Antitrust Law, Competition, and the Macroeconomy

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We live in troubled economic times. Inflation combined with unemployment and a lack of economic growth has produced "stagflation." The problems of meeting the world's need for energy and food insure that all of the world, including this country, will experience radical change in economic conditions in the years ahead.

Inflation, unemployment, and growth, classically, are regarded as outcomes of the relationship of aggregate supply and demand in the economy. A hundred years ago, people might not have expected government to solve the problems of inflation and unemployment. Rising expectations, however, resting at least par-
tially on past successes, now impose upon government policy makers the obligation to control inflation, minimize unemployment and induce reasonable economic growth. Over the past three decades, the instruments used to achieve these objectives have been fiscal actions (tax and spending decisions) and monetary controls designed to affect specific, aggregate economic attributes. More recently, wage and price controls, previously used in war time situations, have received renewed interest and use. The increased use of these tools rests upon the view that many of the causes of current problems reside in the structure of economy.

This article examines the links between antitrust law—one possible tool for dealing with economic ills—and macroeconomic structure. It analyzes the current policy and economic assumptions underlying the importance of antitrust enforcement in reaching a healthy, competitive economy and concludes that such enforcement does contribute to the increased effectiveness of macroeconomic tools.

Part I explores the current macroeconomic theories and their policy implications. Part II discusses the related concepts of market power and competition and concludes that dissipation of market power is preferable, but that the regulation of market

printed in 1 THE PEOPLE SHALL JUDGE 401 (The Staff, Social Sciences 1, The College of the University of Chicago ed. 1949) through the Homestead Act, Act of May 20, 1862, ch. 75, 12 Stat. 392, to the current subsidy programs for energy conservation and synthetic fuels, government has very actively involved itself in trying to stimulate specific economic activity. Until very recently, however, no similar obligation existed as to employment or relative price levels.


* E. REDFORD, ADMINISTRATION OF NATIONAL ECONOMIC CONTROL (1952).


power may yield significant social and economic benefits in the short run, when dissipation is impossible. Finally, Part III examines the role of antitrust policy in the macroeconomy. The article concludes that effective enforcement of antitrust law is consistent with and beneficial to a healthy, competitive economy, and should be preserved and expanded as a tool for combating economic stagnation.

I. MACROECONOMIC THEORIES AND POLICY IMPLICATIONS

A. Demand-Oriented Theories

For the purposes of this article, the most useful way to view the economy is to focus on the total production and sale of goods and services. The level of such activity is set by the interaction of total or aggregate demand, and the aggregate capacity and willingness of the economy to supply what is demanded. Traditional macroeconomic analysis, both Keynesian and monetarist, holds that the proper focus of aggregate economic policy is on the demand side of the equation. Supply is implicitly or explicitly assumed to have a given and predictable character. Hence, by adjusting demand a proper balance to aggregate supply can be maintained. The two schools of thought, however, diverge as to the ways and means of controlling demand.

1. The monetarist school—According to the monetarists, the source of inflationary pressure is in an excess money supply relative to goods and services being produced. In this model, controlling the supply of money alone is sufficient to control inflation. Unemployment is not related directly to inflation but reflects a “real” non-monetary economy. This economy is said to have a tendency to full employment and balanced growth as inherent features. It can get out of adjustment because of er-

* See Laidler & Parkin, Inflation: A Survey, 85 Econ. J. 741 (1975). “Excess,” as used here, is a relative concept. Given any point in time, there is a relationship of money to a level of goods and services. If the amount of goods and services produced grows, the money supply must also grow in a pro rata way in order to hold price constant. If it does not grow at least that much, money will be relatively more scarce than the supply of goods. Prices, in money terms, will then fall (deflation). If the money supply grows relatively faster than the supplies of goods and services expand, the relative excess of money will cause a bidding up of money prices, which translates into inflation.

* Id. at 741.

* Id. at 778.

* Id.
rors in judgment; but prices and wages then fall, causing re­newed expansion and a return of the economy to full capacity.\(^{12}\) This approach assumes that non-monetary demand is an independent function which will stabilize in the long run at a level sufficient to support an optimal level of both growth and employment.

The primary policy implication of the monetarist approach is that government should not interfere with the market adjustment process. Any action which inhibits free wage or price change will delay the smooth working of economic readjustment and recovery. In practical terms, this means that government should avoid subsidies, regulation of wage rates, tariff protection, as well as monopolies and cartels—all of which may delay the adjustment of supply prices necessary to stimulate demand.\(^{13}\) The only positive role for government is to regulate the money supply to keep it in balance with real aggregate supply and demand.

2. The Keynesian model—Initially, the Keynesian approach focused on the problems of unemployment and recession.\(^{14}\) Keynes argued that the economy has no natural, self-correcting quality and so could stabilize at very high levels of unemployment with little or no growth. The core of the problem is that aggregate demand, and specifically demand for investment goods, depends on expectations about the future. People would not invest in new plants and equipment (thus stimulating economic expansion) if they believed that the demand for the output of such investment would not exist. Supply thus depends on demand, and demand requires affirmative stimulation.

Keynes identified government fiscal action as the key stimulus to demand. Funding public works or other direct economic expenditure would stimulate the economy toward levels consistent with both full employment and long term optimal growth. The Keynesian prescription, however, is slightly vague on the question of inflation. Keynes recognized that excess money supply causes inflation in some cases.\(^{15}\) However, in theory, any excess direct stimulation could produce the same results. Hence, when the economy begins to overheat, the government has to stand ready to cut back on its demand-stimulating activity, and try instead to lessen demand by cutting its expenditures and in-

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\(^{12}\) For a model of this pattern see Laidler & Parkin, supra note 8, at 777-78.


\(^{15}\) Trevithick, Keynes, Inflation and Money Illusion, 85 ECON. J. 101 (1975).
creasing taxes. Out of such an analysis came a belief that the economy could be “fine-tuned” through the combined use of monetary and fiscal instruments including taxes, interest rates, money supply and government spending.

3. Market policy ramifications of the Keynesian and monetarist models—For this article, the significance of both the Keynesian and monetarist approaches is that each presupposes that the microeconomic supply phenomenon, on which the macro-demand controlling policy operated, would perform in a predictable way. Moreover, both approaches fundamentally assume that specific markets are workably competitive so that nothing would substantially interfere with the impact of aggregate demand affecting actions. Thus, there is implicit in both models a similar expectation about substantial competition in the marketplace. Both models lack an articulate, specific analysis of growth in terms of stimulating specifically desirable conduct such as innovation and improved productivity. This reflects the essentially static, short-run quality of such approaches.

