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Richard B. Wilson

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ANTITRUST POLICY AND CONSTITUTIONAL THEORY

Richard B. Wilson†

Perhaps the American antitrust story may best be characterized as an interweaving of two grand themes. The first of these is capsulized in George Stocking's paraphrase of Pope's poem:

> Monopoly is a monster of such frightful mien
> That to be hated needs but to be seen.
> But seen too oft, familiar with her face,
> We first endure, then pity, then embrace.[1]

This, then, is the empirical theme, and it consists of facts: the fact of giant firms, of the increasing prevalence of monopoly, oligopoly, and imperfect markets—and all these despite hearty periodic rededication to the Sherman Act and its principles. For many thoughtful scholars, great corporate power is necessary, inevitable, ineradicable, and perhaps even desirable. A. A. Berle, one of the most persuasive spokesmen for this view, concludes that "until a combination of technique and organization can be invented permitting *individuals* to do the job (of producing the complex consumer goods demanded by modern society), we are bound to make the best we can out of the situation. To my mind most of the results are rather surprisingly good."[2]

In a recent study prepared for the Joint Economic Committee, Theodore Kreps succinctly stated the second theme: "Historically antitrust policy, like a gnarled oak subjected to unsystematic pruning by weather, animals, and man, has grown irregularly, inconsistently, from various origins and in several directions."[3]

This illumines the theoretical theme. Its motif is confusion, uncertainty,

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† See contributors' section, masthead p. 579, for biographical data.

1 Stocking, "The Effectiveness of the Federal Antitrust Laws: A Symposium," 39 American Economic Review 719 (June 1949).

2 Berle, Economic Power and the Free Society 15 (Fund For The Republic 1957).

3 Joint Economic Committee, 86th Cong., 2d Sess., An Evaluation of Antitrust Policy: Its Relation to Economic Growth, Full Employment, and Prices 2 (Study Paper No. 22 prepared by Kreps 1960) (hereinafter cited as study Paper No. 22, Joint Econ. Comm.).

and indecision; it embraces sharply contrasting views about "what is" and "what ought to be" within all disciplines claiming jurisdiction over the antitrust arena. Judicial vacillation between *per se* prohibitions and extensive market behavior analysis (in a word, between strict enforcement and the "rule of reason") confirms and reflects theoretical economic dispute about the nature and consequences of monopolistic competition. Both orientations, in turn, mirror pervasive theoretical arguments about the role and relative weight to be assigned such basic social values as freedom, equality, efficiency, and power distribution within an urban, industrial democracy.

Both the "fact" of corporate revolution and the theoretical response which knows not what to make of that fact have had an obvious impact on American constitutional development. So, too, have they both obscured and made difficult attempts to measure the course of that development. The instruments of constitutional desigu—legislators, administrators, and judges—have found it imperative to recognize (at least *sub silentio*) the "fact," but in seeking for ways to legitimate and control it, they have been bounded and frustrated by the perplexities and uncertainties of current social theory. If, then, proliferating organizational power may properly be viewed as the dominant economic fact of our time, and if the economic arrangements of society can be said to be the paramount concern of an industrialized nation, then failure to develop a reasonably coherent theory of public affairs both to describe and to prescribe for that fact points to a constitutional crisis of considerable maguitude. Herein lies both the piquancy and the gravity of current efforts to assess the impact of the antitrust ideas on patterns of constitutional growth.

It will be the central thesis of these remarks that legislative and administrative—if not judicial—interpretation of antitrust policy has affirmed the legitimacy of large-scale corporate organization, apparently justifying the result by an appeal to theories of imperfect competition; that the courts, contrary to the view expressed by a host of contemporary commentators, have largely rejected current economic doctrine as the paramount rationale in antitrust cases, although they, too, have found it necessary to accomodate to the "fact" of bigness; that, finally, the judiciary has, in recent years, begnn to shape a "constitutional" (as distinguished from an economic) position from which to challenge the consequences of monopoly; the root of this emerging position appears to be a concern for equality rather than for liberty, and its ultimate implication may well be a "constitutionalization" of the major centers of economic power.

A subsidiary theme interpenetrating and connecting all these propositions is the largely unexplored relationship between antitrust policy and economic doctrine, on the one hand, and between both of these and general social theory, on the other. While it is clear enough that current notions of imperfect competition have influenced the position of Congress, the Executive, academic commentators, and (to a lesser degree) the courts, the deeper theoretical roots of imperfect competition have not been laid bare, nor has their connection with the more significant trends of current social thought been systematically examined. It would appear likely, however, that an antitrust analysis predominantly influenced by concepts of workable competition does reflect in vague and tentative ways our current theoretical preoccupation with the ideas of *community* and of *scientific organization.* As Sheldon Wolin has recently pointed out, "the political and social thought of the nineteenth and twentieth centuries was largely centered on the attempt to restate the value of community, that is of the need for human beings . . . to experience some closer solidarity than the nature of urbanized and industrialized society seemed willing to grant. . . . At the same time . . . the nineteenth century was a period saturated with the idea of organization."[4] If these seminal doctrines of modern social thought have influenced the formation of economic theory and through it the development of antitrust policy, then they have equally affected the basic assumptions of public policy, or, if you will, the constitutional assumptions upon the basis of which we respond to the facts of economic life.

Each of these propositions and the doctrinal thread which relates them deserves greater elaboration than can be attempted in a brief discussion. But perhaps the rough sketch and the broader canvas will reveal with more clarity some of the causes of conceptual confusion in the antitrust area.

I.

What have been the patterns of antitrust action in the postwar period? From out of the welter of learned comment, politically motivated manifestos and ambiguities of official doctrine, can a general thrust and dominant demand of policy be identified? Has there been, as alleged, a confirmation of bigness and a more permissive attitude toward heretofore suspect practices?

Answers to these and related queries seem to depend upon the authority one chooses to read. George Stocking concludes "that cultural environment—the economic and social milieu—determine the attitudes of the

4 Wolin, Politics and Vision 363-64 (1960).

Courts in antitrust decisions; and that economists who, like judges, have responded to the same influences, have afforded in the concept of workable competition a logical basis for a lax administration of the Sherman Act."[5] More vehemently, Adams and Gray see "a gradual but unmistakable retreat from the traditional anti-monopoly policy which for over three hundred years has prevailed in the Anglo-Saxon community toward an ambiguous and somewhat apologetic acceptance of monopoly as a necessary, even desirable, form of economic organization."[6]

On the other hand, Robert Solo in a recent article for The Antitrust Bulletin asserts that "After acting for nearly a century as the prime guardian of status and barrier to social intervention, since the early 1940s the Court has become . . . the harbinger of basic reform."[7] This is so because the Court regards government as "no longer merely defensive and protective. It is positive and creative." Hence, the "new role of the Court" provides a "positive and creative government . . . the freedom to choose and plan."[8] Finally, Fainsod, Gordon and Palamountain, in their admirable text, underscore what appears to be a general belief in the "new" Sherman Act. "Beginning in the late 1930s," they assert, "antitrust activity was revived as the cardinal feature of American public policy toward the bulk of industry. Except for the war years, this revival has continued down to the present day. It has been marked by broader judicial interpretation of the Sherman Act, more ample Congressional support, and more vigorous executive enforcement. . . ."[9]

What evidence is offered in support of each of these polar interpretations, one of which we might label as affirmative, the other critical? Those who find new vitality and doctrinal strength in postwar antitrust policy point mainly to the work of the courts. *Negatively*, judicial restraint is said to have softened or eliminated many of the constitutional limitations previously functioning as barriers to economic regulation. Thus, a more liberal interpretation of the commerce and welfare clauses facilitates expanded and more effective federal control, while judicial restrictions on the scope of substantive due process liberate both state and national governments from the narrow gospel of private property. *Positively*, a number of landmark decisions construing the major antitrust statutes during the past two decades are hailed as salutary and strengthening in-

