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THE NEW ANTITRUST: A "STRUCTURAL" APPROACH

CHARLES E. MUELLER†

[T]he ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back. I am sure that the power of vested interests is greatly exaggerated compared with the gradual encroachment of ideas. . . . Soon or late, it is ideas, not vested interests, which are dangerous for good or evil.

—John Maynard Keynes
The General Theory

I. Introduction

A GREAT DEAL has been said about the power of "an idea whose time has come" and even a little about the tenacity of some whose time has already come and gone. Indeed, that consummate champion of the new idea, Lord Keynes, added to his other contributions the somewhat disquieting thought that it was not the old ideas themselves that had to die off before the new could forge ahead, but their proponents: "[I]n the field of economic and political philosophy there are not many who are influenced by new theories after they are twenty-five or thirty years of age, so that the ideas which civil servants and politicians and even agitators apply to current events are not likely to be the newest."1 The new idea frequently faces, then, what one might call, to borrow a phrase, the "generation gap."

Happily, however, there are exceptions; a few civil servants and politicians, not to mention "agitators," are influenced by new theories after their twenty-fifth birthday. In the world of antitrust, for example, a theory not fully developed until 19562 has already — a mere decade later — exerted considerably more than a passing influence on the thinking of our Supreme Court Justices, men that were, to put it

† Attorney, Federal Trade Commission, LL.B., DePaul University, 1955. (The views expressed herein are the author's only and not necessarily those of the Commission.)
2. BAIN, BARRIERS TO NEW COMPETITION (1956).
mildly, generally somewhat older than twenty-five in that year. Indeed, it has recently been suggested that the Court’s current antitrust decisions, particularly its merger opinions from 1962 onward, reflect a more studied adherence to that theory “than to past precedent” itself. The “practical” effect has also been considerable. “Antitrust,” as one commentator aptly puts it, “has not been the same since.”

The essence of this new approach to antitrust is actually not so much the abandonment of old ideas that were in some sense “wrong” and the adoption of new ideas that are “right,” as it is, rather, something of a shift of emphasis, a reorientation or refocusing of the inquiry to get at, and attempt to gain some understanding of, important market forces that had successfully eluded older tools of analysis. In substance, this shift of emphasis is away from an almost exclusive preoccupation by antitrust with certain surface features of business “conduct” and toward a more narrow, but much deeper, inquiry into market “structure,” those features of the business environment that are believed to be the underlying causes of commercial conduct. It is not that there is less concern today with the symptoms; it is simply that there is an increased interest in identifying the diseases that lie behind them.

II. THE ALTERNATIVE APPROACHES TO ANTITRUST

There are three basic approaches to what is traditionally called the “monopoly problem.” These are (1) the “structural” approach, (2) the “conduct” approach, and (3) the “performance” approach. While the principal differences are largely matters of emphasis — each of the three generally concedes, for example, the relevance of the factors emphasized by the other two — those differences are substantial enough to critically affect the outcome of particular cases and, in the aggregate, the over-all course of antitrust policy throughout the economy as a whole.

Stated in its most forceful form, the “structuralist” position is that “an industry which does not have a competitive structure will not have competitive behavior.” A chain of causation is posited, one that runs

5. Id. at 288.
from structure—to-conduct—to-performance. Structure determines conduct, and conduct determines performance. For example, high concentration and high barriers to entry (both structural features) are said to be conducive to price fixing (a form of behavior or conduct), which leads to artificially inflated prices and profit margins (an aspect of industry performance). In this view, most of the socially undesirable business practices involved in antitrust litigation are seen not so much as the doings of "bad men," acting out of socially reprehensible personal motives, as they are the fairly predictable activities of quite reasonable decision makers who are simply following the logic of profit maximization along corridors rather clearly marked out by the basic structural features of their markets.

7. "Structure" refers to those relatively permanent features of a market that are beyond the short-run control of the individual firm and that thus constitute the walls or banks that restrain or limit its competitive actions. The most significant structural features are said to be (1) the degree of "concentration" and (2) "barriers to entry." The first, concentration, refers to the number and size distribution of the firms in the market. Its competitive significance is said to lie in the fact that, as the number of firms decreases and the percentage of the total market held by each increases, the probability of their recognizing their "mutual interdependence"—and starting to price like collective monopolists rather than independent competitors—is said to increase significantly at some critical point.

The second structural feature, barriers to entry, refers to obstacles that impose on newcomers higher costs per unit than those encountered by the established firms, or disadvantages that compel newcomers to sell their product for a lower price per unit than established firms can get for a product of comparable quality. These are said to fall into three general categories, (1) "absolute cost disadvantages," (2) "product differentiation disadvantages," and (3) "scale economy disadvantages." See BAIN, BARRIERS TO NEW COMPETITION 12 (1956). For example, one of the "absolute" cost disadvantages sometimes encountered by the new entrant is the inability to buy supplies, materials, and other input factors at as low a price as the larger established firms can secure, i.e., discriminatory pricing. Id. at 14-16. The significance of entry barriers is that they permit established firms to raise their prices above a competitive level without drawing in on them a horde of newcomers that would otherwise be expected to enter and force the price back down to the competitive level.

8. The term "conduct" in definitions distinguishing it from structure and performance, refers to those actions taken by the businessman as part of his competitive strategy. In particular, it is concerned with those actions that reflect the basis on which he is making his price and output decisions, particularly (a) whether he is making those decisions independently or collusively (collusive in the economic sense, including, in addition to overt agreements, the nonindependence inherent in the oligopoly relationship, that is, "oligopolistic interdependence") and whether (b) he is, though acting noncollusively, engaging in predatory or exclusionary practices against his competitors, his suppliers, or his customers. Most of the practices challenged by the antitrust and trade regulation laws—price fixing and other forms of collusion, and price discrimination, exclusive dealing, and other such predatory or exclusionary activities—are included in the term "conduct."

9. "Performance" refers to the economic results produced by business "conduct," i.e., the firm's or the industry's contribution to the economy's over-all (a) efficiency in production and distribution, (b) maintenance of full employment with price stability, (c) achievement of a high rate of progress in technology and productivity, and (d) equity in the distribution of income. See CAVES, AMERICAN INDUSTRY: STRUCTURE, CONDUCT, PERFORMANCE 95 (1964). Particular attention is generally devoted to two of these: antitrust, "efficiency" and "progressiveness." Efficiency is evaluated largely in terms of whether competition is sufficiently intense to compel costs and prices to absolute minima; progressiveness is thought of primarily in terms of the number and importance of the inventions and innovations the firm or industry has introduced, as compared with what it optimally could have produced. See generally BAIN, INDUSTRIAL ORGANIZATION 342 (1959); KAYSEN & TURNER, ANTITRUST POLICY 62-70 (1959) [hereinafter cited KAYSEN & TURNER].
The structuralists are prepared to admit that industry structure is not the sole determinant of business conduct. For example, war, depression, and other such forces external to the market itself can exert a powerful influence on commercial behavior. Notwithstanding these limitations, however, this school of thought considers the basic structural contours of an industry so significant an influence on the conduct of the individual firms in it that they would, in the last analysis, give it decisive weight in determining whether an industry is likely to prove effectively competitive over the long run. For example, if a particular merger is shown to have adversely affected the industry's structure — to have increased concentration or raised barriers to entry — the structuralists would not excuse it on a showing of either good conduct or good performance — or on a showing of both good conduct and good performance. They would take the position that, the compelling pressures of the structural factors being what they are, the long-run probabilities are preponderantly against any serious chances for effectively competitive conduct and performance to endure in an anticompetitively structured industry.

The essence of this position derives from the fundamental premise of economic reasoning that, other things being equal, men prefer more income to less, and hence that reasonable predictions can be made about their probable future courses of action if it can first be determined which of several alternatives would be most likely to yield the largest profits. With profit maximization as the guide to the courses of action business firms can reasonably be expected to take — that is, if it can reasonably be assumed that the individual firm will not knowingly choose a course that reduces its earnings when there is available a lawful alternative that will enhance them — it can then be said that the role of market structure as a key factor in determining conduct is clear. A firm that belongs to a competitively structured market will maximize its profits by continuing to expand its output up to the point where it earns no more than a normal or competitive rate of return. A firm that belongs to an oligopolistically structured market, on the other hand, will recognize the fact that its price and output decisions can affect the entire market and hence will maximize its profits by following its fellow oligopolists in restricting output below, and charging a price above, the level that would have prevailed had the market been structured competitively.  


The most important distinguishing feature of a market with a large number of firms ... is that the individual firms in such a market have an incentive to act
follow in order to maximize its profits is determined in very substantial part by the way in which its market is structured. It follows that, once the structure of a market is known, and if it can reasonably be assumed that the firms in it are rationally attempting to maximize their profits, then meaningful predictions can be made as to the kind of conduct patterns they are most likely to pursue.\textsuperscript{11}

The “conduct”\textsuperscript{12} approach to antitrust emphasizes the fact that business firms are directed by individual human beings, that humans differ widely in their “psychological” makeup, and hence that there is no valid reason for believing that a particular “stimulus” — to use the language of the psychology fraternity — will produce the same pattern of response (“conduct”) in different businessmen. Therefore, in this view, the mere fact that the structure of a market is such that it confers on its members both the power and the incentive to abandon competitive conduct doesn’t mean they will necessarily do so. While this would admittedly be the “rational” course of action, the powerful incentive of

in opposition to the interests of the group or industry, even to the extent that in equilibrium there are no [excess] profits. . . [I]ncreases in output will continue to be profitable for each individual firm even after the . . . total revenue of all firms taken together is decreasing. This process continues until, in equilibrium, there are no [excess] profits. . . [T]he net result is that all firms are worse off, but not because any firm has failed to act in its own self-interest. If a firm, foreseeing the fall in price resulting from the increase in industry output, were to restrict its own output, it would lose more than ever, for the price it received would fall quite as much in any case and it would have a smaller output as well. . . .

Therefore, in any market with large numbers . . . the firms act in opposition to their common interest in higher profits for the group with the result that in equilibrium there are no [excess] profits. This paradoxical consequence comes about because the effects of the individual firm’s actions are so small in relation to the market that no one firm in the industry is significantly affected by them. . . .

The very absence of this condition has always been used to describe oligopoly. In an oligopolistic market, by definition, a firm’s action will significantly affect competing firms, so a firm has to take other firms’ reactions into account in making its own decisions. In an oligopolistic market, as is well known, if one firm increases its output and cuts its price, this will have a noticeable effect on other firms in the group, and may induce them also to cut prices and increase output, leaving all of the firms including the one which first cut its price worse off than before. Foreseeing this, the first firm may not cut price, and the oligopolistic industry may in equilibrium have positive [excess] profits because the firms may have an incentive to forego actions not consistent with the interests of the group. Id. at 616-19. (Emphasis added.)