This section discusses, first, the argument that demand-oriented policy is not indifferent to changes in market power. The second policy implication of the models examined in this section is the impact of alternative levels of competitiveness in the economy on the effectiveness of aggregate demand policy.

The proposition that both demand-oriented theories are not indifferent to changes in market power is easily demonstrated. Cartelization, for example, is objectionable under either theory. If firms in a substantial industry were to band together and create a cartel which would increase the product price considerably, the aggregate effect would be to stimulate inflation. Breaking up the cartel would produce more supply at a given level of demand. This would weaken inflationary pressure and stimulate employment.

Similarly, a merger resulting in monopoly is objectionable because it, too, will result in a reduction of output at any level of demand because of the desire to achieve monopoly profit. Hence, eliminating unnecessary monopoly power and obstructing its creation are policies not only consistent with demand-oriented aggregate policy but essential, though perhaps minor, aspects of insuring the effectiveness of such policy. More expansively, if

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17 B. Klein, supra note 7, at 26-28.


19 If, instead of assuming a newly created cartel or other restriction arising as demand
any merger or course of conduct tends to create enhanced market power in a firm or facilitates the creation or enhancement of shared power, this development creates a risk of undesirable macroeconomic effects. Such effects may be offset by a sufficient increase in productive efficiency resulting from the merger or conduct. Moreover, to the extent that use of such power can be regulated effectively, its existence would not be troublesome from a macro-policy perspective.

The foregoing situations involve basically “one-shot” impacts on the aggregate supply-demand relationship. Hence, after the economy has adjusted to the new level of supply, no further impact will occur. Although the impact is limited, neither Keynesian- nor monetarist-oriented policy ought to object to such enforcement activity generally. Indeed, both approaches should encourage enforcement even if this is a less productive activity in the long term compared to other policies.

A difference in views may emerge between the monetarist and Keynesian approach when the restraint occurs at the point when demand is declining and the problem is one of recession. Here the monetarist should still clearly favor breaking up existing and barring new cartels or other sources of unnecessary market power because they produce distortions in market prices. The solution to a recession is to reduce prices to the level necessary to induce renewed investment and growth.11

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11 Expands, one hypothesizes a continuing cartel, the analysis is not significantly altered. Elimination of a restraint on market power in a significant sector will tend to expand output and retard or reverse price increase, thus producing a greater supply at any price (or demand).


10 See Mueller, Monopoly Power as the Cause of Inflation: An Introduction to the 'One-Shot Affair' Defense, 7 Antitrust L. & Econ. Rev. No. 2, 109 (1974-75); but see L. Thurmow, supra note 7, 69-73 (such one-shot impacts, if substantial, may still be very effective).

81 The monetarist approach might have an ambivalence which stems from a different source. The theory as it relates to real economic affairs posits that this is the "best of all possible worlds" and that non-intervention in economic affairs is the best solution. It may follow that any observed market power is the product of efficiency which makes such dominance necessary. Unnecessary restraints, i.e., those which do not produce significant, not otherwise achievable, efficiency, unless imbedded in enforceable legal commands, are not likely to be effective because of the incentives for participants to cheat and because of entry whenever prices diverge unreasonably from cost. See Demsetz, Two Systems of Belief About Monopoly, in Industrial Concentration: The New Learning 164 (H. Goldschmid, H. Mann & J. Weston eds. 1974). This view of the continuing
The Keynesian view is more ambivalent. The primary remedy is to stimulate demand by direct government action. Such stimulation can be frustrated if the stimulated industry creates a cartel and raises prices more than output. Government action to stimulate demand is also supposed to stimulate private investment decisions which provide both an attractive rate for savings and stimulate the production of investment goods. A vigorous antitrust policy may thus be counterproductive in a recovery period. To the extent that enforcement eliminates restraints on competition, such a policy may reduce the expected future returns of the firms who were acting anticompetitively. It is, nonetheless, uncertain whether this negative effect is greater than the effect that cartel or others' such restrictive behavior was generating before enforcement. At best, the Keynesian approach is more ambivalent about vigorous pursuit of competition in this stage of an economic cycle.

Having examined the relevance of changes in market power to formulating demand-oriented policy, it becomes necessary to discuss the impact of alternative levels of competitiveness within the economy on the effectiveness of aggregate demand policy. The textbook answer is that the degree of competition does not greatly influence the effectiveness of demand tools. This is true only if a monopolist (or powerful firm) and a competitive firm respond in equally predictable ways to demand changes. Unfortunately, even neoclassical theory of the firm suggests that there is a radical difference in response to identical demand. A competitive firm is a price taker. It can manipulate only its output. A firm with monopoly power is a price setter. It must decide on price either directly or by a choice of output. The key objection over the years to monopoly is just this characteristic: the monopolist can select at its sole discretion the price, output, and quality formulation that it desires, unrestrained by any competition in that product industry. A monopolist will respond as predictably as a competitive firm to demand if it is assumed that a monopolist only seeks to maximize its profits in the short

perfection of specific markets is not necessary to the monetarist approach, but it does fit easily with it and reflects premises with which that theory is comfortable. Even so, it would suggest that where government action creates restraints, there, at least, a more competitive policy could be pursued with desirable aggregate effect.

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See, e.g., Standard Oil v. United States, 221 U.S. 1 (1911); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

Monopolist here includes single firm monopoly as well as multi-firm cartels or otherwise shared monopoly.
run. In such a case there is a profit maximizing point at which the additional cost of producing one more unit is precisely equal to the additional profit to be derived from the sale of one more unit. Thus there are also a number of other output points which a monopolist may believe to be more attractive in terms of profit maximization over time, taking account of long term demand.

Thus, firms with market power have some choice over price and output, and over time those choices vary. This suggests that trying to conduct effective macro policy through a monopoly interface, if monopolistic decisions are not carefully regulated, introduces a potentially substantial uncertainty.

It follows that each of the demand-oriented policies must deal with the real and continuing problem of market power in connection with the implementation and effectiveness of any demand-oriented instrument. Indeed, this substantially explains the emerging consensus among economists to dismantle major regulatory schemes in the area of transportation, and to minimize regulation in banking and securities markets.

