizations. Most inventions are accidents and the number of such inventions is likely to be proportionate to the number of people involved and interested. . . . Original inventions are no more plentiful, proportionately, in big than in small organizations."

"I know of no original product invention, not even electric shavers or heating pads, made by any of the giant laboratories or corporations, with the possible exception of the household garbage grinder, developed not by the research laboratory but by the engineering department of General Electric. But the basic idea of this machine came from a smaller concern produc-

77. Quinn, Giant Business: Threat to Democracy 5-6 (1953).
78. Id. at 10.
79. Id. at 204.
80. Id. at 284, 293.
81. Id. at 75, 133, 201, 231.
82. Id. at 79, 167, 171, 200, 227-228, 233, 311.
83. Id. at 167.
84. Id. at 113-114.
ing commercial grinders. It was hardly an original invention. The record of the giants is one of moving in, buying out and absorbing the smaller creators."85

The growth of giant corporations is establishing us as a nation of employees,66 and the leaders of industry are not those who have come to the top through the possession of superior abilities, but either those who are lucky in the possession of wealth or personal friendships, or grinding bureaucrats who remain neutral and do nothing to offend their superiors.87 Moreover, in large corporations the executives are likely to be department specialists with knowledge and outlook more limited than those of the smaller corporation official who inclines to be a better-rounded man.58 In these circumstances, we are forced to conclude that the antitrust laws are not strong enough:

"Unfortunately, both the Sherman and the Clayton laws have been rendered largely ineffective and inoperative by court interpretations and by clever lawyers in the service of the big interests. The concentration of economic power into bigger and bigger corporations has proceeded in leaps and bounds. Now we have an economy on a gigantic scale, with a concentration of power in relatively few hands, that is choking the life out of our traditional economic freedom. The Department of Justice, limited by inadequate funds, does what it can to enforce the law, but what is needed to carry out the will of the people is a law with some teeth in it, which Congress has not seen fit to pass."89

What difficulties of enforcement are indicated:

"In all these matters we forget that a court may devote a few weeks or months and part of its time to a consideration of a business or industry, but those engaged in it devote all of their time and lives to it and are almost sure to find ways of doing what they want to do, despite the intention and wording of the court decisions, unless they are final, definite, clear and unequivocal."90

The difficulties, however, indicate the necessity of more, rather than less, effort and activity in the enforcement of the antitrust laws.81

Although Mr. Quinn speaks chiefly of business in terms of big and small, he is not (like Mr. Lilienthal) speaking in terms of vague abstractions. He sees power as "the central point and essence"

85. Id. at 117.
86. Id. at 34, 45-46, 49, 136.
87. Id. at 52, 106, 145. Note that Mr. Quinn is here referring only to the executives of giant corporations and not to business leaders or executives generally.
88. Id. at 146.
89. Id. at 40.
90. Id. at 71.
91. Id. at 224.
of the controversy involving big and small business. The struggle for bigness is essentially a quest for power; and one of the worst indictments against big business is that its officials, like all other humans, are corrupted by too much power, come to identify their own interests with those of society, and trample heedlessly on the rights of others. Since big business in the sense in which Mr. Quinn uses it represents essentially an aggregation of private power over a large segment of the economy, rather than simply a business enterprise organized for production, it inevitably leads to extensions of government power, or big government. The trend toward aggregations of power in big business and big government, in turn, leads at its best to socialism, and at its worst "threatens to undermine the foundation of free society and create a tyranny more ruthless than any which mankind has ever known." All in all, Mr. Quinn is more interested in reporting the facts as he has observed them and warning of the dangers of present trends than in seeking to formulate programs or remedies. Nevertheless the lesson of his message is unmistakable: strengthen and enforce the antitrust laws or both economic and political freedom will perish and the American way of life will vanish.

COMPETITION IN CONTEMPORARY ECONOMIC THEORY

The debate as to the significance and effect of the antitrust policy has, as we have seen, been conducted almost exclusively in terms of the classical economic theories. It has, of course, been duly noted from time to time that actual conditions frequently deviated from the textbook model, but this was not of great consequence since the economists themselves had considered this fact. The important point is that discussions of antitrust have nearly always assumed that in general and in the long run the economy would behave as Adam Smith, Ricardo and Marshall said it would. However, in the last twenty-five years a number of economic theorists have drawn radically different theoretical inferences from the observed facts than were drawn by the classical school. As a result, the model of the economic system that is accepted by competent economists today is notably different than the one propounded by the classical school, although the latter still retains its popular prestige.

The most fundamental and far-reaching of the revisions of

92. Id. at 213.
93. Id. at 298.
94. Id. at 186, 224, 292.
95. Id. at 141, 102, 130, 187.
classical theory are due to the ideas of John Maynard Keynes. Although Lord Keynes was an Englishman, his ideas had a profound effect on thinking in the United States and much of our governmental policy during the last twenty years is a reflection of his theories.

Keynes himself said that his economic theory did not supersede the classical theory, but merely generalized it. Thus he characterized his theory as a general theory which includes the classical theory as a special case. The postulates of the classical theory are applicable only to this special case, which is a limiting point in the variations of economic forces as postulated by the general theory.

The principal problem to which Keynes addressed himself was the instability of the economic system, its failure to provide for full employment, and its arbitrary and inequitable distribution of wealth and income. He took as given conditions of the problem the existing social structure, including the available labor and capital, existing industrial techniques and the current degree of competition. Keynes observed that it is characteristic of the economic system that while it is subject to severe fluctuations of production and employment, it is not violently unstable. Indeed, it seems capable of remaining in a chronic condition of subnormal activity for substantial periods without any marked tendency either toward automatic recovery or complete collapse. While fluctuations of the economic cycle start briskly, they generally wear themselves out before proceeding to extremes and the normal situation is an intermediate one between a severe depression and great prosperity with full employment. This is contrary to the predictions of the classical theory which holds that in the absence of artificial restrictions on the market, the economy will constantly tend toward a condition of equilibrium at the point of optimum employment and production.

Keynes, therefore, seeks to analyze the factor which explains this observed behavior. His analysis is involved and technical and is probably perfectly comprehensible only to economists (which does not include this writer). His broad conclusions are understandable, however, even by lawyers untrained in economics. In summary, he reaches the conclusion that the conditions which are capable of explaining the observed results are the variations in production.

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96. John Maynard Keynes, The General Theory of Employment Interest and Money 3 (1936). This work is the definitive statement of Keynes' theories. Although it was not published until 1936 many of the ideas it contained had previously been stated by Keynes in speeches and papers.
97. Id. at 372.
98. Id. at 245.
99. Id. at 250.
interest or employment in the economy generally are associated with moderate, but not proportionate or compensatory, changes in consumption, investment and wages. In essence Keynes says that changes in prices, interest or wages are correlated with changes in the supply of goods, money and labor, as stated in the classical theory; but that the changes in prices, interest and wages are not held by any economic law or force to such magnitude as automatically to compensate for the precise change that has occurred in the supply of goods, money or labor. Thus, whereas the classical theory reached the conclusion that the economy always tended toward equilibrium at a point of maximum production and employment, Keynes reaches the conclusion that the economy does not have any inherent equilibrium, but may remain for an indefinite period either at any point between full production and employment and complete collapse or in oscillation around any such point.

One of the chief theoretical contributions of Keynes was the intellectual repeal of Say's law. Keynes demonstrated that the act of production does not always, or even often, provide the purchasing power for consuming the goods produced. On the contrary, one of the principal faults of the economic system is that variations in the interest rate are not adequate in themselves to insure an optimum rate of investment. It follows that the only means of insuring a reasonable approximation to full production and employment is by some "socialization" or government control of investment. It is accordingly justified for the government to influence the economy through the manner and rate of taxation, control of the rate of interest, by the expenditure of funds in public works and similar means. However, aside from this measure of central control, state ownership of the instruments of production is neither important nor desirable. Thus Keynes indicated that his theories, although unconventional, are moderately conservative in their implications:

"Our criticism of the accepted classical theory of economics has consisted not so much in finding logical flaws in its analysis as in pointing out that its tacit assumptions are seldom or never satisfied, with the result that it cannot solve the economic problems of the actual world. But if our central controls succeed in establishing an aggregate volume of output corresponding to full employment as nearly as is practicable, the classical theory comes into its own again from this point onwards. . . . Thus, apart from the necessity of central controls to bring about an adjustment between the propensity to consume and the induc-

100. *Id.* at 250-254.
101. *Id.* at 378.
ment to invest, there is no more reason to socialize economic life than there was before.

“To put the point concretely, I see no reason to suppose that the existing system seriously misemploys the factors of production which are in use.... It is in determining the volume, not the direction, of actual employment that the existing system has broken down.”

Keynes fully believes in the traditional advantages of individualism—efficiency, decentralization and the play of self-interest. He says:

“The advantages to efficiency of the decentralization of decisions and of individual responsibility is even greater, perhaps, than the nineteenth century supposed; and the reaction against the appeal to self-interest may have gone too far. But, above all, individualism, if it can be purged of its defects and its abuses, is the best safeguard of personal liberty in the sense that, compared with any other system, it greatly widens the field for the exercise of personal choice. It is also the best safeguard of the variety of life, which emerges precisely from this extended field of personal choice, and the loss of which is the greatest of all losses of the homogenous or totalitarian state. For this variety preserves the traditions which embody the most secure and successful choices of former generations; it colours the present with the diversification of its fancy; and, being the handmaid of experiment as well as of tradition and fancy, it is the most powerful instrument to better the future.”

