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Antitrust Law and the Paradigm of Industrial Organization

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Congress adopted an antitrust scheme before economists developed a systematic theory of industrial organization. This article presents an economic paradigm that analyzes the effectiveness of the antitrust laws in regulating business activity. The paradigm considers the interrelationship among basic conditions, structure, conduct, and performance. Evaluating these relationships illuminates standards for choosing among types of antitrust regulation.

INTRODUCTION

The antitrust laws do not reflect conscious congressional adoption of any economic model of industrial organization. They largely predate such models.[1] They reflect, in fact, little or no systematic interaction

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[1] Industrial organization as a distinct branch of economics did not emerge until the

between economic thinking and legislative policy.[2] The statutes were legislative responses to social, political, and economic problems manifest within the economic order. The antitrust laws necessarily authorize judicial and administrative intervention into the structure and conduct of business activity. Therefore, it is crucial to relate these statutes systematically to the operation of the business economy.

This article is not an effort to use economic analysis to critique specific rules of law, but rather an endeavor to relate the commands of antitrust law to a relevant overall description of the organization of economic activity. By juxtaposing descriptions of legal authority and economic order, there emerges a picture of the potential inability of the statutory scheme to reach all competitively significant aspects of that order. The apparent incompleteness of the antitrust laws explains some aspects of statutory construction that would otherwise appear as an expansion of judicial review. The fact that economically similar events are, based on their legal characterization, within or beyond the scope of antitrust laws may also help to explain the uneasiness of some courts in reviewing challenges to the economic process which seem arbitrarily included within antitrust law. In addition, critical examination of the economic analysis of industrial organization in light of the alternative economic and noneconomic objectives of antitrust law can greatly illuminate the policy debates over the scope and standards of the antitrust laws.

I. THE SCOPE OF ANTITRUST LAW

Despite their significance to the operation of the economy, the anti-

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1920s and 1930s. Phillips & Stevenson, *The Historical Development of Industrial Organization*, 6 HIST. OF POL. ECON. 324, 332-35 (1974). The basic antitrust laws were adopted in 1890 and 1914. The 1950 amendment to the Clayton Act, which created effective control over mergers, was the object of a more extensive debate by economists. *See* Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 231-32 (1960). But in that instance, the debate focused on the proper legal regulation of mergers, a specific aspect of industrial organization, and not on an evaluation of the overall relation of the legal scheme of regulation to economic order.

[2] W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 77 (1965); H. THORELLI, THE FEDERAL ANTITRUST POLICY 109-27, especially 120-21 (1954). These two histories of the Sherman Act make clear the almost total uninvolvement, direct or indirect, of economists and economic theory in the legislative process leading to the passage of that act. Economists, at least as commentators, were more involved in the period prior to the adoption of the Clayton Act, *see, e.g.*, C. VAN HISE, CONCENTRATION AND CONTROL (rev. ed. 1914), and prior to the 1950 amendment to § 7, *see, e.g.*, Bok, note 1 *supra*, at 231-32, 233-38.

trust laws, particularly their operative provisions, are brief. The Sherman Act, which originally contained eight sections,[3] has only two sections with substantive significance. In Section 1, "[e]very contract, combination . . . or conspiracy, in restraint of trade . . . is declared to be illegal."[4] This section limits legal authority over restraints of trade to those which are the product of "contract, combination . . . or conspiracy." Indeed, the specific language prohibits only the agreement and not the restraint; thus distinguishing restraints that arise from or involve agreement among legally separate entities and those that do not.

The other substantive provision of the Sherman Act, Section 2, makes it a crime for any "person . . . [to] monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several states . . . ."[5] Although the statute does not define either monopoly or monopolize, the general economic meaning of the terms would limit this command to firms which have a substantial or dominant position in a specific type of business. Because Congress lacked any specific economic analysis, the term "monopolize" could embrace all imperfect, nonpurely competitive contexts.[6] However, this interpretation is extreme and is not what the legislature intended or the law's enforcers applied.[7] The traditional focus of this provision, exclusive control of a significant market, is the classic monopoly of traditional economic models, the contrast to perfect, pure competition.

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[3] Sherman Act, Pub. L. No. 51-190, 26 Stat. 209 (1890).

[4] Sherman Act, ch. 647, § 1, 26 Stat. 209, 209 (1890) (current version at 15 U.S.C. § 1 (1976)).

[5] Sherman Act, ch. 647, § 2, 26 Stat. 209, 209 (1890) (current version at 15 U.S.C. § 2 (1976)).

[6] "Perfect, pure competition" is a market context in which many firms produce identical products and no firm has any capacity to affect price by its output decisions. Such firms must accept the prevailing market price and adjust output to achieve optimal productive efficiency. The perfect, purely competitive market provides the model for the competitive market of basic economic models. *See, e.g.*, R. LEFTWICH, A BASIC FRAMEWORK FOR ECONOMICS 246-59 (1980). Other forms of perfect competition can exist, such as perfect monopolistic competition, which deprives firms of any price or output discretion but is otherwise quite distinct. *See* E. CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION 56-70 (8th ed. 1962); *cf.* J. ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION (2d ed. 1969).

[7] In most early antitrust cases invoking § 2, dominance over the production of a good or service in some area was a crucial factor. *See, e.g.*, United States v. American Tobacco Co., 221 U.S. 106 (1911) (monopoly in tobacco products); Standard Oil of N.J. v. United States, 221 U.S. 1 (1911) (monopoly in oil refining); United States v. E.C. Knight Co., 156 U.S. 1 (1895) (monopoly in sugar refining). *But see, e.g.*, United States v. Reading Co., 253 U.S. 26 (1920) (railroad with approximately one-third of market violated § 1 and § 2).

Section 2 is patently ambiguous as to whether mere possession of monopoly is sufficient for a violation. But it appears that Congress expected, and the courts have invoked, this section to review the lawfulness of both market positions and the conduct of firms holding dominant positions in a line of business.[8]

The Clayton Act contains several competitive regulations of only marginal significance. Section 10 seeks to regulate common carrier purchases of supplies and construction services.[9] Section 8 prohibits interlocking directorates between competing firms.[10] Of greater significance, Sections 2 and 3 impose specific standards on transactions between producers and distributors.[11] Section 2, as revised by the Robinson-Patman Act,[12] limits the circumstances under which a producer may discriminate among its customers in factors such as price and services. Nondiscrimination is required "where the effect of . . . discrimination may be substantially to lessen competition or tend to create monopoly . . . ."[13] This definition of the substance of a violation does not restrict jurisdiction. Hence, the conduct encompassed includes both direct price differences and less direct discounts and rebates that might achieve the same result.[14] Unlike Section 1 of the Sherman Act, these provisions do not require agreement; review of unilateral business decisions is possible, but only when the goods involved are "commodities" and when the conduct involves a difference in prices, services, or facilities. Thus, the ability to review unilateral acts is circumscribed.

Section 3 of the Clayton Act subjects to judicial review any agree-

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[8] Structural cases include those cited in note 7 *supra*, and, *e.g.*, United States v. Grinnell Corp., 384 U.S. 563 (1966) (monopoly of accredited central station protection services unlawful and ordered dissolved). Conduct-oriented cases include Otter Tail Power Co. v. United States, 410 U.S. 366, 371-72, *reh'g denied*, 411 U.S. 910 (1973) (monopolist unlawfully sought to preserve monopoly by refusals to deal and spurious law suits); Lorain Journal Co. v. United States, 342 U.S. 143, 148-49 (1951) (monopolist unlawfully coerced customers into boycotting potential competitor); LaPeyre v. FTC, 366 F.2d 117, 121 (5th Cir. 1966) (monopolist unlawfully caused harm to related industry by price discrimination).

[9] Clayton Act, ch. 323, § 10, 38 Stat. 730, 734 (1914) (current version at 15 U.S.C. § 20 (1976)).

[10] Clayton Act, ch. 323, § 8, 38 Stat. 730, 734 (1914) (current version at 15 U.S.C. § 19 (1976)).

[11] Clayton Act, ch. 323, §§ 2, 3, 38 Stat. 730, 730-31 (1914) (current versions at 15 U.S.C. §§ 13, 14 (1976)).

[12] Robinson-Patman Act, ch. 592, § 1, 49 Stat. 1526, 1526 (1936) (current version at 15 U.S.C. § 13 (1976)).

[13] *Id.*

[14] *See id.* at §§ 13(c), (d), (e) (1976).

ment which requires the buyer or lessee of commodities to refuse to buy goods from competitors of the seller or lessor.[15] This provision condemns one particular restrictive contract. Although it may alter the substantive standards of liability for a collective act, Section 3 does not expand the scope of review of business conduct beyond the class of collective acts defined by Section 1 of the Sherman Act.

Currently, the most significant element in the Clayton Act is Section 7's command that:

> [N]o corporation . . . shall acquire . . . the stock or . . . the whole or any part of the assets of another corporation . . . [when] in any line of commerce in any section of the country, the effect . . . may be substantially to lessen competition, or to tend to create a monopoly.[16]

Jurisdictionally, this reiterates Section 1 of the Sherman Act, because any acquisition will require a contract, which restrains trade if its effect may be to lessen competition or to create a monopoly. Nevertheless, Section 7 does clarify that one type of structural corporate change, merger, is subject to the antitrust law. Section 7 also implicitly establishes that generally neither existing patterns of corporate ownership of productive assets nor changes achieved by means other than acquisition are within the scope of antitrust law.[17]

The final statutory scheme is the Federal Trade Commission Act (FTCA).[18] Its operative provision prohibits "[u]nfair methods of competition . . . and unfair or deceptive acts or practices . . . ."[19] This language confers extensive authority over economic activity. Although ownership of assets is arguably neither "unfair competition" nor an "unfair act or practice," it seems initially that all business conduct whether unilateral or collective is includable, and that the Federal Trade Commission (FTC) may limit or prohibit any specific conduct that it determines is unfair or results in unfair competition. Indeed, in the area of advertising and consumer protection, the Commission and the courts have so interpreted this language.[20] However, when cases

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[15] Clayton Act, ch. 323, § 3, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 14 (1976)).

[16] Clayton Act, ch. 323, § 7, 38 Stat. 730, 731-32 (1914) (current version at 15 U.S.C. § 18 (1976)).

[17] The basic exception occurs when such structure falls within § 2 of the Sherman Act.

[18] 15 U.S.C. §§ 41-58 (1976).

[19] *Id.* at § 45(a)(1).