A demand-oriented policy analysis should take into account the presence of market power in an industry even where such power is unavoidable in the effort to produce efficiently. Unregulated power has the potential to distort and frustrate the implementation of demand-controlling policy. Hence, to the extent that regulatory control over power is feasible, it should receive consideration as an element in the overall macro policy arsenal. Indeed, if regulation is feasible, it might substitute for competition generally. An optimistic view of the wage-price controls of the early 1970's seems to justify this conclusion.

B. Supply-Oriented Theories

The supply-side approach to inflation, unemployment and

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89 See K. Cohen & R. Cyert, supra note 22, 197-98. The specific example is limit pricing to deter entry, but it illustrates the discretion of the monopolist to choose output and price combinations which do not maximize profits in the short run but which contribute to long run objectives. Wiles, supra note 16, argues that uncertainty about demand explains why firms with market power respond to increased costs with price increases. See also A. Eichner, supra note 7, at 66-85.
growth holds that there is a trade-off between full employment and inflation.\(^8^0\) The primary focus of the supply-oriented analyses is on the disruptive effects of market power on the interaction of aggregate supply and demand. Thus, the implicit function of market power in demand analysis becomes explicit and central in supply analysis.\(^8^1\)

A key aspect of the supply-side view is the empirical evidence that in times of recession, when employment and production are declining, prices of large firms either hold constant or increase.\(^8^2\)

\(^8^0\) This trade-off, referred to as the Phillips Curve, purports to show how much inflation is needed to generate any given reduction in unemployment. For a general discussion of the literature and references, see Ross & Wachter, supra note 7, at 675-76.

\(^8^1\) It is important to consider the factors which create market power in the economy. In terms of a corrective remedy, for example, it is necessary to know whether the primary source of market power is a collective exploitation of jointly held power by firms in highly concentrated industries or whether the source is individual firms, acting in a world of monopolistic competition, which are exploiting their market power. See E. Chamberlin, Monopolistic Competition (7th ed. 1954); see also Weiss, The Concentration-Profits Relationship and Antitrust, in Industrial Concentration: The New Learning 184, 185-93 (H. Goldschmid, H. Mann & J. Weston eds. 1974).

The distinction is potentially significant both for its legal implications and for its efficiency implications. In terms of efficiency, collective market exploitation implies that the exploiters are probably viable as individual entities, while unilateral actions may imply the impossibility of a competitive remedy which does not produce significantly worse efficiency results or else fails to get to the core of the power of the firm. In Eichner's view, the market power of the large firm arises primarily from participation in collusive price setting. Eichner presents such behavior as the norm of large corporate conduct although he also demonstrates that similar results can be obtained in a monopoly context. A. Eichner, supra note 7, at 40-41.

Another question which deserves consideration is why this phenomenon has emerged only in the last two or three decades during which market power in traditional measures has been largely constant. See F. Scherer, supra note 25, at 63. One suggestion would be that firms have learned only over time that their power is such that either individually or collectively they can behave in this manner. An alternative, with some theoretical and empirical force, is that the increased conglomeratization of the economy has greatly facilitated a degree of inter- and intra-market behavioral coordination which is essential to effective exploitation of specific market power, whether individual or collective in origin. Edwards, Bigness as a Source of Power, in Business Concentration and Price Policy 331 (Nat'l Bureau Econ. Research ed. 1955); Mueller, Conglomerates: A "Nonindustry," in The Structure of American Industry 442 (5th ed. W. Adams 1976); Solomon, Bank Merger, Policy and Problems: A Linkage Theory of Oligopoly, 2 J. Money, Credit & Banking 325 (1970).

\(^8^2\) The original observations came from industrial organization economists, G. Means, Pricing Power and the Public Interest (1962); G. Means, Steel Prices and Administered Inflation (1962); Blair, Market Power and Inflation: A Short-Run Target Return Model, 8 J. Econ. Issues 453 (1974); Blair, Economic Concentration and Depression Price Rigidity, 45 Am. Econ. Rev. 566 (May 1955); Sherman, supra note 7; Qualls, Market Structure and Price Behavior in U.S. Manufacturing 1967-72, 18 Q. Rev. Econ. & Bus. No. 4, 35 (1978); Weiss, Business Pricing Policies and Inflation Reconsidered, 74 J. Pol. Econ. 177 (1966). For a survey, see Mueller, supra note 7. Not surprisingly, contrary results have also been reported. See Lustgarten, Administered Inflation: A Reappraisal, 13 Econ. Inquiry 191 (1975); see also Weston & Lustgarten, Concentration and Wage-Price Change, in Industrial Concentration: The New Learning, 307 (H.
A major premise is that significant sectors of the economy are subject to the monopoly or oligopoly power of the firms dominant in those sectors. Such firms have the ability to choose prices, individually or collectively, over a significant range of alternatives. Choice of specific prices, especially continuously higher prices, results from a continuing battle within such industries among different groups for relative shares of real income.

Thus, as inflation occurs, labor, investors and management seek to protect their level of real income and to enhance it. The managers of a powerful business, having yielded greater money wages to labor and higher dividends to investors, then pass on that increment to the rest of the economy in the form of higher prices. Given power in the market, such firms have great discretion to increase price to achieve previously decided levels of returns regardless of the state of demand. Moreover, given a substantial and economically pivotal oligopoly sector, such price increases will work their way through the entire economy in the form of higher input costs and consequent output prices, and so provide the basis for further price increases by these powerful industries.

Supply-oriented economists argue that it is feasible to limit the prices of firms in oligopolistic and monopolistic sectors of the economy and thereby obtain more output and employment given a fixed level of demand. Such regulation, however, is not useful for competitive industries because these sectors lack the excess capacity which could be used, if price is restricted, to generate greater supply. Given this analysis, inflation represents a continued dispute over relative income among participants in monopoly or oligopoly enterprises. Such firms adjust output and employment to expected demand at the price levels that they have chosen.

1. Classical theory—Classical supply-oriented theory employs the traditional arguments and criteria as to the utility of market power. This theory holds that exploitation of market


See A. Eichner, supra note 7, at 144-68; Blair, Market Power and Inflation: A Short-Run Target Return Model, 8 J. Econ. Issues 453 (1974); Ross & Wachter, supra note 7; Mueller, supra note 19; Peterson, Institutionalism, Keynes, and the Real World, 11 J. Econ. Issues 201, 210 (1977).