In the FTC’s Food Manufacturing study, for example, the Commission’s staff found that, in those industries where the four largest firms held 50% or more of total industry sales, average profits were approximately twice as high as they were in those industries where the four largest had only 35%-50%; and in the still more concentrated industries (four largest firms with 75% or more), average profits were nearly three times the rate in the most competitively structured groups. The Structure of Food Manufacturing, supra at 207.

12. See note 8 supra.
profit–maximization may be more than offset by certain other inducements, particularly some that, while perhaps irrational from the standpoint of the firm's owners or stockholders, are quite consistent with the interests of its managers. The latter may have, for example, a keen sense of social responsibility, one that might lead them to charge a price that is considerably less than the most profitable price they could charge, thus deliberately sacrificing the stockholders' interest in higher profits to the consuming public's interest in lower prices. Or a firm's management might be particularly concerned about its standing in the line of Fortune's 500, where rank is determined by dollar sales, and thus choose to push its volume far enough out front to depress prices well below the profit–maximizing point in many of its markets. The central idea in all of these arguments is substantially the same, however. As long as there are at least two businessmen making decisions in a market, according to this reasoning, there is always the possibility that they might ignore the mutual monetary interests of their respective firms and engage in more competitive rivalry than is forced on them by the structural constraints of that market; the mere existence of the power to restrict output and charge noncompetitive prices does not necessarily mean that it will be used.

The "performance" approach to antitrust is one that is perhaps better known to lawyers working in this area by the more comprehensive title, "workable competition." This latter term actually includes, however, a great deal more than the concepts advanced by the proponents of the "performance" school. Indeed, if workable competition is defined as the closest feasible real-world approximation to the competitive model, as it is frequently so defined, then even the "structuralists" could perhaps subscribe to it. But when workable competition is identified with the "performance" approach exclusively, or even

13. A few members stress that the "doctrine" of workable competition is only a rough and ready judgment by some economists, each for himself, that a particular industry is performing reasonably well — presumably relative to industrial arrangements which are practically attainable. There are no objective criteria of workable competition, and such criteria as are proffered are at best intuitively reasonable modifications of the rigorous and abstract criteria of perfect competition.


Since its formulation by J. M. Clark in a paper presented to the American Economic Association and the Econometric Society in 1939 (Clark, Toward a Concept of Workable Competition, 30 AM. ECO. REV. 241 (1940)), a voluminous body of literature has developed around the notion of "workable competition." See, e.g., Markham, An Alternative Approach to the Concept of Workable Competition, in A.E.A. READINGS IN INDUSTRIAL ORGANIZATION & PUBLIC POLICY 83 (Heflebower & Stocking ed. 1958); Sosnick, A Critique of Concepts of Workable Competition, 72 Q.J. ECO. 380 (1958); Kahn, Standards for Antitrust Policy, in A.E.A. READINGS, supra at 352; Mason, The New Competition in BUSINESS ORGANIZATION AND PUBLIC POLICY 282 (Levin ed. 1958); Stocking, On the Concept of Workable Competition as an Antitrust Guide, 2 ANTITRUST BULL. 3 (1956–1957); Adams, The "Rule of Reason": Workable Competition or Workable Monopoly, 63 YALE L.J. 348 (1954).
primarily, it takes on a quite different character. In substance, this latter approach denies that there is a significant causal relation between market structure, on the one hand, and conduct and performance, on the other. In this view, the antitrust authorities and the courts should go to the end of the chain and examine directly the matter that is really of primary interest to society, namely, performance. If performance is good, then, by definition, all of the market forces that are worth worrying about, including competition, are obviously functioning in a "workable" manner. The premise here is that an industry's structure and conduct, insofar as they are socially relevant at all, are to be inferred from its performance, not the other way around. The idea, in short, is that "by their fruits ye shall know them."

The practical effects of such a standard can be analyzed only by examining the specific factors that it would emphasize. Thus, the term "performance," as noted above, refers to society's four major economic goals: (1) efficiency in production and distribution; (2) full employment with price stability; (3) high rates of progress in technology and productivity; and (4) equity in the distribution of income.¹⁴ Two of these — efficiency and progressiveness — are particularly relevant in evaluating the arguments for the "performance" approach to antitrust.¹⁵ The first, "efficiency," has long been one of the more clearly expressed objectives of our national antitrust policy, the premise being that there is a positive correlation between the intensity of the competition in a market, on the one hand, and its over-all efficiency in serving the consumer's needs, on the other. It can be shown, for example, that under the "perfect competition" type of market structure, all three components of price — production costs, selling costs, and profits¹⁶ — will be kept at an absolute technological minimum, thus simultaneously conserving society's scarce resources and giving consumers the goods they want most urgently at the lowest possible prices.

¹⁵. As to the role of antitrust in maintaining price stability, see Economic Report of the President 114 (1967):
The antitrust statutes assume particular importance in an economy operating near the limits of its capacity. Their vigorous enforcement can counter a possible inflationary bias in product markets by sustaining and strengthening competition. Antitrust activities should continue to be focused on this main purpose. In particular, effective antitrust cannot provide for the protection of individual competitors at the expense of the protection of competition. Ibid.
¹⁶. These are the three aspects of performance Bain considers of common interest and importance in every industry:
(1) the degree of efficiency attained, so far as this is affected by the scales of plants and firms and the rates at which facilities are utilized;
(2) the relation of price to cost as reflected in the rates of profit earned on owners' investment; and
(3) the size of sales-promotion costs, relative to total sales revenue.
Bain, Industrial Organization 342 (1939). See also Kayser & Turner 62-70.
The second major category of performance characteristics, "progressiveness," refers to the rate at which an industry is inventing and discovering new techniques and technology ("invention") and applying them or introducing them into commercial use ("innovation"). In traditional economic theory, the premise here has been the same as that underlying the question of efficiency, namely, that the spur of competition is conducive to invention and innovation, whereas the "dead hand of monopoly" produces complacency and a general dulling of the inventive and innovating spirit. As the Supreme Court said in 1958: "[The Sherman Act] rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress. . . ."

The "performance" approach to antitrust reflects a fundamental skepticism about the connection between structure, on the one hand, and industry performance, on the other. This skepticism centers particularly on the second aspect of performance, progressiveness. There is relatively little dispute on the proposition that the pressures exerted on the individual firm by a competitive industry structure (many firms, easy entry, and so forth) are more likely to result in optimum efficiency (e.g., minimum costs and mark-ups) than would those of an oligopolistic or monopolistic structure. There is profound disagreement, however, on the question of whether there is a positive association between competition and progressiveness (high rate of invention and innovation). Indeed, some assert that there is a negative association — that some degree of monopoly power is absolutely essential if firms are to have the incentive and wherewithal to engage in the expensive and time-consuming research and development programs that alone can produce inventive and innovative progress. Where there is easy entry, for example, there is said to be little incentive to engage in research and development, because there will be insufficient time between the innovation and the entry of newcomers to permit the innovator to recoup, via excess or noncompetitive profits, the amounts initially expended in bringing out the innovation. Furthermore, funds for research and development are almost entirely dependent upon accumulations of monopoly profits from past operations, this being based upon the premise that competition forces the distribution of profits to either

17. The development and introduction of improved production techniques generally involves two distinguishable stages of human activity: invention or discovery of new techniques, which thus become available for use by business firms, and innovation of newly discovered and available techniques, which involves actually applying them in production or introducing them into commercial use. BAIN, INDUSTRIAL ORGANIZATION 394–95 (1959).
stockholders (in the form of dividends) or to customers (in the form of lower prices), and hence leaves nothing for management to put into such speculative adventures as research and development. It is said to follow, therefore, that monopoly must be tolerated, and even welcomed, as a handmaiden to economic progress.

The significance of this argument for antitrust lies primarily in the further fact that, as between the benefits of "efficiency," on the one hand, and "progressiveness," on the other, a fairly persuasive case can be made for the proposition that the public interest in the latter is by far the greater of the two. There can be no doubt about the role of invention and innovation as perhaps the major factor in the country's enormous growth in productivity, and hence in the general standard of living, over the past two centuries. Nor can there be much doubt about the fact that competition in this area — in the development of that which is new — is a form of competition of immense social value, in some cases, perhaps, of even greater value than price competition:

[The competition that counts is] the competition from the new commodity, the new technology, the new source of supply, the new type of organization — competition which commands a decisive cost or quality advantage and which strikes not at the margins of the profits and the outputs of the existing firms but at their foundations and their very lives. This kind of competition is as much more effective than the other as a bombardment is in competition with forcing a door, and so much more important that it becomes a matter of comparative indifference whether competition in the ordinary sense functions more or less promptly; the powerful lever that in the long run expands output and brings down prices is in any case made of other stuff.

The supporters of the "performance" approach to antitrust generally share this view that progressiveness is not only of vastly greater social value than competitive efficiency, but that, as mentioned above, it is quite as likely to spring from a monopolized as from a competitively structured industry. They conclude, therefore, that if it is a progressive, growing economy that is desired, it should be sought directly, not through a policy that promises such uncertain results as one designed to encourage the development of competitive industry "structures." Seeing no causal connection, or at best only a very weak one, between "structure" and "performance" (particularly progressiveness, or invention and innovation), they would focus the inquiry in antitrust cases not on the "remote" question of the industry's structure, but directly on

the ultimate issue of whether its performance had been "workable" or "effective." If so, the case would be dismissed. If not — if the industry had, for example, been found guilty of suppressing new technology — those supporting the "performance" approach would presumably then turn to the question of devising a remedy to remove that deficiency. That remedy would be directed, however, solely to improving the industry's progressiveness, not to increasing its "competitiveness." The emphasis here, then, is on the ultimate results of economic activity, with no presumption that desired results can be secured, and undesired results avoided, by choosing one type of market structure and preventing another. Cases in which performance criteria are said to have significantly influenced the outcome, resulting either in an exoneration of the defendants or in at least saving them from divestiture, include United States v. Aluminum Co. of America, United States v. United Shoe Mach. Corp., United States v. Columbia Steel Co., United States v. National Lead Co., and United States v. E. I. DuPont de Nemours & Co.