5 Stocking, "Economic Change and the Sherman Act: Some Reflections on 'Workable Competition,'" 4 Antitrust Bull. 375, 425 (1959).
6 Adams & Gray, Monopoly in America 1 (1955).
7 Solo, "The New Look in the Constitutional Structure of Public Regulation," 4 Antitrust Bull. 503 (1959).
8 Id. at 511.
9 Fainsod, Gordon, & Palamountain, Government and the American Economy 570 (1959). See also Rostow, "The New Sherman Act: A Positive Instrument of Progress," 14 U. Chi. L. Rev. 567 (1947).

novations. The *Alcoa* ruling,[10] for example, is seen as a partial abandonment, or at least a significant modification, of the "rule of reason," as a rejection of the *U. S. Steel*[11] doctrine that unexercised monopoly power is no offense, and as a denial of the defenses of "innocent intent" and "efficient performance." The *Cement*,[12] *Paramount*,[13] and *American Tobacco*[14] decisions have supposedly mitigated the evidentiary problems of enforcement agencies by affirming the concept of "conscious parallel action," while the four major divorcement orders of the postwar period (*Pullman, Paramount, United Fruit* and *Yellow Cab*)[15] are said to indicate a revival of divestiture as the ultimate enforcement weapon. A significant expansion in the Sherman Act's coverage is believed to result from its recent applications to boxing,[16] the legitimate theatre,[17] newspaper publishing,[18] and building construction.[19] The intra-enterprise conspiracy decisions (*Timkin Roller Bearing, Keifer-Stewart,* and *Yellow Cab*),[20] by holding that illegal conspiracy may exist within the confines of a single firm, are regarded as a firm reassertion that the artificiality of corporate structure must give way to the demands of competition. In a number of recent decisions the ancillary benefits of patent monopolies (such as cross-licensing), originally exempted from Sherman Act prosecution in the *General Electric* case,[21] have been severely curbed. Hence, *Line Material, Gypsum, New Wrinkle,* and *National Lead*[22] are believed to have narrowed a significant constitutional salient in the antitrust perimeter. Finally, there is alleged to have been an effective extension of the *per se* doctrine in unfair practices cases arising under both the Clayton and Sherman Acts: boycotts[23] and collusive price-fixing[24] have

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10 United States v. Aluminum Co. of America, 44 F. Supp. 97 (S.D.N.Y. 1941), modified 148 F.2d 416, (2d Cir. 1945).

11 United States v. United States Steel Corp., 251 U.S. 417 (1920).

12 FTC v. Cement Institute, 333 U.S. 683 (1948).

13 United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

14 American Tobacco Co. v. United States, 328 U.S. 781 (1946).

15 United States v. Pullman Co., 50 F. Supp. 123 (E.D. Pa. 1943), aff'd per curiam, 330 U.S. 806 (1946); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); United States v. United Fruit Co., Trade Reg. Rep. (1958 Trade Cas.) ¶ 68941 (E.D. La. 1958); United States v. Yellow Cab Co., 332 U.S. 218 (1947).

16 United States v. International Boxing Club, Inc., 348 U.S. 236 (1955).

17 United States v. Shubert, 348 U.S. 222 (1955).

18 Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

19 United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954).

20 United States v. Timkin Roller Bearing Co., 83 F. Supp. 284 (N.D. Ohio 1949); Kiefer-Stewart Co. v. Jos. E. Seagram & Sons, Inc., 340 U.S. 211 (1951); United States v. Yellow Cab Co., 332 U.S. 218 (1947).

21 United States v. Gen. Elec. Co., 272 U.S. 476 (1926).

22 United States v. Line Material Co., 333 U.S. 287 (1948); United States v. United States Gypsum Co., 333 U.S. 364 (1948); United States v. New Wrinkle, Inc., 342 U.S. 371 (1952); United States v. National Lead Co., 332 U.S. 319 (1947).

23 See United States v. New Orleans Ins. Exch., 148 F. Supp. 915 (E.D. La. 1957); United States v. Insurance Bd., 144 F. Supp. 684 (N.D. Ohio 1956).

24 Morton Salt Co. v. United States, 235 F.2d 573 (10th Cir. 1956).

been reaffirmed as *per se* violations; tying contracts, likewise, are now held to be *per se* offenses where the seller enjoys a monopolistic position in the market for the "tying" product;[25] exclusive dealerships may now be prohibited when they affect a "substantial" portion of a particular line of commerce even though competition may not actually be diminished as a result of their use, and hence "quantitative substantiality" is said to place exclusive dealerships within the *per se* category;[26] facts proving the existence of price discrimination are now alleged to create a *prima facie* violation of Sec. 2(a) of the Clayton Act,[27] while the "meeting competition" and "legitimate cost difference" defenses are thought to have been largely eroded away;[28] and, of signal importance is believed to be a stiffening judicial resistence to mergers, both past and prospective, as indicated by the *DuPont-G.M.*[29] and the *Youngstown-Bethlehem*[30] decisions.

The affirmative point of view thus derives from twenty-five or thirty key decisions which have come down since 1940 and which are interpreted as broadening and toughening anti-monopoly policy. Critics of antitrust performance, while they would place a considerably less optimistic construction on these judicial results, direct their most effective fire at the other two branches of government. Their arguments are persuasive, if not compelling.

If it is true, as one commentator has recently remarked, that economic regulation is "social engineering, far removed from the settlement of disputes in equity or the minimization of crime,"[31] then it is in legislation and administration that we must seek the constitutional configuration of antitrust policy.

Congress has been characterized as a "promoter of monopoly" and as the creator of "unwise, discriminatory, privilege-creating . . . measures which throttle competition and restrict opportunity."[32] Verification of this sweeping judgment may be sought in four different areas of legislative performance.

First, as Donald Dewey remarks, "The total amount of money spent to enforce the antitrust laws over sixty-five years would not buy a medium-size naval vessel . . . ."[33] Nor have appropriations increased

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25 Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1957); Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953).
26 Standard Oil Co. (Cal.) v. United States, 337 U.S. 293 (1949).
27 Samuel H. Moss, Inc. v. FTC, 148 F.2d 378 (2d Cir. 1945).
28 Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953).
29 United States v. E. I. duPont deNemours & Co., 353 U.S. 586 (1957).
30 United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S.D.N.Y. 1958).
31 Solo, supra note 7, at 505-06.
32 Adams & Gray, supra note 6, at vii.
33 Dewey, Monopoly in Economics and Law 302 (1959).

significantly in the postwar decades. The annual expenditures of the Antitrust Division decreased from approximately 3-2/3 million in 1951 to a low of 3 million in 1955, and then rose to an estimated 3-3/4 million for the current fiscal year.[34] Hence, anticipated expenditures this year will be about 5 per cent above those of a decade ago. These inadequate appropriations produced a 27 per cent decrease in the Division's staff between 1951 and 1955 and there has been only slight improvement in the last five years.[35] According to the Head of the Antitrust Division, the number of attorneys available per action instituted declined from 6.57 in 1952 to 4.02 in 1957, while appropriation dollars per action similarly decreased from $114,000 in 1952 to $65,000 in 1957.[36] It is true, of course, that the Division's annual appropriations during the 1950's averaged roughly ten times those of the 1930's. However, the average federal budget increased over seven times in the same period. while the average annual gross national product increased nearly five times.[37] If account is taken of an over 50 per cent decline in the value of the dollar, and if financing efforts are evaluated in relation to the total cost of government and to the magnitude of enforcement problems in an expanding economy, then it might be argued that antitrust appropriations have, in effect, diminished, or at least that they have not, in real terms, increased significantly. While the volume and complexity of antitrust work is not necessarily proportional to the size of the gross national product, nevertheless, reason would seem to indicate that the greater number of transactions and the larger number of firms, particularly large ones, increases the opportunities for violation; the assumption of a rough correlation between workload and gross national product is probably a tenable one.