R. Lanzillotti, M. Hamilton & R. Roberts, Phase II in Review: The Price Commission Experience (1975). Cf. Slawson, Price Controls for a Peacetime Economy, 84 Harv. L. Rev. 1090 (1971) (proposes tax on excess earnings of corporations which are neither in perfect competition nor in rapidly growing industries as a means to control supply push inflation. The implicit, key assumption is that the source of inflationary pressure is in concentrated, oligopolistic industries).
power to create inflation and unemployment is undesirable.\textsuperscript{86} Market power permits firms to refuse to supply demand when it exists or, from another perspective, to insist on higher prices than the costs of production would justify. Such firms thus depress the quantity of supply at any level of demand forcing prices up, and such prices then pass on as costs in competitive sectors of the economy. Powerful firms thus are able to disrupt the ordinary effect of fiscal and monetary policy. When demand is stimulated, these firms use their power to curtail supply or retard its expansion so that more income diverts to them. This causes employment to grow slowly while prices rise rapidly. When a slowdown occurs, those firms use their power to hold price constant while reducing output (and employment). When investment objectives are not being met, they may even raise prices to capture a higher return on existing sales.\textsuperscript{86} This approach views market power negatively. The more nearly competitive a market can become, the more optimal its performance is likely to be.

The policy recommendation which follows from this approach is that an incomes policy or wage-price control will often be necessary. Such controls are manifestly second-best solutions to the problem of excess market power, but are the only solutions having immediate effect. The longer run, preferred solution is to restore more nearly workable competition in product markets.\textsuperscript{87}

2. The Eichner theory—A very different point of view exists, however, as to the social utility of the pattern of behavior posited in supply-oriented theory. One school of thought, associated with Professor Eichner, deems it socially vital.\textsuperscript{88} Eichner believes that large corporations have greater ability to plan over a longer run than competitive firms. He maintains that large firms have both the incentive and the capacity to engage in sustained intra-

\textsuperscript{86} Mueller, supra notes 7 and 19; Blair, supra note 32; Sherman, supra note 7; Feiwel, supra note 7, at 535; see also L. Thurow, supra note 7, at 54-55; Mueller, supra note 20. Pollard, Antitrust and Price Stabilization Price Controls as a Short-Run Substitute for Structural Reform, I, II, 7 Antitrust L. & Econ Rev. No. 3, 21; No. 4, 97 (1975).

\textsuperscript{87} Support for this conclusion comes from a comparison of inflation, unemployment, and output in the German and American economies. The comparison showed lower inflation and greater output and employment in the German economy where the level of concentration in key sectors is substantially less than in the United States. Arndt, Competition, Price and Wage Flexibility and Inflation: The German Experience, 17 Antitrust Bull. 859, 860-63 (1972). The author also suggests that the greater flexibility in wage rates, made possible by the character of German labor union contract practices, reduces the effective power of this aspect of the market, and has a significant impact on containing German inflation. But see L. Thurow, supra note 7, at 62-63.

\textsuperscript{88} Mueller, supra note 7.

\textsuperscript{89} See generally A. Eichner, supra note 7.
enterprise growth, unlike the competitive firm which can operate only one or two plants because of limited management capacity. According to Eichner, the large firm by use of its market power can more efficiently secure the necessary savings fund to pay for its growth. Moreover, large firms provide a stabilizing influence on macroeconomic phenomenon because their prices remain fixed for periods of time, even while their sales volume fluctuates. This stabilizing effect stems from the firms' tendency to oversave relative to investment as the economy expands, and undersave as it declines. However, such firms are also likely to increase their corporation levies excessively and cause inflation, because the groups within such powerful firms strive for relatively larger shares of the income which a firm may obtain. Nonetheless, Eichner argues, the power of these firms should be regulated rather than destroyed because the beneficial effects of their power are so desirable.

For Eichner, an incomes policy is the appropriate form of regulation, requiring a conscious decision as to the relative entitlements of labor, investors and managers to shares of the corporate levy. Eichner would also create a set of criteria to judge the social value of corporate investment. A corporate management which failed to make socially useful investment would be subject to ouster by a government agency. Obviously, the actual determination of clear and effective criteria presents a formidable obstacle to the adoption of such a scheme.

Despite his slighting references to competition and antitrust, Eichner concedes that an economy could operate with effectively competitive businesses. Such an economy would, in his view, lack "the stabilizing role which megacorps play in the overall economy." Yet, Eichner does concede that the choice is between competition and market power, and that if market power is chosen, it must be regulated intensively.

3. Policy implications—The supply-oriented analyses do not claim that supply alone is ever the only relevant factor in the macro-calculus. Indeed, in the classical pro-competition supply analysis, the effect of market power is to reduce the effect of demand manipulation. Similarly, in the Eichner model the regulation of the use of market power is only a device to facilitate

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88 Id. at 189-223.
89 Id. at 286-87; see also id. at 89-95.
90 Id. at 272.
91 Id.
92 "[T]he largely unchecked power of the megacorp's executive group ... is ... a power which can work to the public's detriment. ..." Id. at 287.
In the pro-competitive view, the solution to problems of market power on the supply side requires distinct short run and long run responses. In the short run, there should be effective wage and price controls applied to the primary, oligopoly industries which would limit the capacity of these industries to exploit their power to raise prices and thus frustrate the traditional instruments of macro policy. In the long run, the ultimate objective is competition, and the primary policy tool is rigorous antitrust enforcement aimed at destroying concentrations of power and restoring (or perhaps creating) more workable competition.

C. Growth Analysis

The focus thus far has been on the short run problems of minimizing unemployment and inflation. Little direct, longer-run, consideration has been given to the third aspect of macro policy concern: economic growth. Implicitly, there are assumptions about growth in the models. In the Keynesian model, an inference is that growth follows and responds to demand. In the monetarist analysis, growth is a self-fulfilling aspect of a well-ordered economic system. Of the supply-oriented theories, the traditional view considers competition the stimulus to growth in efficiency, and the lure of profit the device to induce and allocate added investment. The alternative theory on the supply side, the Eichner view, posits growth maximization as the primary goal of the large firm and prescribes direct control over that growth to achieve socially desirable results.

There is another position on growth which holds that patent, antitrust and related laws affect the incentives to generate new products or even to improve efficiency of existing production. This predominately supply-oriented approach suggests that given substantial demand, entrepreneurs will either forego investment, or direct it elsewhere if they lack sufficient incentive to invest in new plants or improved plants or new product research and development. The existence of investment funds in some potentially socially desirable amount does not create the supply of investments. The users of those funds must have sufficient property rights in the results of the effort to be rewarded

**See Mueller, supra note 19.**

**Id. See also Blair, Market Power and Inflation: A Short-Run Target Return Model, 8 J. ECON. ISSUES 453 (1974).**
adequately for the risk taken. The question remains as to what additional incentives, if any, will induce a change in the rate of growth.