[20] Thus, for example, in dealing with false advertising, the issue is the deceptiveness of the advertising and not the presence or absence of an agreement to engage in deceptive advertising. *See, e.g., In re* Pfizer, Inc., 81 F.T.C. 23 (1972).

involve antitrust issues, the courts' definition of "unfair competition" embraces primarily those acts and practices covered by the Clayton and Sherman Acts.[21] Consequently, FTCA Section 5 has not existed independently of the antitrust acts, although courts and commentators have discerned its potential for expanding the reach of antitrust.[22]

II. THE INDUSTRIAL ORGANIZATION PARADIGM

Economists have devised various methods of organizing economic analysis. Each has relevance to specific issues of analysis, description, and policy.[23] In selecting an appropriate paradigm for explaining antitrust, it is crucial to focus on the issues that the law encompasses. Building on microeconomic theory, industrial organization economics starts with the industry, a group of firms producing similar goods or services, and proceeds to describe, analyze, and predict both the conduct of specific firms within and the overall activity of particular industries. This focus corresponds closely to the issues of antitrust concern.[24] To achieve these objectives in a systematic way, the analyst uses a general descriptive model to determine which categories are relevant for classifying information about an industry and to specify the functional interrelationship among those categories.

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[21] *See, e.g.*, Official Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981); *see also* Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C.L. REV. 227, 252 n.114 (1980).

[22] *See* Boise Cascade v. FTC, 637 F.2d 573, 581 (9th Cir. 1980) (suggesting that FTC has jurisdiction under § 5 to challenge noncollusive anticompetitive behavior); Hay, *Oligopoly, Shared Monopoly, and Antitrust Law*, 67 CORNELL L. REV. 439, 469-72, 476-80 (1982).

[23] Thus, a macroeconomic model, while it has relevance to issues in antitrust law, does not explain the sources of monopoly or other phenomena that antitrust intends to regulate. Nevertheless, it may have some relevance. *See* Carstensen, *Antitrust Law, Competition, and the Macroeconomy*, 14 U. MICH. J. L. REF. 173 (1981) (arguing that a vigorous antitrust policy which effectively limits market power and its use is an essential element in overall economic policy aimed at limiting inflation and stimulating real economic growth). Moreover, antitrust focuses on specific business enterprises, primarily in their relationship to each other and to the class of goods or services that the firm produces, distributes or consumes. Thus, pure microeconomic theory (price theory), although highly relevant, offers insufficient explanation of where the various types of idealized firms come from or when and how they can achieve specific consequences.

[24] This development is not surprising since the economists who developed industrial organization economics as a distinctive branch of economic analysis were very interested in the antitrust laws and public utility regulation. More generally, these economists explored the evolution and conduct of observed markets and the relationship between legal intervention in the markets and the conduct of markets.

In the 1930s, Professor Edward Mason, an originator of the specialty of industrial organization economics, developed a paradigm which has been widely accepted as a basic descriptive tool.[25] This consensus dissolves rapidly when economists get beyond certain essential descriptive implications of the paradigm.[26] Those disagreements do not detract from the present use of this paradigm as a map of relevant categories and interrelationships. In fact, the debates tend to underscore the usefulness of the paradigm, since it yields a framework to explain such disputes.

The industrial organization paradigm describes the relationship between economic factors and the ultimate performance of each specific industry within the economy. Figure 1 schematically presents four relevant categories and their initial relationships:

Fig. 1

BASIC CONDITIONS → MARKET STRUCTURE → CONDUCT → PERFORMANCE

Basic Conditions are those factors, given at any moment, which establish the supply, demand, and legal elements (the context) of the market for an industry. The first element is supply. Scherer's format of

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[25] Mason, *Price and Production Policies of Large-Scale Enterprises*, 29 AM. ECON. REV. 61 (Supp. 1939). The specific format of the paradigm used in this discussion is largely derived from F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 5 (1970) [hereafter INDUSTRIAL MARKET STRUCTURE]. It varies in some particulars from that found in W. SHEPHERD, THE TREATMENT OF MARKET POWER 12 (1975). Other than the names of categories, the most notable differences are that Shepherd treats structure as directly relating to performance and not always being mediated through conduct. The direct relationship merely graphically asserts a deterministic relationship between some aspects of structure and ultimate performance. Shepherd also views performance feedback as influencing both structure and conduct, while Scherer treats feedback as coming only from conduct or structure. This conflict reflects differing definitions of performance. If performance feedback is only a measure of conduct, then conduct alone is an active factor causing consequences, and performance as such has no feedback effect. If, however, performance is defined to include actual conduct, then it is logically a source of feedback. Shepherd does not show structure, conduct, or performance feeding back on conditions. In light of his subsequent concern with capital markets, for example, *id.* at 24-31, this omission is curious.

[26] In one school, the paradigm teaches that structure is the preeminent concern for legal policy, *see, e.g.*, J. BLAIR, ECONOMIC CONCENTRATION 570-75 (1972); Weiss, *The Structure-Conduct-Performance Paradigm and Antitrust*, 127 U. PA. L. REV. 1104 (1979), while to other economists, the structural dimension has limited relevance and conduct is the primary focus, *see, e.g.* J. MCGEE, IN DEFENSE OF INDUSTRIAL CONCENTRATION 124-31 (1978); Kruse, *Deconcentration and Section 4 of the Federal Trade Commission Act*, 46 GEO. WASH. L. REV. 200, 202-10 (1978).

the Mason paradigm lists raw materials (ownership, location), technology, product durability, the relationship of weight to value, and socially prescribed business attitudes, including the nature of the work force and its legal status (unionization).[27] These factors define the context in which production (supply) will occur. If raw materials are scarce, the technology is complex and requires large output for its efficient employment, and the weight to value ratio is such that shipping costs are affordable, a few high volume production facilities can feasibly produce all that consumers desire. Alternatively, if inputs are readily available, the technology allows costs to reach a reasonable minimum at small volumes, and the product is not valuable enough to justify shipping any distance, many relatively small plants will be feasible and more likely to occur.[28] Manifestly, a whole range of other combinations of factors could occur.

Supply must interact with demand, the second element. Various factors structure the nature of demand: the availability of substitutes, the rate of growth of demand, the aggregate amount of demand, its price elasticity, the system of distribution, the way goods are sold (at list price, by competitive bid, by direct, haggling, individual sale), the buyer's conception of the good, and the seasonal patterns of purchase. If many substitutes are easily available, or if demand is very sensitive to price, producers will have only limited discretion to select among prices. If selling is done on an individual basis, the potential to sell at different prices to different customers will increase and consequently reduce the chances that potential producers can easily identify the profitability of entry. Thus, the various aspects of demand shape the context in which producers and customers will interact.

The third element of basic conditions is the legal environment. Contract law defines the possible legally enforceable agreements. Absence of a general contract law would alter the ability of firms to contract out work and make centrally owned organization a more attractive alternative. Such laws also affect the organizational choices of producers and consumers. In general, the law serves as the structuring component of basic conditions. It specifies what organizational choices society will enforce both internally with respect to specific actors, and externally upon the actors' relations to others. The absence of legal authority does not prevent specific conduct, but will usually alter its feasibility and its at-

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[27] INDUSTRIAL MARKET STRUCTURE, note 25 *supra*, at 4-5.

[28] *See* McCraw, *Rethinking the Trust Question*, in REGULATION IN PERSPECTIVE 1, 17-19, 20-24 (T.K. McCraw ed. 1981) (production characteristics historically determined which industries become oligopolistic and which remain diffuse and competitive).

tractiveness.[29] Other laws such as environmental law affect production possibilities both in terms of technology and geographic location; similarly laws regulating distribution relationships, products liability, patent, and other industrial rights also shape the climate in which enterprises will exist.

The paradigm classifies basic conditions as determined or given at any point in time. Of course, the same conditions do not remain fixed. New technology, tastes, resources, products, and law may alter these basic conditions. Some alteration occurs quickly, other slowly. Some events radically alter conditions, others produce a slow transformation.

Human will can also affect conditions. Change requires human action. New techniques, products, world views, and tastes do not occur without conscious human participation. However, it is more controversial to suggest that human action can consciously direct conditions in a systematic way to achieve socially desirable results. To be socially desirable within the framework of economic analysis, alternative conditions having attractive aspects must be achievable. Only then is the actor's capacity to control conditions relevant.

If the only effect of altering a condition is to increase production costs without at least, an offsetting, noneconomic social gain, that would be obviously undesirable. However, the choice between alternative conditions may frequently involve selecting between different, comparably efficient forms of organizing production. Such choice may involve some trade-off of short run efficiency for long run progress in industry. It may also require market creating or market structuring intervention or even an increase in specific publicly supported activity.[30] Nevertheless, the overall choice is between alternatives which offer similar efficiency in the longer run. The resulting choices, if consciously made, involve noneconomic values.[31]

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[29] Antitrust law fits within the set of legal conditions which operate upon an industry. For purposes of the present analysis it is more productive to treat antitrust law as a distinct factor whose role in the other parts of the paradigm is to be examined. One could make a similar examination of other legal constructs included among the basic conditions.

[30] For example, public research and development can be increased if firms are kept too small to support such activity. *Cf.* Carstensen, note 23 *supra*, at 186-87, 203.

[31] If there is a gain to some element in society, the question is whether that gain is worth the cost. This requires a comparison of the value of gains and losses. Many schools of economic analysis suggest that the comparison is very difficult or impossible unless there is in fact a bargained transaction between the affected parties which produces the result. This approach limits optimal choices by the preexisting distribution of wealth and the existing values of economic factors. *Cf.* Heller, *The Importance of Normative Decision Making: The Limitations of Legal Economics as a Basis for a Liberal*

Control over conditions in a noneconomic sense exists with respect to the legal environment. By definition, legislatures and courts can create alternative legal conditions. But does the choice of any set of legal conditions other than some predetermined optimal set have any effect other than producing inefficiency? If one conceives that the fundamental aspects of supply and demand (technology, resources, consumer preference) have an inherently determined character, then nonoptimal legal intervention produces an inefficient, nonessential condition. Such an assumption about human control allows a systematic critique of legal intervention in the economy.[32] Basic factors of supply and demand define what is achievable. Law can facilitate or frustrate, but it cannot alter the preordained, optimally efficient economic order by changing legal conditions. Moreover, changed states of economic development may demand different legal conditions, but any set of economic facts about supply and demand produces only one optimal set of legal conditions.

An alternative view is that many conditions can change without affecting long term efficiency. Law as a condition functions to specify permissible organizational aspects and to assign legal rights. If alternative institutional arrangements can yield the same efficiency, then the choice between them may be on other grounds. Given a set of institutional alternatives defined by law, producers can innovatively achieve efficient production similar to the efficiency which any other institutional set could have achieved.[33] More fundamentally, if the present ba-

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Jurisprudence—As Illustrated by the Regulation of Vacation Home Development, 1976 WIS. L. REV. 385.

[32] This is the point of departure for many scholars associated with the Chicago School of Law and Economics. *See* R. BORK, THE ANTITRUST PARADOX 107-15 (1978). *See generally* R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976); R. POSNER, ECONOMIC ANALYSIS OF LAW (1972). These scholars often refer to consumer welfare as the key standard for judging the desirability of policies. For consumer welfare to be a valid criterion, it must be independent of the matters being evaluated. Hence, it is essential for the validity of the Chicago School critique that the basic conditions of demand (and probably supply) are independent of any socially controlled manipulation. If they are not, then observed consumer welfare is not necessarily "real" consumer welfare and intervention is justifiable. *Cf.* Markovits, *A Basic Structure for Microeconomic Policy Analysis in our Worse-Than-Second Best World: A Proposal and Related Critique of the Chicago Approach to the Study of Law and Economics*, 1975 WIS. L. REV. 950.