The erosion of antitrust coverage by statutory exemptions constitutes a *second* measure of legislative performance. At present there are twenty-two such statutes; twenty-one additional acts vest the enforcement of antitrust policy rather ineffectually in various regulatory commissions.[38] Hence, it is estimated that over 70 per cent of all goods and services purchased by consumers are exempt from antitrust prohibitions.[39] Not only have recent Congresses failed to reduce siguificantly the wide scope of this immunity, but by the McGuire Act they have reinforced resale

[34] Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary, 85th Cong., 1st Sess., ser. 9, pt. 1, at 17 (1957).
[35] Budget of the United States Government (1951-1959 incl.).
[36] Hearings, supra note 34, at 18.
[37] U.S. Dep't of Commerce, Survey of Current Business (Income & Output Supp., March, 1959).
[38] Study Paper No. 22, Joint Econ. Comm. 17.
[39] Id. at 2.

price maintenance,[40] by the McCarran Act agreements among insurance companies have been exempted to the extent that otherwise satisfactory regulation is provided by state law,[41] and under the provisions of the Reed-Bulwinkle Act rate-fixing agreements among railroads and motor carriers which receive the approval of the Interstate Commerce Commission have been legitimatized.[42] Thus, contemporary legislation has widened and fortified a critical gap in our anti-monopoly defenses.

Congressional failure to respond to insistent demands for legislative strengthening of both the substantive and enforcement features of the antitrust laws provide a *third* yardstick for evaluation. Against such admittedly invigorating innovations as the Antimerger Act of 1950, the increase in maximum criminal fines from $10,000 to $50,000, and the provision that cease-and-desist orders of the Federal Trade Commission be made final when issued, must be measured a refusal to consider seriously such proposals as the following: that civil and criminal penalties be reinforced, or even replaced, by the much more effective weapon of charter revocation under a uniform federal incorporation law; that fragmented enforcement authority now scattered among a number of commissions and agencies be centralized in the FTC and the Antitrust Division; that large firms be statutorily prohibited from occupying more than a given percentage of any particular market; that Congress reverse by legislation the *Standard of Indiana* rule[43] which makes the "good faith meeting of competition" proviso an absolute defense to charges of price discrimination under section 2 of the Clayton Act; that a system of treaties be negotiated to protect the American economy against the adverse effects of restrictive international cartels; that section 4 of the Clayton Act be broadened to allow the government as well as private parties to collect damages resulting from violations of the antitrust laws; that section 4 further be amended to authorize private treble-damage actions specifically against producers who refuse to deal with retailers who, in turn, do not wish to enter into exclusive dealing arrangements; that all re-sale price maintenance laws be repealed.

It is beside the point that these and other proposals might prove, upon mature reflection, to be unwarranted. Failure to consider them seriously refutes to some extent the claim of increasing "legislative support" for the antitrust idea.

The *final* test of congressional performance is to be found in the antitrust implications of certain federal regulatory and promotional pro-

40 66 Stat. 631 (1952), 15 USC § 45 (1958).
41 59 Stat. 33 (1945), 15 USC § 1011 (1958).
42 62 Stat. 472 (1948), 16 USC § 577 (1958).
43 Standard Oil Co. v. FTC, 340 U.S. 231 (1951).

grams. Specifically, it is alleged that the independent regulatory commissions, particularly the FCC, the CAB, and FPC, have positively encouraged high concentrations of ownership within the industries for which they are responsible,[44] that defense procurement policies have unduly rewarded the existing industrial giants or have contributed to the development of new ones, and that the statutory basis for the commercial exploitation of atomic energy discourages competition and may well promote monopoly in a potentially crucial industry.[45] The substance of these charges cannot be explored here. Essentially, they rest upon evidence purporting to show a significant decrease in the number of licensees or contractors, an inordinate increase in the profits of regulated firms and defense suppliers, and a proliferation of artificially created barriers to entry, with a consequent restriction of competition far below its technically potential level. Again, while the accuracy of these assertions is subject to debate, available evidence casts considerable doubt on the firmness and direction of legislative contributions to antitrust policy.

As the legislative record of the past two decades reveals no excessive devotion to the antitrust ideal, so administrative performance has been equally lacking in steady purpose and similarly marked by ambiguity. Manifestly, a thorough survey of recent executive experience[46] cannot be attempted here. It should be enough to remark that administrative agencies are buffeted by Presidential policy, conflicting interest group demands, vacillating judicial doctrine, and the often inconsistent views of scholarly commentators. It is not surprising that attempts to accommodate these heterogeneous influences have produced a pragmatic and frequently opportunistic course of conduct. Thus, in cases instituted under section 2 of the Sherman Act, the Antitrust Division has tended to press for wider acceptance of what it conceives to be the *Alcoa*[47] rule that size alone is sufficient to convict.[48] In section 1 proceedings, on the other hand, the Division has been inclined to abandon the doctrine of conscious parallel action and to emphasize economic tests of industry performance. Finally, there is little evidence of an intention to exploit vigorously in the anti-merger field the opportunities provided by the *DuPont-G.M.* decision. On the whole, the performance of both the

44 See "Hearings on the Economic Report of the President," 84th Cong., 1st Sess., at 163, 164, 187, 393, 394, 2039ff (1955).

45 Adams & Gray, supra note 6, at 142-63.

46 For a more complete exploration of recent executive performance in the anti-trust field see Wilson, "The Eisenhower Antitrust Policy: Progressivism or Conservatism?" 32 Rocky Mt. L. Rev. 179 (1960).

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

48 Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1957); United States v. E. I. duPont de Nemours & Co., 351 U.S. 377 (1956); Kansas City Star Co. v. United States, 240 F.2d 643 (8th Cir. 1957).

Division and the Federal Trade Commission reflects an erratic quality which can probably be understood only against the broader background of recent policy developments in other, but related, areas.

II.

How, then, may we summarize the constitutional impact of legislative policy and administrative performance during the past two decades of antitrust experience? *First,* there is little evidence that either branch of government has sought singlemindedly to realize the classical promise of an atomistic market and an individualized ethic by maximizing price competition, effectively dispersing the existing centers of economic power, or facilitating entry of new firms into artificially blocked market areas. If the optimistic commentators assume a model of perfect or near-perfect competition as a standard of judgment, then the modern record does not bear out their sanguine impressions of revitalized and improved performance. *Second,* it would appear that those critics who focus on congressional inaction, executive passivity or ambiguity, and political conformity to a theory of imperfect competition are closer than are their optimistic colleagues to an accurate assessment of recent antitrust experience. *Third,* the underlying constitutional significance of neither legislative nor administrative contributions to antitrust policy are easily identified or assessed. If the core of a constitutional system is viewed in McIlwain's terms, as the balancing of *jurisdictis* and *gubernaculum*[49]—of law and will—then constitutional theory is properly to be viewed as a coherent explanation and justification for the balance which is, at some given moment, achieved. Hence, an explication of the constitutional impact of any concrete program such as antitrust involves at least an attempt to identify and to justify the currently accepted goals of both law and will, and to trace the causal relationship between those goals and the action program under investigation. We will, however, search in vain for the articulation of such an authoritative theory by either congress or the executive. Nor is this surprising, in view of the excessively pragmatic and nondoctrinaire character of the American governmental tradition. Certain tentative, often conflicting, and vaguely formulated objectives, however, can be inferred from recent legislative and executive activity; these, in turn, imply a certain view of interpersonal and intergroup relations, as well as a general formulation of the freedom-authority equation.

