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ANTITRUST POLICY: CHALLENGE AND DEFENSE

JESSE W. MARKHAM*

INTRODUCTION

In view of its age, durability and continuous public assessment one would surely think that our antitrust policy would by now have settled down to that state of quiet acceptance customarily accorded such revered institutions as motherhood, freedom of speech, and—to use Galbraith's analogies—truth, regular bathing and better traffic control.[1]

The longevity and durability of antitrust scarcely require comment: the Sherman Act entered its eightieth year on July 2, 1970, and the Federal Trade Commission and Clayton Acts are each approaching their sixtieth anniversary. As a national policy, therefore, the basic principles of antitrust antedate the Federal Reserve System, the federal income tax, and all the familiar federal regulatory bodies with the single exception of the Interstate Commerce Commission. Moreover, the statutory language setting forth the essential purposes of the policy has undergone remarkably little change since those purposes were elaborated and made more specific in the 1914 acts. The Robinson-Patman Act (1936) simply gave renewed emphasis to Congress' intent to arrest discriminatory pricing and corporate mergers already expressed in the original Clayton Act Sections 2 and 7; the 1950 amendment, of course, also extended Section 7 to cover asset as well as stock acquisitions.

It is obviously not to be inferred from the above that antitrust policy of the 1970's is, in all its administrative and adjudicatory aspects, essentially the antitrust policy of fifty years ago. Even a casual comparison of the early *United States Steel*[2] and the 1948 *Columbia Steel*[3] decisions with those handed down by the courts in the more recent

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[1]*Hearings on Planning, Regulation and Competition Before a Subcomm. of the Senate Select Comm. on Small Business*, 90th Cong., 1st Sess., at 9 (1967) [hereinafter cited as *Planning, Regulation and Competition*].

[2]United States v. United States Steel Corp., 251 U.S. 417 (1920).

[3]United States v. Columbia Steel Co., 334 U.S. 495 (1948).

Bethlehem-Youngstown,[4] *Brown Shoe,*[5] *Philadelphia National Bank,*[6] *Schlitz,*[7] *Von's Grocery*[8] and *Grinnell*[9] cases leads to the inescapable conclusion that antitrust policy is now administered more vigorously, and more rigorously, than it once was, especially toward mergers and acquisitions, but toward ancillary restraints as well. As a consequence, it has become equally clear that business practices the statutes now severely constrain once passed muster under those same statutes.[10] But it should be emphasized that what has come to be called the "new" antitrust policy finds its origin largely in the basic principles laid down in old statutes. As Chief Justice Hughes observed nearly forty years ago:

> As a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape.[11]

This "generality and adaptability" of the basic antitrust laws, rather than any sweeping change in legislative language, accounts for the increased vigor of antitrust policy. As the economic theories of oligopoly and imperfect competition[12] produced new hypotheses concerning the probable relationships between market structure and business behavior, they provided enlarged and more sophisticated definitions of such terms as "monopoly," "monopolizing," "tendency toward monopoly" and "substantial lessening of competition," the familiar standards of legality set forth in the early antitrust statutes. Meanwhile, however, the antitrust laws as expressions of our basic economic policy toward the market economy have remained essentially unaltered.

That the basic antitrust statutes have endured for over a half-century without significant revision in form is all the more impressive when viewed in the light of the spectacular changes which have occurred in the "market economy" to which they are addressed. The first corporation with as much as $1 billion in assets was not formed until 1901 (the United States

[4]United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S.D.N.Y. 1958).

[5]Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[6]United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

[7]United States v. Jos. Schlitz Brewing Co., 253 F. Supp. 129 (N.D. Cal. 1966).

[8]United States v. Von's Grocery Co., 384 U.S. 270 (1966).

[9]United States v. Grinnell Corp., 384 U.S. 563 (1966).

[10]*Cf.* Markham, *Antitrust Trends and New Constraints,* HARV. BUS. REV., May-June 1963, at 84.

[11]Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933).

[12]*Cf.* E. CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION (1st ed. 1933); J. ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION (1933).

Steel Corporations); the 1970 *Fortune* list[13] of the five hundred largest industrial corporations contains 105 such companies having assets in excess of $1 billion—thirteen of which have assets in excess of $5 billion. As large corporations have grown in size and multiplied they have also become vastly more complex and diverse. According to the Federal Trade Commission's recent report, 181 of the largest two hundred manufacturing corporations operate in at least ten distinguishable product markets;[14] and other sources reveal that 187 of *Fortune's* largest five hundred now qualify as multinational corporations.[15]

Obviously, such modern complex corporations compete by different and more sophisticated means than their less complex predecessors. While these differences in competitive methods scarcely require documentation or elaboration, a few statistics on advertising and research and development serve as a rough measure of the extent to which the competitive environment has changed: between 1930 and 1968 business expenditures on research and development increased from slightly over $100 million to $7 billion, most of which was spent on new product development.[16] Between 1935 and 1969 total advertising expenditures by business increased from $1.7 billion to $20.5 billion, of which nearly $3 billion were spent on television, a competitive advertising medium not used by business until 1949.[17]

The increased size and complexity of corporate enterprise and the concurrent changes in its competitive environment are the generative forces behind the current antitrust controversy. On the one hand, there are those who hold that the onrush of these forces has rendered antitrust policy inapplicable—possibly even inimical—to the modern market economy. The therapy prescribed, sometimes explicitly but more often by implication, ranges from tailoring antitrust policy to the "new" market economy to virtually discarding the policy altogether in favor of a more appropriate instrument of public regulation. On the other hand, there are those who contend that effective public policy lies not in accepting these

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[13]Compiled from THE FORTUNE DIRECTORY OF THE 500 LARGEST CORPORATIONS (1970).

[14]Staff study entitled "Economic Report on Corporate Mergers" by the Bureau of Economics of the Federal Trade Commission in *Hearings on Economic Concentration Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess., pt. 8A at 224 (1969).

[15]A multinational corporation is defined as one that operates production facilities in at least six countries. J. VAUPEL & J. CURHAN, THE MAKING OF MULTINATIONAL ENTERPRISE (1969).