[33] Bank regulation provides an illustration. The various states control the form of bank ownership which ranges from unit banks to multibranch banks. Despite the vast range of organizational form, the costs of banking are remarkably similar among the many forms. Choice among forms, enlightened by this information, has to rest on values other than efficiency. The explanation, in part at least, for the independence of efficiency from organizational form is probably found in the Coase Theorum. *See*

sic conditions are in some respects functions of prior activity, then regulation of such activity may establish future conditions. Future conditions can reflect conscious value choices within technological and physical reality. The variable aspects of demand or supply can then be manipulated to achieve objectives. Those objectives are defined by some set of values outside the constraints of existing conditions. Thus, if advertising creates demand when none would have existed otherwise, then the creation of such demand is dependent upon a legal or social choice which allows, limits, or regulates the use of advertising. Similarly, if rewards stimulate invention, then systematic changes to create rewards may affect the direction and character of supply. And if alternative types of equally efficient technology could exist, the reward could seek to promote that technology which is more desirable for nonefficiency reasons.

These alternative views on the capacity of society usefully to control conditions greatly influence antitrust policy and other legal-economic policy. The more limited the capacity of law to affect conditions, the less ambiguous are the policy choices. One can seek and find a single set of efficient conditions. Laws, including antitrust, which undermine or frustrate those conditions, are objectionable. If, however, law can make meaningful selections among conditions, then economic facts are less determined and deterministic. Because every decision is a choice among alternative conditions, the role of law and analysis of its implications are not only more important but more problematic. These two world views explain much of the policy debate about not only antitrust law but the role of law in the economy generally.

Basic conditions, as the arrow in Figure 1 implies, define the parameters of *Market Structure*.[34] In an extreme view, conditions mandate a particular structure; more realistically, they define limits to the range of structures which are likely to occur. While basic conditions may define situations in which an inefficient structure can survive, they rarely require but a single structure. If all scale and other economies in beer production, for example, were achieved at four percent of the national market, then presumably few brewers could survive with smaller

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Coase, *The Problem of Social Cost*, 3 J. L. ECON 1 (1960).

[34] INDUSTRIAL MARKET STRUCTURE, note 25 *supra*, at 4. Structure, in its comprehensive formulation, includes the numbers and sizes of both producers and buyers of the good, the degree of product differentiation, the barriers to new entry, the structure of costs (such as how much of production cost is fixed and how much varies with output), the degree of vertical integration (combination within a firm of multiple levels of production), the geographic distribution of buyers and sellers, and the degree to which firms in this business engage in other related or unrelated businesses.

shares; but unless there is some upper limit on efficiency, brewers many times larger than minimum could also survive.[35]

The most common measure of structure is the share of market sales held by some group of sellers. Such measurements lead to characterization of market structures. A structure in which a single producer provides all or almost all of the output is *monopolistic.* If a relatively few firms control most sales, the structure is *oligopolistic.* When a great many firms operate and no small group has a significant position, the structure is usually described as *competitive.* These labels relate to points on a continuum from highly monopolistic to very competitive. While these labels have predictive significance as to conduct, in this instance they are only structural categories.

According to the paradigm, the structure of an industry shapes the conduct of firms in that industry. Just as conditions do not mandate a single structure, a specific structure does not absolutely fix the character of conduct. Rather, the structure establishes the kinds of conduct which are feasible. A single firm in an industry can behave very differently than a large group of firms in a similar industry. A few firms can interact and reach some consensus on behavior in a way that may not be feasible in a more competitively structured industry. But predicting that consensual conduct is feasible and likely within a particular structure does not mean that it is inevitable. Other conditions or minor structural variances may make nonconsensual conduct more attractive to those who then could define the possible conduct for the remaining firms.[36] As a result, the complete description of structure also includes a range of facts about the character of the goods sold, the type of buyers, and various cost factors.

Conduct describes how firms behave in a market. Pricing is a classic example. It can range from collusive to independent, and from high to low in relation to cost. It may include transportation, repair service, or several distinguishable products. Its form can be a lease, a continuing payment, or a single sum. Closely related to pricing conduct, product strategy can range from a single general product to many specialized ones. Both the price and product dimensions can be closely linked to

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[35] *See generally* F. SCHERER, A. BECKENSTEIN, E. KAUFER, & R. MURPHY, WITH THE ASSISTANCE OF F. BOUGEON-MAASSER, THE ECONOMICS OF MULTI-PLANT OPERATIONS (1975).

[36] Assuming an industry of loosely oligopolistic structure, tacit collusion on prices is feasible; but if a leading firm desired to engage in price competition, all other firms would probably have to abandon collusion and respond. The price cutter might act that way in order to drive some marginal firms from the industry and prepare for later price collusion.

advertising activity. In addition, a firm's research and innovation efforts are aspects of its behavior, as are its choices of legal tactics, such as a firm's decision to seek and enforce patents or trademarks.

Ultimately, we have the *Performance* of an industry. The performance category qualitatively differs from the preceding ones. It purely describes the evaluation of an industry's conduct. How an industry behaves is its conduct; how well or poorly it has behaved is its performance. Structure and conditions produce nothing alone. They are not amenable to performance evaluation. Conditions and structure are subject to these criteria only insofar as they affect conduct.

Although good economic performance has many dimensions, it is usually measured in four ways. The first measurement is the efficiency of the industry, defined as "the efficient relations between prices and costs, capacities and outputs, demands and capacities; and production at efficient scale in efficient locations. The characteristic results of the competitive model define efficiency."[37] Second is the progressiveness or dynamic efficiency of an industry. Progress occurs when firms seek better methods of production or superior products. The third aspect is stability. In general, the optimum occurs when resource use, especially the employment of human resources, is relatively stable over time. The final element of performance is a measure of equity or fairness. Equity includes concern for relative rewards and price stability. An industry which is efficient, progressive, stable, and fair is the ideal. Performance measures the social desirability of given conduct and its alternatives. Altering conduct may result in better performance. The linkage between conduct and performance is much more direct and deterministic than is the connection between conditions and structure or structure and conduct.

Under a traditional industrial organization framework, this set of relationships has a clear primary character, as indicated by the arrows in Figure 1. Conditions specify structure; structure controls conduct; and conduct determines performance. But the relationship among the first three components is not unidirectional.[38] Conduct can affect both structure, by changing such factors as the number of competitors and the costs of entry; and basic conditions, by changing such items as technology and marketing method. Similarly, structure can itself feedback on conditions and affect the choice of technology or nature of selling.

If feedback effects from either structure or conduct can alter basic

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[37] C. KAYSEN & D. TURNER, ANTITRUST POLICY 12 (1959).

[38] Both F. SCHERER, note 25 *supra*, at 5, and W. SHEPHERD, note 25 *supra*, at 12, recognize feedback effects.

conditions, then the entire industrial order becomes substantially more indeterminant and subject to social control. But as long as the relation between basic conditions and structure is not completely determinate, government is justified in directing structure toward the most desirable form, if it can be identified. Similarly, if structure allows for various forms of conduct, the law can enforce conduct choices which are meaningful to performance. Legal restrictions on conduct may also be used to make a less desired structure untenable or less likely. If businesses seek individually optimal outcomes which are not socially optimal as measured by performance, law can counteract those forces which lead to suboptimal performance.[39] This does not necessarily imply that all fundamental conditions are affected by law; rather only artificial, undesirable conditions are the target of such feedback. Some authors suggest, however, that although the law can create inefficient results by meddling in the already efficient market, it cannot produce greater efficiency than presently exists.[40] Thus, the effect of intervention can be at best benign ineffectiveness and at worst malignant destruction of valuable social efficiency. Other theorists argue that although antitrust can eliminate the inherently inefficient results of private optimization under certain structural and conduct conditions, antitrust law itself cannot significantly and usefully alter fundamental conditions.[41] Several scholars take a less deterministic view which justifies more intervention in structure and conduct because either basic conditions are not very controlling or altering structure and conduct will desirably affect basic conditions.[42]

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[39] Professors Bork and Posner support this view. *See* R. BORK, note 32 *supra*; R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 4 (1976). Both recognize that private actors can distort industrial order and thus assign to antitrust law the obligation of counteracting such private distortion.

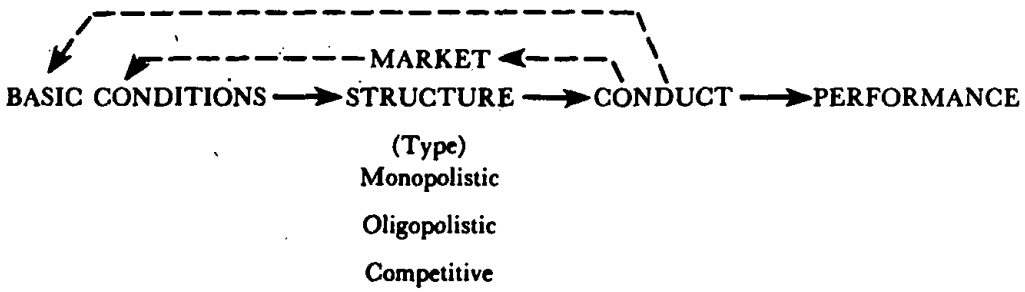
[40] D. ARMENTANO, ANTITRUST AND MONOPOLY: ANATOMY OF A POLICY FAILURE 2-3 (1982); Demsetz, *Two Systems of Belief about Monopoly*, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING, 164, 179, 183-84 (H. Goldschmid, H. Mann, & J. Weston eds. 1974). *But see* Hay, Book Review, 32 J. LEG. ED. 448 (1982) (critical examination of logic of Armenteno's position).

[41] *See* R. BORK, note 32 *supra*, at 116-17 and R. POSNER, note 39 *supra*, at 39-40.

[42] C. KAYSEN & D. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 46-49, 59-60 (1959); Blake, *Conglomerate Mergers and the Antitrust Laws,* 73 COLUM. L. REV. 555, 590-91 (1973); Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979). Pitofsky argues that in addition to economic considerations, there are important political implications which underlie legislation. Such considerations include the preservation of a democratic system and protection of individual freedom. Pitofsky argues that the excessive concentration of economic power undermines the ability of the system to guarantee these liberties.

Figure 2 restates the paradigm with the addition of the feedbacks between the first three elements and the specification of the alternative market structures.

Fig. 2



There are significant limits to the comprehensiveness of the analysis made possible by the industrial organization paradigm. First, without ranking the several criteria for performance, the paradigm provides limited guidance on substantive policy and practically no basis to critique specific doctrines. The measures of performance suggest values which could guide both jurisdictional and substantive antitrust policy definitions. To provide such guidance, however, those values must have some system of priorities. Without these priorities, any substantive doctrine which serves any value can have a justification even if it disserves other values.