As protection of the individual against coercive state power, and, later, rescue of the underprivileged from poverty and want, were the dominant

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[49] McIlwain, Constitutionalism: Ancient and Modern 145-46 (1958).

social demands of earlier epochs, so preservation of the community from the external threats of a foreign power and an alien ideology have become the central preoccupations of our own time. The public *will* has shifted from a focus on individual freedom to an excessive concern with national security. Legislative and executive contributions to the *legal* implementation of and control over this *will* have therefore stressed certain intermediate goals best calculated to effectuate the overriding security objective. In the antitrust area emphasis has been placed on *efficiency*; efficiency in production, in meeting the demands of consumers, in technological innovation, and in defense production.[50] Legislative and executive *action*—as distinguished from *explanation* and *justification*—appears to be premised on the assumption that efficiency in these matters is a function of size, organization, and experience. Defense Department pressure on the Attorney General to drop his demand for a divorce of Western Electric from the American Telephone and Telegraph Company on grounds of national defense requirements is but one instance of this assumption at work.[51] Although the impact of giant firms and their strategic defense role on other values—such as economic growth, full employment, stable prices, and small business opportunities—have not gone unnoticed,[52] an unwillingness to endanger the dominant security goal by positive implementation of these other values has created, by inaction if nothing else, a certain immunity for large concentrations of economic power. Hence, the older constitutional concern with dispersing centers of power and with maximizing the economic freedom of small producers and consumers has been thrust into the background.

Although congress and the executive have been unable to provide any overt, systematic explanation for the balance which has been struck between popular demands for security and the constitutional requirements of liberty, they have adopted, at least in part, a conveniently available theory from the economists: the theory of imperfect competition. It is this idea, which we earlier characterized as a doctrinal thread connecting and relating the major antitrust concepts of the postwar period,[53] that furnishes intellectual support for the majority report of the Attorney General's Committee to Study the Antitrust Laws, the 1952 Report of the Business Advisory Committee of the Commerce Department, and many of the FTC's recent decisions. It is a theory, moreover, whose

50 See Chamberlain, "Product Heterogeneity and Public Policy," 40 Am. Econ. Rev. 85 (May 1950).

51 Antitrust Subcommittee on the Judiciary, Consent Decree Program of the Department of Justice, 86th Cong., 1st Sess. (1959).

52 Study Paper No. 22, Joint Economic Committee, 24-46.

53 P. 506 supra.

implications are not only consistent with but strongly reinforcing of national security requirements for efficiency and large firms.

Stripped to its essentials, this concept holds that contemporary technical and institutional conditions are incompatible with pure competition and atomistic markets, that competition is workable, although imperfect, if there is an absence of collusion within the industry, relative freedom of entry, and evidence of exemplary behavior such as constant product improvement, downward movement of prices reflecting constantly decreasing costs, and concentration of production in units of optimum size.[54] Hence, oligopoly markets, price leadership, selective price cutting, mergers, and quality differentiation rather than price competition are permissible so long as the industry in question meets certain standards of economic performance. The doctrinal upshot of this position is the preservation of competition—albeit imperfect—rather than the protection of individual *competitors*. Hence, while the need for a certain degree of power fragmentation is admitted, the resulting centers of economic influence turn out to be groups rather than individuals—either large, vertically-integrated producers, loosely-knit horizontal combinations under the influence of a price-leader, or integrated suppliers functioning as monopsonists. Unfortunately, the proper relationship to be struck among these groups, within them, and between them and the state, has not been comprehensively formulated within the framework of current economic doctrine. When viewed exclusively from the perspective of economic man, the theory does posit a producer-consumer relationship supposedly guaranteeing maximum output, minimum price, and constant product improvement, as well as an inter-producer relationship allegedly providing the most efficient, long-run allocation of resources. But what is to guarantee the preconditions necessary for the successful development of these relationships? How, in short, is conspiracy to be precluded, entry of new competitors made reasonably possible, and a minimum degree of competition preserved? It would appear that the unarticulated major premise upon which these economic relationships are grounded is an assumption of automaticity suspiciously similar to the classical concept of a mechanically self-adjusting price market. So Galbraith sees effective control of monopoly in the development of certain centers of countervailing power, Schumpeter in a process of "creative destruction" of firms and industries, Berle in the spontaneous self-restraint of business leaders.[55]

54 See Att'y Gen. Nat'l Comm. Antitrust Rep., Ch. 7 (1955); Mason, Economic Concentration and the Monopoly Problem, 351-70 (1957); Clark, "Toward A Concept of Workable Competition," 30 Am. Econ. Rev. 241 (June 1940).

55 Berle, The Twentieth Century Capitalist Revolution (1954); Galbraith, American Capitalism, The Concept of Countervailing Power (1952); Schumpeter, Capitalism, Socialism, and Democracy (1st ed. 1942).

Common to these otherwise differentiated views is a belief that the factors which limit power are automatically generated by the conditions which produce power. This being so, the state, in its role as umpire, need not be overly concerned with positive efforts to shape inter-group and interpersonal relationships.

In brief, theories of imperfect competition imply a theory of the state not essentially different from that implicit in nineteenth century liberalism. Replace the individual entrepreneur with the giant firm, augment the hedonistic calculus with faith in efficiency, and assume an "invisible hand" whose fingers point to social duty as well as to self-interest, and the parallel becomes striking. Schumpeter tells us that "most of the creations of the intellect or fancy pass away for good after a time that varies between an after-dinner hour and a generation. Some, however, do not. . . . These we may call the great ones. . . ."[56] So it is with the seductively simple notion that "that government is best which governs least"—least being a quantum that is relative to time and condition. Greatness, of course, may reside in persistence rather than in truth, as it did for Schumpeter in his original application of this idea to Marxism.

All of this is not to assert that the political implications of current economic doctrine have been systematically analyzed, or that their epistemological, psychological, and ethical roots have been exhumed and examined. On the contrary, the constitutional significance of current economic speculation seems to have gone largely unrecognized except by those few theorists who remain focused on the concepts and language of economic science. We point here merely to a tendency, the consequences of which require more serious exploration than they have yet received.

Thus far, little has been said about judicial contributions to antitrust policy. It has been observed that the optimistic commentators find a salutary and invigorating influence in the postwar decisions, while the critics see only continuing confusion, indecision, or virtual surrender to monopoly. But what are the standards of evaluation for each of these groups? Such critics as George Stocking, Corwin Edwards, Dirlam and Kahn, and Adams and Gray[57] are suspicious of the newer models of imperfect competition and lean toward some practically attainable version of the atomized market as an ideal situation, while the optimists are either inclined to embrace the newer economic formulae or to avoid altogether the thorny task of specifying evaluative models. But both

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56 Schumpeter, id. at 3.

57 Stocking & Watkins, Monopoly and Free Enterprise (1951); Edwards, Maintaining Competition: Requisites of a Government Policy (1949); Dirlam & Kahn, Fair Competition: The Law and Economics of Anti-trust Policy (1954); Adams & Gray, Monopoly in America (1955).

schools, whether approving or disapproving, tend to analyze recent judicial doctrine in terms of economic categories and concepts generally, and within a framework of imperfect competition specifically. This approach suggests a number of critical questions: Have theories of imperfect competition so influenced the courts themselves as to predominantly shape the course of antitrust law? If so, what has been the effect on constitutional development and how shall we evaluate that effect? If not, is it either wise or fruitful to persist in the effort to fit judicial propositions into the narrower categories of economic theory? Finally, if we abandon the present interpretive trend, what alternative analytical framework is available? It is with these questions in mind that we turn to a closer inspection of the recent antitrust decisions.

If, in the language of Chief Justice Hughes, "[T]he [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions,"[58] then we might expect judicial construction of antitrust policy to reflect a dominant preoccupation with those concerns which have traditionally defined the core of our constitutional system—diffusion of power, legitimate and responsible exercise of authority, and preservation of the dignity, liberty, and equality of the individual. These concerns, it is submitted, are considerably broader, involve a more elaborate range of considerations than do the more limited economic objectives of efficiency in production, organization, and distribution. Although it has become fashionable to analyze the court's antitrust work primarily within the narrower economic framework, and although many judicial decisions have been, in part, cast in the language of current economic speculation, nevertheless it would be a mistake to impute to the judiciary an exclusive or even predominant concern with implementing contemporary theories of imperfect competition. J. M. Clark, Joan Robinson, and others, may have been read into the Sherman Act, but their constructs have been viewed more as means than as ends. To what extent has a judicial consideration of means permeated and colored the postulation of ends to be achieved by antitrust policy?