Thus, while destroying the old notion that there is some implicit force immanent in the economic structure which will automatically bring about a state of maximum production and employment regardless of any transient fluctuations, Keynes supported the position that with the addition of certain limited government controls to accomplish specific objectives, an economy on the classical model is still the most efficient and most desirable. While there are some technical deficiencies in the Keynesian theories which the professional economists may debate for years, the public (most of whom have never heard his name) have long since become convinced followers of Keynes’ principal doctrines, largely on the basis of their demonstrated utility in alleviating the effects of the depressions between the wars.

Another important modification of classical theory was pronounced at about the same time as the writings of Keynes in the work of Professor Edward Chamberlin. His concern was with the ideas of competition and monopoly and their supposed behaviour

102. Id. at 378-379.
103. Id. at 380.
104. See John M. Clark, Alternative to Serfdom 91 et seq. (1948).
in determining market price. Chamberlin points out that monopoly ordinarily means control over supply and therefore over price. Pure competition means the absence of such control in any one, which implies that there be a large number of buyers and sellers so that the influence of any one is negligible, and that the goods be homogeneous and be sold in the identical market for all. 106 In the classical analysis there is a separate theory for the pricing phenomena of a market when it is either competitive or monopolistic, but none for a market which is intermediate between the two. 107 However, analysis of actual markets reveals that these two elements are complexly interwoven throughout the price system, with all markets showing some characteristics of each.

Chamberlin seeks to use a rigorous definition of monopoly:

"The term 'monopoly' is meaningless without reference to the thing monopolized. A monopoly of diamonds is not a monopoly of precious stones, nor, to go still further, of jewelry. Differentiation implies gradations, and it is compatible with perfect monopoly of one product that control stop short of some more general class of which this product is a part, and within which there is competition." 107

There is differentiation of any product in an economic sense if any significant basis exists for distinguishing it from the product of another seller. The basis may be real or fancied, important or unimportant, so long as it is sufficient to lead buyers to a preference for one product over another. 108 Thus every seller of a product which is in any way differentiated has, in some degree, a kind of monopoly. The number of sellers in a field cannot be taken as a necessary indication of the degree of competition or monopoly, since the number in the field depends, first of all, upon how broadly the field is defined. 109

These considerations make it clear that a pure monopoly is reached only in the case of control of the supply of all economic goods when the competition of substitutes is excluded by definition. Similarly, pure competition can be reached only where large classes of goods are perfectly standardized and are offered at the same time and place by a large groups of sellers to a large group of buyers, so that every seller faces the competition of a number of perfect substitutes for his product. Thus it can be seen that these are unreal abstractions. Both pure monopoly and pure competition are merely limiting conceptions which mark the ends of a continuum

106. Id. at 3-5.
107. Id. at 65.
108. Id. at 56.
109. Id. at 197.
Upon which are represented all gradations between the two extremes. Actual markets are always a mixture of the two elements of monopoly and competition, necessarily lying some place on the continuum between the two abstract limiting cases.

From these elements Chamberlin constructs a theory of pricing which is designed to fit the numerous situations arising from variations in the numbers of sellers and differentiation of the products. In brief, the theory of monopolistic competition holds that prices will tend to vary from the purely competitive price and to approximate the monopoly price depending upon the degree of control which the dealers have in the market and their knowledge of the probable behavior of other sellers in the same market. For example, if differentiation of the product is slight, even though the seller has perfect control over the particular product, his control over price will be negligible or non-existent because of the competition of substitute products in the same market. But a seller who has, instead of a monopoly of a brand, a monopoly of an entire class of products, has much greater control over price. "The more substitutes controlled by any one seller, the higher he can put his price."

In a market with a limited number of sellers, if the sellers combine, obviously there is monopoly and control of the price. Likewise, if sellers in a market consciously act with regard to their total (rather than individual) influence upon the price, the price will be a monopoly one. If the sellers in a market of few sellers act independently, the price will depend upon the numbers, assumptions and knowledge of the sellers. To the degree that the sellers are numerous and act without knowledge of or regard for the actions of the others, the price will approach the competitive price; to the degree that the sellers are fewer in number and know or correctly assume the actions of the other sellers and the aggregate influence of the sellers on the market, the price will approach the monopoly price. A similar analysis applies also to competitive factors other than price.

Chamberlin concludes that it is fallacious to identify free enterprise with perfect or pure competition: "... the typical outcome of free enterprise is not pure competition but monopolistic competition. Commodities are differ-

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110. Id. at 8, 63.
111. Id. at 204.
112. Id. at 66.
113. Id. at 67.
114. Id. at 31.
115. Id. at 54.
116. Id. at 195-196.
entiated partly by their very nature (without regard to demand), and partly in response to differences in buyers' tastes, preferences, locations, etc., which are as much a part of the order of things within any broad class of product as they are between one class of product and another. Heterogeneity from these causes is vastly increased by businessmen under 'free enterprise,' in their efforts further to distinguish their commodity from others and to manipulate the demand for it through advertising. In other words, an essential part of free enterprise is the attempt of every businessman to build up his own monopoly, extending it wherever possible and defending it against the attempts of others to extend theirs. There is no tendency for these monopoles to be competed out of the picture; on the contrary, they are as much a part of it as is the competition which restrains them.\footnote{117}

Although not all of the implications or technical consequences of this theory are universally accepted, the work of Chamberlin, as of Keynes, has influenced economic thinking generally toward a more realistic understanding of the forces actually at work in the economic environment, particularly of the nature of competition.

The most recent contributor to original thinking in this field is, like Chamberlin, a professor of economics at Harvard. Professor John Galbraith also starts with the apparent inconsistencies between the theoretical requirements and predictions of the classical system and the actual functioning of American capitalism. The first requirement of the classical system, as he points out, is competition, which, if rigorous is a sufficient condition for successful operation of the system.\footnote{118} The incentive to socially desirable behaviour on the part of business is provided by its competitors. The classical economist did not look beyond competition and thus they found the self-regulatory mechanism of the economy exclusively in the interaction of those on the same side of the market.\footnote{119} At the same time, the concept of competition used by the economists was refined to the point where it became the definition of a model that would produce ideal results, but which did not correspond to observable reality.\footnote{120} Extensive and reliable investigations such as those of Berle and Means and the TNEC have shown that a small number of large concerns are responsible for a substantial proportion of all industrial activity. It is decidedly dubious whether or not this concentration is increasing and the exact statistical measure of concentration is probably subject to a significant margin of error,

\footnote{117. \textit{Id.} at 213-214.}
\footnote{118. John K. Galbraith, American Capitalism: The Concept of Countervailing Power 14 (1952).}
\footnote{119. \textit{Id.} at 117.}
\footnote{120. \textit{Id.} at 17.}
but there is no serious challenge to the general conclusion.\footnote{121}{Id. at 40-41.} Further, the typical industry is shared by a relatively small number of corporations, so that there is concentration in individual markets as well as in the aggregate.

Under these conditions the market of few sellers commonly establishes a convention outlawing prices as a weapon of competitive warfare.\footnote{122}{Id. at 48.} But a similar convention against innovation or technical improvement would require a remarkably comprehensive form of collusion, which would be both difficult as well as legally dangerous.\footnote{123}{Id. at 94.} Consequently, even under oligopoly, or a market dominated by a few, there remains an attenuated but still workable competition which minimizes the scope for exercise of private market power and makes this structure preferable to any available alternative.\footnote{124}{Id. at 61.} Thus, while the market concentration of American industry does not operate at any given moment to encourage the largest possible production at the lowest possible price, it is favorable to technical progress and has produced the showpiece of American Industrial achievement.\footnote{125}{Id. at 96, 99.}

Galbraith believes that this analysis, while valid so far as it goes, is inadequate, by itself, to explain the relatively satisfactory performance of the economic system, and is incomplete. Economists have failed to see that the long trend toward concentration of industrial enterprise in the hands of relatively few firms has brought into existence not only strong sellers but also strong buyers. Thus the same process which impaired the restraints on private power on one side of the market operated to create new restraints on such power operating from the other side of the market. Galbraith calls this counterpart of competition "countervailing power."\footnote{126}{Id. at 118.}

The scope and effect of countervailing power is wider than might be supposed at first impression. At the end of virtually every channel by which consumers' goods reach the public there is in practice a layer of powerful buyers.\footnote{127}{Id. at 126.} So, most positions of market power in the production of consumers' goods are covered by positions of countervailing power.\footnote{128}{Id. at 128.} The retailer is typically concerned with his volume of sales, and so it is in his interest to resist any exercise
of market power by suppliers that results in higher prices and to exercise whatever power he can to reduce prices.129

Countervailing power, as thus conceived, performs an indispensable regulatory function in the modern economy,130 and our government policy should be as concerned with strengthening countervailing power as with strengthening competition.131 On this aspect, Galbraith says:

"Since the development of countervailing power is irregular and incomplete, it does not provide a blanket case for the exclusion of state interference with private decision. Moreover the state must be expected to participate in the development of countervailing power. Nonetheless, it is countervailing power which, in the typical modern market, regulates the power of private decision. As such it provides the negative justification for leaving decision in private hands, for it prevents these decisions from working harm on others."132

This rationale has the incidental advantage of justifying the exclusion of labor and agriculture from the general operation of the antitrust laws, a point which has bothered many who believed in the fundamental wisdom of antitrust policy.133

The theory of countervailing power implies certain extremely important limitations upon its operation. First, it will operate as an effective restraint on market power only when there is a relative scarcity of demand. That is, the buyer must be of sufficient importance to the seller so that there is at least some degree of compulsion interest in complying with the buyer's demand.134 This is roughly equivalent to saying that in a "seller's market" there is little opportunity for the development or influence of countervailing power on the part of buyers.