One view, the "stick" view, is that the strongest incentives to efficiency, new product development and growth come from the vigorous sting of the market. Professor Klein's analysis identifies the stultifying effect of oligopoly, conglomeratization and vertical integration on the operation of competitive market uncertainty as the key stimulus to growth. Those industrial organization economists who stress the utility of increased competition as a means to control price increases and unemployment would reach a similar conclusion. The shift in focus is from the immediate and static effects of competition to a longer-run, more dynamic view. Indeed, commentators perceive a substantial role for and relevance to competitive policy in the achievement of "progressiveness" in productive activity. The implications of this view are that generally the right of a business to exclude others from its activity should be narrowly construed, and that reducing competitive pressures is either not likely to produce socially useful responses, or likely to do so only at excessive cost to society.

The contrary view is that competition destroys the incentive to innovate and grow. Business needs "carrots" and not sticks. This approach finds expression in the current debates over protection of the steel and auto industries from competition. It also can lead at the extreme to demands that the antitrust laws be repealed. Significantly, the business community has over many generations claimed that competition is harmful. Repeatedly, this has

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47 B. Klein, supra note 7.

48 Mueller, supra note 19; F. Scherer, supra note 25; Markham, Concentration: A Stimulus or Retardant to Innovation, in Industrial Concentration: The New Learning, 247 (H. Goldschmid, H. Mann & J. Weston eds. 1974).


50 Even those opposed to antitrust see this risk. See Throow, supra note 19.

51 Id. at 146-50. See also Thurow, Let's Abolish the Antitrust Laws, N. Y. Times, Oct. 19, 1980, § 3 at 2, col. 3.

been a false alarm. Moreover, there is implicit in the claims, as they relate to growth, the argument that businesses should both produce and innovate. Yet, no necessity commands that the firms which produce products must also innovate them. Many commentators suggest that some or all research and development activity be centralized which implies a separation from the productive enterprise.

Agriculture is an excellent example of the "stick" model of growth. Its key features would appear to be reliance upon non-producer, largely publicly-funded research and development, and a vigorously competitive market in basic output terms. In addition government has been willing via subsidy and loan programs to ameliorate the harshest results of market consequences. This market intervention has arguably produced excessive consumer costs compared to the benefits conferred. Agriculture has long separated primary research and development activity from productive enterprise. This separation suggests that it is error to assume that all functions traditionally performed by businesses should be continued. Notably, the agricultural sector has remained largely non-conglomeratized, vertically disintegrated and financed by outside capital sources.

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63 The experience of the 1930's is an example. The failure of the National Recovery Act and its cartel approach led the government to embrace a policy of active promotion of competition. E. Hawley, The New Deal and the Problem of Monopoly (1966); A. Schlesinger, The Politics of Upheaval (1960).

64 B. Klein, supra note 7; Dasgupta & Stiglitz, Uncertainty, Industrial Structure and the Speed of R & D, 11 Bell J. Econ. 1 (1980).

65 L. Thurow, supra note 7, at 92-95; A. Eichner, supra note 7, at 284-85.

66 Agriculture is the segment of the economy which has had the greatest sustained growth in productivity over more than a century. It is also the one sector of the economy most nearly perfectly competitive. Agricultural research and development has occurred largely in public institutions (L. Thurow, supra note 7, at 95) or in sources of supply and then been disseminated rapidly because farmers had to be efficient to survive. This need drove them to adopt new and more productive techniques as soon as those techniques were available. Despite decades of demand for more income, farmers have raised the needed capital to make necessary investments in farms.


II. MARKET POWER AND COMPETITION: THE CHOICE BETWEEN REGULATING AND DISSIPATING MARKET POWER

A. Macroeconomic Policy Objectives

The conflicting macroeconomic theories have a set of consistent objectives and a common concern. Identification of those objectives and that concern will permit an evaluation of the choice between competition and other regulation as a means of managing market power. Where competition is the chosen approach, appropriate policy directions can be prescribed.

The overall objectives common to all the theories of economic policy are efficiency in production and distribution, progressiveness in the development of new products and new production techniques, stability in terms of employment and prices, and some reasonable equity in the distribution of goods and services among the population. Relative emphasis may vary among these objectives, but all are central to a comprehensive economic policy.

Moreover, under any theory, unchecked market power creates the risk that these objectives will not be achieved. This suggests that every macroeconomic theory must deal with market power. The fundamental choice is between acceptance of power combined, perhaps, with regulation thereof, and a rejection of power as socially desirable with a consequent policy of limiting or eliminating it.

B. The Case for Dissipation of Market Power

In evaluating the contending choices of maximized competition against regulated power, one should not only consider the current economic situation but also the political environment. Within this framework, market power can be viewed either as a necessity for macro policy reasons or as an inevitable by-product of our economic system.

1. The Eichner analysis—Eichner asserts that market power is both inevitably and desirably a part of macro-economic events. Eichner favors large, management controlled enterprises because by virtue of the skills and interests of their managers, they are able and willing to plan in longer time perspectives

than classically imagined owner-operators appear likely to do. They are also, for the same managerial reason, more able to operate multiple facilities and to add to such multiplicity without adverse managerial effect. Neither of these capabilities require market power. Hence, even assuming that manager-controlled firms made more efficient investment decisions, there is no need for them to have market power. Even Eichner's argument that large firm conduct acts in a counter-cyclical way, cooling periods of excess growth in demand and stimulating demand when it lags, relates to the planning and time perspective of such firms and not their market power. Moreover, other actors, e.g., pension funds, have long-run savings needs and would or could have counter-cyclical flows of funds as compared to investments, and so could perform a similar stabilizing function. 60 Eichner's own analysis suggests that overt control of the internal investment decisions of firms is necessary to exert a counter-cyclical force. 61

2. The corporate levy problem—It is important to consider whether the power to employ the corporate levy itself is socially desirable. Eichner's claim that megacorps are better decisionmakers than the market is unjustified by either systematic examinations of such corporations generally or by specific examples of such investment decisions. 62 Those in control of powerful corporations act as much to enhance their own position or prestige as they do to maximize some mythical corporate return. 63 From the perspective then of stimulating dynamic growth and innovation, Professor Klein's argument that it is the spur of the competitive stick which the manager needs and not the pacify-

60 Pension plans, which are increasingly significant sources of economic wealth, see A. BERLE, POWER WITHOUT PROPERTY (1959); P. DRUCKER, THE UNSEEN REVOLUTION: HOW PENSION FUND SOCIALISM CAME TO AMERICA (1976), would indeed seem to have exactly the same long run investment incentives as Eichner's megacorp managers. Such funds might be preferable vehicles for investments because they could have greater latitude to invest in many varied projects without having to take on managerial responsibility and because they may be able to act to force managers to achieve greater productive efficiency. See Leibenstein, Allocative Efficiency vs. "X-Efficiency," 56 AM. ECON. REV. 392 (1966); see also A. BERLE, supra. Thus pension fund managers may provide a nongovernmental policing function on investment decisions which could at least partially obviate the need for government regulation.