The key to understanding many of the academic debates and judicial policy shifts in antitrust is to recognize that different primary values may be sought. Thus, those emphasizing efficiency make that their primary value in ordering their analysis of appropriate policy, while those valuing progress, fairness, or equity would put similar emphasis on those values. In addition, differing views on the law's capacity to affect fundamental basic conditions is a vital element in explaining policy prescriptions. Those having a less deterministic viewpoint more easily accept temporary inefficiency since their assumption is that businesses will eventually become efficient under the new social order. The paradigm's analysis of performance is that it is multifaceted. Consequently, value conflicts are predictable. The framework does not resolve the ultimate problem of relating values, but it clarifies the problem and the contending alternatives.

The second major limitation of the paradigm is its omissions. The omissions occur in two areas. First, there are omissions of potentially relevant descriptive elements from the basic paradigm. Second, because

it is focused on economic values, the paradigm omits potentially crucial values from the performance criteria.

The paradigm exclusively employs a market power perspective in distinguishing among alternative market structures. Such a perspective is constricted even from an economic viewpoint. Other forms of economically relevant power can exist. The failure to include these other forms of power within the paradigm limits its universality.

There are at least four forms of economic power. The most common type is market power, the capacity to affect price and output in some defined market having both product and geographic dimensions. Markets are classified from monopolistic to competitive to measure the potential for market power. To determine such market power potential, both the product and geographic dimensions of the market must be defined.[43]

The second form of economic power is relational power.[44] This power arises from an existing legal or economic relationship. A franchisor has significant relational power over its franchisee. The franchisor can cause serious economic harm to its franchisee even though it lacks any discernable capacity to affect the prices or output of the market in which its franchisee operates. Even assuming that a rational firm with relational power will not abuse it, the social and economic consequences of relational power are not beyond concern especially when it is combined with some market or discretionary power. The relational power may allow the endowed party to appropriate some or all of the market advantage that initially accrued to the other party. Such transfers can in turn produce distorted investment or other economic decisions having both structural and behavioral implications.

The third form of power is discretionary power.[45] Such power exists

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[43] The legal and economic literature on the subject is extensive and indicates that resolving these issues is difficult. *See, e.g.,* Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981) (proposing adoption of a formula to determine market power). *But see* Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1523, 1541 (1982) (critical comments on the Landes & Posner theory); Comment, *Landes and Posner on Market Power: Four Responses*, 95 HARV. L. REV. 1787 (1982).

[44] *See, e.g.,* Bohling, *Franchise Terminations Under the Sherman Act: Populism and Relational Power*, 53 TEX. L. REV. 1180 (1975). Bohling defines relational power and argues that although there is social utility in franchising, the structure lends itself to abuses due to the disparity in relational power between the franchisor and the franchisee.

[45] *See, e.g.,* Dewey, *The New Learning: One Man's View*, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING 1, 11 n.18 (H. Goldschmid, H. Mann, & J. Weston eds. 1974); Brodley, *Potential Competition Mergers: A Structural Synthesis*, 87 YALE

whenever an economic actor has the ability to make choices which have economic significance. Thus, even a bankrupt railroad subject to detailed rate control retains the discretion to select where its shops will be or which suppliers it will employ. Consequently, it has the capacity to have significant economic effect despite its lack of market power as a railroad.

A final, more ephemeral form of economic power is aggregate power.[46] Aggregate power is not only a cumulative index of other, more specific measures of size, but also a measure of a firm's absolute size, the depth of its pocket. Some economists measure aggregate power in terms of the number of firms in some broadly defined class of economic activity, such as manufacturing, which hold some percentage of all assets, employment, sales, profits, or some other dimension of business performance. This is the form of the Fortune 500.[47] Aggregate concentration is consistent with either high or low levels of market power. If each of 100 firms is engaged in all markets, market concentration could be low, but the aggregate dominance of 100 firms over the economy aggregately might be very great. Hence, aggregate economic power measures dominance in a broader perspective than the market power concept, yet it can have market implications.

In traditional market structure analysis, market power measures capture a number of aspects of the other economic power measures, but the latter are still peripheral to the market structure and power idea. Hence, an exclusive focus on the market power measure limits the capacity of the paradigm to incorporate relevant observations.

The other analytical limitation to the paradigm is that it posits economic values as the only values relevant to describe and explain antitrust standards.[48] If antitrust has a social or political dimension, then the standards for performance should include these relevant

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L.J. 1, 35 (1977) (definition and discussion of discretionary power).

[46] *See, e.g.*, INDUSTRIAL MARKET STRUCTURE, note 25 *supra*, at 39-45.

[47] *See* Williams, *Fortune's Directory of the 500 Largest Industrial Corporations,* FORTUNE, May 3, 1982, at 258-59.

[48] Pitofsky, note 42 *supra*, at 1051; Blake & Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377 (1965). Blake and Jones argue that antitrust has a broader ideological base than preserving economic efficiency. Competitive markets also serve political and ideological objectives, such as minimizing political interference and protecting individual liberty. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1202-03 (1977). Elzinga argues that although efficiency is a major force behind the antitrust laws, it is not absolute. A strong relationship also exists between antitrust policies and other social objectives, such as equity.

noneconomic values. One value might be the flexibility of the economy or the freedom of action which individual entrepreneurs can preserve.[49] The social value of antitrust may also reside in its capacity to disperse relational or discretionary power.[50] Such power threatens not only the narrowly defined economic order but the integrity of the entire social order.

Without a significant revision of the entire paradigm, it would be misleading to try to factor noneconomic performance goals into this paradigm and assume that these values have been effectively included. The problem is that these performance concerns may make sense only in the context of economic power measures that are different from the market power concept around which the paradigm revolves. Incorporating these alternative measures into the paradigm requires a reexamination of the paradigm's fundamental definitions and the relationship between the categories.

In the context of this discussion, this observation implies that the integration of the paradigm with antitrust law can significantly illuminate the economic analysis of antitrust. The paradigm cannot provide a comprehensive analytic framework until all values and all relevant views of the antitrust issue are included.

III. ANTITRUST LAW IN THE INDUSTRIAL ORGANIZATION PARADIGM

The antitrust laws address matters which involve (i) contracts or combinations in restraint of trade (collective conduct); (ii) monopoly and monopolization (the structure and conduct of actors characterized as monopolists or attempted monopolists); and (iii) merger (external structural change). All other structures or behavior are basically excluded from coverage.

Consequently, to mesh the antitrust laws with the economic paradigm, two distinctions need to be made within the paradigm. The first distinction is between unilateral conduct and collective conduct. The former type is activity which involves a single, legally recognized actor. The latter type requires two or more legally distinct entities whose action results from an agreement or understanding.

The second distinction requires a three part division of structure.

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[49] Dorsey, *Free Enterprise vs. The Entrepreneur: Redefining the Entities Subject to the Antitrust Laws*, 125 U. PA. L. REV. 1244 (1977).

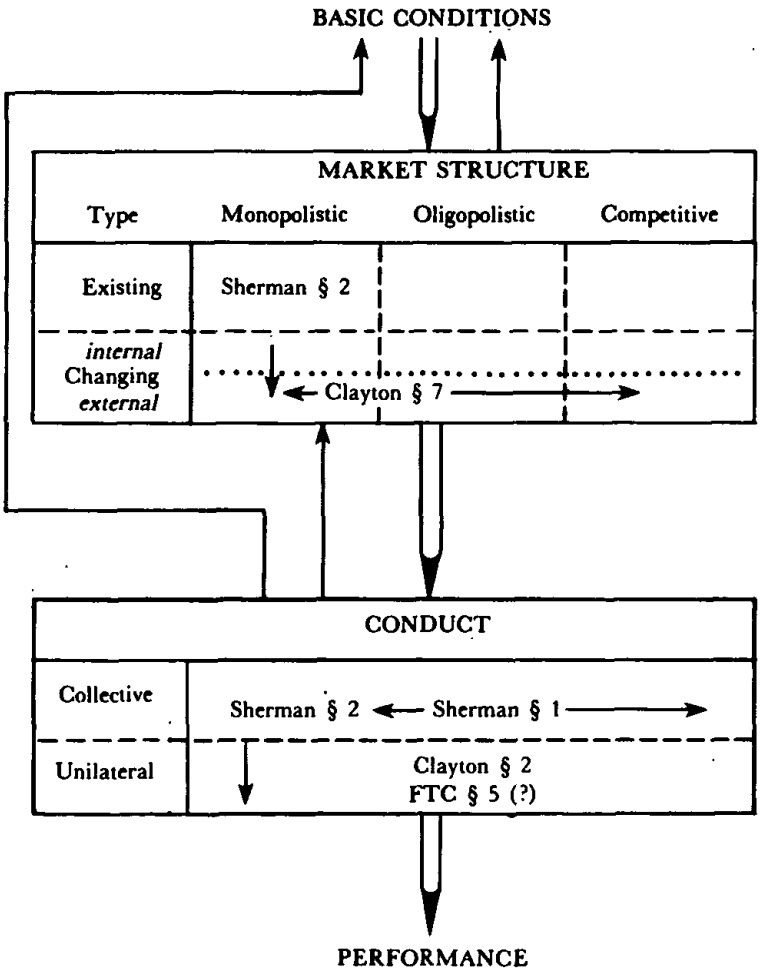
[50] Any democratic society is likely to have concerns about discretionary power. Such power can, intentionally or not, cause arbitrary discrimination among otherwise identical classes. Discrimination is of special concern when power is used for clearly unacceptable ends such as racial discrimination.

The first part is "existing" structure which is the present, continuing structure of a market. The second and third parts reflect alternative characterizations of a change in structure; those of "internal change," and "external change." An internal change results from any expansion or contraction of the enterprise not involving the purchase or sale of a going concern, such as construction of additional facilities, which alters the firm's productive capacity. An external change occurs when a firm merges with another firm or acquires some of the assets of another firm. Both sets of distinctions have a generally descriptive and functional basis but are not integral to the paradigm's categories of structure and conduct. They produce nonfunctional distinctions in the context of those categories. They are highly legalistic and formal in origin.

These additions in the initial paradigm produce a more complex legal-economic description of industrial organization.

Figure 3 incorporates these additional distinctions and diagrams the relationship of antitrust law to the economic paradigm.

Fig. 3



The diagram highlights the primary focus of antitrust on specific, limited aspects of structure and conduct. It also reveals the lack of direct authority to control either basic conditions or performance.