[16]Adapted from periodic reports of the National Science Foundation and from E. MANSFIELD, MICROECONOMICS: THEORY AND APPLICATIONS 452 (1970).

[17]J. BACKMAN, ADVERTISING AND COMPETITION 178 (1967); ADVERTISING AGE, March 30, 1970, at 47-48.

forces as immutable, but in the premise that they are containable, even reversible, through a radically revised antitrust policy. While they prescribe vastly different remedies, both contemplate radical change in traditional antitrust.

II. The Challenge

It may be appropriate at the outset to stress a point obvious to all students of antitrust policy: controversy over certain of its aspects is not of recent origin. The early landmark Sherman Act decisions, and especially the *Standard Oil*[18] decision, precipitated lengthy and often heated debate over the relative merits of the "rule of reason" and "reasonable rules"[19] as appropriate antitrust standards—a debate that apparently has not yet entirely subsided. Spokesmen from the business community have complained that the laws were painfully vague or, alternatively, that they were painfully precise. In general, antitrust lawyers have voiced their preference for a policy erected more squarely on rules while economists have urged greater reliance on economic analysis.[20] Nevertheless, it can fairly be said that the antitrust controversy, until very recently, centered more on procedure and method than on substance. Few would register strong disagreement with George Stocking's summary assessment of the situation in 1955 when he wrote:

> The postwar period has revealed little disposition by any influential group to abandon the principles of the antitrust laws. It has, however, sparked a movement for their modification.[21]

The distinguishing feature of the current antitrust challenge is that it emanates in increasing numbers from those who come perilously close to urging abandonment of the principles of antitrust altogether. By far the most elegant and, if assessed solely in terms of the limited economic evidence offered to sustain it, the most persuasive case for their abandonment is made by John K. Galbraith in his *The New Industrial State.*[22] However, Galbraith had several illustrious intellectual forebears. David Lilienthal, first in his 1952 article[23] and shortly thereafter in his

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[18]Standard Oil Co. v. United States, 221 U.S. 1 (1911).

[19]The contrasting terms are those of Kingman Brewster. Brewster, *Enforceable Competition, Untruly Reason or Reasonable Rules?,* AM. ECON. REV., May 1956, at 482.

[20]*Cf.* Mason, *Monopoly in Law and Economics,* 47 YALE L.J. 34 (1937).

[21]Stocking, *The Attorney General's Committee's Report: The Businessman's Guide Through Antitrust,* 44 GEO. L.J. 1, 3 (1955).

[22]J. GALBRAITH, THE NEW INDUSTRIAL STATE (1967) [hereinafter cited as THE NEW INDUSTRIAL STATE]; see especially 184-97. A summary of Galbraith's position appears in *Planning, Regulation and Competition* at 4-11.

[23]Lilienthal, *Our Antitrust Laws are Crippling America,* COLLIER'S, May 31, 1952, at 15-17, 74-75.

book *Big Business: A New Era,*[24] lauded the giant corporation as our nation's greatest asset and urged that its performance be judged not in terms of traditional indicia of competition but in terms of its great capacity for research, for creating national markets, promoting national defense, and for giving its employees greater security and vastly improved wages and working conditions. Our antitrust laws, erected on the outmoded principle of maintaining market competition, were irrelevant to the functioning of the modern corporate economy and served only to hamper industrial progress.

The late A.A. Berle in his *The 20th Century Capitalist Revolution*[25] rendered a diagnosis of the corporate economy closely akin to that of Lilienthal's. Modern markets, he argued, were typically concentrated in the hands of a few giant corporations—the "Big Two," the "Big Three" or at most the "Big Five"—possessing enormous power. As evidence, he pointed out that about two hundred of these "concentrates" own outright slightly more than half of the nation's total industrial assets. Moreover, he argued, the power of concentrates extends far beyond the simple arithmetic of property actually owned.[26] For example, the so-called "small" businesses who either supply the large automobile manufacturers or hold agency contracts to distribute their automobiles may be nominally independent, "[b]ut their policies, operations, and, in large measure, their prices, are determined by the [giant automobile companies]."[27] Clearly, Berle argued, such concentrates do not, as conventional economic theory would have it, respond to the forces of supply and demand of the market; instead they control the market. Further, they have evolved to the point of escaping the powerful controlling factor of the "judgement of the market place" in the capital markets, a control on which conventional economic theory places such heavy reliance. Citing a study made by economists for the National City Bank,[28] Berle found that of the $150 billion corporations spent on capital formation in the period 1946-1953, "[p]robably not more than $5 billion . . . was represented by common stock—the one situation in which an investor considers an enterprise. . .and puts down his savings, aware of a degree of risk but hoping for large profit."[29] In contrast, sixty-four per cent came from internal sources, twelve per cent from bank borrowing, twelve per cent from the issuance of bonds and notes (half of which was privately placed), and the rest from preferred and other special stock flotations, none of

[24] D. LILIENTHAL, BIG BUSINESS: A NEW ERA (1953).
[25] A. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION (1954).
[26] *Id.* at 27.
[27] *Id.* at 27-28.
[28] *Id.* at 37-38.
[29] *Id.* at 39.

which, in Berle's view, was clearly tested in the competitive capital market place.

The implication of Berle's thesis is that modern corporate concentrates have, in the process of rendering the conventional theory of competitive market behavior obsolete, made antitrust policy an ineffectual and inappropriate instrument of public control. What means, then, are available for containing the awesome power the capitalist revolution has placed in the hands of corporate concentrates? Berle's review of the history of western economies prompts him to observe that frequently a solution has been sought in statism, but with results that scarcely recommend it as a promising alternative. In any case, however, the final resolution of the problem is political rather than economic; meanwhile, we must rely upon those ad hoc instruments of control we already have; namely, the forces of public opinion, a subdued and limited form of oligopolistic rivalry, and the potential threat of direct government intervention. Antitrust policy, it should be noted, is not even assigned a supporting role.