Second, and most important, countervailing power cannot operate at all in a market dominated by a single seller. For countervailing power to be effective it is necessary that the buyers have some alternatives. A few large buyers opposed in a market to a few large sellers may play off one seller against the other, or at least have an opportunity to shift their trade from one to the other if there is anything less than a perfect coalition between the sellers. Without this degree of flexibility in the market there is no oppor-

129. Id. at 124.
130. Id. at 143.
131. Id. at 155.
132. Id. at 173.
133. Id. at 145, 173. The writer of this article confesses that he was one of those who had previously thought of the exemptions of labor and agriculture from the antitrust laws as simply a recognition of political power. Loevinger, The Law of Free Enterprise 79 et seq. (1949). Galbraith's theory is much more rational and satisfactory on this point.
134. Loevinger, op. cit. supra note 133 at 136.
tunity for the operation of countervailing power. Thus this theory supports the classical theory in the conclusion that there is something uniquely evil about monopoly.\(^\text{135}\)

A third limitation on the operation of countervailing power is that it does not exist where industries are integrated vertically. Industries which control their own distributing as well as manufacturing facilities, whether through ownership or influence over dependent dealer organizations, are not faced with countervailing power.\(^\text{136}\) Finally, in an inflationary period of the economy countervailing power loses its effectiveness. During inflation the demands for increases in prices and wages become more insistent and the incentives to resist such demands become less potent since any increases can easily be passed on to the consumers. Consequently countervailing power must not be supposed to exert an automatic check upon inflationary movements but, on the contrary, may actually operate to reinforce them.\(^\text{137}\)

With all of its limitations, this theory obviously broadens the scope of economic doctrine to include important and heretofore un-rationalized aspects of economic behaviour. Galbraith suggests that there are important policy considerations which follow from this. While there are good reasons for government action attacking positions of original market power in the economy, there is no justification for attacking positions of countervailing power and leaving positions of original market power untouched. This would ordinarily be inequitable and damaging to the economy.\(^\text{138}\) This does not mean that an exemption of countervailing power should be written into the antitrust laws.\(^\text{139}\) It does indicate that before action is taken against the possession and exercise of market power the question should be asked: Against whom and for what purposes is the power being exercised?\(^\text{140}\) Further, the theory of countervailing power supports the antitrust policy of seeking to prevent monopoly or quasi-monopoly. Action to prevent or disperse single-firm control of an industry is desirable since it provides an opening for the exercise of countervailing power; and similar and equally good reasons exist for resisting mergers.\(^\text{141}\)

There is no neat formulation of contemporary economic theory which ties all of these new ideas into a tidy theoretical package.

\(^{135}\text{Id. at 151.}\)
\(^{136}\text{Id. at 129.}\)
\(^{137}\text{Id. at 196 et seq.}\)
\(^{138}\text{Id. at 144.}\)
\(^{139}\text{Id. at 151, 149.}\)
\(^{140}\text{Id. at 149.}\)
\(^{141}\text{Id. at 151.}\)
Galbraith's formulation is, in any event, too recent to have received much attention from other economists. However, one of the best of the eclectic economists is John M. Clark, who has sought to give some thought to the place of competition in current economic theory.

Clark contrasts competition with security because the drive for security is the most powerful limiting force on competition and because competition and security represent polar conditions in the business environment.\textsuperscript{142} Monopoly, on the other hand, is attractive to business as much because it represents security and ease as because it offers the opportunity for exorbitant profits. It is even suggested that: "The best of all monopoly profits is a quiet life."\textsuperscript{143} Thus monopolies do not by any means tend always to seek the highest price that can be gotten, but rather to fix prices at a level which will give a satisfying profit and which is higher than economically justified, and then to maintain them at that level. Monopoly prices thus tend to be "sticky," or unresponsive to changes in economic conditions. A monopoly, therefore, can do plenty of harm even if it uses only a third or a quarter of its monopoly power.\textsuperscript{144}

Clark believes that competition is still the main safeguard against economic exploitation in our civilization.\textsuperscript{145} However, he does not think that competition, in order to be workable, must correspond to the models of the economists. On the contrary, "business competition exhibits almost infinite variety."\textsuperscript{146} It may involve price, quality, substitutes, services, or any and all of these. It may involve short-term and long-term forces and trends. It may exist in greater or less degree, and actual conditions range through many degrees of competition and near monopoly. And:

"Finally, one neglected feature of competition is the fact that, like most human matters, it is always evolving. Economists are typically in error in this respect through their predisposition to find fixed and unchanging economic laws. On the whole, it seems truer to say that the character and force of competitive tactics tend continually to change, as people learn what to expect of their rivals and try new ways of adjusting themselves to the rivalry. Therefore the character of competition seems to depend partly on how long a given type of competitive contact has been in operation. Competition may tend to settle down to a sort of stalemate unless fresh areas and types of competitive contacts

\textsuperscript{142} John M. Clark, Alternative to Serfdom \textit{et seq.} (1948).
\textsuperscript{143} \textit{Id.} at 68.
\textsuperscript{144} \textit{Id.} at 66.
\textsuperscript{145} \textit{Id.} at 62.
\textsuperscript{146} \textit{Id.} at 72.
are continually being opened up; for example, by improved transportation bringing new producers into a market, or by the starting of new enterprises or the introduction of new processes or new products. Competition needs to be dynamic; if it gets to obeying fixed and rigid laws, it is already half-dead. The fixed formulations of economic theory are statements of what might be, but seldom accurate descriptions of what is. The requirements of neat theoretical formulations and those of a healthy living organism are not the same."

**The Legal Meaning of Monopoly**

While the economists and other social theorists have been debating the meaning of "competition" the courts have been concerned with defining "monopoly." The reason for this difference is the diverse tasks that they perform. The economists were concerned to observe the phenomena of economic action and then construct a conceptual model that would serve either as a norm or an explanation for the working of the actual system. The concept of competition was an important working part of the economic model. However, the competition found in practice constantly varied from the competition postulated in one or another conceptual scheme. Consequently the economic theorists have been concerned to create a concept of competition that would have consistency and theoretical validity and also correspond to reality. They have had little difficulty with monopoly since for them, it was simply an abstraction opposed to competition and did not require to be brought into correspondence with any particular observed phenomena.

In contrast, the courts have not been concerned with setting standards for desirable conduct, but in defining that conduct which is socially so undesirable as to be proscribed by law. As mentioned before, this is the method required by our legal tradition and culture pattern. To prohibit anti-social acts and leave the individual free to follow his conscience or whim in all else appears to be likely to leave a much wider area of individual freedom than to prescribe the norms of conduct that are thought to be most desirable and then punish those who do not conform. At any rate, that is the judgment of our society and the method of our law.

The law applicable to economic conduct does not, therefore, require competition; rather it prohibits monopoly. Theoretically competition and monopoly are grammatical antonyms and logical opposites. So it would seem that an adequate definition of one would necessarily imply the definition of the other. But where the defini-

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146a. *Id.* at 72.
tion required is a working definition applicable to factual situations, this does not follow. Thus the economists define monopoly easily, but struggle long and hard over competition. The courts, on the other hand, are not concerned to waste much thought on the nature of competition, but labor mightly in describing monopoly.

The difficulty that the courts have in defining monopoly is the same one and arises from the same causes as the difficulty of the economists in defining competition. The problem of definition arises for the courts only when some particular case is presented in which it is charged that some specific factual situation is monopolistic. But facts are recalcitrant and do not easily fit into the neat patterns of theory. So the courts have found that, with perhaps a single exception, they are never faced with a situation corresponding to the economic definition of monopoly and apparently are unlikely ever to find such facts. However, faced with the necessity of applying abstract principles to a practical world for the purpose of achieving actual results, it becomes appropriate, and indeed inevitable, that the concepts embodied in the principles be modified and adapted to the facts as found. Consequently the courts have broadened the concept of monopoly, which is their working tool in this field, until it includes a large part of the continuum starting with the limiting case of a "perfect monopoly" and reaching toward the concept of competition.

The economists, on the other hand, have started from the opposite end of the scale. They have retained monopoly as an abstract limiting case, but have modified and adapted their notions of competition to correspond with observed facts until economic competition has come also to include a large part of the continuum starting with the limiting case of "perfect competition" and reaching toward the concept of monopoly.

It is, therefore, neither surprising nor logically improper for the legal concept of monopoly occasionally to overlap the economic concept of competition. Ideally the competition-monopoly continuum should be divided by a line somewhere down the middle, on one side of which lies economic competition and on the other side of which lies legal monopoly. If the economists were successful in defining their concept of competition so as to include as much of the competition-monopoly continuum as contains conduct which is socially desirable, and if the courts were able to define their concept

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147. The only reported case that appears to involve a "perfect" or complete monopoly is United States v. Pullman, 50 F. Supp. 125 (1943); subsequent proceedings, 53 F. Supp. 908 (1944); 55 F. Supp. 985 (1944); 64 F. Supp. 108 (1946), aff'd, 330 U. S. 806.
of monopoly so as to include so much of the competition-monopoly continuum as contains conduct which is socially undesirable, and if the judgment of the economists and the courts on this matter coincided perfectly, then there would be such a line. Obviously these conditions will not be met. Neither economists nor judges are perfect, and there are other apparent reasons. It follows that so long as the economists use competition as their working conceptual tool, and so long as the courts use monopoly as their working conceptual tool, and so long as perfection is elusive, the two concepts will occasionally overlap and some conduct may be competition to the economists and monopolistic to the lawyers. This does not indicate that either is wrong, or even that one or the other must be in error. Since the standards of judgment will necessarily differ, it may well be that each is correctly applying his own standard in such a case. (For the purposes of simplifying this discussion I am disregarding individual errors and variations in judgment and considering the matter as though the economic and legal judgments were either those of single individuals on each side or of groups of like-minded individuals.)