A. Antitrust and Performance

To the extent that direct control over performance is the object of legal policy, the relevant tool is traditional direct regulation of price and other aspects of performance. Performance regulation compels specific conduct that the regulator determines to be in the public interest and to represent optimal performance. Many public utility regulatory schemes typify such control. Indeed, the direct control over performance distinguishes traditional utility regulation from the antitrust model of indirect, performance control. Direct regulation can expand into control over other aspects of conduct, structure, and even basic conditions. Without such ancillary control, unregulated entities might enter the business and by their conduct preclude the regulated entities from achieving their required performance objectives. In banking, regulatory controls were initially spread over a wide range of financial substitutes. Then the impossibility of directing savings to depositories offering rates below the market level became evident. Deregulation of the conduct and performance of regulated financial institutions is now occurring.[51]

Thus, while both performance control and antitrust are economic regulatory systems, they reflect fundamentally different perceptions of how to achieve optimal performance. This difference creates tension when a regulated industry comes into conflict with antitrust commands. But, as Judge Wright has stated, the ultimate objectives of the two regulatory models are fundamentally the same:

> Despite a continuing debate it appears that the basic goal of direct governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of antitrust law is the same — to achieve the most efficient allocation of resources possible. For instance, whether a regulatory body is dictating the selling price or that price is determined by a market free from unreasonable restraints of trade, the desired result is to establish a selling price which covers costs plus a reasonable rate of return on capital thereby avoiding monopoly profits. Another example of their common purpose is that both types of regulation seek to establish an atmosphere which will stimulate innovations for better

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[51] *See* Depository Institutions Deregulation Act of 1980, 12 U.S.C. §§ 3501-3509 (Supp. V 1981).

> service at a lower cost. This analysis suggests that the two forms of economic regulation complement each other.[52]

Courts, legislatures, and commentators have sought to reconcile the tension between the two approaches to economic regulation in light of that premise. In general, antitrust or indirect market control is the fundamental regulatory instrument.[53] Direct performance regulation requires a departure from a presumed norm of self-correcting competitive markets. When direct regulation affects competition either in structure or conduct, it must present an excuse or justification for that effect. In a fully developed formulation, as in Wisconsin's antitrust law,[54] regulatory intervention affecting structure or conduct can survive only if it is the least anticompetitive intrusion and it coincides with the public interest objective which the legislature defined. The use of antitrust policy to critique and evaluate direct regulatory controls does not confer authority upon the antitrust laws to command specific performance; it has only the effect of providing guidance and insight to the evaluation of regulation.

Courts and the FTC, employing the antitrust laws, have obtained jurisdiction over performance aspects as an element of some decrees. For example, in the ASCAP decree, the court retained the right to set the price for music copyright licenses if the licensee and licensor could

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[52] Northern Nat'l Gas Co. v. FPC, 399 F.2d 953, 959 (D.C. Cir. 1968).

[53] National Gerimedical Hosp. & Gerontology Center v. Blue Cross of Kansas City, 452 U.S. 378, 388-89 (1981); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) (private utility charged with tying sales, although in part regulated by the state, was required to conform to antitrust laws); Gulf States Util. Co. v. FPC, 411 U.S. 747, 756-62, *reh'g denied,* 412 U.S. 944 (1973) (FPC must consider anticompetitive consequences of security exchange before approving bonds); Denver & Rio Grande W.R. Co. v. United States, 387 U.S. 485, 498 (1967) (ICC is required to review proposed stock transactions in light of public interest including policy of antitrust laws before approving stock issuance); Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 218 (1966) (agreements between defendant association of shipping companies establishing rates for their members, which had not been approved by the FMC, were subject to antitrust laws); Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963) (because antitrust laws are paramount to Securities Exchange Act of 1934, defendant exchange's refusal to grant nonmember broker-dealers direct wire telephone connections constituted an unlawful boycott).

[54] It is the intent of the legislature to make competition the fundamental economic policy of this state and, to that end, state regulatory agencies shall regard the public interest as requiring the preservation and promotion of the maximum level of competition in any regulated industry consistent with the other public interest goals established by the legislature.

WIS. STAT. ANN. § 133.01 (West Supp. 1982).

not agree.[55] In a sense, such decrees suggest that no antitrust violation has occurred. If the wrong is remediable not by specific action which recreates a market, but only by direct continuous regulation of performance, then competition, the central objective of antitrust, impliedly cannot provide the socially desired performance. Thus, the basic theory of antitrust excludes direct performance regulation.

B. Antitrust and Basic Conditions

The other category of the paradigm over which antitrust exercises no direct control is basic conditions. Again the fundamental conception of the relationship between antitrust law and the overall economic order explains this omission. The purpose of the antitrust laws is to promote competition, given the rest of the legal and economic environment. Antitrust law would take on a constitutional quality if it exercised direct authority over the other coequal legal commands which shape the economic conditions of specific industries. As in the case of performance regulation, however, legal issues involving the basic production conditions can receive illumination and focus from antitrust policy. The imposition of conditions contrary to the goals of antitrust would be objectionable absent another compelling policy justification. Given a policy objective of competition, definitions of conditions can be rejected if they do not achieve their primary, noncompetitive goals in the least anticompetitive manner.

Using the principles of competition policy as defined in antitrust law, legislatures, courts, and agencies can shape basic conditions to achieve competitive and noncompetitive goals. For example, the federal statute legalizing and regulating the beer industry specifically defines the permitted elements of advertising and includes a prohibition on any "disparagement" of a competitor's goods.[56] The Treasury Department interpreted this command as forbidding any negative statement about a competitor whether the statement was true or false.[57] This position es-

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[55] United States v. American Soc'y of Composers, Authors & Publishers, 1956 Trade Cas. (CCH) ¶ 68,524 (S.D.N.Y. Oct. 31, 1956); *see also* United States v. Paramount Pictures, 1952 Trade Cas. (CCH) ¶ 67,254 (S.D.N.Y. Feb. 15, 1952).

[56] Federal Alcohol Administration Act, ch. 814, § 5, 49 Stat. 997, 981 (1936) (current version at 27 U.S.C. § 205(f) (1976)). *See also* 27 C.F.R. §§ 7.29, 7.54 (1982).

[57] *See FTC Asks Treasury to Ease BATFs Ban on "Disparaging" Alcoholic Beverage Ads,* [1978] ANTITRUST & TRADE REG. REP. (BNA) No. 875, at A-22 (Aug. 3, 1978).

sentially outlawed truthful comparative advertising. Although the specific effect of this condition on the structure of the industry is unknown, it clearly restricted the ability of local or regional brewers to establish product credibility and comparability with major brewers whose products received substantial product differentiating promotion. In the late 1970s, the FTC identified the anticompetitive and anticonsumer implications of the Treasury's interpretation.[58] After learning of these effects and that in other areas of law disparagement meant only false, negative statements about a competitor's goods, the Treasury apparently retreated from its earlier position. Comparative advertising became an observable element of product promotion in the beer industry.[59]

Competitive analysis to define basic conditions also guided the United States Supreme Court in the *Bates*[60] decision which invalidated Arizona's general prohibition on lawyer advertising. Because this was a state created limit, it was not a Sherman Act violation even though its effect was to restrain competition.[61] Upon finding the law's market effects to be anticompetitive, the court interpreted the First Amendment to limit the anticompetitive aspects of the state's power to regulate advertising. The state must choose regulatory means which are least anticompetitive and consistent with the state's legitimate interests.[62]

C. Antitrust and Structure

The Sherman Act confers jurisdiction to review the structure of monopolies. As the typography of markets employed in Figure 4 suggests, economic analysis distinguishes markets which are monopolistic from

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[58] *See id.; FTC Urges Comparative Advertisements in Alcoholic Beverage Industry*, [1979] ANTITRUST & TRADE REG. REP. (BNA) No. 907, at A-28 (Mar. 29, 1979).

[59] Although no change in Treasury policy has been announced, it is clear that brewers are now engaging in comparative advertising. *See* 45 Fed. Reg. 83,530, 83,533 (1980) (notice of proposed rulemaking and summary of comments); 43 Fed. Reg. 54,266, 54,266-67 (1978) (notice of proposed rulemaking to alter interpretation of disparagement).

[60] Bates v. State Bar of Ariz., 433 U.S. 350, *reh'g denied*, 434 U.S. 881 (1977).

[61] *Id.* at 359.

[62] *Id.* at 384. Control over some aspects of conditions can also arise under the antitrust laws as a matter of relief. Thus, a court might order limits on the use of legal rights which ordinarily would exist as a way to insure restoration of competition. When such a remedy occurs, it is not inconsistent with the basic model of no direct control over conditions. It has an integral and limited function in bringing about a change in conditions to restore those which would have existed but for the feedback effect of the defendant's wrongful structure or conduct.

those which are oligopolistic or competitive. If that classification carries over to the legal concept of monopoly, then nonmonopolistic structure is beyond the purview of the Sherman Act. The predictable outcome of this approach is that much legal effort is expended on characterization.[63] This effort is unproductive if, regardless of classification, a suitable judicial decree could improve the structure of the industry.[64]

The final structural command in antitrust law is that merger is unlawful if it "may substantially tend to lessen competition." This provides jurisdiction over all "external" changes in market structure regardless of the classification of the market in which it occurs.

Together, the monopoly and merger elements of antitrust's structural law confer authority over only two elements of industry structure. They leave outside the law all existing structure and all internal structural changes that fall short of monopoly. Thus, if an existing oligopolistic structure produces avoidable anticompetitive effects, it is unreviewable under antitrust law. However, if a merger creates a structure likely to produce such effects, it is reviewable. Of course, a similar structure resulting from internal expansion also falls outside the antitrust structural law.[65]

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[63] *See, e.g.*, United States v. Grinnell Corp., 384 U.S. 563 (1966) (a monopoly of central station protective services found despite existence of substitute protective services); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956) (du Pont did not monopolize cellophane "market" since market was broadly defined to include not only cellophane, but all flexible packaging material); United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) (only producer of "virgin" aluminum in United States held to be monopolist of market consisting of such aluminum); United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953) *aff'd per curiam*, 347 U.S. 521 (1954) (company which produced most of shoe making equipment sold in United States held to be monopoly).

[64] Thus, in United States v. Aluminum Co. of Am., 148 F.2d 416, 439-45, 447 (2d Cir. 1945), the divestiture of Alcan, Alcoa's Canadian affiliate, would have produced a more competitive structure regardless of whether the aluminum industry was monopolistic or tightly oligopolistic. Similarly, given the very high prices relative to cost which du Pont received for its cellophane, a remedy which either divested du Pont of some productive facilities or made new entry possible would have been likely to yield significant positive changes in price conduct and ultimate performance. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 392 (1956) (no entry into cellophane market without du Pont assistance); *id.* at 422 (Warren, C.J., dissenting) (profit level very high). Thus, the finding of no monopoly simply created a jurisdictional barrier to potentially desirable relief.