Galbraith, while relying heavily on essentially the same economic facts that underlie Berle's thesis, erects a much more elaborate analysis, and one from which he adduces a more devastating attack on antitrust policy. As did Lilienthal and Berle, he begins with the evidence that American business has become very big:

> In 1962, the five largest industrial corporations in the United States, with combined assets in excess of $36 billion, possessed over 12 percent of all assets used in manufacturing. The 50 largest corporations had over a third . . . . The 500 largest corporations had well over two-thirds . . . . In the mid-1950's, 28 corporations provided approximately 10 percent of all employment in manufacturing, mining, and retail and wholesale trade. In the first half of that decade . . . a hundred firms received two-thirds by value of all defense contracts; . . . . In 1960 four corporations accounted for an estimated 22 percent of all industrial research and development. . . . [T]hree hundred and eighty-four corporations employing 5,000 or more workers accounted for 85 percent of these research and development expenditures . . . . [I]n 1965, three industrial corporations, General Motors, Standard Oil of New Jersey, and Ford Motor Co., had more gross income than all of the farms in the country.[30]

The facts cited, while they emphasize the dramatic at some sacrifice in detail and pertinence, are sufficient to establish Galbraith's essential point: some corporations are very large, are much larger than most

[30] *Planning, Regulation and Competition* at 5-6.

corporations and, at least in absolute terms, are much larger than the largest corporations of earlier eras.

The largest contemporary corporation, continuing with Galbraith's analysis, possesses enormous power. It has power over the prices it charges and over the prices and wages it pays. Moreover, as Berle had argued earlier, it has, by virtue of its reliance on retained earnings for three-quarters of its capital needs, exempted itself from dependency on the capital market. Accordingly, large corporate enterprise has usurped the sovereignty that once resided in the consumer, liberated itself from the constraining forces of the market, and emancipated itself from the control of stockholders. In short, it no longer is governed by the economic forces of the market place; it manages the market place.

Galbraith is, of course, not the first to argue—erroneously, as I shall show later—that business size is synonymous with market power.[31] The novelty of his analysis, which depends on equating these virtually unrelated aspects of the market economy, is that it provides a rationale for equating the two. To conduct large corporate ventures, Galbraith contends, is to incur enormous expenditures. The developmental and capital costs of launching a new product, *e.g.*, the Ford Motor Company bringing out the Mustang,[32] often requires a commitment of hundreds of millions of dollars. Not even the contemporary large corporation could long afford to entrust the success of such costly ventures to the vagaries of the market. Accordingly, a prerequisite to launching them is the prior assurance of their success. Corporate enterprise, through massive advertising, obtains this assurance; it can plan because it manages the market place; and it can manage the market place because in an affluent society consumers buy not what they pressingly need but what they can be persuaded they want. As Galbraith puts it:

> No hungry man who is also sober can be persuaded to use his last dollar for anything but food. But a well-fed, well-clad, well-sheltered and otherwise well-tended person can be persuaded as between an electric razor and an electric toothbrush. Along with prices and costs, consumer demand becomes subject to management.[33]

In such an organized and planned industrial state antitrust, to use Galbraith's term, is a charade. It is a generally accepted proposition, he reminds us, that it is vastly more difficult to break up existing bigness or

[31] *Cf.* Edwards, *Conglomerate Bigness as a Source of Power*, in BUSINESS CONCENTRATION AND PRICE POLICY 331-59 (1955).

[32] THE NEW INDUSTRIAL STATE at 11-12. Styling and tooling costs alone amounted to $59 million.

[33] *Id.* at 4-5.

market power under the antitrust laws than it is to prevent small and medium-size firms in possession of neither from attaining them. Large firms therefore need not fear the present intensified battle the antitrust agencies are waging against mergers—they will not be demerged. On the contrary, the antimerger battle as a practical matter is being waged against the medium-size firms who wish to unite in order to deal more effectively with the giants. Similarly, when firms are large and have few rivals they are able to establish prices and related terms of trade satisfactory to all without collusion. They do this simply by practicing the artful but not too difficult sport economists define as conjectural interdependence or, to use the lawyer's equivalent phrase, conscious parallelism.[34] But when there are twenty or so firms in an industry the attainment of a mutually satisfactory price can be achieved only by meeting together or by exchanging information on such matters as prices and costs. This, however, is unlawful, as is evidenced by the fact that it is an everyday object of prosecution by the Department of Justice's Antitrust Division.[35]

Galbraith argues that all this is generally agreed upon, the only novelty in his own particular assessment is that he draws the disagreeable conclusion flowing from the agreement: "The antitrust laws give the impression of protecting the market and competition by attacking those who exercise it most effectively . . . . There is no escaping the conclusion that the antitrust laws, so far from being a threat to big business are a facade behind which it operates with yet greater impunity."[36] This, then, is the charade, and the situation is not remediable through the all-out attack on market power adumbrated in the writings of those who favor it. Such an onslaught would be tantamount to declaring the heartland of the modern economy illegal. Galbraith concedes that it would be quixotic to urge the obvious and call for a repeal of the antitrust laws—they are a part of American folklore—although other industrial countries function quite competently without them. As for himself, he would be content if we withdraw our faith from them and let them slowly atrophy.[37] The resulting policy void could effectively be filled, again as other industrial countries have filled it, with some form of publicly administered price and wage controls.[38]

I have gone to some pains in providing the essential details of Galbraith's challenge of antitrust policy because he not only develops

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[34]*Cf.* Markham, *Oligopoly* in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 283-90 (1968).

[35]*E.g.*, United States v. Container Corp. of America, 393 U.S. 333 (1969).

[36]*Planning, Regulation and Competition* at 9-10.

[37]*Id.* at 11.