In general, however, it would seem that lawyers and economists are, or should be, using substantially similar standards in constructing their conceptual models in this field. The antitrust laws deal only with economic activity. Their purpose is to establish some standard of desirable and undesirable conduct on the basis of economic consequences. This, in turn, is also the ostensible standard of those economists who hold that a competitive, as distinguished from a socialist or nationalist, economy is the most fruitful and desirable. Consequently it would seem that—making due allowances for differences in viewpoint and human error—there should ordinarily be some consonance between the legal definition of monopoly and the economic definition of competition. Thus, except for the rare case in which it may be decided to allow inconsistency, with reference to economic behaviour within this field that which is not legal monopoly should be economic competition, and that which is not economic competition should be legal monopoly.

This is by no means the same dichotomy as that of the early classical economists who divided all market situations into those which represented either pure competition or monopoly. Quite to the contrary, this classification contemplates that within each category of legal monopoly and economic competition there shall be elements of "perfect competition" and of "perfect monopoly" intermingled in what Chamberlin has called monopolistic com-
petition. This analysis demonstrates that within situations which are economically competitive there may be elements which are monopolistic; that within situations which are legally monopolistic there may be elements which are competitive; and that in almost every situation this must be the case. Competition and monopoly (or "perfect competition" and "perfect monopoly") remain as abstractions which are limiting cases only. Legal monopoly and economic competition are practical concepts which apply to the actual economy and, at least roughly, divide the field of economic behavior into two categories which are, respectively, illegal or undesirable and desirable or legal. Thus the economic consideration of competition, which has been reviewed, becomes directly relevant to the legal problem of defining monopoly. It remains to consider the cases.

The first case which it is useful to consider in seeking to find the present views of the courts is the Standard Oil case.¹⁴⁸ This is the decision which announced the famous "rule of reason" that has caused so much confusion among those who seek to reduce the decisions to definite principles. The court in the Standard Oil case starts by observing that the views urged upon it in the argument on the case as to the meaning of the Sherman Act are "as wide apart as the poles." It therefore undertakes to make a rather extensive review of the background and interpretation of the law, with particular reference to its application to an alleged monopoly. It is observed that the congressional debates show that doubt as to whether there was a common law of the United States relating to monopoly was among the influences leading to passage of the act. More than this:

"They conclusively show, however, that the main cause which led to the legislation was the thought that it was required by the economic condition of the times; that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally."¹⁴⁹

The court says that at common law monopoly meant the grant of an exclusive right over a part of trade by the sovereign and that there was no prohibition against the creation of a monopoly by an individual since it was then supposed that monopoly could arise

¹⁴⁸. Standard Oil Co. v. United States, 221 U. S. 1 (1911).
¹⁴⁹. Id. at 50.
only from the act of the sovereign. However, in this country acts which gave rise to the same harmful consequences as those ascribed to monopoly came to be spoken of as monopoly also. In other words, practical common sense caused attention to be concentrated not upon the theoretically correct name, but upon the evils aimed at and the acts which caused them. As modern conditions arose, legislation and judicial decisions came more and more to adapt the recognized legal restrictions to new manifestations of conduct and of dealing which were thought to involve the evils aimed at. The court then announces its view of the proper interpretation of the Sherman Act:

"Without going into detail, and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy." 150

"... as the contracts or acts embraced in the provision were not expressly defined ... it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibition contained in the statute had or had not in any given case been violated. Thus not specifying, but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided." 151

The court then observes that the reference in the act to "any part" of commerce has both a geographical and distributive significance,
so that it includes any portion of the country and any one of the classes of things involved in commerce. The court adds that the word "monopolize" includes "every act bringing about the prohibited result."  

The opinion is extremely long and, at least from the viewpoint of more than four eventful decades later, somewhat confused. However, a fair interpretation seems to be that the rule of reason was not meant to permit acts which were only slightly or moderately injurious to competition, but was the court's way of stating that the law prohibited acts which by their character were not normal competitive business methods but were, rather, methods tending to or aimed as a restriction of competition.

This view is, indeed, virtually what the court itself said in explaining the *Standard Oil* decision just two weeks after it was announced. In the *American Tobacco* case (1911) the court elucidated the rule of reason announced in its earlier decision:

"In that [Standard Oil] case it was held, without departing from any previous decision of the court, that as the statute had not defined the words 'restraint of trade,' it became necessary to construe those words, —a duty which could only be discharged by a resort to reason ..."

"It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, it was held not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret, which inevitably arose from the general character of the terms 'restraint of trade,' required that the words 'restraint of trade' should be given a meaning which would not destroy the individual right to contract, and render difficult, if not impossible, any movement of trade in the channels of interstate commerce, —the free movement of which it was the purpose of the statute to protect."

The court then explains that by giving to the statute a reasonable construction all the difficulties created by the complicated forms in which the assailed transactions are clothed become of no moment, because just as a reasonable construction excludes all normal and usual business contracts from the scope of the statute, so it also brings within that scope:

"... every conceivable act which could possibly come within..."

152. *Id.* at 61.
154. *Id.* at 179-180.
he spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed. That is to say, it was held that, in view of the general language of the statute and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape, by any indirection, the prohibitions of the statute.\textsuperscript{155}

Applying this view of its rule, the court holds that the combination here attacked as monopolistic is in fact such, since its history is replete with acts which it was the obvious purpose of the statute to forbid, as they are demonstrative of a purpose to acquire dominion and control of the tobacco trade by driving competitors out of business.

The next important decision of the Supreme Court in a monopoly case was rendered nearly a decade later in 1920, and involved the United States Steel Corporation.\textsuperscript{156} The force of the decision as precedent is somewhat diminished by the division of the judges which the controversy engendered. The prevailing opinion was joined in by four of the nine justices; three justices dissented, and two did not participate. Nevertheless this case seems to be the origin of the doctrine that mere size is not a violation of the antitrust laws.

The prevailing opinion of the court states that the law is clear in its denunciation of monopoly and equally clear in its direction that the courts shall prevent and restrain monopoly.\textsuperscript{157} On the other hand, the law does not compel competition.\textsuperscript{158} Although merely passing comments in the decision, these dicta reflect fundamental considerations in our legal system which have been noted previously.

The court declares that in both the Standard Oil and American Tobacco cases it was dealing with persistent and systematic lawbreakers masquerading under legal forms which had acquired and exercised power by "brutal" methods. However, the district court had found the Steel Company absolutely guiltless of such conduct in the present case, and the Supreme Court agrees. Furthermore, it finds a contradictory paradox in the government's case, as it is urged both that the Steel Company's competitors were oppressed by its superior power, and also that they ascended to opulence by following its prices. The court says that concerted action by the Steel Company and its competitors is not asserted and so is not an

\begin{itemize}
\item \textsuperscript{155} Id. at 181.
\item \textsuperscript{156} United States v. United States Steel Corp., 251 U. S. 417 (1920).
\item \textsuperscript{157} Id. at 452.
\item \textsuperscript{158} Id. at 451.
\end{itemize}
issue in the case. Thus the court is brought to the issue whether mere size is an offense:

"The corporation is undoubtedly of impressive size, and it takes an effort of resolution not to be affected by it or to exaggerate its influence. But we must adhere to the law, and the law does not make mere size an offense or the existence of unexerted power an offense. It, we repeat, requires overt acts...."159

The Supreme Court concludes that it agrees with the lower court that the corporation has not achieved monopoly. Since the statute is directed against monopoly and not against its mere expectation, the corporation has not violated the statute.

The dissenting opinion agrees that mere size is not an offense against the statute.160 However, it says a dominating power over the market may not be derived from conspiracies or combinations in restraint of trade, and it argues that by combining companies controlling approximately half the steel business of the country the defendants have combined to monopolize and restrain trade.161

As in so many cases, the judges here seem to have come to irreconcilable conclusions concerning the facts from the same evidence. But the basic principles which both sides seek to apply to the evidence do not differ materially. The prevailing judges were much impressed with evidence presented by the Steel Company from both competitors and customers indicating that the defendant did not dominate the market and that competition remained substantially unimpaired by the combinations attacked. The dissenting judges were obviously unimpressed with this testimony. All of the judges took as the touchstone of determination whether or not the conduct complained of had diminished competition.

This principle was made explicit a few years later in the *International Harvester* decision.162 There the court reiterates: "The law, however, does not make the mere size of a corporation, however impressive, or the existence of unexerted power on its part, an offense, when unaccompanied by unlawful conduct in the exercise of its power."163

The court then specifically holds that the establishment of competitive conditions in the trade constitutes a compliance with the requirements of the law.

Although these opinions seem to indicate that "size" as such cannot constitute monopolization, close analysis of the factors dis-

159. *Id.* at 451.
160. *Id.* at 460.
161. *Id.* at 461 *et seq*.
163. *Id.* at 708.
cussed by the court in each case indicates that there was careful consideration given to the questions whether the defendants had acquired and exercised a power to dominate the market or to take unfair advantage of competitors. This is recognized by the dictum of Justice Cardozo in the *Swift* case:

"Mere size, according to the holding of this court, is not an offense against the Sherman Act unless magnified to the point at which it amounts to monopoly... but size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past." 164

Inherent in the first part of this dictum is the suggestion that perhaps it may be illegal for a business merely to be of such magnitude as to constitute a monopoly, regardless of other considerations. This, of course, is the concept which the pro-big antitrust critics have recently been reading into the law and have been most vigorous in denouncing. There are two grave difficulties in testing this criticism. The first is that size and monopoly are by no means corresponding concepts. In fact, it is quite meaningless to speak literally of "mere size" in connection with this problem. Size is simply a nonsense syllable unless taken in relation to some standard of measurement. There are at least half a dozen obvious and different standards that may be used to measure magnitude in a business enterprise:

1. The dollar value of the total assets or of the total production of the business.
2. The number of physical units produced or extent of the physical plant.
3. The proportion of the total national product produced or of the total national assets possessed by the business.
4. The number and variety of classes of commodities produced.
5. The relative magnitude of the enterprise, measured by any of the foregoing standards, as compared to the competitors of the enterprise.
6. The proportion of the total market in which it is engaged that is controlled by the enterprise.