[65] Two partial exceptions may exist. First, if a specific structure is the product of collusion, and if the colluding parties hold a monopoly, they may constitute a conspiracy to monopolize; *cf.* United States v. Paramount Pictures, 334 U.S. 131 (1948); American Tobacco Co. v. United States, 328 U.S. 781 (1946). Alternatively, an in-

The interplay of these categories is illustrated by some quasi-hypothetical aspects of the beer industry. Collectively, but not collusively, Miller and Anheuser-Busch dominate the beer industry.[66] The result is an oligopolistic market which may lack vigorous price, product, and other competition. If this is true because of the structure of the industry, then structure is producing types of conduct which yield undesirable performance. Moreover, most economic analysis and direct industry observation suggest that effective, efficient competition does not require market shares at the level held by the leading firms.[67] Because brewers exist with shares appreciably less than minimum efficient scale, the relatively minor cost changes over the range of observed sizes may be offset by other costs such as shipping and labor specialization, thus making large size even less relevant to survival and efficient performance.[68] Given the two assumptions (bad performance stemming from oligopolistic structure and no economic efficiency justification for that structure), a court endowed with antitrust jurisdiction would be fully justified in evaluating the implications of a restructuring of the industry leaders.[69] But under the present condition of the Sherman Act, a court would lack authority to consider the issues and to evaluate potential remedies.

Changes in structure having similar consequences also receive different treatment. Miller, Anheuser-Busch, and Schlitz in the 1960s and 1970s began to build major new breweries expanding their productive

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dividual firm may have a position approximating a monopoly and a structural remedy may be justified under the attempt to monopolize clause although generally that clause is employed only to govern conduct. *See* Greyhound Computer Corp. v. IBM, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); *cf.* Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 MICH. L. REV. 373 (1974).

[66] In 1977, Anheuser-Busch and Miller made nearly 40% of all beer sold in the United States. C. KIETHAHN, THE BREWING INDUSTRY 22 (1978). By 1980, this share was 50%. Asst. Att'y. Gen. McConnell to Rep. Rodino, April 13, 1982, at 4-5 (discussing H.R. 3269) (copy on file at U.C. Davis Law Review office).

[67] C. KEITHAHN, note 66 *supra*, at 33-39; F. SCHERER, note 35 *supra*.

[68] Historic accident may well explain the present structure. *Cf.* Elzinga, *The Beer Industry*, in THE STRUCTURE OF AMERICAN INDUSTRY 221, 236 (W. Adams ed. 5th ed. 1977).

[69] There may be major transaction costs and significant substantive risks in imposing such relief. Authority to grant such relief would not make such a remedy desirable. But today courts never reach that issue. This was an objective behind the industrial deconcentration legislation proposed by the late Sen. Hart of Michigan. *See* INDUSTRIAL CONCENTRATION: THE NEW LEARNING 339-426, app. B (Hart Bill), app. C (Neal Report Proposal) (H. Goldschmid, H. Mann, & J. Weston eds. 1974).

capacity significantly beyond their existing sales.[70] These plants could satisfy all new demand and, at full production, would also capture existing demand from other sellers. Other existing brewers and their sources of finance would be deterred from either expanding or remodeling existing breweries, or building new ones. Hence, such brewers would consume their plants and eventually leave the industry. This "internal" structural change arguably would move the beer industry structure substantially toward oligopoly. If this had been an external change (if these firms had bought breweries with current sales equal to the anticipated output of the new breweries), antitrust jurisdiction and violation would have been likely. Despite identical structural effects, the form of change determines the outcome as a matter of antitrust jurisdiction.[71]

Many economic investigators and policy panels have found persistent

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[70] C. KIETHAHN, note 66 *supra*, at 26-28; *cf.* Elzinga, note 68 *supra*, at 229-30.

[71] There are two basic rationales for this result. One approach asserts that few existing structures pose serious competitive risks unless they approximate monopoly, or at least that any anticompetitive aspect is remediable through conduct control. Further, internal changes pose no serious risk of competitively significant structural change. But Congress adopted the Sherman Act in 1890 in reaction to perceived threats at a time before oligopoly was an accepted idea among economists. Similarly, the Clayton Act merger rules as devised in 1950 were a response to specific, perceived problems. Thus, any policy rationale for the overall pattern must assert, at best, the intuitive wisdom of Congress.

An alternative rationale for the limitation suggests that the gain to competition (performance) from interfering with existing or internally changed structures would not be worth the costs of the changes. Hence, no reason exists to confer authority. When no collusion and no limit on entry exist, a market structure which remains oligopolistic over a long period of time has arguably proven by its survival that it is efficient and perhaps inevitable, even if observers cannot explain specifically the reasons for that result. *See* Demsetz, note 40 *supra*, at 166-67, 168-69, 177-78. Similarly, internal expansion, being much more risky than acquisition, is so likely to be efficient and rational that subjecting such decisions to review serves no good purpose. This would follow even if one conceded that sometimes existing structures and internal change could be avoidably anticompetitive if the costs of detecting, prosecuting, and remedying such cases would likely be substantially in excess of the gain to the economy from the remedy. The analysis of optimal investment in enforcement is derived from K. ELZINGA & W. BREIT, THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS 7-13 (1976).

Monopoly, the ultimate in potentially costly structure, would be one exception to this general conclusion. R. POSNER, note 39 *supra*, at 3. Similarly, because the parties had a viable independent existence, merger would be an instance in which the costs and risks of remedy might be less and so would qualify as a structural aspect for which judicial review would be appropriate. Such an explanation, while theoretically plausible, can, for reasons adverted to earlier, draw no support from the Congressional actions themselves but must look to direct assessment of the evidence for justification.

oligopolistic behavior costly to the economy.[72] In fact, the Neal Report argues that oligopoly is far more costly than monopoly because of its pervasiveness. Moreover, the ability of corporate enterprises to shed divisions, plants, or product lines at will suggests that the difficulty in effecting relief is primarily in designing the administrative tools rather than inherent in reconstructing corporate enterprise.[73] Doubts about the need for remedy and its achievability at reasonable cost may justify different substantive standards. However, it is difficult to justify on policy grounds a clear line drawing of the type which the antitrust laws produce.

D. Antitrust and Conduct

Antitrust law also focuses on conduct. In Figure 3, a key distinction exists between unilateral and interdependent conduct. Because courts can consistently make this distinction, at least in theory, it has a better functional quality for deciding jurisdictional issues than does structural classification.[74] But does it meaningfully separate classes of economic

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[72] Weiss, *The Concentration-Profits Relationship and Antitrust*, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING 184 (H. Goldschmid, H. Mann, & J. Weston, eds. 1974); *Report of the White House Task Force on Antitrust Policy* (1968), *reprinted in* 115 CONG. REC. S13890, 13891-93 (daily ed. May 27, 1969), *and in* 2 ANTITRUST L. & ECON. REV., Winter 1968-69, at 11, 22-30 [hereafter *Neal Report*].

[73] Posner intimates that corporate entities represent inherently efficient organizations of capital and therefore, that their reorganization creates a direct threat to efficiency. Posner, *Problems of a Policy of Deconcentration*, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING 393, 397-99 (H. Goldschmid, H. Mann, & J. Weston eds. 1974). Corporate managers treat the assets under their control as a much more fungible set of income producing sources to be bought, sold, opened, or closed. This conforms to Penrose's model of the corporation as an open ended collection of assets. E. PENROSE, THE THEORY OF THE GROWTH OF THE FIRM 24 (1959). *See also* O. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS (1975).

[74] *Compare* FTC v. Cement Inst., 333 U.S. 683, 720 (1948) (action of defendant cement producers who employed base-point system of pricing held to be concerted action in violation of FTCA § 5); Interstate Circuit, Inc. v. United States, 306 U.S. 208, 221 (1939) (concerted action inferred from defendant film distributors' conduct which imposed restrictions upon their licensees in various cities); *and* Bogosian v. Gulf Oil, 561 F.2d 434, 446 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) (charge that gasoline producers had violated § 1 could be established by showing parallel, interdependent conduct); *with* Theatre Enter. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954) (because proof of parallel business behavior among film distributors does not necessarily establish interdependency or agreement, no antitrust violation necessarily will exist as result of such behavior). *See* Turner, *The Definition of Agreement*

conduct? That courts examine the lawfulness of unilateral acts in monopolization cases suggests that the distinction is not necessarily economically relevant. Interdependent conduct is not necessarily undesirable. Many agreements are vital to efficient and productive economic conduct.[75] Partnership agreements, basic sales agreements, franchise and distribution agreements are all potentially desirable. Indeed, as a matter of substantive antitrust law, there is a continuing need to define standards which can distinguish desirable from undesirable collective conduct.[76]

Just as not all collective conduct is unreasonable, not all unilateral conduct is inherently reasonable. The unilateral decision to cut prices below variable costs is generally recognized as unreasonable if its consequence is to produce distorted competition at some future time.[77] A firm's decision to initiate excessive product promotion or to employ a price structure which is likely to harm competitors would not be labelled collective conduct, but would nonetheless be socially undesirable.

Some aspects of beer industry behavior illustrate arguably anticompetitive unilateral conduct. Prior to World War II, a small group of producers, Anheuser-Busch, Miller, Schlitz, Pabst, and Blatz sold their beer nationally from breweries in Milwaukee or St. Louis. The resulting transportation costs required that they charge a price considerably above that of more localized beers in order to make a profit. The national brewers were apparently more adept at the technology of bottling beer and consequently claimed more consistent high quality for their packaged products vis-a-vis local beers. In addition, the nationals produced beer with a generally weaker flavor, thus creating a somewhat differentiated product. Given these differences and vigorous advertising, the nationals succeeded in promoting their beers as "premium" beer and so justified higher prices relative to the local beers although they sold relatively small quantities of their beer in any locality.

Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 HARV. L. REV. 655, 657-84 (1962).

[75] *See generally* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, (pts. 1 & 2), 74 YALE L.J. 775 (1965), 75 YALE L.J. 373 (1966).

[76] *See id.* (pts. 1 & 2); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 152-500 (1977). Of the nearly 800 pages of text in Sullivan, nearly one-half are devoted to defining and explaining the substantive standards for finding violations given the existence of an agreement.

[77] William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1032-36 (9th Cir. 1981); Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 698-99 (1975).

After World War II, the national brewers except Miller and Blatz opened or acquired breweries in various parts of the country. Although the transportation cost disadvantage was eliminated, the price differences between their beers and most local beers remained. Starting in the late 1950s and through the 1960s and 1970s, Anheuser, one of the leading nationals, decided not to raise its prices, even as costs rose.[78] The directly competing national brewers had to follow suit or lose significant sales. To the extent that consumers accepted the product differentiation claim and expected regional beers to offer a discount price, this maneuver (combined with various basic demand conditions operating on the market) created a price limit on the regionals. Each regional facing increased input costs could raise its price only at the expense of significant loss of volume as customers switched to the perceived higher quality expensive premium brands. The short run gain to consumers was that prices remained low. The long run effect was that local brewers left the market or resigned any pricing discretion to the national brewers. Thus, the unilateral act of a national brewer combined with continued product promotion adversely affected structure and perhaps long run performance in the market. Unless such conduct was either deemed to fall within the specific provisions of Sections 2 or 3 of the Clayton Act or classified as monopolization, it was beyond the scope of the antitrust laws. Liability still might not be imposed even if this conduct fell within the jurisdiction of antitrust. A substantive standard would have to emerge which would allow courts to determine when such conduct constituted a violation given its mixed consequence for consumers. Still, without jurisdiction, the substantive issues would not even be addressed.[79]

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[78] *See* C. KIETHAHN, note 66 *supra*, at 89-100; Elzinga, note 68 *supra*, at 239-43.