The core of most Sherman Act decisions has been the familiar "Rule of Reason." As originally formulated in the *Standard Oil* case,[59] this concept was not intended as a device for distinguishing "good" trusts from "bad" ones, but rather as a measure of the anti-competitive effects of certain market structures and conduct. Price-fixing, destruction of competitors, and exclusion of new entrants were considered violations whether or not the firms involved were well-managed, progressive, and benevolent.

[58] Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933).
[59] Standard Oil Co. (New Jersey) v. United States, 221 U.S. 1 (1911).

Hence, Justice McKenna could announce in his *U. S. Steel* opinion that the law does not make mere size or unexerted power an offense. "It, we repeat, requires overt acts and trusts to its prohibition of them and its power to repress or punish them."[60]

But if the Rule of Reason was not originally intended as an umbrella over imperfect markets, it was nevertheless susceptible of such an interpretation. Does a particular market structure or a certain course of conduct result in *less* price competition, *greater* destruction of competitors, or exclusion of *more* potential entrants than would some alternative situation? If the Rule of Reason is viewed in this light—if, in short, it rests upon the assumption that certain anti-competitive effects are implicit in all successful competition—then elaborate economic analysis involving price policy, production quality, conduct of firms, boundaries of the market, number of firms in the industry, etc., becomes the necessary prerequisite to judgment. In this sense, the Rule of Reason becomes a pseudonym for "workable competition."

In section 2 cases, however, there is little indication that the Rule has received this interpretation. The *Alcoa*,[61]*Pullman*,[62] *United Shoe*,[63] and *Kansas City Star*[64] decisions evince a judicial tendency to discover in market dominance, coupled with exclusionary practices, the power to fix price and to block potential entrants. Alcoa's control of 90 per cent of the nation's aluminum ingot production, observed Judge Hand, "necessarily had a direct effect on the ingot market."[65] Hence, he concluded, the company "was free to raise its prices as it chose, since it was free from domestic competition . . . ."[66] Only so long as the monopoly remains inert is it valid to argue that the mere existence of power does not constitute an exercise of power. "[A]s soon as the monopoly began to operate; for, when it did—that is, as soon as it began to sell at all—it must sell at some price and the only price at which it could sell is a price which it itself fixed."[67] In none of these cases was it considered necessary to weigh industry performance, to speculate on the comparative advantages of giant firms, or to evaluate price trends, quality improvement, and technological innovation.

If the Rule of Reason, in the sense of market structure, has been the dominant rationale in section 2 cases, then the doctrine of Conscious

60 United States v. United States Steel Corp., 251 U.S. 417, 451 (1920).
61 United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
62 United States v. Pullman Co., 50 F. Supp. 123 (E.D. Pa. 1943).
63 United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass.) (1953).
64 Kansas City Star Co. v. United States, 240 F.2d 643 (8th Cir. 1957).
65 United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945).
66 Id. at 426.
67 Id. at 428.

Parallel Action has played a similar role in section 1 decisions. It would seem equally clear that this doctrine does not translate the Rule of Reason into an apology for imperfect competition. Indeed, the second *American Tobacco* decision merges and equates conscious parallelism with the Rule of Reason as construed by Hand in *Alcoa,* resting both on what is essentially an assumption that certain market structures, coupled with a particular pattern of behavior, produce a prohibited result. That result is "not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so."[68] Hence, conscious parallelism comes rather close to, although it cannot be equated with, those *per se* rules so vigorously attacked by a majority of the Attorney General's Committee as inconsistent with theories of workable competition.[69]

Other section 1 decisions offer additional evidence of a judicial trend toward the *per se* concept and away from complex economic reasoning. Thus, in the twelve criminal proceedings initiated against trade associations during the first quarter of 1959, the courts affirmed the Government's contention that price cutting, exclusion or boycott of computing firms, associations embracing competitors at different levels of an industry, and overly methodical policing of members to guarantee adherence to the association policies are all *per se* offenses under section 1, and that trade association membership is a *per se* offense whenever unlawful behavior can be imputed to the parent organization.[70] Further, price-fixing[71] and the imposition by manufacturers of some territorial and customer restrictions on distributors[72] continue to be regarded as *per se* violations under section 1.

What, then, are the broader implications of recent Sherman Act rulings? *First,* care must be taken to avoid the error earlier imputed to the optimistic commentators that these decisions represent a toughening of antitrust policy within the traditional meaning of that concept. They are

68 American Tobacco Co. v. United States, 328 U.S. 781, 811 (1946).

69 It is true, of course, that conscious parallelism has had a declining career during the past decade and that the Court has observed that "'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely." (Theatre Enterprise, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954)). However, two observations are in order here. First, the Court has been hesitant to reverse a factual finding by either the FTC or the trial courts that conscious parallelism does not exist in a given situation. Moreover, the FTC, in particular, has not been well disposed toward the doctrine in recent years. Second, the Antitrust Division has been inclined to accept the view of the Attorney General's Report and has therefore hesitated to rest its charges in whole or in part on conscious parallelism. Perhaps, then, administrative agencies should assume major responsibility for eclipse of the doctrine.

70 See Wilson, "The Eisenhower Antitrust Policy: Progressivism or Conservatism?" 32 Rocky Mt. L. Rev. 179, 188 (1960); Withrow, "Trade Associations," 4 Antitrust Bull. 173 (1959).

71 Morton Salt Co. v. United States, 235 F.2d 573 (10th Cir. 1956).

72 Handler, "Recent Antitrust Developments," 13 Record of N.Y.C. B.A. 417, 434 (1958).

not oriented primarily toward limiting the size of individual firms nor at prohibiting large concentrations of economic power. Nor do they seek to disintegrate existing centers of power through the traditional remedies of dissolution, divorce, and divestiture. On the contrary, government attempts at trust-busting were rebuffed in the great majority of these instances. *Second,* the essential test of legitimacy implied by these decisions appears to be a simplified market-structure analysis;[73] beyond a certain point in size and below a certain number of firms, illegal conduct (such as price-fixing and exclusion of competitors) can be assumed. The empirical, economic evidence of industry behavior need not be tortuously examined. *Third,* a simplified market structure analysis, at least when employed in the manner referred to here, would appear to depart rather widely from current notions of imperfect and monopolistic competition. It is true, of course, that monopoly in the legal sense has usually been thought to mean *abusive or restrictive practices,* while monopoly in the economic sense has been equated with *control of the market.* It is also true that market structure is recognized as one significant aspect of market control. But it must be emphasized that recent judicial doctrine employs market structure tests first as a means to the more basic end of ascertaining the existence of illegal practices and second as a device for identifying power situations which may be objectionable on other than economic grounds; market control in an economic sense is not necessarily an offense. As indicated earlier, there are more fundamental and traditionally constitutional objections to the forbidden practices and to the prohibited power situations than mere economic dominance over a specified market area; these objections we shall inspect more closely in the conclusion. Finally, there is a notable absence of complex economic analysis in recent Sherman Act cases. Many economists, particularly those who emphasize performance rather than market structure tests, view this as proof that the courts are employing economic reasoning in an inadequate manner. Such an indictment is largely irrelevant, however, if, as we indicate here, the judiciary has not accepted a model of imperfect competition as its dominant organizing concept.