Although the courts from time to time have spoken of size as such, without qualifying adjectives, it is quite apparent from a reading of the cases that size has always been considered as significant only in relation to the last standard suggested—the proportion of the market which is controlled by the enterprise in question. This, of course, involves measurement of size by dollars or physical

units and comparison of this measurement with other measurements, including those of the competitors. Nevertheless, the courts have never fallen into the error of taking size as an abstraction unrelated to the total market. The pro-big disciples such as Lilienthal, who either ignore or overlook this fact are consequently talking completely beside the point.

The second difficulty in dealing with the criticism of the judicial attitude toward size arises from the fact that it assumes the case of a big business which has acquired its size purely through the force of legal and economic virtues without engaging in any improper activities, and which is nevertheless outlawed or dissolved by the antitrust laws simply because of "size." This poses an insuperable difficulty due to the happenstance that there is no such case—the difficulty is purely imaginary. The closest the courts have ever come to confronting this imaginary situation as is in the Pullman case.\(^5\) There the court observed that the defendant had, over the years, acquired all of its competitors by non-predatory practices, until it was in the unique position of controlling 100% of the business in its field. Had these facts stood alone the court might have had the hypothetical problem referred to:

"[However], the facts presented in evidence constitute, in our opinion, an infraction of the monopoly section of the statute, that is section 2. We have here defendants who are not only the sole purveyors of sleeping car service, but who got themselves into that position by buying out competitors with the express intent, as recorded in their own corporate minutes, of eliminating what they pleased to call 'useless competition.' Then having acquired the sole possession of the field they so arranged matters that no one else can enter it."\(^6\)

The court reviews a number of specific practices engaged in by the defendants for the purpose of excluding competitors, and concludes that there has clearly been monopolization in violation of law.

The case that is most often cited for the proposition that size alone may violate the antitrust laws (and the only case relied on


\(^{166}\) Id. at 126.

\(^{167}\) Id. at 134.
by Lilienthal) is the Alcoa case, which followed the Pullman case by two years. Here, however, Judge Hand expressly reserved this point:

“It does not follow because ‘Alcoa’ had such a monopoly that it ‘monopolized’ the ingot market: it may not have achieved monopoly; monopoly may have been thrust upon it. . . . It is unquestionably true that from the very outset the courts have at least kept in reserve the possibility that the origin of a monopoly may be critical in determining its legality; and for this they had warrant in some of the congressional debate which accompanied the passage of the Act. . . . This motion has usually been expressed by saying that size does not determine guilt; that there must be some ‘exclusion’ of competitors; that the growth must be something else than ‘natural’ or ‘normal’; that there must be ‘wrongful intent,’ or some other specific intent; or that some ‘unduly’ coercive means must be used. . . . What engendered these compunctions is reasonably plain; persons may unwittingly find themselves in possession of a monopoly, automatically so to say: that it, without having intended either to put an end to existing competition, or to prevent competition from arising when none had existed; they may become monopolistic by force of accident. . . . A market may, for example, be so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to supply the whole demand. Or there may be changes in taste or in cost which drive out all but one purveyor. A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster.”

The court follows this discussion of principles by emphatically rejecting the proposition that Alcoa was the passive beneficiary of monopoly following upon the involuntary elimination of competitors through automatically operating economic forces. The court finds that Alcoa clearly sought to strengthen its position in the market by a number of unlawful practices, and further finds that many transactions which were neutral on their face in fact were not necessary to the development of Alcoa’s business and had no motive except to exclude others and to perpetuate Alcoa’s hold upon the market. The case thus presented is not simply that of a business which has grown great by competing—that is seeking business for itself—but which has deliberately and aggressively sought to elimi-

168. United States v. Aluminum Co. of America, 148 F. 2d 416 (2d Cir. 1945).
169. Id. at 429-430.
nate and exclude competitors from the market, and which has succeeded to the extent of securing nearly complete market dominance. This, the court has no difficulty in holding, constitutes monopolizing.

There is language in the *Alcoa* case indicating that continuous expansion of its facilities to meet new demand was one of the factors considered by the court as tending to show exclusion of competitors. However, as in all judicial opinions this language must be read in the context of the facts of the case. So read, it is clear that the court is not condemning business growth or expansion as such, but only expansion which is coupled with an intent and tendency to secure dominating power over a market or, what comes to the same thing, eliminate or exclude competition.170

The *Alcoa* decision has special prestige by virtue of the fact that the year after its rendition the Supreme Court welcomed the opportunity to endorse it, and cited it as supporting the view that:

"... the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so."171

This idea is elaborated in the *Griffith* case where the Supreme Court reverses the decision of a lower court for failure to hold that the exercise of monopoly power to gain competitive advantage is a violation of the law.172 The court says that it is immaterial whether or not there was a specific intent either to violate the law or to build a monopoly. Such intent is necessary only where the acts are not sufficient in themselves to produce the prohibited result, but require other acts in addition in order to create a dangerous probability that monopoly will occur. But where particular conduct actually causes restraint of trade or monopoly, no further showing of intent is required. No monopolist monopolizes unconscious of what he is doing.173

The court uses language which, taken alone, might be construed to say that the mere possession of monopoly power, whether lawfully or unlawfully acquired and whether exercised or not, constitutes a violation of the antitrust laws.174 But this is followed by

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170. This is the view of the *Alcoa* decision taken by the Supreme Court. See United States v. Griffith, 334 U. S. 100, 107 (1948). Note also that the *Alcoa* case is cited by appellants as authority for the proposition that, "A monopoly is not illegal per se," in Lorain Journal Co. v. United States, 342 U. S. 143 (1951).
173. *Id.* at 105.
174. *Id.* at 107.
the qualification that the possession of monopoly power must be coupled with the purpose or intent to exercise that power in order to violate the law. The court states that it is unreasonable per se to foreclose competitors from any substantial market, said:

"It follows a fortiori that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."

It thus fairly appears from the cases that as an abstract proposition, the mere possession of market power sufficiently great to constitute a monopoly does not violate the law without more. However, monopolistic market power is a violation of law if it has been (a) acquired with monopolistic intent, or (b) maintained, or (c) expanded, or (d) used, with monopolistic intent or effect. Examined realistically this seems to allow almost no practical possibility for the existence of that hypothetical passive and innocent monopoly which is not unlawful. This does not indicate that the courts are being unfair or unrealistic or that they are condemning "big business" as such. Rather, it much more logically leads to the conclusion that the pro-big apologists are being ridiculously hypothetical and unrealistic when they seek to use such an example to belabor the courts. Legal doctrine still allows for the possibility of the innocent possession of monopoly power. But after more than half a century of experience with the antitrust laws the courts have found as a practical matter that monopoly power simply is not acquired or maintained in the real economic world by fortuitous accident; that the metamorphosis of a competitor into a monopolist does not happen innocently. The experience of the courts to the present day serves further to confirm the conclusion of Justice Brandeis that "no monopoly in private industry in America has yet been attained by efficiency alone. No business has been so superior to its competitors in the processes of manufacture or of distribution as to enable it to control the market solely by reason of its superiority."

Examining the course of judicial decisions over the years in the light of economic theory leads persuasively to the conclusion that in the adoption of applicable criteria of monopoly the courts have tended to be reasonably realistic. There is certainly loose language in decisions from time to time, although there is remarkably little even of this in the opinions of the Supreme Court. On the whole, however, the judicial definition of legal monopoly has been worked

175. Id. at 107.
out, as it theoretically should be, to include that area of economic activity which is not within the ambit of normal competition. The courts have come with increasing frequency to explicit recognition of this dichotomy by expression such as the recent one of the Supreme Court:

"The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.'\(^{177}\)

It is apparent that from the viewpoint of this philosophy a prohibition against monopoly does not exhaust the field of threats to competition. There may be, and as a matter of common knowledge actually are, many practices which are patently injurious to normal competition but which do not, at least in their initial stages, rise to the level of threatening imminent monopoly. These practices Congress has sought to include within the legal ban by the prohibition against "restraint of trade." Although the concepts of restraint of trade and monopoly had wholly different legal origins, and historically, have somewhat different legal meanings, they have been tending to coalesce in the recent thinking of the courts. In the Alcoa decision, for example, it is observed that the vice of restrictive combinations and of monopoly is the same, being the denial to commerce of the protection of competition.\(^{178}\) In the Griffith case it is said that the things condemned as monopoly are, in large measure, the end products of the conduct which violates the provision against restraint of trade.\(^{179}\) Most recently the Supreme Court has added an illuminating gloss to the rule of reason:

"A restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal \textit{per se.} For example, where a complaint charges that the defendants have engaged in price fixing, or have concertedly refused to deal with non-members of an association, or have licensed a patented device on condition that unpatented materials be employed in conjunction with the patented device, then the amount of commerce involved is immaterial because such restraints are illegal \textit{per se.}"\(^{180}\)

This view is essentially similar to the one taken in the first American Tobacco case, but it does represent a somewhat more felicitous use of words and substantially greater economic sophisti-

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\(^{178}\) United States v. Aluminum Co. of America, 148 F. 2d 416, 428 (2d Cir. 1945).