[38]Professor Galbraith has urged the adoption of such controls in his recent television appearances. *But see* THE NEW INDUSTRIAL STATE 190-91.

virtually all the salient arguments made by others identified with his general appraisal, he develops them more clearly and in a far more telling fashion. However, two arguments others have made and on which Galbraith did not dwell—in his own sweeping indictment of antitrust policy they would, at best, have been trivial—merit brief comment. Our antitrust policy is an obstacle (1) to the smooth and efficient functioning of our multinational corporations in foreign and international markets[39] and (2) to those cooperative arrangements which would contribute to increased productivity at home.[40] The major thrust of the first of these arguments is that while our antitrust laws have remained essentially unchanged for decades, extensive quantitative and qualitative changes have occurred in both the methods and environment of international business. As the gap widens between the law and certain aspects of the economic system to which it is addressed, the law needs to be overhauled. The second of the two arguments derives from what most industrialized countries call "rationalization" agreements; that is, agreements among firms are generally held to be permissible if the parties involved can show that they may increase productivity or have other such desirable consequences. In view of the lagging productivity of the United States economy in recent years, made more serious by predictions that it is not likely to rise substantially in the foreseeable future, it is argued that our antitrust laws should be relaxed sufficiently to permit industry committees preoccupied with productivity to function. Presumably, the relaxation would consist of exempting such intra-industry agreements from prosecution under the Sherman Act which, as interpreted historically by the courts, makes such agreements per se illegal. And since it is extraordinarily difficult to ascertain where collective action on productivity leaves off and that on such important market matters as price and output begins, the recommended relaxation would constitute a substantial break with an antitrust doctrine that has endured almost without interruption for nearly three-quarters of a century.[41] Precisely what sort of overhaul would be required to make the antitrust laws more attuned to the new international economy is not clear, nor is it made clear by those who urge that it is necessary. However, it may reasonably be inferred that an overhaul contemplates considerably more than modest or incidental revisions in the basic antitrust statutes.

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[39]For a clear statement of the issues, see Vernon, *Antitrust and International Business*, HARV. BUS. REV., Sept.-Oct. 1968, at 78, and Ball, *Cosmocorp: the Importance of Being Stateless*, 11 COLUM. J. WORLD BUS. 25 (1967).

[40]*Cf.* Bloom, *Productivity: Weak Link in our Economy*, HARV. BUS. REV., Jan.-Feb. 1971, at 4.

[41]*See* Addyston Pipe and Steel Co. v. United States, 175 U.S. 211 (1899); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

The main premise underlying what I have chosen to call the new antitrust challenge is that corporate enterprise, and perforce the market economy it dominates, has undergone such radical change that traditional antitrust policy has in whole or important part been rendered obsolete. The conclusion logically follows that the policy should be radically revamped or possibly discarded altogether and a more appropriate instrument be designed to take its place. The evidence offered to support the premise, from which the challenge flows, is that corporations have now attained such enormous size and market power that they in fact control those market forces which antitrust policy proposes to maintain in a sufficiently viable state to control. I should now like to turn to the conclusiveness of the economic evidence on which the challenge rests.

III. The Evidence

First, on the issue of business size the facts cited by Galbraith and others speak eloquently for themselves. It is perfectly obvious that the giant corporations of a half-century ago were no more than one-tenth the size of the giants today. Also, there is fairly persuasive evidence that significant changes in managerial techniques have been a concomitant of the greatly increased size. In truth, if managerial techniques have not undergone substantial change over this period the intensified efforts of graduate schools of business administration to instruct the future captains of industry in the skill of scientific management must be written off as a futile and extremely expensive exercise. However, that corporations have attained great size and are managed more professionally—even if planning is a crucial part of the new professionalism—is scarcely relevant to the issue of whether the market economy is more or less viable than it once was. Careful statistical analysis may very well reveal that firms possessing substantial market power are often large, but it cannot be inferred from this that the larger the firm the more market power it possesses. The two are distinctly different phenomena. Similarly, there is no clear presumption that the emergence of scientific management has somehow emancipated its practitioners from the constraining forces of the market economy. Because modern managers "plan"—as they allegedly do—it does not follow that they attain greater control over those forces external to the companies they manage. For example, we may have every confidence that the Ford Motor Company planned the Edsel, and that the Kellogg Company planned its cereals with freeze-dried fruits. We may be equally confident that in neither case were the results a part of the plan.

Moreover, in emphasizing the simple statistics on corporate size those who challenge the relevance of antitrust greatly exaggerate the role of bigness in the economy. While the present day large corporation is ten times the size of its early twentieth century counterpart, the total economy

is larger by almost the same multiple. Considerable interest has centered on the position of the largest one hundred or largest two hundred manufacturing corporations in the United States economy, an interest that has generated a steady outpouring of statistics on aggregate levels of concentration.[42] The conclusions they support depend importantly on the measure used and on who does the measuring. Morris Adelman found that between 1933 and 1960 the share of all manufacturing corporate assets controlled by the 117 largest corporations actually declined from 45.6 per cent to 44.6 per cent.[43] Gardiner Means, using a different method of measurement, calculated that the one hundred largest manufacturing corporations controlled forty per cent of all manufacturing corporate assets in 1929 and forty-nine per cent in 1962;[44] Means assigned to the largest one hundred corporations the assets of all subsidiaries in which they held at least a fifty per cent common stock interest. A recent Federal Trade Commission report shows that the largest one hundred manufacturing corporations increased their share of total corporate assets from 36.1 per cent to 49.3 per cent between 1925 and 1968, but from only 44.2 per cent to 46.2 per cent between 1933 and 1962.[45] The share of the two hundred largest manufacturing corporations rose from 47.7 per cent in 1929 to fifty-six per cent in 1962, and to 60.9 per cent in 1968.

It cannot be conclusively determined from these data whether the shares of the one hundred largest or two hundred largest corporations of the total domestic economy have actually changed since the 1920's. Assets are only one of several possible measures of the relative importance of a given number of firms, and for this purpose is a less desirable measure than "value added in manufacture" — a census of manufactures concept. It is known that the largest corporations tend to be more capital intensive than other corporations, and hence have a larger share of the manufacturing economy's assets than of other of its activities such as "value added" on employment.[46] It is possible, therefore, that a portion of the increase in the share of total corporate assets accounted for by the largest one hundred corporations between 1925 and 1968 simply means that these corporations have grown more capital intensive than all other corporations. Moreover, the assets attributed to these companies include

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[42]For an excellent summary of the statistical findings and the merits and defects of particular methods of measuring aggregate concentration, see F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 39-44 (1970) [hereinafter cited as SCHERER].

[43]*Hearings on Economic Concentration Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess., pt. 1, at 236, 239 (1964).

[44]*Id.* at 15-19, 281-324.