[79] As in the case of the structural rules, the divisions may be rational, even if Congress had only a reactive rationale. Agreements between parties provide a very clear focus for judicial review and remedy. Arguably, the risks of sustained harm from unilateral conduct exist only if conditions or structures support that result. The argument is that the focus properly ought to be on the earlier stage and not its manifestation in conduct. Conduct oriented responses are examples of treating symptoms and not causes.

In contrast, it is sometimes extraordinarily difficult to identify causes and even more problematic to remedy them effectively. This problem is especially acute if the relationships among conditions, structure, and conduct are nondeterministic so that a change in conditions or structure has only a probabilistic effect on conduct. Moreover, moving from specific conduct to structure to conditions expands the effect of a remedy aimed at one industry. The expansive effect may be anticompetitive in related, affected industries. In addition, unless anticompetitive specific conduct is made an essential element of the legal standard justifying a remedy, a structurally oriented standard may result in intervention in similarly structured industries which lack the conduct problems that

In fact, much unilateral conduct is subject to legal control. This is the basic focus of consumer protection, advertising control, and product safety protection. Significant portions of the FTC's effort are devoted to policing "unfair acts and practices" in the economy. Despite these precedents, the antitrust laws simply do not provide for general legal control over unilateral conduct.

The existence of the Sherman Act's Section 2 control of monopolistic conduct and the Clayton Act's Section 2 regulation of price discrimination support the proposition that unilateral conduct is legally controllable and that the distinction drawn by the rest of the Clayton and Sherman Acts has no fundamental economic rationale. However, neither Act provides general jurisdiction over unilateral conduct. Section 2 of the Clayton Act regulates only price and related differences in the sale of goods. Section 2 of the Sherman Act requires a finding of monopolization or attempted monopolization before it will authorize review of unilateral conduct. In terms of the universe of unilateral conduct, these are fairly limited and selective zones for review. Moreover, they lack any prima facie economic rationale as distinct and economically relevant subcategories.

It is likely that in 1914 Congress saw weakness in the scheme of specific statutory commands and sought to remedy it by endowing the FTC with the authority to review all business actions and to condemn those which constituted "unfair competition."[80] In the 1930s, Congress expanded that jurisdiction to include "unfair acts" even if they had no effect on competition. Despite some dicta which suggested that the FTC in fact had jurisdiction to bring the substantive standards of antitrust to bear in areas in which those laws lacked jurisdiction, the courts have generally rejected FTC efforts to reach otherwise unreachable behavior.[81] In some instances the courts have argued that the conduct is

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initially justified the rule. The rule may produce inefficient and anticompetitive results in those industries.

[80] *See* Carstensen & Questal, *The Use of Section 5 of The Federal Trade Commission Act To Attack Large Conglomerate Mergers*, 63 CORNELL L. REV. 841, 850-51 (1978), and sources cited at note 62 therein. The authors argue that FTCA § 5 is a potentially useful weapon for combating particular anticompetitive acts, such as conglomerate mergers, which are not otherwise addressed by the Clayton Act. The language of § 5 and its legislative history indicate that Congress intended the Act to have a broad application.

[81] For limits, see Boise Cascade v. FTC, 637 F.2d 573 (9th Cir. 1980) (declining to enforce FTC order based on the commission's finding of § 5 violation because FTC failed to establish conspiracy to justify order); Official Airline Guides Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980), *cert. denied*, 450 U.S. 917, 925-27 (1981) (finding no specific violation of antitrust laws and reversing FTC finding of unfair competition when mo-

not anticompetitive, but apparently the underlying reason is that the courts perceive the jurisdictional limits to mandate a policy of nonintervention into exempted areas. This view does not comport well with the stated Congressional reasons for creating the FTC.[82] Moreover, conferring on the FTC exclusive power to review the merits of nonmonopolistic unilateral conduct would have been a rational policy judgment. If the substantive analysis of such conduct is very difficult, it may best be consigned to an expert administrative agency whose orders have only prospective effect and create no private damage liability.[83] The risks of private damages and criminal sanctions and the potentially less refined analysis of trial judges and juries can be focused on monopoly and collective anticompetitive conduct cases in which the likelihood of socially desirable conduct being inhibited is low. The courts have nonetheless constrained the FTC to dealing with conduct essentially within the jurisdiction of the Sherman and Clayton Acts whenever the agency has sought to regulate conduct in the interest of competition.

E. Conclusions

The antitrust laws authorize intervention in selected aspects of the structural and conduct dimensions of industrial organization. The selection was not the product of conscious congressional judgment about

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nopolist publisher of airline flight schedules did not publish schedules of connecting commuter flights). *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) (dicta) (Section 5 empowers FTC to determine whether conduct violates that section on general equitable grounds; actions at issue, efforts to eliminate competitors, were at least arguably attempts to monopolize); FTC v. Texaco, 393 U.S. 223, 229 (1968) (upholding FTC decision finding agreement for Texaco to promote Goodrich accessories violates § 5 because it adversely affects competition in accessories market); FTC v. Brown Shoe Co., 384 U.S. 316, 320, 322 (1966) (defendant shoe manufacturer guilty of unfair trade practices and exclusive dealing; FTC has power under § 5 to arrest trade restraints in their incipiency without proof of actual violation of antitrust laws); FTC v. Cement Inst., 333 U.S. 683, 708-09 (1948) (collective use of a base-point pricing system held concerted action in violation of § 5); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 466 (1941) (women's garment manufacturers "unlawfully combined" when they refused to sell to retailers who sold copies of the defendant's designs; FTC could challenge conduct which did not violate Sherman Act).

[82] *See* note 80 *supra*.

[83] There is no private civil liability for a § 5 violation. *See, e.g.*, Holloway v. Bristol-Meyers Corp., 485 F.2d 986, 988-89 (D.C. Cir. 1973); Carlson v. Coca-Cola Co., 483 F.2d 279, 280 (9th Cir. 1973). *But see* Guernsey v. Rich Plan of the Midwest, 408 F. Supp. 582, 588 (N.D. Ind. 1976), *noted in* 29 VAND. L. REV. 1077 (1976).

which aspects of the paradigm most warranted judicial review; they were ad hoc selections responsive to particular perceived problems. The results may be rationalized as correct selections, but enough contrary evidence exists to make it unlikely that the case for no jurisdiction will be persuasive.

IV. SOME IMPLICATIONS

The integrated map of antitrust authority and the industrial organization paradigm provides a basis for insights relevant both to the development of antitrust law and to the question of alternative ways to handle the problem of social control over the economy. This section presents a limited number of implications. The basic purpose is to demonstrate that the integration illuminates aspects of important legal issues.

To obtain jurisdiction over structure other than external changes in structure or over most unilateral conduct, a court must classify that structure or conduct as monopolistic. Predictably, courts desiring jurisdiction over structure and conduct have employed expansive definitions of monopoly. This partially explains the highly confused character of the definition of Sherman Act Section 2 offenses.[84]

For example, in the network programming cases,[85] a crucial issue was whether any of the television networks could be a monopoly when each held about one-third of the apparent market — network programming. The government claimed that the networks had individual, noncollusive, power of substantial proportion over independent programmers and were abusing that power. The abstract determination of whether that was monopoly power or individual market power produced by an oligopoly market had no significance to the merits, but controlled jurisdiction. The district court hearing the cases held that the facts alleged, if proven, would constitute monopolization.[86] Similarly, in the *Reading Company*[87] case in 1920, the Supreme Court declared that a firm with about one-third of the business in hauling anthracite coal

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[84] *See* Cooper, note 65 *supra*, at 418-24.

[85] United States v. CBS & ABC, 459 F. Supp. 832 (C.D. Cal. 1978). This decision involved two cases brought simultaneously against two commercial television networks for monopolizing the subsequent showings of network programs.

[86] *Id.* at 839.

[87] United States v. Reading Co., 253 U.S. 26 (1920).

was a monopoly and decreed a structural remedy.[88] As in the network cases there was significant evidence of power and its abuse. The results, while jurisdictionally essential, render the definition of monopoly even less certain than it had been under the *Alcoa, United Shoe, du Pont* and *Grinnell* line of cases.[89] The current law undermines a consistent definition of monopoly and monopolization. Because the terms operate to limit rational jurisdiction, they have received varied meanings depending on the desire of courts to reach the merits of specific cases.

The various "shared monopoly" theories are another effort to cope with the legal implications of monopoly.[90] These theories seek both to expand the jurisdiction of Section 2 of the Sherman Act and, simultaneously, to create a "no-fault" standard of substantive liability. Although the two elements are distinct, they are related. As the scope of authority to review structure or conduct broadens, the only mechanism to control misuse of such authority is in the substantive standard of review. Hence, sweeping theories of shared monopoly may require sophisticated substantive standards for proof of violation. Conversely, a "no-fault" standard focused on a narrowly defined class of monopoly structure may also be defensible. Finally, a more generous standard for liability may be sensible from a policy standpoint even though the structures to which it applies may include some or all types of shared monopoly situations.[91] Much of the debate on shared monopoly has not distinguished between jurisdiction over types of structure which have monopolistic aspects and substantive standards for violation when a structure comes within the statute. Consequently, these proposals have further muddled the debate over the scope and standards of monopoly law.

Added confusion in the judicial and academic construction of Section 2 stems from its dual role as the only applicable statutory provision for reaching both existing structure and unilateral, anticompetitive conduct generally. A court wishing to intervene against a predatory (anticompetitive) but unilateral act, must, absent specific conduct violating the Clayton Act, declare the actor to be a monopolist or an attempted monopolist before it can have jurisdiction over the conduct. Thus, in the

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[88] *Id.* at 59-60.

[89] *See* note 63 *supra.*

[90] *See* Cooper, note 65 *supra*, at 375-78, 410-11, 434.

[91] *Cf. In re* E.I. du Pont de Nemours & Co., 96 F.T.C. 705, 751 (1980) (du Pont monopoly of titanium dioxide production held not unlawful in part because legal standards required more abuse of position or misconduct than was evident in record).