What the Rule of Reason and Conscious Parallelism have been to the Sherman Act, the doctrine of Quantitative Substantiality has been to the Clayton Act. This concept occupies the central interpretive role in the so-called vertical integration cases,[74] of which *Standard Stations*[75] and

[73] See Mason, "The Current Status of the Monopoly Problem in the United States," 62 Harv. L. Rev. 1265 (1949).

[74] For a more complete delineation of the vertical integration theme see Kessler & Stern, "Competition, Contract, and Vertical Integration," 69 Yale L.J. 1 (1959).

[75] Standard Oil Co. (California) v. United States, 337 U.S. 293 (1949).

DuPont-G.M.[76] are perhaps the most representative. Here, again, is a formula which does not fit easily into the theory of imperfect competition. *Standard Stations* raised the question of whether exclusive dealing contracts imposed by the Standard Oil Company of California on its retail outlets "substantially lessened competition" in the petroleum industry in violation of section 3 of the Clayton Act. The majority concluded that such contracts were an offense because, to borrow a phrase from Kessler and Stern's excellent analysis, "When competitors are foreclosed from a substantial enough share of the market, it is not farfetched to infer a substantial lessening of competition."[77] Does this imply that exclusive dealing contracts are a *per se* offense and that all are prohibited regardless of circumstances? Not quite, since the question of what is "a substantial enough share of the market" must still be answered. It would seem clear that the Court was not influenced by Standard's 6.7 per cent share of the Western retail market, but rather by the 65 per cent share controlled by the seven major distributors, each of whom employed exclusive dealing contracts similar to those used by Standard.[78] Once again, the underlying rationale of the decision appears to be a market structure of market power analysis. Quantitative substantiality is thus given much the same interpretation as were the Rule of Reason and the Concept of Conscious Parallel Action in recent Sherman Act decisions. Further, the majority in *Standard Stations* specifically rejects Mr. Justice Jackson's argument that the *economic* consequences of voiding these contracts in what is essentially an imperfect market will reduce rather than increase the volume of competition. The Court, then, seems to be taking something of a middle course between the *per se* idea and the theory of imperfect competition.

The facts of the *DuPont-G.M.* decision, which also constituted a case of vertical integration, scarcely need repeating here. Essentially, the government charged that DuPont's acquisition of 23 per cent of G.M.'s stock would "tend to create a monopoly" in violation of section 7 of the Clayton Act. The Court, however, construed "tend to create a monopoly" as identical to the phrase "substantially lessen competition," citing *Standard Stations* for the meaning of the latter, and, consequently, of both concepts.[79] Mr. Justice Brennan thereupon found that since G.M. controlled over half the automobile market, and, since, further, DuPont supplied "the largest part" of G.M.'s needs for fabrics and finishes, that "there was a likelihood that competition may be 'foreclosed in a substantial

[76] United States v. E. I. duPont de Nemours & Co., 353 U.S. 586 (1957).
[77] Kessler & Stern, supra note 74, at 28.
[78] Id. at 30.
[79] 353 U.S. 586, 595 (1957).

share' " of the market; thus, DuPont's interest in G.M. "tends to create a monopoly." Although the relevant market was defined here as automotive finishes and fabrics, most critics are quick to point out that such a market constitutes only a small portion of the total paint and fabric market. Therefore, the likelihood for DuPont's control to "substantially" reduce the competitive opportunities of other paint and fabric suppliers is even less than the anti-competitive potential implicit in the *Standard Stations* situation. One can only conclude that the simplified market-structure test of the *Standard* case, and all that it implies, has been affirmed and extended by *DuPont-G.M.*

While it is still too early to determine whether the Court will continue to employ an essentially non-economic orientation in cases arising under amended section 7, the Anti-Merger Act of 1950, the *Youngstown-Bethlehem*[80] and the *Maryland-Virginia Milk Producers*[81] decisions afford some indication that they will do so. The Federal Trade Commission, however, in its *Brillo*,[82] *Crown-Zellerbach*[83] and *Scott Paper*[84] rulings appears content to follow the well-known *Pillsbury*[85] precedent, requiring a thorough market analysis of all relevant economic facts in determining the probability of adverse competitive effects in section 7 cases.

A final observation on the doctrinal thrust of recent antitrust decisions concerns George Stocking's allegation that three of the leading divorcement actions of the postwar period—*Alcoa, United Shoe,* and *National Lead*[86]—reflect an almost total judicial preoccupation with theories of imperfect competition.[87] In all three cases the courts found that violations of the Sherman Act had occurred, but in none was divorcement relief granted. Stocking remarks that in refusing to grant the requested relief, the courts "attached greater weight to the industry's performance than to its structure,"[88] thus grounding the analysis in each case on "a broad conception of the principle of workable competition."[89] It is true that all of these opinions show a careful examination of the usual factors

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

81 United States v. Maryland & Va. Milk Producers Ass'n, Inc. 167 F. Supp. 799 (D.D.C. 1958), aff'd in part, rev'd in part 362 U.S. 458 (1960).

82 Brillo Mfg. Co., Trade Reg. Rep. ¶ 27,243 (FTC June 4, 1958).

83 Crown Zellerbach Corp., Trade Reg. Rep. (1957 Trade Cas.) ¶ 26,923 (FTC Dec. 26, 1957).

84 Scott Paper Co., Trade Reg. Rep. ¶ 277.16 (FTC Jan. 5, 1959), reversing ¶ 27,312 (FTC Aug. 4, 1958).

85 Pillsbury Mills, Inc., 50 F.T.C. 555 (1953).

86 United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953); United States v. Aluminum Co. of America, 91 F. Supp. 333 (S.D.N.Y. 1950); United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945), aff'd, 332 U.S. 319 (1947).

87 See Stocking, "Economic Change and the Sherman Act: Some Reflections on Workable Competition," 4 Antitrust Bull. 375 (1959).

88 Id. at 394.

89 Id. at 396.

bearing on industry performance—number and strength of firms, extent of technological development, availability of close substitutes, etc.—but whether they reveal enthusiastic judicial adoption of theories of imperfect competition is doubtful. It must be recalled, *first,* that courts are essentially *negative* rather than *positive* formulators of regulatory policy. They are equipped with neither the knowledge nor the organization to undertake the planning and restructuring of markets or the detailed direction of economic life. The tortuous course of the public utility rate cases up to *Hope Natural Gas* and subsequent abandonment of judicial efforts to create criteria for measurement of the rate-base provide rather convincing evidence for this assertion. *Second,* what Donald Dewey calls the innate conservatism of the courts[90]—their unwillingness to disturb the existing property and contractual relationships among stockholders and employees of the affected firms—must be considered a cardinal factor in the fate of all divorcement actions. It is one thing to assume that further concentrations of power will produce inequitable results and to block it; it is quite another to anticipate the distributive consequences of a positive reorganization of economic relations and to adopt an economic model that will guarantee those consequences. While the first may require some degree of sophisticated conjecture, the second demands either omniscience or else an abiding faith in the economic theory on which it rests. Hence, far from affirming a theory of imperfect competition, these decisions would appear to cast some doubt on its viability.

III.

In conclusion, then, Rule of Reason, Conscious Parallelism, Quantitative Substantiality, etc., the dominant interpretive doctrines by means of which the courts have fashioned current antitrust policy, veer away from rather than toward the idea of imperfect, or even workable, competition. None requires or has been given the type of complex economic analysis, particularly in terms of industry performance, that implementation of this idea would seem to require. But, if the courts have not read imperfect competition into the Constitution as a fundamental organizing concept, what has been the broader constitutional significance of their work? Does a doctrinal position, sufficiently coherent to be identifiable, emerge from recent antitrust decisions? If not, can one be fashioned from the suggestions and implications of judicial reasoning?