III. The Performance Approach

Several objections can be made to the "performance" approach to antitrust summarized above. The first is that such research as has been conducted on the point fails to support the argument "that we need tolerate giant firms in order to achieve efficiency in research and development. The economic evidence on the subject indicates that small firms may be less efficient in this field, but that medium-sized firms are as good as, if not better than, giant ones." Thus, beyond a certain

26. Letter from Donald F. Turner, Assistant Attorney General in Charge of the Antitrust Division, Department of Justice, to Senator Wayne Morse, May 2, 1967, in 113 CONG. REC. 7116 (daily ed. May 18, 1967). Dr. Turner summarized several of these economic studies:

Professor Mansfield reports that the largest firms in the petroleum, drugs, and glass industries spent somewhat less on research and development relatively speaking than did smaller firms. And, Professor Mansfield concludes that "in most industries, the productivity of an R&D program of given scale seems to be lower in the largest firms than in somewhat smaller firms." Professor Scherer concludes from his study of patent behavior in a group of 448 firms selected from the Fortune list of the largest 500 industrial corporations in 1955 that "the evidence does not support the hypothesis that corporate bigness is especially favorable to high inventive output. . . ." In view of this evidence, we stand by the position that research and development economies do not typically require giant size. Ibid. (Emphasis added.)

See also, HAMBURG, ESSAYS ON THE ECONOMICS OF RESEARCH AND DEVELOPMENT (1966); SCHMOOKLER, INVENTION AND ECONOMIC GROWTH (1966); Scherer, Firm Size, Market Structure, Opportunity, and the Output of Patented Inventions, 55 AM.
minimum size, one that appears to be essential before significant efforts at research and development can be profitably undertaken at all, there seems to be no further correlation between firm size and innovation. And certainly no evidence has been presented to demonstrate that this minimum firm size needed for effective innovation is so large that such a firm would necessarily be a monopolist in its various markets.  

A second objection to any antitrust standard that would make the outcome of cases turn on whether the industry had been “progressive” is that there is apparently no acceptable method of distinguishing “good” from “bad” performance in this respect. It is not enough merely to count the number, and assess the significance, of the inventions and innovations that have in fact appeared in the industry over some particular period of time.

What will be lacking is any basis for deciding whether the firm’s performance was good or bad in light of its opportunities. The record may reveal that output has grown ten times in the period under study; it will not reveal whether or not output could have grown fifteen times if price policy had been different or if more vigorous efforts had been made in product development, in foreign marketing, or in cost reduction.


27. One study suggests that a manufacturing firm with sales of about $18 million, employing perhaps 1,000 persons, would be sufficiently large to maintain a research staff of efficient size, that is, at least twenty scientists and their technical assistants. Hearings Before Senate Select Committee on Small Business, 90th Cong., 1st Sess. ... (1967), (Statement by David Hamberg, Size of Enterprise and Technical Change). The firm at the bottom of Fortune’s list of 500 largest industrial firms in 1965 had sales of $109.6 million; the one at the top had sales of $20.7 billion. Fortune, July 15, 1966, pp. 232-47. See generally Cooper, R&D Is More Efficient in Small Companies, Harv. Bus. Rev., May-June 1964, p. 76.  

28. Kayser & Turner 53-54. (Emphasis added.) It is particularly inappropriate to “compare” the progressiveness of different industries, and then conclude: [T]hat industries with frequent and important technological innovations have a “good” performance in the matter of progressiveness, whereas those with infrequent and unimportant innovations have a “bad” performance, or are “technologically backward.” Application of this criteria of “gross progress,” for example, would find the petroleum refining industry as showing “good” progress in the last forty years, with a steady stream of technological developments, but the flour-milling industry as having “poor” progress, since over the same period firms in that industry were able to find or introduce only minor improvements in a technique which was fully developed by the early years of the century (when the petroleum industry was in its infancy). The comparison is unfair, and the conclusions are meaningless, both because of the wide difference in the intrinsic complexity of the manufacturing process involved, and of the wide difference in the ages of the two industries. The rate of “gross progress” is not a good direct index to how effectively an industry has performed in the dimension of progressiveness. The more appropriate question (and standard of evaluation) concerns how progressive the industry was relative to its opportunities — how well it exploited the available opportunities for invention and innovation. Each industry should be judged in terms of how well it did relative to what it was "possible" to do.

This latter standard, however, is by its very nature wholly unworkable, for:

[T]here is no way of knowing, a priori, what unknown things can reasonably be expected to be discovered. The “potential” rate of discovery, against which the actual rate might be measured, cannot in any way be systematically guessed or approximated. . . . Therefore, the absolute rate of discovery is not susceptible to meaningful evaluation, and its relative acceptability from a social standpoint is not subject to meaningful measurement.29

Or as another group of observers sums up the problem:

It seems impossible to establish scientifically any final conclusion concerning the relation between monopoly and innovation. The arguments in favor of monopoly are not very good arguments, and they do not wholly fit the facts. On the other hand, the case for competition is certainly not conclusive. In the last resort, those who have to frame public policy must judge whether competition, with its stimulus and uncertainty, will be a more effective force than monopoly, with its security but its absence of the driving force of rivalry.30

At least one modest conclusion would seem to be justified here, however. Considering the unquestioned benefits of competition on other grounds, the inconclusiveness of the evidence on progressiveness would hardly seem to call for an abandonment of the national policy in favor of competition and against monopoly. The burden of proof, and the onus of failing to carry it, would seem to be properly on those who argue that the benefits of monopoly in this particular dimension more than outweigh its rather obvious shortcomings in other respects. Until

29. Id. at 396. Bain concludes that both fact and theory are equally barren on the relation, if any, between structure and progressiveness:
As we are unable to distinguish good from bad performance in the dimension of technological progress shown by available records of this progress, we are similarly unable to establish, empirically, the conditions of market structure which might favor good progress. An alternative is to theorize, to the end of developing a priori predictions of what structural conditions should be expected to lead to optimal progressiveness. Unfortunately, the indications of such theorizing are so inconclusive as to be almost useless. We therefore drop the matter of technological progressiveness, and turn to other matters.
Id. at 397.
30. Jukes, Sawers, & Stillerman, The Sources of Invention 249 (1961). Others have also challenged the argument that without monopoly power, that is, freedom to reap the full benefits of the new development without interference from competitors, there cannot be an effective incentive for innovation:
[C]ompetition is clearly a stimulus to innovation. It is precisely when old products made by old processes yield only meager returns that the economic stimulus to discover new products or cheaper processes is strongest. Thus reduction of market power may not impair the capacity for innovation, and it will certainly increase the incentive to it.
Kaysen & Turner 85.
that burden has been carried, there would appear to be little basis for shifting to a policy that would accept a "good" performance in the matter of invention and innovation as justification for the monopolization of an industry.

Perhaps the ultimate difficulty with the "performance" standard, however, is that it has no workable remedy to offer when it finds "unworkable" competition. Having denied the existence of a causal relation between structure and performance, it cannot logically prescribe divestiture. And if it prescribes an injunctive remedy, it is then faced with the problem of framing a command that will effectively say to the firms in an industry, "Be efficient," or "Be progressive." Are they behaving like oligopolists — restricting output and holding prices above a competitive level? That is their very nature, and commanding them to do otherwise is roughly comparable to the "command" method of flood control, namely, standing on a river's banks and verbally exhorting its waters to stand still. To be sure, injunctive remedies can eliminate particular practices that may have been handicapping smaller firms and excluding potential entrants, thereby preserving the high concentration and entry barriers that make such pricing possible. This is, in effect, a "structural" approach, however. An attempt to alter the pricing and output patterns themselves by injunctive command is another matter entirely, and one that is wholly at odds with the basic philosophy of antitrust.

If one denies that performance can be improved by structural changes — directly, by reducing concentration thru divestiture, or indirectly, by lowering entry barriers or restraining conduct that has been used to protect an anti-competitive structure from gradual erosion by smaller firms and new entrants — then there are only two alternatives left: (1) government regulation in the fullest sense of the word, including direct specification of what is to be produced, how much is to be produced, the techniques that are to be used in producing it, and the price that is to be charged for it, or (2) outright government ownership of the industry's production facilities. That is to say, the government must ultimately be driven either to specify the "performance" desired in minute detail, e.g., a maximum profit rate of, say, eight per cent on invested capital (profit rates or markups being an aspect of "efficiency," as mentioned above), or to undertake the entire task on its own.

Both of these latter alternatives are highly undesirable for a number of reasons, one of the more obvious of which is again simply the matter of efficiency. To specify "performance" is, in effect, to "manage" business enterprises by setting prices, output, wages, and so forth, a task for which government officials have never been thought particularly qualified. The enormity of the regulatory task can best be appreciated by comparing it to the quite modest effort involved in an antitrust program:

The important point to grasp is that [a structural] antitrust policy does not involve exhaustive investigation or analysis of all the factors which conceivably may have a bearing on industrial performance... Its strength derives from the fact that a maximum effect may flow from a minimum of government intervention. It is not necessary to assemble and maintain a vast bureaucracy which exercises continued intervention in and surveillance of the affairs of business. But this is precisely what is required when public policy has as its objective the identification and implementation of what constitutes desirable performance. To do this job well requires an enormous volume of regulatory resources.32

As an illustration of this principle at work, it is said that:

[T]he Interstate Commerce Commission, whose major responsibilities involve setting of rates and other performance characteristics, has twice as many employees as the combined employees in antitrust enforcement at the Federal Trade Commission and the Department of Justice. And importantly, the ICC has responsibility for just a part of the field of transportation. Quite clearly, direct specification of industry performance requires, relative to the antitrust approach, a vast amount of government resources and intervention into the day-to-day affairs of business.33

The ultimate objective of all public regulation is simply to create artificially the end results that competition is expected to produce naturally. Under perfect competition, as noted above, firms that are unable to produce at the lowest possible per unit cost are forced out of business, thus leaving all production in the hands of firms of optimum productive efficiency; firms that incur unnecessary selling costs meet the same fate, with the result that distribution also takes place in the most efficient manner; and, finally, the pressure of new entrants squeezes out all excess or monopoly profits, leaving on top of those two "layers" of minimized costs (production costs and distribution costs) a profit margin that gives the entrepreneur a "normal" or competitive

32. Id. at 4.
33. Id. at 5.
return on his investment, but no more. The final result, then, is that the consuming public gets the product at the least possible total cost, given the existing state of technology — minimum production cost, minimum selling cost, and minimum profit margin.\textsuperscript{34} But only one of these, the profit margin, is under the direct control of the “regulator.” He can prescribe the socially acceptable profit rate, one that approximates the return being earned in competitive industries (\textit{e.g.}, eight per cent after taxes on invested capital) and set a price that, after deducting an assumed level of costs, will yield approximately that return. But the regulator is relatively powerless to do anything about the costs themselves, and these are by far the largest component of the total “price” paid by the public. Indeed, it has been persuasively argued that “cost is a function of price,” not the other way around — that, in accordance with some “Parkinson’s Law” of its own, cost tends to creep upward to fill any available “space” left vacant as price soars higher and higher above the minimum cost line.\textsuperscript{35}

Quite aside from the matter of efficiency, however, such a pervasive system of regulation, if extended throughout the economy, would undoubtedly be found socially and politically offensive to the bulk of the American people. Regulation, by putting a ceiling on prices and profits, and by setting a limit on how many firms may be allowed to enter, necessarily puts at the same time a “ceiling” on opportunity itself, on what Americans sometimes call the “main chance.” That would indeed be a closing of the “last frontier,” the ringing down of a curtain on what we still fondly refer to as the “American dream” — an action not likely to be widely applauded in a country that still cherishes the Horatio Alger “luck and pluck” saga as a part of its received faith.