\(^{179}\) United States v. Griffith, 334 U. S. 100, 106 (1948).

cation. The difference in expression clearly reflects the fact that between 1911 and 1948 the Court has observed a large number of practices which it classifies as "unreasonable" because injurious to competition and so does not feel constrained to express itself in merely abstract terms. Consequently the court now states rather clearly that any practice is a restraint of trade which (a) regardless of its character is engaged in with monopolistic intent, or (b) has a tendency to lessen competition because of its nature, regardless of intent, if it is not a normal method of competition. Without exploring all of the minor legal qualifications and ramifications, it may thus fairly be concluded that restraint of trade includes any act or practice which has either a monopolistic intent or tendency.

Monopoly is thus again emphasized as the central concept in our antitrust policy. This, in turn, requires that in determining the scope and application of the antitrust laws the courts shall not rely upon historical legal precedent but must have resort consideration of contemporary economic criteria.

That such necessity is now recognized by the Supreme Court is indicated by the Columbia Steel decision. This case raised the unusual issue as to when vertical integration would create such market power as to amount to monopoly. The court split sharply on the facts, rendering a five to four decision. Since the precise situation cannot conceivably arise again, the holding as to the factual situation has little value as precedent. However, all of the justices showed a clear realization that the controversy must be determined by the weighing of economic considerations rather than by seeking for illusory legal precedents.

The majority opinion in the Columbia Steel case discusses the necessity of defining the market both geographically and in terms of classes of commodities before dealing with the problem of monopoly. It then indicates what is thought to be the proper function of the courts in applying the antitrust policy:

"It is not for the courts to determine the course of the Nation's economic development. . . . On the other hand, the courts have been given by Congress wide powers in monopoly regulation. The very broadness of terms such as restraint of trade, substantial competition and purpose to monopolize have placed upon the courts the responsibility to apply the Sherman Act so as to avoid the evils at which Congress aimed."183

"In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business con-

181. Id. at 508, 520.
182. Id. at 510 et seq.
183. Id. at 526.
trolled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed. 184

THE CURRENT ROLE OF ANTITRUST

Even from this summary survey of the economic, social and legal rationale of the antitrust policy some conclusions emerge which appear to have considerable significance for the function, interpretation and future role of the laws.

One of the first and most obvious points is that the problem of economic power—its exercise and control—is much more complicated, at least in modern society, than earlier theorists, economic and legal, had any inkling of. Both competition and monopoly have turned out to be highly complex, rather than simple, concepts; and in operation each has proved to have a protean character. Actual economic behaviour is less subject to predictable laws than had been supposed, and analysis of the economy has disclosed more variables than early theory had taken into account. The mechanism of economic self-regulation has, as a consequence, been found to be much more intricate than previously thought. This conclusion must inevitably permeate and color all serious thinking on this subject. Those who have the most knowledge on this subject are thus likely to be that least dogmatic in their conclusions and the most receptive to the impact of new data and the influence of new ideas. In our present state of enlightenment, only the ignorant can be certain of conclusions. Fully mindful of this, the rest of the conclusions in this essay are offered as the most probably and reasonable inference from present data and theories, not as eternal or immutable truths.

Although modern economic criticism and theory has considerably refined and modified the classical theory, it has by no means discredited or wholly outmoded all of the classical principles. For example, the criticism of Adam Smith's theory of monopoly pricing based upon the argument that a monopolist cannot, in modern times, indefinitely secure high prices for his product, actually tends to prove the fundamental validity of the classical theory. The argument is that sooner or later modern technology and enterprise

184. Id. at 527-528.
will devise and offer to the public some substitute for the monop-
olized product. But this is saying no more than that technology is
capable of introducing competition into almost any monopoly
situation. It is not, and has not been contended that the inevitable
tendency of monopoly is not toward uneconomic prices and in-
efficiency. It is contended merely that a monopoly cannot be main-
tained indefinitely in the circumstances of a modern technological
society. Thus, when analyzed this argument does not detract at
all from the force of the classical conception of the effects of
monopoly and competition, but merely suggests that competition
is more assertive and viable in modern industrial society than the
older economic theories had postulated.

Actually the newer economic theories probably do little more
than incorporate into the body of economic theory an account of
conditions which either did not exist or had little significant effect
more than a century ago. In the eighteenth century the concept of
the market was closely identified with a definite geographical place.
Today it is necessary to emphasize that geographical extent is one
of the dimensions of the market that must be determined before
considering competition or monopoly. Transportation and com-
unication have changed the geographical dimensions of nearly
all markets. Similarly, the variety of goods and of brands, the
effects of advertising and the difficulty of quality determination by
the buyer have made an analysis of the classes of commodities con-
cerned in competition and monopoly much more difficult. The de-
velopment of legal and of extra-legal forms of organization and the
growth of power groups on different sides of various markets have
added elements that must be taken into account. Government itself
has intruded into the picture with regulations, limitations of some
forms of competition, and other kinds of intervention that are in-
tended to and do influence economic behaviour in many ways. Con-
fusing and perplexing, but unavoidable, is the observation that
competition is characterized in practice by monopolistic elements
and monopoly by competitive elements, and that the pure forms
of either, if they ever existed, have disappeared.

Probably the most disturbing of all the conclusions that have been
forced upon us in the last two decades is that competition is not a
sufficient condition of economic equilibrium and prosperity. The
most serious error made by the classical economists was the sup-
position that competition, in any form or degree that is probable in
reality, would automatically guarantee a stable, prosperous and self-
regulating economy. The realization that competition alone is not
enough to insure our economic welfare had been a long time in coming, but Keynes was one who finally formulated it in theoretical terms. Today, this conclusion is hardly questioned although many still ostensibly cling to economic dogma that gives little explicit recognition to this altered viewpoint. However, it is common to find expressions such as this from a staunch editorial supporter of the new Republican administration:

"But the new policy recognizes, as the Coolidge and Hoover administrations did not, that government has a responsibility to prevent depressions and the paralysis and suffering they bring."\(^{185}\)

Whether consciously or not, this attitude is based upon the economic theories of Keynes as much as the faith in competition is upon those of Smith. In classical theory government's only role is to maintain competition; that will insure that any economic disequilibrium will eventually right itself. Government cannot and should not seek to improve matters by meddling with the free play of economic forces, regardless of whether or not temporary hardship may come to some segments of the population.

Peculiarly enough, those who are the last most loyal devotees of the doctrine of competition as an adequate regulation of the economy are the ones who are counted as antagonistic to big business as such. Some few of the anti-big group still cling to the faith that all our troubles are traceable to the growth of monopolistic business and the decline of competition. They still devoutly believe that if only the government would strengthen the antitrust laws and enforce them vigorously enough, then our economy would approach its utopian best. They argue that the depressions of the 1930's were due to the merger movements and decline of competition in the 1920's, and that we could, if we would, restore competition to a state something like the classical model. This, they seem to say, is all that is required for our economic welfare.

Actually those who argue in this vein, or even close to it, are tending to discredit, rather than strengthen, the policy and support of the antitrust laws. One is doing no favor to a friend who insists that he is paragon of superlative virtues. Such a description can lead only to disillusionment. Insistence that competition alone is a sufficient condition of economic welfare can lead only to discrediting the legitimate role and importance of competition. It simply is no longer credible that restraint of trade is the cause of all our woes, or that competition is the cure for all of them.

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The public and the economists are by now well aware that there are numerous government policies in addition to antitrust which play important and perhaps vital functions in directing and influencing economic activity. Indeed, there are numerous activities and policies of government—in addition to antitrust—which have a direct bearing on the maintenance of competition. Most patent are the policies involving regulation and requiring certificates of public convenience and necessity to be issued by a regulatory authority before any competition is allowed. The theory of such regulation is that those enterprises which are permitted to operate in the field, as compensation for being controlled as public utilities should be protected against competition, with the argument sometimes added that this will, in some way, conduce to greater efficiency or service. More subtle, but also more pervasively effective are the effects of government policy in such matters as the control and allocation of materials, the awarding of government contracts, the granting of tax favors such as amortization and depletion allowances, the construction of the tax scale, and the whole burden of compliance with regulations, record keeping and reports. There can be little doubt that in the related matters of material allocations under the war powers, awarding government contracts, and granting rapid tax amortization privileges, the government itself has favored big business at the expense of small business, and thus has contributed in some degree to the concentration of economic power. If economic concentration has thereby been increased and competition diminished—which seems most likely—this is a matter


188. See David Lynch, The Concentration of Economic Power 3 et seq. (1946); also hearings and report of Select Committee on Small Business, U. S. Senate, on Participation of Small Business in Government Procurement (1950).

189. See Bruce Catton, Taxes Into Profits, The Nation, April 11, 1953, 176:304. In this, most recent of the references, it is reported that in the basic industries in which the bulk of tax amortization certificates have been granted, small business represents 35% of the employment but has been granted only 10% of the value of the certificates granted, and accounts for 23% of the applications denied. These certificates permit the cost of new plant facilities and equipment to be amortized and written off through depreciation in a period much shorter than the actual physical life of the facilities. Since all of these facilities are employed in defense production under government contract, and since allowable costs for tax purposes are similarly allowable for contract renegotiation purposes, the government is, in effect, paying for these facilities. As facilities such as a steel mill, aluminum plant, electric power plant, or transportation equipment will be productive and profitable even for non-defense purposes, this program amounts to a substantial government subsidy for big business.
which the antitrust laws can neither prevent nor do much to cure. The remedy, if one is required, must be political.