The current search through judicial analysis for a grand organizing theme, at once subordinating and encompassing pertinent economic and

90 Dewey, supra note 33, Ch. XVII.

sociological concepts, has attracted a number of observers to the intriguing idea of "constitutionalizing" the major centers of private economic power. Arthur Miller, for example, argues that "the factory community should be recognized as a private government" and that "the governing power, wherever located, should be subject to the fundamental constitutional limitation of due process of law."[91] Wolfgang Friedman concludes that "The challenge to the contemporary lawyer is to translate the social transformation of these organizations (corporations and unions) from private associations to public organisms into legal terms."[92] Berle, Wirtz, Buchanan and Hale have similarly commented upon the public character of corporate power and upon the possibility of disciplining it within the framework of constitutional limitations.[93]

This conceptualization has great appeal in logical and administrative as well as in theoretical terms. Granted that certain private associations possess governmental power (*i.e.*, the capacity to affect in significant ways the life of an entire community) and that a constitutional system is intended to define and to limit the exercise of such power, then it follows that power existing outside the system must be brought within it; given the premises, the argument is as simple as it is compelling. Moreover, such an ingestion is facilitated administratively by the pre-existing pattern of constitutional precedent fashioned through a century and a half of judicial attention to the powers of state and federal agencies. Finally, "constitutionalization" provides a convenient answer to some of the more perplexing implications of pluralistic political theory. As Sheldon Wolin has so forcefully emphasized in his Vision and Politics, modern social theory (of which pluralist thought is but one strand) discovers "the primary social realities in groups and associations, rather than in the state."[94] Hence, the political order is reduced to a "bookkeeping function" and the state is subordinated, at best, to a position of *primus inter pares* and at worst to a mere "coordinator" of those few activities not falling within the domain of private associational relationships. The idea of constitutionalization, however, provides a theoretical basis upon which to reassert the primacy of political government, to incorporate the particular into the general, and to provide a justification for harnessing the pluralistic tendencies of modern society.

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91 Miller, "The Constitutional Law of the 'Security State'," 10 Stan. L. Rev. 620, 663 (1958).

92 Friedman, "Corporate Power, Government by Private Groups, and the Law," 57 Colum. L. Rev. 155, 176 (1957).

93 Berle, Economic Power and the Free Society (Fund for the Republic 1957); Wirtz, "Government by Private Groups," 13 La. L. Rev. 440 (1953); Buchanan, The Corporation and the Republic (Fund for the Republic 1958); Hale, Freedom Through Law (1952).

94 Wolin, Politics and Vision 314 (1960).

But, if the general sweep of the idea attracts, the application perplexes. Are all the basic constitutional limitations on power equally applicable to private associations? If not, which ones are? Is it the *procedures* by means of which private groups exercise economic and social authority that are to be regularized, or is the *substance* of power itself to be domesticated?

Thus far, academic analysis and judicial action have both centered almost exclusively on due process as a constitutional device for regulating the exercise of authority by private persons and groups. Specifically, state and national courts have initiated a tentative and selective restriction on the power of certain private groups performing public functions —notably labor unions—in dealing with their members.[95] A union exercising exclusive bargaining power, for example, is said to be under "an affirmative constitutional duty equally to protect" the rights of all members and not "to deny, restrict, destroy or discriminate against the rights of those for whom it legislates. . . ."[96] Hence, a closed union and a closed shop may not coexist in some jurisdictions.[97] In others, members may not be arbitrarily expelled or fined.[98] In still others, the union may not arbitrarily and capriciously refuse to consider and to press the legitimate grievance of an individual employee.[99]

That these few decisions amount to something less than a pervasive constitutionalization of private power centers and that they have only limited applicability to the antitrust problem is patent. Due process, even in its substantive and particularly in its procedural dimension, has generally been limited to the protection of those persons who are directly and immediately the subjects of a particular authority, and who are related to that authority by formal and definite lines of control. Thus it may be invoked by citizens charged with violation of the law or by those who claim to be arbitrarily injured by action of the state, or latterly by members of a formal group the officers of which have behaved capriciously. The gravamen of monopoly, however, bears no such specific and direct relationship to the welfare of each party who is injured by it. The consumer who may lose freedom to choose from among competing prod-

95 Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1944); Williams v. International Brotherhood, 27 Cal. 2d 586, 165 P.2d 903 (1946); Betts v. Easley, 161 Kan. 459, 169 P.2d 831 (1946); Carroll v. Local 269, 133 N.J.E.Q. 144, 31 A.2d 223 (1943); Clark v. Curtis, 297 N.Y. 1014, 80 N.E.2d 536 (1948).

96 Steele v. Louisville & N.R.R., 323 U.S. 192, 198 (1944).

97 James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1944).

98 Dorrington v. Manning, 135 Pa. Super. 194, 4 A.2d 886 (1939); Thompson v. Grand Brotherhood, 14 Tex. Ct. 467, 91 S.W. 834 (Civ. App. 1905).

99 Jenkins v. Wm. Schluderberg-T. J. Kurdle, Co., 217 Md. 556, 144 A.2d 88 (1958); cf. Cortez v. Ford Motor Co., 349 Mich. 108, 84 N.W.2d 523 (1957).

ucts, or who may be forced to pay higher prices for inferior quality, the competitor driven to the wall or severely restricted in the scope of his activity, the potential entrant frustrated in the realization of his economic objective—few of these can claim a clear organizational relationship to the source of their ills nor can they in most cases show the kind of direct impact on their fortunes which due process would seem to require. (Wherever such direct injury can be demonstrated, of course, private treble-damage proceedings are already available to some of them.) On the contrary, the evils of monopoly and restrictive conduct are cumulative and generalized more often than they are discrete and direct; they are less the issue of individualized and aberrant behavior than of a pervasive social ethic, a widely shared *Weltanschaung*, and a highly complicated system of business conduct.

If, then, the theoretical notion of constitutionalizing private centers of economic power is to provide a useful basis for the control of monopoly, a more flexible and tractable vehicle than due process is required. To this end, the concept of equal protection of the laws merits careful consideration. Just as substantive due process with its inordinate emphasis on individual rights to property and to contract was the central constitutional theme of an earlier day, so the idea of equality under law might be viewed as the key to modern day constitutional development. An accelerating penetration of economic life by organs of the state inevitably has shifted the constitutional focus from what have been called the *negative* freedoms toward what may be labeled the *positive* freedoms: emphasis is no longer placed primarily upon freedom *from* state interference, but rather upon freedom *for* the full enjoyment of such privileges as earning a livelihood, achieving a decent standard of living, raising a family, and other basic social objectives of a democratic society. Freedom in this latter sense has been thought to require not only protection of the individual from the arbitrary demands of public power, but also, and equally, from unwarranted interference by the holders of private power. It is this aspect of the libertarian idea that shares much in common with equalitarianism. Both are oriented toward the positive promotion of those conditions necessary for the full and equal enjoyment of the fruits of social organization.

While the equal protection idea might well provide a more viable route to the constitutionalization objective than does due process, and although it would furnish a more comprehensive architectonic pattern for the management of antitrust problems than current economic theories do, yet the Court has not clearly articulated equality under law as the foundation of its antitrust work. On the other hand, it can be argued that recent decisions in this area are thoroughly consistent with the implications and broader meaning of equalitarian doctrine and that the concept, if carefully applied to the anti-monopoly objective, promises innovation in an area heretofore either strait-jacketed by economic considerations or beset by a turbulent sea of conflicting social theories. A closer look at some recent decisions may reveal a few of these possibilities.

The heart of the constitutional idea of equality, whether derived from the equal protection clause itself, the fifth amendment, the commerce clause, or the first amendment,[100] has been the concept of reasonable classification—the demand that when privileges are granted to, or restrictions are imposed upon, groups of individuals, that all who are similarly situated be similarly treated and that the purpose of the classification be legitimate.[101] Under conditions of modern economic life, privileges and restrictions flow from the decisions of both public and private centers of power: General Motors no less than the State of Michigan conditions and defines the scope of what we have called the positive freedoms. This being so, ultimate constitutional authority is as much concerned with the reasonableness of those classifications resulting from private decision-making as it is with the classificatory consequences of public action. So, price discrimination may arbitrarily advantage some purchasers at the expense of others; conspiracy to monopolize or to restrain trade can unreasonably restrict potential competitors to the profit of existing ones, or unfairly discriminate against that class of consumers which views the product in question as a necessity; full-blown monopoly may exacerbate all of these discriminatory consequences.