It seems fair to conclude, in short, that the “performance” approach to the monopoly problem is not a particularly promising one. To be sure, performance data can be highly revealing in particular cases, as in those instances where long-run profits greatly in excess of competitive levels have been viewed as revealing a market structure (monopoly) otherwise obscured by the difficulty of marking off the “relevant market” itself.\textsuperscript{36} But its usefulness as a supplement to market

\textsuperscript{34} Kayser & Turner 62-65.

\textsuperscript{35} This is of course one of the reasons why profit margins are an incomplete measure of monopoly power: a monopoly that could have earned, say, thirty-five per cent after taxes on its investment, may have squandered the bulk of it on unnecessary costs (costs that would have been squeezed out under the pressure of a competitive market structure), leaving the appearance of only a “normal” — or “competitive” — return (say eight per cent) to confuse students of monopoly.

structure data should not be taken as evidence that it can either substitute for, or override evidence of, those far more basic features — concentration and entry barriers — in determining the long-run prospects for effective competition in an industry. A policy standard that would have the antitrust authorities and the courts assign greater weight to a defendant’s “efficiency” and “progressiveness” than to an inordinately large share of a highly concentrated, entry-barricaded market is in reality no “standard” at all; it is simply a vote of “no confidence” in a competitive economic system.

IV. The Conduct Approach

The antitrust laws of the United States have, for the most part, been addressed either exclusively or primarily to matters of business behavior — to “acts,” not “situations.” Antitrust is a branch of law, and law is traditionally concerned primarily with concepts of fairness or justice to the individual litigants before it, not with the implementation of broad abstractions. Thus, the first of the federal antitrust laws, the Sherman Act of 1890, did not outlaw “monopoly,” as such, but (1) collusive activities that “restrain trade,” and (2) activities that tend to “monopolize” trade. Much emphasis has been placed on the fact that the statute employed the verb, “monopolize,” rather than the noun form, “monopoly.” Hence it is not enough for the prosecutor to prove the mere existence of a monopoly; he must also show that its existence is attributable to someone’s act of “monopolizing,” that is, to the acquisition of monopoly power by means that are in some way offensive to the law’s notions of commercial fairness and justice.

37. Section 1 provides: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .” 26 Stat. 209 (1890), 15 U.S.C. § 1 (1964).

Section 2 provides: “Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . .” 26 Stat. 209 (1890), 15 U.S.C. § 2 (1964).


This conception of the problem has necessarily directed the focus of the inquiry away from the rather impersonal economic forces of the market, and focused them, instead, upon the treatment accorded to competitors of the alleged monopolist. The central issue is thus shifted away from the basically economic question of whether market power is being used to injure the consuming public, to the more clearly legal question of whether that power has been acquired in a manner that somehow "unfairly" disadvantaged competing firms. In other words, the law has directed its concern to the opportunities of businessmen to compete for the profits of a market, rather than to any "right" of the consumer to buy in a competitive market, at competitive prices. To be sure, it has generally been assumed that the "protection of competitors" is simply a proxy for the "protection of competition," and hence that the prevention of conduct unfairly reducing the sales and profits of individual competitors is not only consistent with, but quite sufficient to assure, the preservation of a competitive market and its accompanying public benefits. But the mere formulation of the problem in terms of "fair conduct" has tended to place a premium on "ethical" arguments in antitrust cases, rather than on economic analysis. The question has seldom been, "Has he acquired the power to charge the public super-competitive prices?" but rather "Did he acquire whatever power he has 'fairly'?" While the public has a decided interest in seeing that commercial competition is conducted fairly — that those who risk their time and capital are not injured by techniques that have nothing to do with economic efficiency — the public interest here is largely the same as that involved in the administration of justice generally, namely, the concept that one can assure justice for himself only by assuring it to every other man. The first question, however, involves a more direct form of public interest, since a noncompetitive market translates directly into prices that are higher than those that would have prevailed had competition been more effective, and hence means, quite unambiguously, a lower standard of living for those members of the public paying that super-competitive price.

As noted above, it has generally been taken for granted that the same result is reached by both approaches — that competition will be amply protected as a by-product of protecting competitors from "unfair" business practices. The premise here, and it may very well be a correct one, is that entrepreneurial talent is not the exclusive province of a handful of men running a few very large firms but a commodity in sufficient supply among American businessmen that there can probably be no such thing as a monopoly acquired by entirely "fair" means. This argument is, one might say, another expression of the essentially
egalitarian American spirit, a firm denial of another form of "elitism." If one man can do it, there will be others who can and will learn to do it just as well, if not better. One does not remain a "champion" forever. The title can be held for a while; but champions grow old and complacent, and younger, stronger men remorselessly narrow the gap. When that does not happen in commerce, when one firm gets and holds an effective monopoly on some market for a substantial period of time, many are not persuaded that the means used to beat off the challengers can have been wholly "fair." Carried to its logical extreme this argument apparently implies that an effective antitrust policy can be built entirely on rules of law prohibiting "unfair" business conduct.

There seems to be no question but that the elimination of unfair practices does in fact generally improve the competitiveness of markets. One of the major difficulties of an antitrust policy based solely on conduct standards, however, is that it is fairly difficult to administer. Judges and administrators, like men generally, often differ rather widely in their conceptions of what is "fair" and what is "unfair" in business dealings. Thus a particular court's willingness to tolerate a very substantial amount of "unnecessary roughness" might well result in the elimination of all but the two or three largest firms in one market (and hence eliminate most price competition there), while an unduly sensitive commercial conscience might lead another court to suppress, in another market, even the kind of socially-beneficial forms of rivalry (e.g., nondiscriminatory price cutting) that generally do no more than weed out the inefficient and hence lead to a more productive use of the country's economic resources. A fairly persuasive case can thus be made for the proposition that, if "competitiveness" (and its high output and low prices) is desired for its own sake or for the economic

38. We must assume that it is not the case that a few firms, managed by men of superior gifts, can and will continue to attract the small number of superior managers, and thus will be enabled to outperform all rivals in all fields, were they permitted and motivated to do so. In other words, large permanent differences in economic efficiency among firms, persisting in time over wide ranges of output and wide product lines, are either nonexistent or rare. This proposition implies something about the distribution of business ability in the population at large and the nature of business activity. On the first point it is assumed that first-grade managerial talent exists sufficient to man a few hundred companies such as Du Pont, General Motors, Standard Oil of New Jersey, etc.: there is a chairman of the board's gavel in the attache case of every division manager. On the second, it is assumed that where a particular firm does have an advantage in men and methods, rivals can and will copy the methods and hire away the men, and that incentives of pay and promotion will suffice to do so. . . . It is hard to support this proposition with concrete evidence, and, while we believe it accords with experience, others have expressed different views. Perhaps it is best to label this assumption as an article of democratic faith and leave it at that.

Kaysen & Turner 9. (Emphasis added.)

Schumpeter is mentioned as one of those that had doubts about the wide distribution of executive talent. "Whether he had any more evidence than a temperamental inclination toward aristocracy is not clear." Id. at 9 n.8.
results it causes, the law should consider it directly rather than through a proxy, adding it as a further objective of antitrust policy, alongside "fairness" and any others that might be considered desirable.

Another and perhaps even more serious difficulty with a "fairness" standard is that, in practice, it is likely to mean equal treatment only for firms already operating in the market, with little attention to the "rights," if any, of potential entrants. This, in turn, is related to such problems as those raised by mergers or "peaceful combination." A merger of consenting firms, one that presumably benefits both of the parties, might be quite devoid of any trace of "unfairness" to the remaining firms in the market and yet, by raising barriers to entry, severely injure both the opportunities of potential entrants and the interests of the consuming public in the larger output and lower prices that the added capacity of new competition could reasonably be expected to bring.

Finally, the most fundamental shortcoming of a "conduct" approach to antitrust is that, as mentioned above, it focuses on the symptoms, and not on the underlying disease. "Unfair" conduct generally consists of coercing some rival, supplier, or customer in a way that enriches the defendant at the other party's expense. But coercion, by its very nature, implies the existence of some degree of monopoly power, a "reservoir of force on which it draws that accounts for the acquiescence of the coerced party in a situation that, by definition, is not the result of mutually free bargaining." That is to say, the various aspects of business conduct commonly dealt with under the antitrust laws — price discrimination, exclusive dealing, and the like — are largely symptomatic of a more deep-seated ailment, an anticompetitive market structure on either the selling side, the buying side, or both.

None of this is intended to suggest that the law should be unconcerned with unfair business conduct. On the contrary, there are several reasons why conduct can never be left completely unrestrained. For one thing, even the proponents of the "structural" approach agree that the line of causation does not run exclusively from structure-to-conduct-to-performance, but often in the other direction, from conduct back to

40. Id. at 20.
41. Id. at 17.
42. [Thus], coercion consists in the ability of a firm with market power to impose terms in a bargain which the other party would refuse, were there an alternative transactor with whom he could deal more advantageously. The normal instruments of business bargaining, delays, refusals to deal, representations which fall short of complete candor, and the like, can be turned uniformly to the advantage of the powerful bargainer, because his partner in the transaction would be even worse off if he did not accept the terms imposed.

Ibid.
structure. For instance, several kinds of business behavior, such as mergers and predatory or exclusionary practices, can severely alter the structure of an industry, quickly transforming a competitive structure into an oligopolistic or monopolistic one.\(^43\) Secondly, so long as any substantial aggregations of monopoly power are allowed to remain in existence — and there have been few serious proposals to launch a widespread attack on every industry that shows any signs of market imperfection — some restraint must necessarily be placed on the way that residual power is used. The law’s traditional role of preventing as much unfairness or injustice as possible will always remain as one of the major objectives of antitrust policy.