Such policies do, however, accentuate the importance of antitrust. There are many government activities which promote economic centralization and concentration; there are some which are at least capable of exerting some indirect deterrent influence. But antitrust still stands as the only government policy or activity which is capable of directly or effectively opposing the formation or exercise of monopoly power, and perhaps even more important, it stands as the only government weapon to discourage collusion among competitors—which is an even greater threat to our welfare under modern conditions than the traditional form of naked monopoly power. Although all experience to date has indicated that the increasing burdens of government regulation, reporting and record keeping, and taxation bear more heavily upon small than upon large business, thus favoring concentration of economic activity, it is at least theoretically possible for these trends to be reversed and for government policies to be so shaped as to favor less rather than more concentrated aggregations of business enterprise. But any possible effects from such policies, assuming them to be politically possible and economically practicable, are bound to be indirect and long-range. Even taxation has been a relatively ineffectual weapon against monopoly, compared to antitrust. Further, it seems impossible to conceive of any government policy other than antitrust which could even touch the problem of potential collusion among enterprisers in markets of few enterprises.

Thus the conclusion that antitrust is not a sufficient condition of economic welfare must not lead to the fallacious inference that it is not a necessary one. Because water is not sufficient to sustain man does not indicate that it is not essential to man’s health. There is nothing in any of the new economic theories to minimize the importance of competition as an essential condition for the proper functioning of the economy. Indeed, the newer theories emphasize the importance of maintaining competition since they indicate essential functions which it performs that were not contemplated by the classical theory.

Drucker suggests that even in a relatively monopolistic situation, competition serves as a spur to and a yardstick of efficiency, lacking which, any enterprise is almost certain to become inefficient. Galbraith and Chamberlain point out that even in markets of few sellers or buyers there are forces of competitive or countervailing power at work so long as the few enterprises are not merged or
combined by agreement or collusion. No matter how monopolistic competition may become, monopolistic competition is still infinitely better than none. Furthermore, the differences are those of degree; and competition is effective for its purposes to the extent that it is less monopolistic and more free in nature. Competition is the element of flexibility in the economy that permits it to grow and adjust to new conditions. Monopoly is hardening of our economic arteries.

While the ancient outcries against the evils of monopoly were vehement enough, the increasing scope that modern technology has given to business enterprise has made monopoly power less, rather than more tolerable. As Quinn points out, when business expands to the verges of monopoly on a national scale, its size becomes not a matter of efficiency or even greater profits, but simply a means to power. Most of the political philosophers have concluded that the existence of great aggregations of concentrated power is incompatible with and has a tendency to the destruction of democratic government. Many thus oppose the growth of giant economic enterprises on other than economic grounds. As Judge Learned Hand observed in the Alcoa case, it is possible because of the indirect social and moral effects to prefer a system of relatively small competitive producers to one in which the great mass of men must accept the direction of a few. To secure the political, social and moral benefits of diffused power was certainly one of the great purposes of the antitrust laws.

It must not be imagined that differences in attitudes towards the antitrust policy are reflections of differing attitudes towards business generally. Emphasis on the importance of competition implies that business is regarded as fruitful and important to society. On the other hand, many if not most thoughtful businessmen recognize the importance of maintaining competitive conditions and genuinely support the antitrust laws. One of the most articulate and sagacious of present business leaders is Paul G. Hoffman, who has recently characterized the American economic system in six points: 1. It is productive; 2. It distributes wealth widely; 3. It is flexible; 4. It involves competition; 5. It is based on diffusion of economic power and decision making; and 6. It involves self-reliance and co-operation in activities to expand markets, but not to fix prices. It must be obvious that each of these characteristics is served by the anti-

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190. United States v. Aluminum Co. of America, 148 F. 2d 416, 427 (2d Cir. 1948).
191. Speech by Paul G. Hoffman Feb. 16, 1953 before the Minneapolis Junior Chamber of Commerce at the Radisson Hotel, Minneapolis, Minnesota. The summary given is taken from notes made by the writer during the speech.
trust policy. While the antitrust laws are not a sufficient condition to insure the existence of any one of these characteristics, antitrust is a necessary condition for the existence of all of them.

It is apparent from the analysis that has been made that most of the criticisms of antitrust stem from an over-simplification of the concepts and problems involved. Those who belong to the anti-big school use the classical concept of competition, find it non-existent, and conclude that antitrust either has not been or cannot be effective. They overlook or disregard all the other operating factors as well as using a false standard of competition. The pro-big advocates, on the other hand, invoke the classical concept of monopoly to show that no matter how big a business may get or how much power it may acquire, it still is not really a monopoly. They are also inclined to point to our economic ills as illustrations of the inefficiency of competition and to attribute all our economic benefits to the advantages of big business, thereby ignoring the host of other circumstances involved.

The most troublesome point that remains, in spite of the formal fallacies involved in these arguments, is the evidence of economic concentration which appears in the statistics. While the precise figures vary depending upon the methods and measures used, it is apparent that a very large proportion of business assets, employment and productivity are controlled by a very small number of giant corporations. The difficulty in dealing with this data, however, is that we do not know what it means, either in terms of causes or of effects upon competition. Disregarding for the moment the government policies other than antitrust that may have more or less responsible for this condition, it is by no means clear that the growth in the number and size of large enterprises is not primarily a reflection of the development of mass production methods in industry. There are obviously going to be more and smaller producers in a market in which handicraft production is the prevailing mode than where machine production or mass production has been adopted. So almost by definition, industry and business become more concentrated in a mass production industrial economy.

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192. See David Lynch, The Concentration of Economic Power (1946); United States Versus Economic Concentration, Report to Monopoly Subcommittee of the Committee on Small Business, 79th Cong. (1947); compare Stocking and Watkins, Monopoly and Free Enterprise (1951). Also see The Minneapolis Star, Apr. 22, 1953, p. 30 which reports: "American industry rounded out an unprecedented decade of expansion in 1952 with a record number of billion-dollar corporations, according to a United Press survey." The number of such corporations is now 66, more than double the number of 11 years ago.
However, this does not necessarily indicate anything as to the consequences for competition of such concentration. Figures of concentration for the economy as a whole are not very helpful at this point. It is necessary to distinguish measures which indicate concentration of economic power in the economy as a whole, those which indicate concentration in a particular market and those which relate directly to dominance of a market or monopoly power. These concepts may be, and undoubtedly are related; but they are not identical. Unfortunately we do not have any objective indicia of monopoly which are applicable to such data. No one is in a position to say whether there is more or less competition where a single large producer, for example, with 25% of market sales is in the same market with a large number of small producers, or where there are few relatively large producers of equal size—say three or four—which split the market approximately equally. It may very well be that there is no categorical answer, and that the judgment must vary from market to market depending not only on the distribution or concentration of assets and sales but also on dynamic factors of behaviour.

We may, nevertheless, assume that the figures as to the concentration of economic power indicate some lessening of competition although it is impossible to postulate any quantitative correlation. Does this assumption support the conclusion that the antitrust laws have not been effective? Again the conclusion is dubious. It is certain that the tendency toward economic concentration and most of the forces supporting it had been initiated before passage of the antitrust laws. It is also clear that during the first three or four decades after passage of the Sherman Act there was relatively feeble enforcement effort. Then there are a number of facts indicating that antitrust has been relatively effective despite the apparent trend toward concentration. First, there is the obvious fact that competition has by no means disappeared from the American economy in spite of the strength of the forces operating in favor of concentration. It is not even clear that concentration has increased substantially since the Berle and Means study in 1932. Second, is the fact that although concentration in the economy as a whole appears not to have diminished much, there have been notable changes both in the relative size and position of particular enterprises and also in the concentration existing in specific markets.

193. See references cited in note 192 supra.
194. Note 20 supra.
Finally, there is the testimony of big business itself. If the arguments of the pro-big apologists demonstrate nothing else, they show concern over the operation of the antitrust laws which is more than simply academic. More direct is the statement of the staff of the Brookings Institution. After a five-year investigation of the one hundred largest industrial corporations during a forty-year period, it was concluded that change is characteristic not only of positions among the 100 top corporations, but also of industries represented by them and of positions within an industry and activities of the corporations. As a partial explanation it was stated:

"Undoubtedly restraint-of-trade prosecutions by antitrust authorities since the mergers of fifty-odd years ago and the subsequent 'trust-busting' era played a role. The evidence would indicate that fear of prosecution and desire to conform with prevailing standards of business morals played an even greater role."

There is some reason to think that the tendency of the last decades has been toward a less active and lively competition in pricing. There has surely been a marked diminution of price advertising in recent years. However, this may easily be due principally to the constant inflationary pressures during the entire decade. It may also signal a shift in emphasis from short-term to long-term price competition in particular fields. It is certainly too early to pass judgment on this issue.

It may be worth noting that at least one reputable if unconventional economist, the late Joseph Schumpeter, took the position that industrial concentration has been exaggerated, and that competition has never been as effective and prevalent as in the present era.

In the final analysis, it is impossible to find any objective criteria by which to say whether or not the antitrust laws have been as effective as they might or should have been. Clearly they have had some effect; but how much? The answer is bound to be at least partially the intuitive response of the one who undertakes to pass judgment. Stocking and Watkins, two of the most able and impartial students of the subject, conclude that it cannot be said that the antitrust laws have been a complete success, but it can be said that they have not been a complete failure.
It seems quite plausible to me to take the view that antitrust has been a rather notable success. The judgments of most critics seem to rest upon figures reflecting conditions of concentration or comparisons of the economy of this country at different periods. But such data do not seem logically to support any inferences of this sort. Since we are obviously dealing with a phenomenon which has been and is in the process of dynamic growth and change over the period of the last century as the result of numerous forces and influences, comparisons involving our own status at different times during that period hardly give logical support to any inferences as to the influence of a single cause in such changes as are thus observed. If we wish to test the effectiveness of a specific factor in influencing the direction or rate of change, it is necessary to make a comparison with some other economic system that is subject to the same basic forces but which lacks the factor under consideration.