[45]"Economic Report on Corporate Mergers," *supra* note 14, at 173.

[46]SCHERER at 40.

those of their foreign subsidiaries. As Scherer has observed ". . . it is conceivable that a substantial fraction of the apparent growth of the 100 largest firms' share of all manufacturing assets reflects those firms' expanding position in foreign markets . . ."[47] For example, his calculations show that in 1963 the largest one hundred manufacturing corporations accounted for only thirty-six per cent of total *domestic* manufacturing assets, while the Federal Trade Commission data show that in the same year they accounted for 46.5 per cent of all manufacturing assets. Even without these qualifications, it is clear that large corporations have not increased their relative importance in the economy by even a significant fraction of the increase they have registered in their absolute size—the increase to which Galbraith and Berle assign such critical importance. With these qualifications, we cannot be certain that their share of total economic activity has changed measurably over the past fifty years.

The important issue, however, and one far more pertinent to the viability of antitrust policy, is whether the market power of large corporations has increased so dramatically and become so irremediable that a national policy of maintaining competition is a futile gesture. Those economists who have analyzed the relevant quantitative data on market structure are in virtual unanimous agreement that, on the average, markets are certainly no more monopolistic, and are probably less monopolistic, now than they were at the turn of the century. The conclusion can be stated in no more precise terms because the standard measures of monopoly are themselves imprecise, and for the long period 1899 to 1935 the factual evidence is incomplete.

The measure most widely used as a proxy for monopoly power is the concentration ratio, the percentage of total industry sales, assets, employment or "value added" accounted for by the four largest firms in each of the Census of Manufactures four-digit Standard Industrial Classification industries. The only study of market concentration from 1899 up to 1935 shows that over this period the share of total "value added" for manufacturing produced in industries having concentration ratios equal to or greater than fifty declined from 32.9 per cent to twenty-four per cent.[48] Because of the broad industry definitions used and deficiencies in the data the resulting calculations can best be described as reasonable estimates. A much more refined analysis based on more recent data shows that the shares of manufacturing value added originating in industries with concentration ratios equal to or greater than fifty were as follows:[49]

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[47]*Id.* at 44.

[48]W. NUTTER, THE EXTENT OF ENTERPRISE MONOPOLY IN THE UNITED STATES, 1899-1935 (1952).

[49]SCHERER at 62.

TABLE I

CONCENTRATION IN THE AMERICAN ECONOMY, 1947, 1963 and 1967

	No. Industries					
	1947		*1963*		*1967*	
*Concentration Index**	*No.*	*Per Cent*	*No.*	*Per Cent*	*No.*	*Per Cent*
80 - 100	31	7	25	6	23	6
60 - 79	65	15	48	12	56	14
40 - 59	104	24	91	22	88	21
20 - 39	152	35	159	38	165	40
1 - 19	81	19	91	22	79	19
	433	100	414	100	411	100

* 4-digit S.I.C. basis.

Source: U.S. Department of Commerce, Bureau of the Census, *Concentration Ratios in Manufacturing, Part 1,* (Washington, 1970).

1947	24.4 per cent
1954	29.9 per cent
1958	30.2 per cent
1963	33.1 per cent
1966	28.6 per cent

While the changes in the "extent of monopoly" from one census year to the next are evident, on balance there was no discernible upward trend throughout the entire twentieth century.

Nor is monopoly, or more accurately, highly concentrated oligopoly, anywhere nearly as pervasive as those who have challenged the viability of antitrust would have us believe. A frequency distribution of concentration indexes for selected postwar census years is shown in Table I. It will be noted that in all years more than half the industries have concentration ratios smaller than forty, that is, in over half the more than four hundred industries the four largest firms account for less than forty per cent of the total value added in their respective industries. In no more than one-fifth of the industries do the largest four account for as much as sixty per cent of total value added, in only six per cent do they account for as much as eighty per cent. The distribution of concentration ratios has remained fairly stable over the twenty-year period, demonstrating no perceptible trend. Market power, as that term is generally construed, obviously exists, but it is perfectly clear that the large corporation does not characteristically control the markets in which it operates.

These data merit additional comment in terms of their pertinence to the alleged ability of large corporations to manage the demand for their products through advertising—an important aspect of both Berle's and Galbraith's thesis. The concentration indexes show that each firm typically competes with at least a half-dozen rivals, usually significantly more, in each market in which it sells. Many of these rivals are also large corporations. Since a gain for one means a loss to the others, it is quite evident that *all* cannot simultaneously control demand through advertising. What is one rival's success is another's failure. Furthermore, if as Galbraith contends, affluent consumers "can be persuaded as between an electric razor and an electric toothbrush," the calculated concentration ratios considerably understate the number of competitors with which each corporation must vie for consumer patronage; the producer of electric razors not only competes with other electric razor producers, but also with producers of electric toothbrushes, tape recorders, phonograph records, and a host of other consumer products and services—including possibly an evening at the theater. In a society where consumer demands respond to persuasion rather than need, all consumer products are in some sense in competition with each other, and the market control held by any one firm is decidedly less than what we might infer from its share of a particular four-digit industry.

We turn now to the issue of whether antitrust is a charade—an institution that protects the very monopoly power it purports to attack. There is no disputing the fact that anti-merger policy has been administered much more vigorously in recent years than at any time prior to 1950. As a consequence, some firms who would seek to attain the size of their larger rivals through merger are denied this once open avenue of growth. The courts are aware that Clayton Act Section 7 denies to some corporations the opportunity to grow through merger to the size of their largest rival, and have spoken in unmistakably clear language why this denial is essential for the preservation of competition. As Judge Weinfeld stated it in his *Bethlehem* opinion:

> If there is logic to the defendants' contention that their joinder is justified to enable them, in their own language, to offer 'challenging competition to United States Steel . . . which exercises dominant influence over competitive conditions in the steel industry . . .' then the remaining large producers in the 'Big 12' could with equal logic urge that they, too, be permitted to join forces . . . in order to give more effective competition to the enhanced 'Big 2'; and so we reach a point of more intense concentration in an industry already highly concentrated—indeed we head in the direction of triopoly.[50]