V. The Structural Approach

An evaluation of the “structural” approach requires a somewhat fuller description of its basic concepts than the brief summary sketched previously. As noted, the structural features of a market are described under the two general terms, “concentration” and “barriers to entry.” These refer to the number and size distribution of the firms in the market (concentration) and to any obstacles that impose on firms attempting to enter for the first time, vis-à-vis the already established firms, either higher per-unit costs or lower per-unit prices (barriers to entry).\(^44\) The competitive significance of the first lies in the fact that high concentration — a small number of firms, each with relatively large shares of the total market — is said to destroy the incentive for independent decisions on price and output, and to encourage, instead, the development of what is called “oligopolistic interdependence” — a recognition of the fact that the profits of each is dependent on the decisions of the others. The competitive significance of the second structural feature, entry barriers, lies in the fact that the power to charge super-competitive prices conferred by the market’s high concentration can be exercised only if there are barriers to hold back the newcomers that can be expected to pour in as the price, and hence the profits, rises to increasingly attractive levels. From the standpoint of

\(^{43}\) This recognition of a reverse flow — that certain forms of conduct are sharp enough to cut into the underlying market structure — should not be confused with the general “conduct approach” discussed here. The distinction is that, whereas the latter is concerned with conduct as such (because of its unfairness and the like), the interest of the structuralist is primarily in its anticipated effects on concentration and entry barriers, not the conduct itself. This distinction is particularly critical in those instances where the conduct in question, though “unfair” and hence presumably unlawful, is inherently incapable of altering the industry’s structural composition. Similarly, there are a number of practices that, while highly effective as entry barriers and thus as destroyers of effective competition, are regarded as quite “fair” by the courts and thus remain entirely lawful. See, e.g., the discussion of exclusive distributorship agreements, note 67 infra and accompanying text.

\(^{44}\) See note 7 infra.
the would-be monopolist, then, neither is sufficient without the other. “What concentration gives, easy entry can take away.”45 From the public’s viewpoint, this means, happily, that there is a “second line of defense” against the harmful effects of such collective monopolization — that even though the battle to prevent undue concentration may have been lost, the actual fruits of victory, low prices and high output, can still be squeezed from the industry if the entry barriers around it can be kept sufficiently low.

This is not to say, however, that concentration is less important than the condition of entry. Indeed, it is only after a market has become, or is about to become, highly concentrated that there is even any occasion for asking whether entry is easy or not. In the atomistic market — one with many firms, none of which has any significant share of the total market — the internal (“intraindustry”) competition generated among themselves by that large number of already-established firms should itself be sufficiently intense to force price and output to competitive levels, with no assistance needed from those additional firms that might be standing outside the market’s perimeter, threatening to enter if prices and profits should start to climb to particularly attractive levels. Thus, it is only in a single situation, one in which the intensity of competition inside a market is becoming too weak to keep price and output at competitive levels, that the pressures exerted by potential competition from the outside will be noticed by, and can be expected to restrain the conduct of, that market’s already-established firms. In other words, the two structural features that most significantly influence the competitive behavior of business enterprises, “concentration” and “entry barriers,” are so closely interrelated that it is very difficult to understand either without some grasp of the other as well.

A. Oligopolistic Interdependence and the Concentration Factor

High degrees of concentration are relevant because, as noted, they imply high degrees of “oligopolistic interdependence” between the larger firms in the market, a recognition of their mutual interests and the benefits of avoiding conduct that reduces both their individual and collective profits. Unlike the small firms in an “atomistic” market — firms with shares so small that any one of them could either double its output or go out of business entirely without causing a noticeable change in the over-all market price of the commodity in question —

neither of the "big four" in an industry will be able to avoid the discovery, sooner or later, that its individual output volume is such a large percentage of total market sales that any significant increase or decrease in its individual volume will have an immediate effect on the entire market price. Thus, if each of the "big four" firms currently have twenty per cent of a given market, and if one of them suddenly decides to build another plant and double its individual output, the "excess" supply created by this new capacity can be expected to cause a sharp drop in the marketwide price, including not just the price received by the firm that built the new plant, but by the others as well. At that lower price, however, the firm that built the new plant might discover that, while its sales had indeed doubled, its total profits had not increased at all or had perhaps even declined. Experiences of this sort quickly teach firms that they are no longer "independent" of each other, but that, on the contrary, the earnings of each are closely dependent on the price and output policies of the others. The essential nature of oligopoly is most clearly seen, however, in the matter of price-setting. The critical distinction between oligopoly, on the one hand, and competition, on the other, is that whereas the individual firm in the competitive industry can alter its price without causing a reaction by its rivals, the individual oligopolist must anticipate precisely the opposite result, namely, that any price change it makes will be noticed by its rivals and taken into account by them in setting

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46. This is what is called the "percentage effect." Heflebower, Corporate Mergers: Policy and Economic Analysis, 77 Q.J. Econ. 537, 554 (1963). Under the "law of demand," the price of a product must generally be lowered if more of it is to be sold. Consumers have only so much money to spend. Moreover, the "satisfaction" the consumer gets from owning a second unit of any commodity is generally less than that gotten from owning the first; e.g., most people do not get twice as much enjoyment from owning two Cadillacs as they get from owning one Cadillac. "Diminishing returns" sets in with the purchase of the second unit.) Here, for example, the new plant, by adding twenty per cent to the total volume offered for sale in the market would create a "surplus" and hence force all of the sellers to lower their prices in order to induce consumers to clear the market. Whether a twenty per cent increase in the volume offered for sale would result in a corresponding twenty per cent decrease in the price would depend on exactly how sensitive consumers of this particular commodity are to price reductions. The fall in price following an increase in output can be on a one to one basis (a twenty per cent increase in volume causes a twenty per cent fall in price) or it can be either more or less than that.

47. Dixon, supra note 45, at 987.

48. There is of course a relationship between the price selected by an industry and the quantity that can be sold (the "law of demand"), so that the fixing of the one automatically determines the other. As Bain illustrates this principle:

For example, the demand for product A in a given situation may be such that buyers will take 10,000 units per month if the price is $1.00 per unit, 11,000 per month if the price of 95 cents per units is charged, and 12,500 units per month if the price is 90 cents per unit. Now if sellers set a price of 95 cents per unit, they have effectively determined their saleable output at 11,000 units per month. If, conversely, they do not set a price at all but simply produce and offer 11,000 units of output for sale for what it will bring, buyer demands will tend to bring the selling price to 95 cents.

BAIN, INDUSTRIAL ORGANIZATION 269 n.1 (1959).
their own price. If it cuts its price, for example, and if its rivals promptly follow with similar cuts of their own, then the firm initiating the move will presumably gain nothing by it: the quick matching of its new price will remove the incentive for buyers to transfer their patronage and hence will presumably prevent it from making any gain in market share at the expense of its “competitors.” In addition, it is now selling that unchanged market share at a lower price — and thus may well be realizing a lower net profit than it was realizing before the price cut was undertaken. The net result may be, in other words, that it now has the same percentage “slice” of the total “pie” as before, but that the size of the pie itself has shrunk.

If, on the other hand, the individual oligopolist elects to raise its price, it must similarly anticipate a reaction by its rivals. If they follow with matching increases of their own, then again market shares will be unchanged. (Now, however, prices are higher, not lower, and both individual firm and industry profits are presumably up; each has an unchanged percentage “slice,” but of a larger “pie.”) And if the others do not follow the price increase by the first firm, then its customers will presumably start to desert, and it will be forced to rescind it and rejoin them at the lower price.

The critical point here is the knowledge, by each member of the oligopoly, that a price change by him is, in effect, a price change by the industry as a whole. Price differentials, if large enough to be effective in actually diverting trade from one oligopolist to another, cannot and will not be tolerated for long. Each knows this in advance. He knows the others cannot afford to let him maintain a lower price and divert their trade to him. If they are to behave rationally, that is, as profit-maximizers, then they must meet his price cut. Similarly, they know he must come back down if they fail to follow his price changes upward. Knowing that there can be no permanent differentials in their prices, they necessarily know that any permanent change by one must be a permanent change by all. When the individual oligopolist is thinking about changing his price, therefore, he must recognize that his fellow oligopolists are going to take some action that will erase the new price differential and hence that his market share is going to remain unchanged. The only occasion for a price change, then, is when one or more of the firms believes that the size of the “pie” itself can be changed in such a way as to increase not just

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49. This depends on how responsive consumers are to price changes in this particular industry. It is possible, of course, for an industry price cut to cause so large an increase in industry volume that profits are enlarged, not reduced. This would imply, however, that the industry had previously been short-sightedly maintaining prices that were too high to maximize its profits.
his individual profits, as such, but his profits as a part of increased group profits. With each member knowing that he will not be allowed to price differently than the others, and that he can only increase his individual profits by increasing those of the group as a whole, the oligopolist is expected to rationally avoid price cuts that demonstrably lessen the group’s (and his own) profits, and to either initiate himself, or at least recognize and go along with, any price increases that will in fact (taking into account the effects on volume) add to both group and firm profits. This “most profitable” price for an oligopoly and each of its members is, then, other things being equal, the same as the “monopoly” price, the price a profit–maximizing monopolist would be expected to discover by trial and error and, eventually, adopt as his long–run price policy. The industry is quite as much “monopolized” by the one as by the other. One is a “collective” monopoly, achieved by a group of firms acting in unison (though, perhaps, noncollusively), the other a single–firm monopoly. The economic results are essentially the same.

Needless to say, however, not all industries classified as “oligopolies” succeed in achieving this kind of perfect coordination. Actual observation shows that in many such industries prices are nowhere near the monopoly price “ceiling” and may in fact be quite close to the competitive price “floor.” What causes these differences in results? Several factors are believed to be at work here, particularly (1) differences in the actual degree of concentration in one “oligopoly” as compared with that in another, and (2) differences in the height of the barriers guarding entry to one “oligopoly” as compared with those around another.

It should not be assumed that there is some agreed–upon definition of when an industry leaves the “competitive” classification and crosses a border into some clearly defined category called “oligopoly.” At most there is a range, a sort of “zone” that separates the two. In theory, of course, oligopoly begins at that point where “the few largest sellers have a share of the market sufficient to make it likely that they will recognize the interaction of their own”50 and their rivals’ individual price and output decisions as causes of over–all market price and profit levels. Since these matters of “recognition” and “interaction” involve the responses of individual men, it is not to be expected that a single set of “concentration” figures will evoke precisely the same patterns of conduct in every industry, or even in the same industry at different periods of time. In general, however, it can be said that the majority of economists working in

50. KAYSEN & TURNER 27. (Emphasis added.)
this area are substantially agreed that oligopolists are likely to "recognize" their mutual interdependence a long time before they're able to actually do anything about it. That is to say, there must be at least two subclassifications of oligopoly. The first, "loose" oligopoly, refers to that early stage in which the larger members of an industry or market are beginning to recognize their community of interests but are still too numerous, and their market shares too small, to permit successful coordination (absent outright collusion) in restricting output much below, and raising prices much above, competitive levels.