61 A. EICHNER, supra note 7, at 89-95; see also C. LINDBLOOM, POLITICS AND MARKETS 78-85, 149-55 (1977).


ing quality of the oligopolistic carrot, is the more persuasive.

To the extent that savings itself is inadequate in the economy to provide for the desired level of growth, the corporate levy is clearly not the only alternative. The problem may well be institutional, and solutions may well require restructured tax or other incentives to individual or group savings. The emergence of the pension funds now subject to regulation requiring adequate funding may provide an alternative means to generate needed levels of savings. If, in fact, the corporate levy were reduced, individual and group savings would be made more feasible. Or as yet another alternative, the government could explicitly tax sales to generate needed savings.

3. The economic performance dimension—Assuming that roughly similar macro results can flow from regulated market power and from a more competitive market, there are practical considerations weighing against regulated power. Regulation of market power is very difficult to accomplish. Indeed, regulation of market power to the extent necessary to have a substantial effect on the market is likely to stifle the growth of the economy. The presence of such power has necessitated much of the current regulation of safety and other aspects of corporate conduct. This approach does not commend itself as a preferable


46 A direct government tax has several advantages. Such a device could set rates based on the likely social costs of asking various groups to save. Under a corporate levy, the rate of “tax” depends on the relative elasticity of demand and barriers to entry as well as the need for investable funds. For example, oligopoly drug makers are able to tax the savings of the sick to generate investment funds for their corporate activities. More conscious social planning of the tax incidence would seem desirable. Likewise, as a government tax, the proceeds could be directed to socially desirable investment decisionmakers. This would require some assignment device, but that is clearly within the capacity of legislatures.

66 This is true in the narrow public utility context, R. Schmalensee, The Control of Natural Monopolies (1979); Posner, Natural Monopoly and Its Regulation, 21 Stan. L. Rev. 548 (1969), and even more true in trying to regulate the economy as a whole. Jones, Government Price Controls and Inflation: A Prognosis Based on the Impact of Controls in the Regulated Industries, 65 Cornell L. Rev. 303 (1980). The participants in the wage-price controls of the earlier 1970’s, while finding some merit in those controls as short-term measures, describe the great problems of making any set of regulations operational and point to the intense difficulty of continually adjusting to new and changing events on both the supply and demand side. Lanzilotti, Hamilton & Roberts, supra note 34. See also A. Weber, In Pursuit of Price Stability: The Wage-Price Freeze of 1971 (1973).

67 B. Klein, supra note 7, at 216-21.

68 The exploration of the interaction of market power, the failure of traditional legal institutions to provide relevant and effective signals to businesses, and the use of new directly regulatory controls to re-establish desired performance are additional factors to
social alternative.

Even if macro functions could be carried out without market power, it may be that market power is either necessary as an element of microeconomic life or an inevitable concomitant of it. Galbraith, arguing the first position, advances the idea that in order to exist, modern firms need the capacity to control demand, i.e., market power, to insure a place for their products. Other observers suggest that firms can merely respond to demand and still survive. Galbraith’s argument, viewed in longer and more dynamic terms, seems even more questionable because of the greater uncertainty which any producer confronts.

Some have advanced the second position that observed power in the market is always a product of the superior efficiency of those producers who possess it. Eichner’s analysis of investment alternatives shows the weakness with this position.

One observer, Professor Markovits, argues that much of the market power of firms arises from locational and relational advantages that each firm has with respect to some or all of its customers. This view of economic reality, which takes account of both spatial phenomenon and the costliness of transactions, suggests that at least some power is inevitable. But because the power which Markovits identifies is a consequence of inter-enterprise economic organization, its dissipation only eliminates sub-optimal aspects of the way the economy operates and does not affect the productive efficiency of the firm.

Thus, the position that market power is either a necessary or

consider. The mandating of specific auto safety and efficiency standards may reflect the failure of both the market (because of the lack of competition among automakers) and the traditional legal sanctions (e.g., product liability) to induce socially desirable behavior. The choice between regulation and restoration of a more effective market context in order to achieve desired performance has apparently been overlooked by decision makers. As a consequence, the regulatory environment makes effective competition by small car manufacturers even more difficult, and makes safety and efficiency into subjects of political negotiation rather than market imperatives. See B. Klein, supra note 7, at 216-21; C. Lindblom, supra note 61, at 149-55.


70 See B. Klein, supra note 7, at 133-35; C. Lindblom, supra note 61, at 38-40, 216-17; cf., A. Eichner, supra note 7, at 117-20.

71 See B. Klein, supra note 7, 134-35.

72 See J. McGee, In Defense of Industrial Concentration (1971); Demsetz, supra note 21.

73 A. Eichner, supra note 7, at 90-96; see also C. Lindblom, supra note 61, at 149-55; B. Klein, supra note 7, at 73-78.

inevitable aspect of microeconomic activity is unconvincing. Moreover, there are strong non-economic reasons against allowing such power to exist absent a compelling showing. The social-political concerns over power in any aggregated form are deep and strongly justified. These non-economic concerns suggest a policy of dissipating market power.

C. Regulation of Market Power as an Alternative to Dissipation

The reasoning to this point suggests that effectively competitive markets are preferable to regulated, oligopolistic or monopolistic markets. It does not follow that all markets can be made effectively competitive at acceptable costs in terms of efficiency and enforcement. It should also be emphasized that antitrust law is not the exclusive instrument for the control of market power. Much work remains to be done in connection with limiting or eliminating market power created by laws which authorize such power in private industry.