However, because the recently strengthened antimerger policy denies to the second, third, or even sixth largest competitor those mergers the largest firm once consummated with impunity, it scarcely follows that the policy protects the large firms with market power from those seeking to share it with them. With a few notable exceptions, the mergers recently challenged under Section 7 have been those in which the acquiring firm already had a substantial share of the relevant market and, in general, were precisely those large corporations Galbraith contends the law protects. According to Mueller, sixty-two per cent of the corporations having $1 billion or more in assets and one-third of the largest two hundred corporations have been subjects of antimerger complaints.[51] Nearly all merger complaints have been confined to the largest five hundred corporations. At the other end of the size spectrum hundreds, sometimes thousands, of small mergers take place annually and go unchallenged. Between 1959 and 1968 the Federal Trade Commission recorded 11,242 mergers and acquisitions in mining and manufacturing alone, and an additional 3,827 in trade and services.[52] In less than ten per cent of these recorded mergers and acquisitions did the acquired firm have

[50]United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 618 (1958).

[51]Statement of Willard F. Mueller in *Planning, Regulation and Competition* at 25.

[52]"Economic Report on Corporate Mergers," *supra* note 14, at 665, 677.

assets of $10 million or more. The antitrust agencies challenged perhaps two per cent[53] of the slightly more than fifteen thousand mergers and acquisitions. It is obvious, therefore, that antimerger policy is not directed against small and medium-size companies to protect the large. Small mergers that go unchallenged are a daily occurrence.

As to the remaining component of the charade, namely, that antitrust permits the informal price fixing of highly concentrated oligopolies while it attacks the more formal price-fixing arrangements of the more competitive sector, the evidence neither decisively supports nor refutes the contention. In their analysis of the relationship between the number of price-fixing cases resulting in criminal penalties and industry concentration, Clabault and Burton found a weak inverse relationship between the two.[54] The eighty-five per cent of the industries with concentration indexes of less than sixty accounted for ninety-four per cent of the cases, whereas the fifteen per cent of the industries with higher concentration ratios accounted for six per cent of the cases. These data lend themselves to several alternative interpretations. They suggest the possibility that highly concentrated industries in fact do, as Galbraith asserts, rely relatively more on informal price fixing, and that these arrangements are less often prosecuted. They also suggest the possibility that corporations with market power, conceivably because of their extensive legal resources and past antitrust experience, more assiduously avoid interfirm agreements and trade association activities that could be construed as conspirational. In any case the data clearly do not support the contention that price fixing in highly concentrated industries is virtually immune from persecution under the Sherman Act.

In sum, the reasoning underlying the recent antitrust challenge is logically faulty and inconsonant with the facts. That reasoning may be stated syllogistically as follows:

> Major premise: All large corporations possess unremediable market power.
> Minor premise: Many corporations have grown large.
> Conclusion: Many corporations possess unremediable market power.

The major premise, and hence the conclusion, is untenable. Not only are corporate size and market power logically different and the one distinguishable from the other, the statistical facts clearly show that their

[53]The Department of Justice and The Federal Trade Commission actually issued a total of only 207 Section 7 civil actions and complaints in the period 1956-1968, but some involved multiple acquisitions.

[54]J. CLABAULT & J. BURTON, JR., SHERMAN ACT INDICTMENTS, 1955-1965: A LEGAL AND ECONOMIC ANALYSIS 130 (1966).

longrun trends move independently: the enormous increases registered in absolute corporate size in the twentieth century have not been accompanied by any discernible increase in the average level of market concentration. Nor has the growth in absolute size been accompanied by even a pronounced upward trend in aggregate concentration. The largest one hundred or two hundred corporations account for approximately the same proportion of total domestic economic activity now as they did in the 1920's. However, it is the behavior of market concentration that is relevant to the issue of whether antitrust policy is an appropriate and effective means of social control of industry. That the average level of market concentration has remained at approximately 1899 levels in the face of developing technological imperatives and similar sweeping changes in the economic environment and business methods surely attests to its continuing appropriateness, and even to its past effectiveness.

Finally, the analysis of any policy leads eventually to an evaluation of feasible alternatives. Those who have challenged antitrust policy on the grounds that it is no longer relevant to modern corporate enterprise have not always made it clear precisely what they would substitute in its place; however, Galbraith has proposed direct regulation in the form of price and wage controls as the most likely alternative. The substitution of direct regulation for antitrust where workable competition has been patently unattainable is, of course, consistent with historical precedent. While a variety of economic and political factors entered into the creation of our familiar regulatory agencies, by far the most important was that the industries made subject to their jurisdiction were perceived to be "natural" monopolies.

One scarcely needs to adumbrate the generally uninspiring historical record of direct regulation to support the conclusion that any further substitution of this means of control for antitrust at this stage of our economic development would be at best misguided, at worst, folly. In a penetrating recent analysis of this issue Donald Turner was prompted to observe that ". . . it is by no means frivolous to ask whether direct control over entry, rates and service . . . is really worth the effort."[55] He admits to his doubts that the entire direct regulatory apparatus could, or should, be scrapped, but he makes a persuasive case for enlarging the scope of antitrust in the regulated industries, to be accommodated by a commensurate contraction in direct regulation. Others, examining essentially the same record, have dealt with the direct regulatory apparatus less generously and urged that it be dismantled altogether.[56] In

[55]D. TURNER, *The Scope of Antitrust in* INDUSTRIAL ORGANIZATION AND ECONOMIC DEVELOPMENT: IN HONOR OF E.S. MASON 89 (J. Markham & G. Papanek ed. 1970).

[56]Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548 (1969).

the face of such persuasive arguments to the contrary, one would be extremely hard pressed to make a case for the wholesale substitution of direct regulation for antitrust Galbraith prescribes.

IV. PROPOSALS FOR RADICAL CHANGE

Recent proposals for radical[57] change in antitrust policy derive from essentially the same diagnosis of the market economy as do those proposals that it be discarded altogether and replaced by another policy; namely, large corporations in highly concentrated oligopolies possess a degree of market power inconsistent with a public policy purporting to maintain effective competition. The debate, therefore, begins with the prescribed remedies. Those who challenge the appropriateness of antitrust policy make their case on the proposition that concentrated oligopolies are a consequence of immutable economic forces. Those who propose a radically changed antitrust policy perceive concentrated oligopoly not only as mutable but as remediable.