The reason, of course, is that at these relatively low levels of concentration, the impact of individual firm actions on each of the others, though perceptible, may be still too weak to cause the kind of instant responses that alone can suppress the individual urge to shade prices and get extra volume at the expense of the others. The various commentators have suggested that this lower or "recognition" threshold of oligopoly may lie perhaps somewhere near the point where the eight largest firms have thirty to forty-five per cent of the total sales in a market,\(^1\) and the largest of these have individual shares of perhaps five to eight per cent.\(^2\)

It should not be assumed, however, that this kind of "loose" oligopoly has the same competitive implications as the more concentrated variety, the "tight" oligopoly. This latter term is reserved for those industries in which concentration has proceeded to a point where the signs of noncompetitive performance, such as output restriction and supercompetitive prices, have already appeared or are considered very likely to appear in time. Again different researchers have reached different conclusions as to exactly how much concentration is required before these undesirable results can reasonably be expected. But in general, the various estimates range around two figures, namely, a market in which the four largest firms control fifty per cent or more of the total sales, and one in which the eight largest control seventy per cent or more.\(^3\)

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52. Bain, id. at 131. Thus, in the recent Von's Grocery case involving the merger of two firms with four and seven-tenths per cent and four and two-tenths per cent of the market, respectively, the Solicitor's brief quoted testimony by a former president of the acquired firm that it and its competitors (the largest of which had eight per cent of the market):

... check one another to see what the other man is doing, and we know that we can't demand any more from the customer than the other fellow on a nationally known item. There may be items in our store that we wouldn't be to the penny the same price, whether it be a mistake in the pricing or a mistake that the store would fail to catch when they made their price changes.

53. See Bain, Industrial Organization 413 (1959); Bain, Relation of Profit Rate to Industry Concentration: American Manufacturing, 1936–1940, 65 Q.J. Econ.
The explanation for the difference between the results expected from “loose” and “tight” oligopolies lies in the different degrees of “interdependence” generated by each. The smaller the number of firms, and the larger the market share of each, the greater the impact of their individual moves on each other and thus the sharper the awareness of their mutual interdependence. This awareness is of course at its absolute maximum where there are only two firms, each with equal shares of the market. Suppose that, in this situation:

[O]ne of them, seller A, increases his sales volume 10 per cent at the expense of the other, perhaps by a small price cut sufficient to generate this increase. Then the other, seller B, will suffer about a 10 per cent decrease in his sales volume. He will notice it and identify its source, and he will presumably react by changing his price. Moreover, his reaction will have a noticeable effect on the sales volume of seller A. Then oligopolistic interdependence (operating circularly or two ways between the two sellers) exists.54

If, on the other hand, the industry consists of five equal-sized sellers rather than two, a similar ten per cent increase in the sales volume of one would reduce the sales of each of the other four by only two and one-half per cent. And if there are, instead, 101 equal-sized sellers in the industry, such a ten per cent increase by one would reduce the volume of each of the others by no more than about one-tenth of one per cent.55

Would there be “interdependence” in the last two situations? In one of them, the one involving the five-firm industry, the answer is apparently “yes.” The loss by the other four firms of two and one-half per cent of the market “will still be noticeable and identifiable as to source, and reactions would be induced. Oligopolistic interdependence still exists, but it is not so strong an interdependence as would exist if there were but two sellers.”56 How about the other one, the situation where there were 101 equal-sized firms? The answer there is said to be “no.”

It seems highly unlikely, in all actual markets in which slight variations in sales volumes due to many causes are always

[It appears that profits are particularly sensitive to concentration at levels where four firms account for around 50 percent of total sales]. . . . Four-firm concentration in the immediate range of 50 percent appears to be a critical degree above which profits are significantly higher and below which they are significantly lower.

Id. at 205.
54. BAIN, INDUSTRIAL ORGANIZATION 121-22 (1959).
55. Id. at 122.
56. Ibid. (Emphasis added.)
occurring, that this slight [1/10th of 1%] loss of sales would be either noticed or identified as to source by the other 100 sellers. Reactions of rivals to individual-firm price and output adjustments would not ensue or be anticipated; each seller would tend to act independently without taking account of such reactions; oligopolistic interdependence is not present; and an atomistic market structure prevails instead.\footnote{57}

It is this loosening of the ties that bind an industry's firms together, the weakening of their incentive to price collectively and the strengthening of their incentive to price independently, that, by degrees, changes it from one that is effectively monopolistic to one that, although still an oligopoly in the "recognition" sense mentioned previously, may in reality be much closer to the "competitive" end of the structural spectrum than the "monopoly" end.

Indeed, the significance of these attempts to distinguish these two sub-categories of oligopoly lies primarily in the fact that while the first, "loose" oligopoly, should certainly be considered an "early warning signal" giving notice of approaching trouble, it can in fact be quite workably or effectively competitive, yielding costs, prices, and outputs that are not significantly different from those that could be expected under perfect competition. This, in turn, means that the attainment of these desirable fruits of competition is not, as some critics of antitrust have suggested, an impractical undertaking; one rendered too costly by the existence of opportunities in various industries for very large firms to realize significant economies of scale. The argument has been that, because "perfect competition" as conceived in theory requires perhaps hundreds of firms, each with infinitesimal market shares, plus perfect knowledge of market conditions and the like, and because any such fragmentation of American industry would obviously reduce its efficiency, raise costs, and thus impair the people's standard of living, all hopes for creating or maintaining competition must perforce be abandoned and monopoly accepted with whatever grace can be mustered. In the context of this "scale economy" argument, these findings that competition does not die off at the first sign of oligopoly but, rather, retains the bulk of its vitality well into the intermediate concentration ranges, is of course highly significant. It means, in effect, that only a relatively modest change in the structure of an industry, one that pushes it, for instance, barely across the line from a "tight" to a "loose" oligopoly, can often be expected to yield very large dividends for the public, restoring a degree of competition that, while admittedly far from the economist's model of "perfect"

\footnote{57. \textit{Ibid.}}
competition, may nonetheless be quite effective in pressing prices and output tolerably close to the competitive optimum. Restoring the idealized version of "perfect" competition in America's mass-production industries may well be both impossible and undesirable; preserving a reasonably close, real-world approximation to that ideal, however, may be well within our capabilities with no sacrifice at all in efficiency:

It is true that modern technology rules out highly fragmented industries consisting of vast numbers of companies. But only the unsophisticated will jump from this observation to the inference that the alternative to atomistic competition is monopoly. Industrial experience demonstrates that there is a vast difference between the behavior of variously structured oligoplies. There is a broad range of effectively competitive industries between fragmented industries and those approaching monopoly. Careful study of American industrial behavior reveals that most industries fall in this intermediate territory. . . .

B. Barriers to Entry

Perhaps the most unique contribution of the "structural" approach, however, lies in its emphasis on what is called the "condition of entry." Economists have long recognized the role of newcomers in pushing an industry's price down and its output up. Fulfillment of that traditional role hinged, however, on actual entry by outsiders, and classical economic theory credited those not already inside the market's perimeter with little or no influence on its currently prevailing price and output levels. In fact, however, potential entrants, those firms standing at the edge of a market prepared to enter should it become sufficiently attractive, can and frequently do have a very profound influence on the behavior of that market's established firms. Just as there can be a recognition of "interdependence" among the established firms themselves, so there can be an awareness of a similar interdependence between an industry's established firms, on the one hand, and its potential entrants, on the other.


59. The building of new capacity, as noted above, achieves lower prices by triggering the so-called "percentage effect." (See note 46 supra.) If the industry's already established firms restrict their output and create the artificial "scarcity" that permits them to charge a super-competitive price, new firms, attracted by those abnormally high profits, will continue to enter and build new capacity until the industry's profit rate is once more at the normal or competitive level. At that point, there is no further incentive for newcomers to enter, and the process is automatically stopped. Should "too much" entry occur and push profits below the competitive level, some established firms would be expected to leave, this reverse flow continuing until industry earnings had once more reached the competitive equilibrium point.
There are few concepts as critical in understanding the Supreme Court's current administration of our national antitrust policy as the concept of business "entry" into a market or industry. It begins with the premise that the birth and death of business enterprises, and their entry into and exit from industries and markets, is motivated, at least in large measure, by a rational pursuit of profit. This means that there is a constant tendency for capital to flow out of those industries yielding low returns and into those yielding higher ones. The net result of these flows is a general tendency toward equalization of returns in the various industries throughout the economy at some sort of "normal" or competitive rate of profit. This latter concept, in turn, provides economic analysis with the "basic tool needed to describe the conditions under which entry and exit — those critical events in determining whether an industry will or will not be competitively structured — can be expected to take place." Thus, if the firms in an industry are earning a return that is at least roughly comparable to that being earned in most other sectors of the economy, there is no incentive for them to leave their industry and go to another. Similarly, if the return in a given industry is no better than elsewhere, there is no incentive for any of the firms in other industries to leave their own and come to that one. This leads to the definition of the normal or competitive rate of return as one that is (1) sufficient, but just sufficient, to induce the already established firms in an industry to continue producing and selling the product, and (2) insufficient, but just barely insufficient, to induce new firms to enter. This figure establishes something of a pivot point: profits above that level are expected to induce entry, profits below it are expected to encourage exits.

60. The term is formally defined by Bain as "the combination of two events: (1) the establishment of an independent legal entity, new to the industry, as a producer therein; and (2) the concurrent building or introduction by the new firm of (new) physical production capacity. . . ." Bain, Barriers to New Competition 5 (1956). The two requirements of "entry," then, are (1) a new firm, and (2) new productive capacity. It should be noted, however, that the firm itself need not be "new" in the newly-created sense; it can be an old, long-established firm in some other industry or market, its "newness" lying solely in the fact that it is now entering this market for the first time.