Market power can also exist because poorly organized markets fail to provide consumers with adequate information or relevant choices. Agencies regulating such markets can cause relevant disclosures thus reducing power and inefficiency in the market. Alternatively, the legal system may intervene using either antitrust or constitutional mandates to bar anticompetitive market behavior. More radical restructuring may occasionally be es-

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70 One commentator has stated this concern in broad social terms:
It has been a curious feature of democratic thought that it has not faced up to the private corporation as a peculiar organization in an ostensible democracy. Enormously large, rich in resources, the big corporations, we have seen, command more resources than do most government units. . . . They are on all these counts disproportionately powerful, we have seen. The large private corporation fits oddly into democratic theory and vision. Indeed, it does not fit.
C. Lindblom, supra note 61, at 356. See also Blake, Conglomerate Mergers and the Antitrust Laws, 73 Colum. L. Rev. 555 (1973); Carstensen & Questal, supra note 62, at 863-66.

72 Some commentators do argue, correctly, that law is the most effective creator and protector of market power. See, e.g., Demsetz, supra note 21.
74 Such market perfecting regulation is quite different in character from specific performance regulation. Its objective is not to control specific decisions but rather to create an environment in which consumers can make effective choices based on relevant information. The compulsory automobile fuel efficiency disclosure, and cigarette tar and nicotine content disclosures, are but two examples of efforts via regulation to perfect the market rather than replace it.
75 See California Retail Liquor Dlrs. Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97
essential, as in health care, to create a market context in which buyers organized to seek cost-effective care can come together with sellers able to compete on that basis. 81

To the extent that power cannot be effectively limited, there is a sound basis for regulating its use. However, the gains from such regulation may be more than offset by the debilitating effect of such regulation on innovation and independence. 82 Despite these concerns, once there is a recognition that powerful entities can wreak havoc on macroeconomic policy through their independent decisions, it is unlikely that political intervention in such decisions can be avoided. This in turn suggests another reason to prefer an unregulated economy: the dynamic potential of individual economic actors will be less constrained in such an environment, thus keeping free the capacity for innovation and development of new markets which is essential to sustained economic growth.

These reasons cumulatively suggest a preference for the creation and maintenance of effectively competitive markets. The policy preference is relevant to longer-run policy because such competitive markets may not be possible in the short run. In the short run, given substantial, existing power, it would be desirable to have available effective, efficient regulatory controls to restrain the socially unproductive use of such power. Such short-term regulation, whether via wage and price guidelines or more formal control, would also provide a context in which to refine and test the regulatory alternative to competition.

III. THE ROLE OF ANTITRUST POLICY IN THE MACROECONOMY

This section identifies the ways in which antitrust policy and enforcement efforts should be directed in light of the conclusion that macroeconomic policy should both minimize existing market power and keep new power from developing. 83

The broad outlines of the desirable antitrust enforcement policy are evident. First, the enforcement agencies need to locate the firms which possess or potentially can possess substantial market power which can affect significant economic sectors. Sec-


81 L. THUROW, supra note 7, at 69.
82 See B. KLEIN, supra note 7, at 213-21. See also note 68 supra.
83 See Part II C supra.
ond, remedies must be developed which can effectively eliminate existing power and frustrate efforts to convert potential into actual power. Third, in order to achieve these remedies, some legal doctrines will have to be reworked or elaborated to the extent that they currently make ineffective the enforcement program prescribed in the first two steps. Fourth, the enforcement agencies will have to have the resources, will, and direction to pursue a consistent program to eliminate market power.

A. Standards for Determining Market Power

Policymakers need a far better idea of the location and causes of market power now that such power has been linked to the macroeconomic process. The usual static analysis of microeconomics assumes the existence of power (monopoly) or its absence (competition) but does not explain how that power arises. The intensity and duration of such power also needs fuller exploration. Power may arise and be maintained because of the productive efficiency of a few firms out of a group of competitors. It may arise because of the locational or transactional advantage that sellers have with respect to individual customers. The most common explanation is that it comes from interdependent decisions about price and output made by a group of dominant firms within each industry. The aggregate structure of industry, i.e., its degree of conglomeratization, may also greatly affect the degree of power firms possess as well as their inclination to use that power in specific contexts.

To the extent that market power results from efficiency, legal or politico-economic conditions can be adjusted to permit other firms in the industry to achieve equal efficiency. The other theories of power do not imply that eliminating such power sources will affect the efficiency of the firms involved. Investigation of individual industries using rough measures of power and significance could yield substantial insight into the sources of power in any specific firm or industry.

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84 See Demsetz, supra note 21, at 166-67.
86 See Markovits, supra note 74.
87 A. Eichner, supra note 7, at 38-45.
B. Remedial Measures for Market Power

The choice of remedy is critical in dealing with market power. Remedies are either structural or conduct-directed in character.

1. Conduct-oriented remedies—Conduct-oriented remedies in turn either define permissible zones of conduct or impose a regulatory environment. If a conduct-oriented antitrust remedy takes the latter course, it implies the correctness of the claim that power is inevitable and must be directly regulated. If, however, by specific guidelines, collective power can be kept latent, and competitive conduct put in its place, then the effect of the conduct-oriented remedy is to restrict the capacity of latent power to have effect.90 Such remedies are highly desirable.

A greater restriction on the ability of firms in concentrated industries to establish list prices and to announce changes substantially in advance of their implementation or otherwise signal to each other would force upon such firms more uncertainty, retard their interest in price increases, and stimulate more competitive conduct generally. A systematic enforcement program could seek to eliminate as many as possible of the facilitating devices which appear to be crucial factors in the effective creation and maintenance of shared market power. Such remedies could significantly reduce the capacity of firms to employ collusive or interdependent conduct.

An examination of restricted distribution schemes by powerful firms might show that their primary contribution is not efficiency, but enhanced control over the economic environment, making it easier to obtain and retain power.90 Solutions would then include elimination of territorial and customer restrictions on resale, and prohibition of those devices which effectively impose exclusive purchasing requirements on the dealer. Recent experience in the oil industry is suggestive that more dealer freedom in obtaining supplies is likely to stimulate substantially...

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greater price competition.91

Where the use of locational or relational power has not pro-
duced explicit, restrictive agreement, the problem of remedy is
even greater. Case-specific analysis could show the extent to
which limits on conduct can affect the degree of exploitation of
such power. Potentially useful might be requirements that pro-
ducers sell f.o.b. to any financially able buyer or that the power
to refuse to sell, once some sales had been made, could be exer-
cised only for good cause. Defining appropriate remedies for
such transactional and locational power is a difficult task be-
cause of the problem of insuring efficient distribution while
eliminating power-creating restraints without creating new
sources of power.