The most comprehensive of the recent recommendations for radical change is the proposed Concentrated Industries Act set forth in the *Report of the White House Task Force on Antitrust Policy* submitted to the President in 1968.[58] The proposed act would provide for the dismantling of highly concentrated oligopolies, the erection of an absolute prohibition on the acquisition of one of the leading firms in a concentrated industry by a very large firm, an improvement in the quality and availability of economic and financial data relevant to antitrust policy, a removal of features in the Robinson-Patman Act that unduly restrict competitive forces, and more liberal licensing of patents. Variants of these proposals have been made from time to time by others,[59] but I shall limit my discussion here to the more far-reaching proposals of the Concentrated Industries Act, specifically those for reducing oligopoly.

The proposed act provides a rule for divestiture of oligopoly firms having as much as fifteen per cent of any market in which the four largest firms have accounted for as much as seventy per cent of the market in at least seven of the ten most recent years and four of the five most recent

[57]The term "radical" is used in its literal sense as denoting a substantial departure from the usual or traditional. Accordingly, I am not concerned here with proposals for modest changes in antitrust policy such as, for example, those urging more temperate enforcement of the Robinson-Patman Act.

[58]The full text of the report of the task force, headed by Dean Phil C. Neal; appears on 115 CONG. REC. 13,890 (1969) [hereinafter cited as *The Neal Report*] and in J. REPRINTS FOR ANTITRUST L. AND ECON., Winter 1969, at 633.

[59]*Cf.* testimony of Walter Adams in *Hearings on Concentration, supra* note 42, at 248-62, in which he proposes a holding company act to curtail conglomerate bigness. *See also* C. KAYSEN & D. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 44 (1959).

years, provided that the combined market share of the four largest firms in the most recent five-year period is at least eighty per cent of their combined share in the immediately preceding five-year period, and provided further that aggregate sales in the market have amounted to as much as $500 million in four of the past five years.[60] When these conditions are met, divestiture of individual firms will proceed until no single firm has more than a twelve per cent market share.

A confluence of circumstances are offered in support of the proposal: (1) highly concentrated oligopolies can reap the rewards of monopoly without entering into formal agreements; since antitrust policy cannot reach the anticompetitive behavior, appropriate relief must be sought through structural reorganization; (2) while Section 7 of the Clayton Act provides strong protection against the growth of new concentration, the Sherman Act has not yet proved effective in dealing with existing concentration; a gap of major significance therefore needs to be closed; (3) competitive pressures cannot be relied upon to erode the high level of concentration that persists in numerous important industries; and (4) it is virtually impossible to gather all the data relevant to any particular oligopoly, and the best of judges could not be expected properly to take all such data into account; hence, a set of rules is superior to the traditional case by case approach. According to the Task Force's estimates, the proposed act would require divestiture of the largest firms in industries that in 1963 accounted for about fifteen per cent of the manufacturing economy, including such major industries as motor vehicles, flat glass, synthetic fibers, aircraft, organic chemicals, soap and detergents, and many others.[61]

Most students of antitrust would agree that highly concentrated oligopolies often behave as monopolies. The outpouring of industry studies following the temporary National Economic Committee Hearings of the 1930's contains abundant factual evidence that in highly concentrated markets rivals tend to avoid overt price competition and to substitute in its place business strategies of questionable benefit to the public. Those same studies also show that, in general, their profits tend to be higher than less concentrated industries. But this same outpouring of industry studies also points clearly to the conclusion that industries having similar structural characteristics often demonstrate vastly different patterns of rivalrous conduct. Stated another way, the concentration ratio that leads to a stifling of socially beneficial competition in one industry often turns out to be numerically quite different from that required to produce the same result in another. This fact alone, a fact that the Task

[60]*The Neal Report* at 13,897-98.
[61]*Id.* at 13,892-93.

Force readily acknowledges, calls into serious question the advisability of attempting to solve the oligopoly problem by means of a rigid structural rule, even such a carefully considered rule as that proposed in the Task Force report.

The enormous difficulties attending the application of the proposed rule can best be illustrated by reference to Table II, where are listed the four-digit industries having concentration indexes of seventy or more in 1963.[62] Since concentration ratios are not computed each year all the criteria set forth in the Task Force's proposed rule could not be applied in compiling the list, but most of the industries it contains would be likely candidates for dissolution. The list provides some surprises. For example, it includes such industries as "carbon black," "tobacco stemming and redrying," "petroleum and coal products," but does not include such important oligopolies as petroleum refining, basic steel or heavy electrical equipment other than steam turbines. Additional refinement would very likely reduce the list's anomalies, but it is clear that a rigorous application of the proposed rule would reach some dubious candidates while falling lightly upon industrial sectors generally regarded as constituting the oligopolistic core of the American economy. However, it would catch such prominent oligopolies as motor vehicles and parts, cellulosic man-made fibers, primary copper, lead and aluminum, steam engines and turbines, aircraft propellers, cigarettes and chewing gum.

Of more critical importance, however, some of those oligopolies destined for dissolution under the proposed rule, as examination of detailed case studies reveals, demonstrate strikingly different patterns of competitive behavior, ranging from a display of undeviating patterns of conjectural interdependence to reasonably effective price competition.[63] To pursue a purely structural standard that completely disregards these behavioral differences would be procrustean and needlessly indiscriminate.

It does not follow from this that structural remedies are neither necessary nor desirable. Distinguished antitrust authorities have long reminded us that effective administration of the Sherman Act and Section 7 of the Clayton Act contemplates dissolution or divestiture, as the case requires. And a persuasive case can be made that structural remedies have been used too sparingly. The logical defect in such simplistic rules for dissolution as that proposed in the *Neal Report* is not that it would call

[62] For a more extended analysis of these difficulties, see Markham, *Structure Versus Conduct in Antitrust*, in ANTITRUST POLICY AND ECONOMIC WELFARE 102 (W. SICHEL ed. 1970).