61. Dixon, supra note 45, at 988.

62. Alexander Hamilton explained the concept of the normal or "reasonable" profit to the Second American Congress in 1791 this way: "When a domestic manufacture has attained to perfection, and has engaged in it the prosecution of a competent number of persons, it invariably become cheaper. . . . The internal competition which takes place, soon does away with everything like monopoly, [and] by degrees reduces the price of the article to the minimum of a reasonable profit on the capital employed. This accords with the reason of the thing, and with experience." Alexander Hamilton, Report on Manufacturers, 2d Cong., 1st Sess. 133 (1791). (Emphasis added.) See also Kaysen & Turner 63: "If normal profits are of the magnitude of, say, 6 to 8 percent on invested capital [after taxes], an average profit of 9 percent over ten years could not be identified as supernormal with any confidence, but one of 12 percent could." Ibid.
This figure also leads to the notion of an "entry-inducing price," a key element in understanding the concept of barriers to entry. The first step is to translate the normal or competitive rate of return — for example, eight per cent after taxes on invested capital — into terms of "a 'gap' or margin between price, on the one hand, and cost, on the other."63 As the leading firms in a tight-knit oligopoly acquire a stronger and stronger sense of their mutual "interdependence" and employ it to raise their prices higher and higher above costs, "a point is . . . ultimately reached where the difference between the two translates [back] into a supernormal return [on invested capital] and hence can be expected to attract new entrants. Outsiders are expected to observe these price-cost movements"64 and, attracted by the prospect of sharing in the supercompetitive profits, to move in "as soon as that gap or spread between price and cost crosses the critical point where more than a competitive profit is being earned."65 Unless entry is restricted in some manner, therefore, monopoly pricing is self-correcting: any attempt on the part of the leading firms in a highly "concentrated" industry to raise their prices above the competitive level will simply draw in an avalanche of new firms whose added output will quickly push the price back down to where it was in the first place. This means that there are situations in which a small number of leading firms may have the power to raise prices to a noncompetitive level, but where, because entry is unrestricted, they cannot afford to exercise it. Or, to use again our shorthand summary of the relationship between these two elements of market structure, what "concentration" gives, "easy entry" can take away.

The established firms in concentrated industries are, of course, aware of all this. They understand quite clearly that, unless they can devise some means of barricading newcomers out, the industry's high profits will act as a veritable magnet drawing those outsiders in.66 The

63. Dixon, supra note 45, at 989.
64. Ibid.
65. Ibid.
66. The "interdependence" here between established sellers, on the one hand, and potential entrants, on the other, is of course similar to, and in fact dependent on, that which exists among the established firms themselves. It is only when each firm regards its own individual price changes as equivalent to industrywide price changes that it will take into account the possibility of inducing or forestalling entry. Suppose that all sellers, or at any rate the principal sellers, in an industry act collectively, in the sense that each views his own price changes as equivalent to similar changes by the whole industry. Then each will regard the effect of his own price changes on entry (whether he is leading others or following others and thus validating their leadership) as similar to the effect of a concurrent industry-wide price change on entry. And if this is so, two things follow. First, the individual seller will always calculate, in considering his own price adjustments, as if his own price adjustment had a definite (and in a sense maximum) effect on entry, since his own adjustment is effectively equivalent to an industry-wide price adjustment of a similar magnitude. He will be led to consider that
objective, therefore, is to arrange it so that, no matter how wide the "gap" between cost and price (profit margin) becomes for the established firms themselves, it will always remain too narrow to permit even the most efficient potential entrant to earn more than a normal profit, and therefore, too narrow to induce him to enter. This is accomplished by erecting entry "barriers" around the industry, obstacles that cut down the potential entrant's profit margin in one of two ways, namely, (1) by imposing on him higher costs per unit than those encountered by the established firms themselves, or (2) by compelling him to sell his product at a lower price per unit than the established firms get for a product of comparable quality. Either way, the result

his own price adjustment can alternatively forestall or induce entry to the industry. Second, the seller will be led, in making his own price adjustments, to consider the effect upon industry profits, via entry, of an industry-wide price adjustment equivalent to his own, and upon his share of these profits. BAIN, BARRIERS TO NEW COMPETITION 27 (1956). (Emphasis added.)

67. As mentioned above (see note 7 supra), barriers are divided into three general categories, (1) "absolute cost disadvantages," (2) "product differentiation disadvantages," and (3) "scale economy disadvantages." An example of the first is discriminatory pricing, or denying potential entrants the opportunity to buy supplies, materials, and other inputs at as low a price as the larger established firms can secure. Another and perhaps even more important example is the use of reciprocal "exclusive distributorship" and "exclusive dealing" contracts in many consumer goods industries, such as automobiles and the like. The gist of these contracts is that the dealer agrees to handle only one manufacturer's "brand" and that manufacturer, in turn (and in consideration therefor), agrees to sell his brand to no other dealer in that local market. If another manufacturer tries to get the dealer to handle a second brand, the dealer will refuse to buy; if another retailer opens up a local shop and tries to buy from this manufacturer, the latter will refuse to sell. The net effect is that (1) a very high barrier is thrown up at the producing level (new producers are denied access to the most efficient retail outlets, thus increasing their distributive costs and reducing the public acceptance, and hence the price, their products can command), and (2) the high concentration thus fostered at the producing level is then faithfully transmitted down to the retail level. Each retail market is structured exactly like the upstream manufacturing market: the latter reproduces itself, amoeba-like, in every town and hamlet across the nation. If there is only one manufacturer of a product and it practices mutual exclusive dealing with its dealers, then by definition there can be only one dealer in each retail market; if, on the other hand, there are 20 such manufacturers and each appoints a single dealer in each town, there will necessarily be 20 dealers there.

Using a "conduct" approach to these problems, however, the courts frequently see them as nothing more than harmless "refusals to deal." See, e.g., Amplex of Maryland, Inc. v. Outboard Marine Corp., Trade Cas. ¶ 72,135 (4th Cir. 1967). In this case, for example, the court saw nothing unlawful under either Sections 1 and 2 of the Sherman Act or Section 3 of the Clayton Act in the defendant-manufacturer's cancellation of an outboard-motor retailer's dealership because he had opened another store in the same town and commenced selling a competing brand of outboard motor. Structurally, the manufacture of outboard motors appears to be a classical "duopoly," with two firms holding some 85% or more of the national market. (The defendant, Outboard Marine, maker of Johnson and Evinrude motors, has some 60%; its only significant competitor, the maker of Mercury outboard motors, is said to have 25%–30%.) With this degree of concentration, no meaningful price competition is to be expected at the manufacturing level; and since exclusive distributorship contracts reproduce that same pattern downstream, they similarly wipe out any reasonable expectation of such competition in the local retail markets. This result may be "fair" as between these two manufacturers and their chosen dealers, but its fairness to the Maryland public that would have benefited from the lower prices more competitive market structures could reasonably have been expected to bring is far from clear. Using a structural approach, instead, the courts might well be able to focus upon a much sturdier application of the "rule of reason," one that would find
is the same. Whether the potential entrant's disadvantage lies in his higher costs or his inability to command as high a price for the same quality product, the result is that he will always earn, regardless of the price that happens to prevail in the market at any given time, a lower profit than the established firms will be earning. If the current price is one that just permits the established firms to break even, he will be losing money; if the price is one that permits them to earn only a normal or competitive return, he will be earning less than a normal profit; and if the price is one that permits him to earn a competitive profit, they will necessarily be earning more than that — a supernormal or monopoly return.

This brings us to the actual measurement of the height of the various entry barriers, expressed in terms of the degree or "extent to which established sellers can persistently raise their prices above a competitive level without attracting new firms to enter the industry."\(^{68}\) If entry is completely unobstructed, then, by definition, any price that permits more than a competitive return — no matter how miniscule that excess profit — will attract a sufficient number of entrants, with sufficient new productive capacity, to beat the price back down to the competitive level. But if there is some obstacle that imposes on the most efficient potential entrant a cost or price disadvantage of, say, five dollars per unit, and if this disadvantage permits the established firms to safely raise their prices by that amount — from $100 to $105 for instance — then it is said that there is a "five per cent entry barrier," one that permits the established firms to raise their prices five per cent above the competitive level without inducing this potential entrant to come into the market.\(^{69}\) It is conceivable, of course, that the barriers surrounding an industry might be so high that the established firms

\(^{68}\) BAIN, BARRIERS TO NEW COMPETITION 3 (1956). The "competitive level of prices" is defined here "as the minimum attainable average cost of production, distribution, and selling for the good in question," plus "a normal interest return on investment for the enterprise." Id. at 6. After a detailed study of twenty industries, Bain rated them as having either "very high," "substantial," or "moderate to low" entry barriers. He concluded:

1. that in the "very high" category, established firms might be able to elevate price 10 per cent or more above [the competitive price level] while forestalling entry;
2. that with "substantial" barriers, the corresponding percentage might range a bit above or below 7 per cent;
3. that in the "moderate to low" category the same percentage will probably not exceed 4, and will range down to around 1 per cent in the extreme entries in this group. Id. at 170.

As to the type of factual information used in making these measurements, see the questionnaires set out in Bain's appendices, id. at 223.

\(^{69}\) Ibid.
could raise their prices all the way to the monopoly “ceiling” without
inducing entry, that is, without creating a “gap” between cost and
price that would permit the handicapped newcomer to earn enough
above a competitive return to make entry attractive to him. In this
situation, it is said that entry is “blockaded” — it would only occur if
the price rose above the monopoly level, and such a price is auto-
matically ruled out by the assumption of rational, profit-maximizing
behavior.

Doubtless a more common situation than either completely “easy”
entry or completely “blockaded” entry is the intermediate case where
barriers are high enough to permit the established firms to charge a
price well above the competitive floor, but not high enough to permit
a price all the way up to the monopoly ceiling. Here the established
firms must make a critical decision. They must decide whether it
would be more profitable to keep their prices at that entry–excluding
level, contenting themselves with what might be a relatively modest
amount of excess profit at that price, or ignore the potential entrants
and raise prices all the way to the monopoly level, harvesting as much
excess profit as possible before the inevitable new entrants are able
to get into production and force the price back down to the competitive
level. Where entry barriers are relatively low, thus permitting very
little in the way of excess profits without attracting new entry, the
firms in a highly concentrated industry could very well find the latter
course the more profitable of the two.

In general, however, the other situation is probably much more
common in American industry. Here the established firms, recognizing
their “interdependence” not only with each other but with potential
entrants as well, and recognizing that the more profitable course is to
accept whatever excess profits their barriers permit them to take without
inducing new entry, will engage in what is called “entry-forestalling
pricing,” that is, the selection of a price between the competitive floor
and the monopoly ceiling that falls just short of the figure that would
induce potential entrants to come in.