Fortunately this is not difficult. Our antitrust laws have no real counterpart in any other country. This does not mean that we can validly compare ourselves to any other country in the world. Lilienthal seeks to compare America with the backward countries of the middle east, Latin America and Asia. Since we are vastly better off than they, and since we have big business and they do not, he concludes that we owe our present condition of welfare to big business. It would be quite as logical to note that America has an antitrust law, that the backwards countries of other parts of the world do not have an antitrust law, and that therefore, our welfare is due to our antitrust law.

Clearly, however, to make a valid comparison between this and another country, we must choose one that is at least roughly comparable in resources and industrial development. It is, therefore, much more to the point to make a comparison of this country and those of western Europe. The chief difference between the industrial system of this country and that of Europe has, indeed, been the existence of antitrust laws in this country and the existence of the "cartel" system in Europe. It is, accordingly, not unreasonable to credit the antitrust policy for much of the accomplishment that made American industry superior to European even before the war. This is one answer also (if any answer is needed beyond the data as to the actual growth of business) to those occasional faint suggestions that antitrust is unduly hampering the growth of American business. This country is not distinguished from the other indus-

trialized countries of the world by the size of its industry—there were and are many enterprises in western Europe and Britain which are of comparable size to corresponding enterprises in this country. America is distinguished from the other industrialized countries by its antitrust policy and its insistence on competition. If there is any single factor in our economy other than geography and natural resources which deserves credit for our condition of prosperity and welfare, it would appear to be the insistence on competition. Not big business but competition is America’s greatest economic resource.\textsuperscript{200} Considering the pressures that have existed for the restriction of competition and the degree to which other industrial countries have succumbed to such pressures, the achievement of the antitrust policy in maintaining and restoring the degree of competition now existing in this country should be reckoned as monumental. It would be foolhardy or ignorant to call any law a “complete success.” Yet even a cautious appraisal will give the antitrust laws credit for a very large measure of success.

The dangers of such a judgment are not so much that it may be retrospectively erroneous as that it may be prospectively too complacent. The tendency toward concentration (sometimes called centralization), the pressures to restrict competition and the drives toward monopoly are all as potent today as ever before in history. If there is any truth at all in the conclusion that our welfare is due, in any degree, to the antitrust policy, then the need for that policy continues and increases. However, just as economic conditions, structures and theories change, so must the applications and interpretations of the antitrust policy. The courts have come to see that in the application of the antitrust policy they must resort to economic criteria. But, as Keynes has observed, “Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economists.”\textsuperscript{200a} Even those who consciously submit to intellectual influences are likely to be more impressed by the thoughts of one now dead and famous than those of some contemporary who has not yet been generally acclaimed.

Herein lies much danger for the law. The system of decision by precedent in itself makes for a backward-looking viewpoint and tends to inhibit the reception of current ideas.\textsuperscript{201} But such an attitude

\textsuperscript{200} Compare R. T. Haslam, Competition Is an American Resource, Reader’s Digest, Jan. 1948, p. 132. Mr. Haslam is vice-president of the Standard Oil Co. of New Jersey.

\textsuperscript{200a} Keynes, \textit{op. cit.} supra note 96, at 383.

\textsuperscript{201} Loevinger, \textit{An Introduction to Legal Logic}, 27 Ind. L. J. 471 (1952).
would be, or will be, fatal in the enforcement of antitrust laws. The classical model of the economic system is no longer a safe standard by which to judge dangerous or anti-social practices. As the new economists have pointed out, competition is constantly changing in operation, form and appearance. It exists as a matter of degree and it is an evolving characteristic of the economic system.

Just as competition is changing and evolving, so are the restraints on competition and so is monopoly. Restraint of trade and monopoly are as various in their manifestations as competition itself. Monopoly can no longer be identified simply by the level of prices or the pattern of price variation in a market. There is no single or simple economic test for judging monopoly or monopolistic tendency. The courts must resort to all the tools and concepts of economic analysis if they are to perform adequately in this field.

The functional analysis between horizontal and vertical agreements is a familiar one. The courts have referred to it, but have not seemed to know what significance to attach to it. The economic analysis should be suggestive here. All economists are agreed that the domination of a market by a few sellers who act collusively is equivalent to monopoly. It is also clear that the danger of subtle or tacit agreement is much greater in the market of few sellers than where there are many. It is also apparent that competition in a modern market involves many elements other than price.

The courts have recognized the dangers in price-fixing agreements by declaring them unreasonable per se. In this they have not distinguished between horizontal and vertical agreements, but have brought all within the same ban. The same considerations which dictate that price-fixing should be illegal per se, with similar force argue that all horizontal agreements relating to matters which are or should be competitive, must be declared illegal (or unreasonable) per se. Perhaps this is already the holding of the courts. Some of the Supreme Court opinions seem to look this way. But the rule is not so clear that it is beyond doubt, and does not serve as the imperative warning that it should be.

On the other hand, there must be a distinction here between horizontal and vertical agreements. There is no reason why competitors should agree upon services to be rendered or quality to be maintained or any other element of that which is sold to their customers. But there may be good reasons why manufacturers or dis-

204. Stocking and Watkins, Monopoly and Free Enterprise 305 (1951).
tributors should be able to require retailers to maintain standards of service or quality, even though they are not similarly privileged as to price generally. The rule of reason should be explicated to indicate that in general, reasonable contracts or combinations are those along the vertical lines of distribution, but that horizontal combinations or agreements are abnormal and unreasonable, and not to be permitted except as to particular subjects which are not properly competitive matters.

The courts must also be sensitive to the fact that the greater the number of substitutes or classes of commodities controlled by one or a few sellers, the greater the market power and the more monopolistic the tendency. Similarly, the analysis as to original and countervailing power suggests a discrimination which has not yet appeared in the decisions. On the other hand, the distinction between "close" and "loose" combinations, which some legal text writers favor, does not have any functional significance worthy of consideration.

Perhaps the most significant single criterion which the courts can use in cases involving antitrust questions is that of market behaviour. Corwin Edwards, one of the most astute economists in this field, suggests that variations in market conduct should be the test of whether or not competition exists. Actually the decisions have tended to approach this principle. While the law in terms requires a showing of combination or conspiracy to establish violation, the courts have been willing to infer conspiracy from substantial unanimity or concert of action. This is simply the converse of the principle proposed by Edwards. Variation in market conduct will be taken to show competition; its absence will be the basis for inferring conspiracy.

The reason that even such an apparently simple standard as this will not solve the problems of antitrust enforcement is that economic criteria are no more self-enforcing or self-applying than legal principles. What does or does not in any case constitute variation on the one hand, or concert or substantial unanimity of action on the other, will not always be an easy decision. The attitude with which the case is approached will make much difference. The courts, after all, are merely judges; and many judges still suffer from an attitude of ambivalence in the application of the antitrust laws to

business men. Most judges are, like most business men, devoted to the principles of free enterprise and competition. But they are reluctant to see "respectable" business men of the community, or of another community, as criminals, and conspiracy still has much of the flavor of crime about it. To "infer conspiracy" is still a difficult psychological hurdle for a judge to jump in an antitrust case. Yet restraint of trade and monopolizing are indubitably as anti-social in their nature as tax-evasion or embezzlement. In their effect upon victims and their impact on society they are far more anti-social and reprehensible than the ordinary legal offenses.

Probably if the courts can bring themselves to consider these matters in terms of economic rather than moral or legal judgments they may be able to deal with them more objectively. It may not be as difficult to observe lack of variation in market conduct as it is to infer conspiracy from concert of action. Indeed, there may even be some substantive difference since the economic test requires no more than observation of objective conduct; while the conspiracy test requires that there be at least a reasonable suspicion of some clandestine meeting or subjective agreement. This shift in emphasis should require no change in substantive law, for the Supreme Court has also said that acquiescence in a common course of conduct is equivalent to agreement upon it.207

The basic provisions of the antitrust laws are surely both adequate and admirably adapted to the purpose for which they were intended. Of course they are not self-executing, any more than the provisions of any other law. No economic principle or test can make them self-executing. The laws will be and must be administered by judges who will in the future, as many have in the past, commit errors of judgment and decide cases contrary to the ideas of many not on the bench, and even of some on the same bench. One attempting to understand as controversial a field of law as this must be particularly careful not to be influenced by disapproval or disappointment at the holding in a particular case or cases to the extent of casting out principles which are capable of being soundly applied. Undoubtedly the judges now on the bench, if called upon to re-examine some of the cases decided in the past, would reach different conclusions as to the facts from the same record and the same principles as those used originally.

This emphasizes again that attitude is of crucial importance in this field. The principles enunciated in antitrust decisions have, on the whole, been both practical and theoretically sound. Yet it is the

207. See cases cited in note 206 supra.
judgment of competent and impartial scholars that the Supreme Court has shown distinctive reluctance relentlessly to adapt its interpretation of the antitrust laws to the requirements of an effectively competitive economy. That the antitrust policy has been as effective as it has is probably due as much to voluntary compliance by business as to rigorous enforcement by the courts. But the two are not separable. Business looks to the courts for its attitude toward the law. If the courts are hesitant, stereotyped or reluctant about enforcement, business will be indifferent about compliance; if the courts are rigorous, realistic and sophisticated in their interpretation and application of the law, business will be meticulous and conscientious in compliance.

There is less security for the individual enterprise in competition than in monopoly; and there is less comfort in facing a program of vigorous law enforcement than one of official indifference. But both the individual and society have a priceless stake in maintaining competition and the social policy which supports it. Such insecurity is the price of freedom. The newer economic theories give us much information about formerly obscure aspects of our economy. They make available to the law new and powerful intellectual tools for analyzing and controlling modern market conditions. Ultimately they confirm rather than alter the fundamental principle of our economic and political faith: the maintenance of competition and of our antitrust policy is an essential (even if not, by itself, sufficient) condition for the preservation of our economic and political freedom.