[63] The cigarette and synthetic fiber industries are cases in point. *Cf.* W. NICHOLLS, PRICE POLICIES IN THE CIGARETTE INDUSTRY (1951); J. MARKHAM, COMPETITION IN THE RAYON INDUSTRY (1952).

TABLE II

Industry	VALUE OF SHIPMENTS (Per cent accounted by four largest companies)
Cereal Preparations	86
Blended and Prepared Flour	70
Wet Corn Milling	71
Chocolate and Cocoa Products	75
Chewing Gum	90
Cigarettes	80
Tire Cord and Fabric Industry	79
Pressed and Molded Pulp Goods	72
Industrial Gases	72
Cyclic (Coal Tar) Crudes	(D)
Cellulosic Man-Made Fibers	82
Organic Fibers, Noncellulosic	94
Soap and other Detergents	72
Explosives	72
Carbon Black	72
Petroleum and Coal Products, N.E.C.	70
Tires and Inner Tubes	70
Reclaimed Rubber	93
Flat Glass	94
Gypsum Products	84
Electrometallurgical Products	79
Primary Copper	85
Primary Lead	(D)
Primary Aluminum	(D)
Nonferrous Forgings	84
Metal Cans	74
Steam Engines and Turbines	93
Typewriters	76
Carbon and Graphite Products	83
Household Refrigerators	74
Household Laundry Equipment	78
Household Vacuum cleaners	81
Sewing Machines	(D)
Electric Lamps	92
Telephone-Telegraph Apparatus	92
Electron Tubes, Receiving Type	87
Cathode Ray Picture Tubes	91
Primary Batteries, Dry and Wet	89
Motor Vehicles and Parts	84
Aircraft Propellers and Parts	(D)
Locomotives and Parts	97
Hard Surface Floor Coverings	87
Matches	71
Tobacco Stemming and Redrying	70

(D) = Withheld to avoid disclosing figures for individual companies.
Source: Compiled from *Concentration Ratios in Manufacturing Industry 1963*, Part I, Bureau of the Census, U.S. Department of Commerce (1966).

for dissolution in some several dozen industries, but that it rests on the assumption that, where antitrust remedies are concerned, what is appropriate for, say, the carbon black industry is appropriate for all industries of similar structure. The highly disparate patterns of competitive behavior found among industries having very nearly the same concentration ratios would seem to argue strongly that these indicia of monopoly should be weighed heavily in dissolution suits, if for no other reason than that doing so would enhance the efficient use of antitrust resources; it would surely be more promotive of competition to dissolve structural oligopolies that behave as oligopolies than to launch an indiscriminate dissolution program against all the forty or more industries having concentration ratios equal to or greater than seventy.

V. The Controversy Re-examined: A Summary

This analysis of the current antitrust debate opened on the note that the substantive content of the antitrust laws has endured with only modest change for more than half a century. The legislative changes which have been enacted, such as the Robinson-Patman Act and amended Section 7, were reflective more of renewed emphasis than the need for new substantive law to deal more effectively with sweeping economic change. Antitrust proponents and antagonists alike now urge that this historical continuity be broken, and for essentially the same reason but with radically different consequences. Both have, with relatively minor differences in emphasis, looked upon the giant corporations and highly concentrated oligopolies visible on the economic scene and judged them to be incompatible with our antitrust policy as presently framed. One school of thought sees these as a product of immutable economic and social forces and proposes that antitrust policy be discarded in favor of a more promising, as yet unspecified, institution of public control. The other proposes the enactment of legislation that, in a single stroke, defines concentrated oligopolies as unlawful, and calls for their dissolution as essential to the preservation of antitrust policy itself, and of the market economy it purports to govern.

The challengers of antitrust clearly have not made their case. The relevant data on the American economy convincingly support the hypothesis that, in spite of enormous growth in corporate size, the average market remains as competitively structured as it was shortly after the enactment of the Sherman Act. There is therefore no evidence that the growth in corporate size has made the market economy less viable, or antitrust policy less pertinent. Nor is there any evidence, as their antagonists assert, that the antitrust laws provide a shield for those in possession of market power against their lesser rivals seeking to share it. Section 7 of the Clayton Act, and we may reasonably assume the Sherman Act as well, have been applied primarily against large firms with market power attempting to increase it by merger. The case for rejecting

antitrust is made even less persuasive in the absence of any clearly workable alternative to substitute in its place.

The arguments by those who defend antitrust policy but propose that it be radically altered deserve to be taken more seriously. Few would deny that the market economy contains highly concentrated oligopolies, or that this structural condition is often the most important source of anticompetitive behavior. Nor would many hold, on the basis of available factual evidence, that highly concentrated oligopoly is an inevitable consequence of technological imperatives or similar immutable economic forces. Many such oligopolies are, after all, a product of past mergers, and in those instances where they have been subjected to dissolution the feared dislocations can be said to have been greatly exaggerated. Dissolution, then is clearly an appropriate remedy for intolerable monopoly power, whether that power is exercised independently by one firm or jointly by several.

However, having acknowledged that dissolution of highly concentrated oligopolies may reduce the present inconsistency between antitrust in theory and antitrust in practice, the critical issue of by what process this inconsistency is removed remains. Those who call for radical change urge that this be accomplished through the application of a rigid structural formula—a formula which imputes to concentration ratios of a specified magnitude greater predictive capabilities than is supported by either economic theory or empirical studies of oligopolistic industries. It may very well be that the time has arrived for Congress to assert again that the Sherman Act, as it now stands, was originally designed to arrest all monopoly that threatens unreasonably to impair the effective functioning of competitive market forces. In doing so, it would arm the Department of Justice and the courts with a reaffirmation of congressional intent both appear to need. This is essentially what Congress did for merger policy in amending Clayton Act Section 7, and without resort to rigid formulas but with manifest results. Such an approach would have most of the advantages, and none of the disadvantages, of dissolution by inflexible rules. It would also preserve, to repeat Chief Justice Hughes observation referred to earlier, the Sherman Act as a charter of freedom having "the generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape."[64] Until those who challenge antitrust policy as outmoded, or those who propose that it be made more effective through radical change, make a much stronger case, these features merit preserving.

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[64]Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933).