It would be hard to overestimate the significance of this latter con-
cept. It means that the price and output levels prevailing in an industry
are the products not simply of the sometimes feeble competitive forces
generated within the industry itself, but in addition, those compelled
by another, outside force, the force of potential competition “waiting in
the wings.” The larger firms in the highly concentrated industries must
necessarily make some kind of an estimate as to how high they can raise
their prices without attracting new entrants or, stated another way,
they must estimate how low they have to keep their prices in order to
forestall entry. In short, they are required to actually make some kind of “measurement,” no matter how rough an approximation it might really be and no matter whether they think of it in these or wholly different terms, of the actual height of the barriers around their industry. To be sure, they may miscalculate and set a price above the entry-forestalling level. The chances are, however, that any errors will be on the low rather than the high side. Considering the penalty for crossing the line and actually inducing new entry — “excess” capacity and lower prices and profits — the more probable result is that the established firms will pick a conservative figure well below the danger zone, thus turning this element of uncertainty in estimating barrier heights to the further advantage of the consuming public. The net result of relatively moderate entry barriers, then, is that the established firms in even the most concentrated sectors may be compelled to behave as though they were members not of tight-knit, oligopolistic industries, but of much more competitively structured ones. “This means, of course, that potential entrants into those industries are exercising a keen competitive influence — i.e., causing the price to be lower than it otherwise would have been — even if they never actually enter.” Chairman Dixon goes on to say:

This concept of “barriers” and their role as a shield against the competitive pressure of potential entrants provides economic analysis with perhaps its most flexible and versatile tool in making the kind of economic judgments required in antitrust cases. For example, in the conglomerate merger field, the fact that the acquiring and acquired firms occupy different markets automatically means that the traditional tools of analysis — e.g., measuring the changes in the number of firms and their respective market shares — are wholly inadequate; one firm has simply replaced another and hence there has been, by definition, no change in either of those dimensions. It may still be possible, however, to make reasonable estimate of the probable effect on competition by studying the effect the merger is likely to have on the condition of entry. If, for example, . . . the acquiring firm was . . . one of the group of “potential entrants” that the established firms were pricing to “forestall” — holding prices lower

70. Dixon, supra note 45, at 990. (Emphasis added.)

71. Discovering the identity of an industry’s “potential entrants” is very important and can be, in certain situations, extremely difficult. Its importance lies in the fact that only those potential entrants that are recognized as such can exercise a pre-entry influence on the insiders’ behavior: the highest price that will forestall entry cannot be known and its competitive influence felt until something is also known (1) about the probable level of costs each potential entrant would be likely to encounter if it actually entered and (2) about the returns each potential entrant is earning in its other markets. Thus, a firm that perhaps appears at first blush to
than they otherwise would have been in order to prevent its entry — then the acquisition, by moving that firm from the outside to the inside without adding new capacity, has necessarily removed its part of that restraint on prices and, to that extent, has definitely lessened competition. And, if it can be shown that this acquiring firm was likely to have actually entered on its own by internal expansion — by building new capacity — then its entry by merger has, by definition, reduced by one the number of firms which would have ultimately been actually competing in the industry. Finally, of course, it is frequently possible to show that the "substitution" of the acquiring for the acquired firm has itself changed the condition of entry . . . that it has raised barriers to entry (and perhaps disadvantaged other established firms as well) and hence, pro tanta, reduced the intensity of future competition in the industry.72

For example, a conglomerate merger that replaces a medium-sized regional or local firm with a national organization known for its aggressiveness against smaller firms can clearly have an adverse effect on competition. The smaller firms already in the market, having committed their capital, may be unable to leave readily and hence may feel constrained to swallow their fears and try to stick it out (perhaps taking care to avoid undue independence in their future pricing decisions). Potential entrants of comparable size, however, with the critical decision on entry yet to be made, may very well view the presence of this belligerent giant in the market as reason enough for deciding to risk their capital elsewhere. Whether real or imagined, such fears can themselves constitute formidable barriers to entry, barriers that permit the larger firms in a market to discipline the smaller ones and compel them to follow along as prices are raised above the competitive level .

VI. Conclusion

Several especially desirable features of the "structural" approach to antitrust enforcement have already been mentioned, particularly its

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be the most likely potential entrant — one with adequate funds, familiarity with the technology, knowledge of the market, and perhaps a very substantial advantage over all other potential entrants in terms of costs — may in fact be quite uninterested in entering this market if the latter's profits, though well above the normal or "competitive" level, are nonetheless below what this firm is earning in its other markets. The possibility of earning twelve per cent after taxes might well induce entry by a firm that is currently earning only ten per cent on its various investments, but will hardly excite a firm that is earning, and expects to continue earning, at least twenty per cent. In a sense, therefore, a firm's own super-competitive earnings in other markets can themselves constitute a "barrier" to its entry into this one.

72. Dixon, supra note 45, at 991.
relative efficiency, its maximum effectiveness with a minimum of enforcement resources, together with the accompanying minimization of government interference in the management of business and thus the enhancement of personal liberties. Brief mention was also made of the fact that this approach tends to measure injury to competition largely in terms of potentially higher prices and restricted output rather than confining the inquiry to a search for injured competitors, a difference of emphasis that guards against the danger of forgetting this broader aspect of the public interest. A number of other advantages of this approach are perhaps inherent in the over-all discussion to this point, but they deserve explicit recognition here.

One of the more familiar cries in antitrust enforcement is for more “realism” and more “certainty.” Commission and court decisions that go against particular business practices are not infrequently criticized as being economically unrealistic and, for that reason alone, so inherently unpredictable that the business community could not have reasonably anticipated the rule announced, no matter how diligently it might have been laboring to keep itself in full compliance with the requirements of antitrust. By “economically unrealistic” it is generally meant that the decision in question has condemned a form of behavior that, whatever its other features, was clearly consistent with profit-maximization. Behavior that maximizes profits is, by definition, both rational and realistic. It is “realistic” in that, among other things, the prospects for keen observance of an antitrust order that commands behavior inconsistent with it are not always particularly good. As one commentator puts it, “business confidence that antitrust is leading to results that make some rudimentary economic sense is . . . important in stimulating voluntary compliance.”

Attempts to induce competitive behavior in a market that is noncompetitively structured must necessarily suffer this unhappy deficiency.

Similarly, rules of law prohibiting “unfair” business practices can hardly be expected to avoid the charge of “uncertainty.” So long as business enterprises are following the ancient economic law of profit-maximization in industries that are so structured as to deliver one group of entrepreneurs in the power of another, the latter will always be surprised and dismayed to learn that the law proposes to take away what that distorted structure gives.

The “barriers” approach can contribute a great deal to a lessening of these misunderstandings. The members of concentrated industries

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apparently have no difficulty following the idea that the imposition of disadvantages on would-be competitors makes for a quieter life and that the elimination of those handicaps would subject the industry's established firms to all the hazards of a competitive existence, including the necessity of lowering costs and prices. Moreover, the terms in which entry barriers are measured — the degree to which prices can be raised above a competitive level without inducing entry — are nothing if not "realistic"; calculation of the entry-forestalling price is one of the basic skills in which every significant firm in a concentrated industry is expected to show considerable proficiency. A fairly persuasive case can thus be made for the proposition that a rule of law prohibiting the building of entry barriers, and providing for the pulling down of those purposely thrown up, would add a sharp new note of realism and certainty to antitrust.

Finally, and perhaps most importantly of all, the structural approach itself offers two options for antitrust enforcement. The first is the traditional remedy of "trust-busting," a program of divestiture and dissolution aimed at a direct elimination of the pricing power inherent in the extremes of industry concentration. There are, however, a number of disadvantages in this approach, the principal one being its impracticality. The nation has an enormous reservoir of faith in the superiority of competition over monopoly (both single-firm and collective), but that reservoir shows signs of running dry the moment some "radical" proposes a wholesale breaking up of the country's great oligopolies. Divestiture is considered by many to be too "harsh" a solution to the problem.

The other alternative offered by the "structuralists" would focus primarily upon the "barriers" surrounding those industries and, where feasible, upon efforts to lower them enough to restore the vigor of competition in them. As Bain puts it: "[A]lteration of the condition of entry might constitute a generally more feasible regulatory technique than dissolution and dismemberment policies aimed just at reducing seller concentration." One of the more obvious virtues of this approach is that, once the artificial barriers have been pulled down, the "dissolution" or erosion of the large market shares held by the industry's leaders is accomplished "naturally," by the entry of other businessmen and the gradual restoration of the competitive market's own

74. But see, Stigler, The Case Against Big Business, in Monopoly Power and Economic Performance 3, 11 (Mansfield ed. 1964), cautioning that "inadequate remedies for monopoly are 'harsh' treatment for the public interest."

75. BAIN, Barriers to New Competition 208 (1956).
incomparably “harsher” discipline, rather than by the blunter hand of public authority.

In any event, however, there can be little real doubt that a highly significant change has taken place in this area of the law. Indeed, it is hard to escape the conclusion that a distinct era, that of an almost exclusive preoccupation with the “conduct” approach, is drawing to a close and that another one, a predominantly “structural” approach, is beginning. Under this new standard, conduct, where relevant, would be evaluated not in isolation from the market context, but against the background of, and indeed as a product of, the market from which it grows and draws its sustenance.\(^76\) While there is a superficial sense in which it remains as true today as it was a decade ago that “legal requirements are prescribed by legislatures and courts, not by economic science,”\(^77\) and that “the law cannot, save in the most obvious cases, assume that actual behavior in the marketplace will in fact correspond to the pattern of competitive behavior that would theoretically be expected in a market of a given structure,”\(^78\) one might well question whether such an observation would be particularly meaningful in the wake of the Supreme Court’s post-\textit{Brown Shoe}\(^79\) decisions, particularly its 1967 \textit{Clorox} opinion.\(^80\) As Justice Harlan observed in his concurring opinion there, the starting point in merger litigation today is a rebuttable presumption “that the market operates in accord with generally accepted principles of economic theory. . . .”\(^81\) and hence, that a \textit{prima facie} violation of the antimerger statute has been made out if it appears “reasonably probable that there will be a change in market \textit{structure} which will \textit{allow} the exercise of substantially greater market power. . . .”\(^82\) This last phrase — the reference to changes in market structure that “allow” the exercise of more market power — makes it abundantly clear that the “generally accepted economic principles” referred to in the Justice’s preceding phrase are those of the “structuralists,” not of those who would examine the wrong end of the horn and pronounce markets “workably competitive” on no other evidence than a sincere but unprovable conviction that they satisfy

\(\text{76. See supra note 67.}\)


\(\text{78. Id. at 317.}\)

\(\text{79. Brown Shoe Co. v. United States, 370 U.S. 294 (1962).}\)

\(\text{80. FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).}\)

\(\text{81. Id. at 598 (concurring opinion). (Emphasis added.)}\)

\(\text{82. Id. at 599 (concurring opinion). (Emphasis added.)}\)
some ambiguous standard of economic "performance." Indeed, considering some of the inherent limitations of the "conduct" and "performance" schools of antitrust, the more prudent policy may well turn out to be one that, while emphasizing the barrier-lowering rather than the dissolution remedy, nonetheless takes as its basic premise the notion that "an industry which does not have a competitive structure will not have competitive behavior."\(^8\)