The simplified market-structure analysis which seems to underpin most of the leading antitrust doctrines could well be viewed, at bottom, as a demand for reasonable classification in private economic decision-making. Organizations, of course, cannot discriminate until they act, and it is the practice not the structure which ultimately must be judged on equalitarian grounds. But since the judiciary is no better equipped to police the details of all business conduct than it is to supervise the behavior of every public agency, it must make assumptions about the potentially discriminatory effects of large configurations of economic power. Firms in an oligopolistic industry *may* not discriminate against competitors, potential entrants, or consumers, but then neither may juries from which Negroes have been systematically excluded *necessarily* discriminate

100 For an extended analysis of the scope and limits of the equal protection concept see Antieau, "Equal Protection Outside the Clause," 40 Calif. L. Rev. 362 (1952).

101 See Tussman & ten Broek, "The Equal Protection of the Laws," 37 Calif. L. Rev. 341 (1949); Wilson, "The Merging Concepts of Liberty and Equality," 12 Wash. & Lee L. Rev. 182 (1955).

against colored litigants whose cases are before them. Monopolies *may* not arbitrarily exploit buyers, but then neither may licensing boards which operate without the guidance of specific statutory standards necessarily discriminate unreasonably against licensees or applicants. In any case, it is the *likelihood* of discrimination that will, under the equal protection concept, determine the ultimate judicial outcome. Hence, it is upon the general configuration of the industry in question that crucial assumptions about the reasonableness or unreasonableness of economic decisions must be based. To the extent, of course, that certain conduct, such as collusive price-fixing, can be proved and the anti-competitive effects clearly and sharply demonstrated, such assumptions will be unnecessary. It is, however, precisely the difficulty of measuring the long-range, indirect impact of many varieties of suspect conduct upon all areas of the economy that has contributed to the popularity of economic analysis in the antitrust field and has cast the traditional *per se* concept into disrepute. We can probably expect to find fewer and fewer of these clear-cut cases as time goes on.

But whether the root of analysis be conduct or inferences drawn from structure, or both, what does it mean to apply reasonable classification doctrine to an antitrust situation? Robinson-Patman Act cases offer perhaps the clearest and most simple illustration. Section 2 of the Clayton Act, as amended by the Robinson-Patman Act,[102] forbids sellers from discriminating in price between different purchasers of like grade and quality, and prohibits buyers from inducing such discrimination. In a sense, he who so discriminates creates by his decision two distinct classes: those who are unreasonably denied an advantage and those who are inordinately benefited. Congress has declared that, unless price differentials can be justified by demonstrated cost savings, there is no reasonable relationship between the maintenance of a free economy on the one hand and the exclusion of certain persons from the favored group, on the other. In construing the Robinson-Patman Act, the Court has in a general sense continued to apply the spirit, if not the words, of this test. In *FTC v. Morton Salt Co.*[103] the Court struck down a seller's differentiated price system even though quantity discounts were, in theory, available to all buyers. In fact, argued Mr. Justice Black, economic realities make it impossible for all but a tiny handful of buyers to purchase in sufficiently large amounts to qualify for discounts. As with the licensing ordinance in *Yick Wo v. Hopkins,* the jury selection system in *Smith v.*

102 38 Stat. 730 (1914), 15 U.S.C. § 13 (1934), as amended by 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1958).

103 334 U.S. 37 (1948).

Texas, and regulations for the use of public property in *Niemotko v. Maryland*[104] (of which none, on its face, created an unreasonable classification) it was the *fact* of discriminatory application rather than the abstract possibility of equal treatment that was decisive. But perhaps even more light is cast on the application of equal protection doctrine to antitrust in *Morton Salt* by the narrow construction there given the "injury to competition" phrase. Such injury was logically inferred from the fact that some merchants were required to pay more for the product than were their competitors. It was the heavier burden borne by the one group rather than the total amount of competition restrained or the possibility that some of the disadvantaged might, by extra effort, overcome the effects of their burden which was conclusive for the Court.

Similarly might the "quantitative substantiality" doctrine be explained in equalitarian terms. In neither the anti-merger nor the exclusive dealership cases can it well be argued that prohibition is likely to increase the number of new entrants sufficiently to allow for effective price competition. Neither is it likely that judicial restriction of these devices will reduce price significantly and improve quality for the consumer. Both practices are likely to occur in those industries involving a high percentage of fixed costs and a natural inclination toward oligopoly. Hence, a judicial negative will probably do little positively to increase the amount of competition beyond existing levels. To prohibit mergers and exclusive dealerships, then, whenever their effect on competition is "quantitatively substantial" is primarily to deny to the firms involved power to create discriminatory classifications under conditions currently prevailing in the industry: that is, to prevent *existing* competitors from bearing heavier burdens than those who enjoy the advantages of either practice, and to preserve for consumers whatever degree of price or quality competition presently exists. In seeking thus to preserve the prevailing distribution of burdens and advantages within an industry, the Court interdicts only those practices which are sufficiently inequitable to satisfy the demands of classification analysis. If the courts have never demanded that classifications established by public agencies have a perfectly symmetrical relationship to the objective sought—have never, in short, required that *all* who are similarly situated with respect to that objective, *and no others*, be included in the class singled out for special treatment—then they can hardly impose such an administratively impossible demand on "private" governments. The anticipated illegal consequences must be more than

104 340 U.S. 268 (1951); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Smith v. Texas, 311 U.S. 128 (1940);

de minimis yet less than predominant to be actionable under traditional classification analysis.

While the application of equal protection doctrine to other representative antitrust situations could be explored at much greater length, the purpose here is suggestive and exploratory rather than exhaustive and analytical. We have sought to discover a rationale which is more satisfactory in constitutional terms than the currently popular economic orientation. We have sought, moreover, for a theoretical base not inconsistent with the dominant facts of industrial organization. If, then, recent antitrust decisions can legitimately be evaluated in equal protection terms, rather than within the narrower confines of economic theory, the traditional dichotomy between *per se* rules and complex economic analysis becomes somewhat irrelevant. The requirement for reasonable classification and equal treatment is not intended to guarantee the survival of every would-be competitor, regardless of experience, ability, or resources, nor can it provide impartial protection to each individual consumer. It seeks to rationalize relationships among and within large groups, rather than to guarantee personal rights and privileges; it is directed primarily to a reasonable use of power under existent conditions and specified policy aims, rather than to an authoritarian formulation of these conditions and aims. Hence, it can and must accept the reality of large-scale enterprise, seeking only to restrain and to control its consequences. On the other hand, the equalitarian idea encompasses values other than, and in addition to, that of economic efficiency. It cannot afford to become captive of an analysis which is aimed exclusively at such a limited objective.

It is in this sense that the constitutional idea of equality provides a middle route between the *per se* extremes of individualism and the collectivist implications of theories of imperfect competition. At the same time, it offers an effective possibility for translating economic formulae into the more fundamental requirements of constitutional doctrine. Finally, it facilitates an accommodation between popular demands for national security and the traditional desire for constitutional limitations on the exercise of power—be that power public or private. We might well conclude, then, with Eugene Rostow's observation that "Economic activity, after all, is a means as well as an end in the hierarchy of Democratic ambitions. An economy should be judged by what it adds to the wealth of a nation. . . . Beyond that goal, judgment should measure its effect on men, on politics, and on the values and culture of the society."[105]

105 Rostow, Planning for Freedom 3 (1959).