ITT Continental[92] case involving predatory pricing, the court dispensed with almost all structural requirements of monopoly power to establish jurisdiction and authorize intervention.[93] This action is consistent with the tenor of the emerging law on other specific predatory behavior which places such conduct under Section 2 regardless of the market position of the parties.[94]

As they have expanded the jurisdictional definition of monopoly, courts simultaneously have tended to adopt restrictive substantive rules for defining violations. This is a sensible effort to govern unilateral conduct of firms which actually lack present or future potential for significant monopoly power. However, when these same substantive standards carry over to judge whether structural monopoly is unlawful or whether a monopolist's conduct requires relief, serious and unjustifiable limitations emerge. Thus, in the *ReaLemon*[95] case, pricing conduct was relevant to establish that ReaLemon had willfully and, therefore, unlawfully retained its monopoly position. Whether the prices were above or below some measure of cost was irrelevant to the inquiry into the lawfulness of the monopoly position.[96]

The failure to recognize that Section 2 regulates both structural and conduct related situations produces many of the apparent tensions in the legal rules that courts employ. Conversely, if the courts employed a fuller legal-economic "map" which showed the alternative economic uses of Section 2, they might better identify the distinctive economic issues facing them. Then the courts could define both jurisdictional tests and substantive standards in ways that fit the relevant categories. Express recognition of the structural and conduct aspects of Section 2 would illuminate the resulting choices of substantive standards and jurisdictional definitions. It would not dictate particular choices.

The absence of readily apparent jurisdiction over existing structures and unilateral conduct explains the generally strict standards of substantive merger law. The *Brown Shoe*[97] opinion in its analysis of the

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[92] William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014 (9th Cir. 1981).

[93] *Id.* at 1030-31.

[94] *See, e.g., id.*; Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).

[95] *In re* Borden, 92 F.T.C. 66 (1978), *aff'd*, Borden, Inc. v. FTC, 674 F.2d 498 (6th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3150 (U.S. Aug. 25, 1982) (No. 82-328) (settlement proposed). If the issue were one of private damage claims, the price-cost relationship might be relevant. 48 Fed. Reg. 9023 (1983).

[96] *In re* Borden, 92 F.T.C. 669, 790 (1978).

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

vertical aspects of the merger expressly drew upon an analogy to vertical contracts, such as tying.[98] The merger was treated as a substitute for such contracts. Because such contracts would be illegal, the merger had to be also, in order to vindicate the policy regulating such agreements.

The subsequent *Philadelphia National Bank*[99] opinion justified a rigid rule of presumptive illegality for mergers in concentrated markets, referring to the need to preserve whatever competition existed and whatever potential for deconcentration such entities offered.[100] Implicit in this view is the recognition that there is no other easily invoked route to reform an existing, concentrated, inefficient structure. Moreover, if a court believed that undesirable unilateral conduct was a risk of more concentrated structures, the absence of direct control over such conduct would lead a court to adopt stricter views on merger law. In critiquing merger law standards and judicial definition of those standards, it is important to see the relationship of structure to conduct and to appraise the risk of undesirable conduct which is outside antitrust jurisdiction. In addition, if a deconcentrated structure is likely to affect positively basic conditions, then that would justify imposing strict rules independently of any specific structure-conduct relationship. Conversely, a different standard for mergers could emerge if the feedback is slight or negative and if structure has only a limited effect on conduct. Indeed, the shift in attitudes of both law enforcement agencies and the courts regarding merger law can best be explained in these terms.

The debate over the definition of "contract, combination, and conspiracy" can be much better understood once the importance of collective action to the antitrust laws governing conduct is established. By including tacit interdependency[101] and vertical agreements[102] within the statutory category, the courts have obtained jurisdiction over many more collective actions than a superficial reading of the statutory terms

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[98] *Id.* at 330-32.

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

[100] *Id.* at 365 n.42.

[101] *See* FTC v. Cement Institute, 333 U.S. 683 (1948); Interstate Circuit Inc. v. United States, 206 U.S. 208 (1939); Bogosian v. Gulf Oil, 561 F.2d 434 (3d Cir. 1977) *cert. denied*, 434 U.S. 1086 (1978).

[102] Albrecht v. Herald Co., 390 U.S. 145, *reh'g denied*, 390 U.S. 1018 (1968) (vertical price fix on resale of newspapers unlawful per se); United States v. Parke, Davis & Co., 362 U.S. 29 (1960) (resale price fix agreed to by wholesalers and retailers unlawful per se). Vertical price fixing is illegal, whether the price set is a maximum or a minimum. Albrecht v. Herald Co., 390 U.S. 145, 152. In *Albrecht*, the Court held the combination to be illegal when a newspaper tried to force one of its route salesmen to stop overcharging subscribers. In *Parke, Davis* the Court held unlawful agreements between defendant producer and druggists to maintain the wholesale and retail prices.

would have suggested. Professor Turner's classic argument for a restrictive definition of agreement has not been accepted by the courts.[103] Many reasons may explain this reticence. The devotion to statutory language and United States Supreme Court decisions would be factors. But courts have frequently chosen a more instrumental approach to defining agreement: a legally cognizable agreement exists if the collective conduct is remediable. The existence of plausible remedies justifies calling interdependent behavior agreement, and the lack of a remedy justifies the failure to so label similar interdependency.[104] Whatever definition of collective conduct is employed, its function is only to describe the jurisdictional limit of antitrust's primary control over conduct.

The now inconsistently concluded plywood litigation also illustrates the outcome-controlling influence of the characterization of conduct as collusive or noncollusive. The plywood manufacturers in selling plywood from southeastern mills employed "phantom" freight rates (rates calculated from Portland, Oregon). The FTC challenged this industry-wide conduct. It charged the effect was to create an artificial element in price competition which could only adversely affect buyers. The Ninth Circuit rejected this challenge because the FTC failed to claim that the conduct was collusive.[105] In a private damage case, however, the jury found that the conduct was collusive and the Fifth Circuit upheld this verdict.[106] The Supreme Court granted certiorari in part to review the standards for proving collusion.[107] The defendants, who had convinced the Ninth Circuit that there was no proof of actual harm from their conduct, then paid the plaintiff class $165 million to settle the case before the Supreme Court could review it.[108]

Had the Court reviewed the case, the justices would have focused on the definition and evidence needed to establish unlawful interdependency. It is unthinkable that the Court would have regarded these is-

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[103] Turner, note 74 *supra*, at 681.

[104] *Compare* Bogosian v. Gulf Oil, 561 F.2d 434 (1977), *cert. denied*, 434 U.S. 1086 (1978); Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939); *with* United States v. General Motors, 1974-2 Trade Cas. (CCH) ¶ 75,253 (E.D. Mich. Sept. 26, 1974). *See* Hay, note 22 *supra*, at 466 n.92. In the first set of cases a remedy, assuming violation, is relatively easy to define, but in the *General Motors* case the interdependence is not remediable by any workable, conduct-oriented decree.

[105] Boise Cascade v. FTC, 637 F.2d 573 (9th Cir. 1980).

[106] *In re* Plywood Antitrust Litigation, 655 F.2d 627, 631-34 (5th Cir. 1981), *cert. granted*, 102 S. Ct. 2232 (1982).

[107] *Id.*

[108] The case was settled before argument in the Supreme Court. 54 Indus. News Rep. (Moody's) 2942 (Jan. 23, 1983).

sues as irrelevant. From a broader view, it is arguably absurd to chastize an oligopoly for artificial, collective price setting and to regard as immune from review the same artificial exploitative pricing policy if done unilaterally. Yet, liability would have turned on the definition of unlawful, collective action. The fundamental irrelevance of that definitional issue for substantive policy governing conduct becomes clearer once its place in the paradigm is evident.

Some academics would press the definition of collective action further and create a category of legally presumed collusion.[109] This fiction, like the constructive trust and the legally implied contract, would allow a court to take jurisdiction and proceed to the merits. Such fictions evolve only when statutes or common law doctrine fails to provide jurisdiction over all functionally similar cases.

The recent re-emphasis on the FTC's potential to invoke its power to control unfair competition and unfair acts has great relevance in this context.[110] Such authority, if recognized, would allow administrative agency review of any conduct by a firm regardless of its size or the structure of its industry. In arguing for such jurisdiction, it is important to recognize the vast breadth of its scope. This scope demands that clear, coherent, and rational standards govern the use of such power. A detailed review of the ultimate economic merits of each challenged transaction creates a standard which could allow expansive agency discretion to condemn disfavored conduct on an ad hoc basis. From the standpoint of economic activity, the beauty of the collective conduct requirement was that it left so much behavior free from any review and potentially undesirable intervention. Consequently, in expanding jurisdiction, concern for its substantive implications is important.

A final utility of the integration of antitrust and the economic paradigm discussed here is its helpfulness in explaining the relationships between antitrust and other systems of economic regulation. Direct control over warranties, advertising, and product safety illustrate forms of control over unilateral conduct based on specific performance goals. Specific regulation exists because such controls occupy an area in which antitrust law has only limited and tangential jurisdiction. Because such

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[109] L. SULLIVAN, note 76 *supra*, at 355-65. Sullivan argues that Section 1 and Section 2 of the Sherman Act, when they prohibit collusion, ought to include "non-collusive, interdependent" conduct. To the extent that this merely expands the definition of collusion it is not novel, but to the extent that Sullivan wishes to include situations in which conduct is not even interdependent but is exploitative of collective market power, he is suggesting going beyond the statute to create a constructive conspiracy.

[110] *See* Hay, note 22 *supra*, at 469-72, 476-80.

regulation may have effects on conduct, and, via feedback effects on structure and basic conditions, ultimately it may yield undesirable performance in many possible dimensions. This in turn suggests the need for a more systematic review of the relationship of specific conduct control to overall economic interaction.[111]

The paradigm can also be used to examine the problems of overlap and choice among legal schemes focused on ultimate performance regulation, definition of basic conditions, or regulation of structure and conduct. The choices are complex and may involve selecting values as well as assessing the degree of determinism in the relationships among categories when affected by a change in some basic condition. Tracing either the sequence by which a change in conditions has to work to affect performance, or the way in which a change in performance regulation may impact upon other categories causing other performance effects, is possible without deciding whether a proposal is desirable or which control method is best. But such an analysis can make comparisons between alternatives more informed and can provide a tool for a more probing analysis of the direct and indirect consequences of a proposal.

CONCLUSION

No single map of physical terrain can serve all purposes of all potential users. This article does not suggest such a map can exist for antitrust legal and economic policy issues. It does assert that a number of productive insights can emerge by relating the antitrust laws to the paradigm of industrial organization. The resulting framework can help explain the implicit assumptions about the effect of law on business structure and conduct. It provides a basis to understand the ambiguity in certain statutory standards which the courts employ to reach a wide range of contexts. Finally, recognizing the relationship of structure to conduct and then to performance illuminates the choices involved in electing among types of regulation. This view also assists in producing economically based, substantive standards which resolve the inherent tension among the various measures of performance. This map is not definitive. Its limits and omissions need to be recognized. Despite those

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[111] This analysis also may contribute to comparative institutional analysis. *See generally* Komesar, *In Search of a General Approach to Legal Analysis: A Comparative Institutional Approach*, 79 MICH. L. REV. 1350 (1981).

limits, it is a tool for constructive analysis and description of economic law and policy.