2. Structural remedies—If conduct-oriented remedies fail
to keep potential power latent and inactive, an alternative remedy
may be necessary. Where signaling and comparable stabilizing
devices cannot be removed, or where their removal does not suf-
ciently disrupt shared market responses, one solution is to re-
quire dissolution.92

The shape of such dissolution would have to consider loca-
tional or relational power so that the resulting structure would
minimize that source of power as well.93 Once firms' power is
neither necessary nor a necessary by-product of efficiency, there
should be no theoretical objection to reorganizing an industry to
eliminate such power.94 Practical problems of implementing such
remedies are more convincing objections.95 One of the most seri-
ous obstacles is that the courts and enforcement agencies are re-
luctant to require a structural remedy. However, courts should
not lose sight of the relative ease of implementing such struc-
tural changes. For example, the investment banking community
is in fact as adept at subdividing businesses as it is at combining
them. The problem is to bring such resources to bear on the
problem.

Even if it appears that market power is largely associated with
past efficiency on the part of a small group of firms in an indus-
try, a structural remedy, if appropriate, should be considered.

91 The existence of occasional "gas wars" attests to this proposition.
93 Markovits, supra note 74.
94 See S. 3832, 92d Cong., 2d Sess. (1972); see also REPORT OF THE WHITE HOUSE TASK
FORCE ON ANTITRUST POLICIES (1968).
95 Posner, Problems of a Policy of Deconcentration, in INDUSTRIAL CONCENTRATION:
THE NEW LEARNING 393 (H. Goldschmid, H. Mann & J. Weston eds. 1974).
Such a remedy would be especially appropriate where some or all of the firms are operating on a substantially decentralized basis. Although it is important to determine whether any common features of the enterprise will be disrupted, the likelihood of any serious adverse effect is not appreciable in cases where the industry is already decentralized.

Mergers, whether horizontal, vertical, or conglomerate, can both enhance market power and create added inducements to its exploitation. Merger is, however, very rarely the only solution to any real economic problem confronting the participants. A stern policy of opposition to all significant mergers is a long-run guarantor of an economy of increasing numbers of actors and thus minimized market power.

C. The Antitrust Law Framework

The proposition that the enforcement of the antitrust laws can have a positive impact on macroeconomic phenomenon in the long run does not require a shift in antitrust enforcement from its focus on the promotion of competition. Rather, in maintaining this focus, effective antitrust enforcement will help to create an economic environment in which the traditional macroeconomic policy tools can be effectively employed. Accordingly, no major changes in existing legal doctrine are essential.

Very large firms in general are obliged to copy the market internally in order to achieve efficiency. E. Penrose, The Theory of the Growth of the Firm (1959); see also O. Williamson, Markets and Hierarchies: Analysis and Antitrust Implications 132-75 (1975).

There is much debate about the economic impact of conglomerate mergers. See P. Steiner, supra note 62. There is a substantial body of evidence that argues that such mergers are unlikely to produce efficiency or other socially desirable economic advantages; but there is also substantial evidence that such mergers do not in themselves alter market power. See id.; see also Carstensen & Questal, supra note 62, at 842-49. Professor Eichner argues, however, that the effect of conglomeratization is to change the incentives to engage in oligopolistic market exploitation in specific markets because of both the greater skill of the conglomerate at market exploitation and its interest in taxing one market to finance activity in another. A. Eichner, supra note 7, at 117-26. From a pro-competitive perspective, Eichner cautions that conglomerate firms may behave more anti-competitively in specific markets and fail to make investments in such markets because of the alternatives which they perceive. In other contexts, economists have shown the inefficiency of such conduct. See Burnstein, A Theory of Full Line Forcing, 55 Nw. U. L. Rev. 61 (1960); Preston, Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards, 30 L. & CONTEMP. PROBS. 506 (1965).


See Mueller, supra note 68; Ferschuk & Davidson, What's Wrong with Conglomerate Mergers, 46 Fordham L. Rev. 1 (1979); see also Carstensen & Questal, supra note 62.
Imperative, however, is an expansion of judicial awareness of the social and economic reasons for objecting to the creation and retention of effective market power, and second, some refinement and elaboration of doctrine to insure that effective remedy is not frustrated.

1. Mergers—Current law against substantial mergers is fully effective to support challenges to significant horizontal and vertical mergers. Its most serious weakness is in handling potential competition and conglomerate merger. The problem is not the unwillingness of the Supreme Court to employ presumptive standards, but the unwillingness of judges to perceive risks to economic values in such combinations.

Judicial recognition of the effect of such mergers, including an awareness of aspects of such combinations discussed above, should lead the courts to bar such mergers. The appropriate doctrinal response is to create a presumption of illegality against all large mergers, and to exempt therefrom only those for which positive proof of offsetting desirable effects is tendered.

2. Oligopolistic industries—To the extent that the source of power is interdependent oligopoly activity, Interstate Circuit and the basepoint pricing decisions establish that such behavior will constitute collusive conduct under the Sherman Act.

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In the hands of lower courts, the results are sometimes less logical. See, e.g., United States v. International Harvester, 564 F.2d 769 (7th Cir. 1977). This in tum counsels the need for a re-emphasis upon the structural and presumptive character of merger analysis.

101 Yet Professor Eichner, for example, identifies the conglomerate organization as one with the strongest interest in and the greatest potential to create market power, see EICHNER, supra note 7; Professor Klein analyzes the conglomerate as having a debilitating effect on the dynamics of the market, see B. KLEIN, supra note 7, at 41; while Professor Steiner and many others find the conglomerate unlikely to produce significant economies or efficiencies not otherwise achievable. P. STEINER, MERGERS: MOTIVES, EFFECTS, POLICIES 205-08, 323 (1975).

102 For proposals along these lines which are not based on the macroeconomic concerns raised here, see Bauer, Challenging Conglomerate Mergers Under Section 7 of the Clayton Act: Today's Law and Tomorrow's Legislation, 58 BOSTON U. L. REV. 199 (1978); Blake, supra note 75; Broadley, Potential Competition Mergers: A Structural Synthesis, 87 YALE L.J. 1 (1977); Carstensen & Questel, supra note 62; Pertschuk & Davidson, supra note 99.


The outer boundary of demonstrable interdependent behavior is set only by the existence of an effective remedy.\textsuperscript{106} Again, the doctrinal implication is that the courts must be clear that whenever behavior is interdependent it is, by definition, collusive and, so long as it is remediable, it is also unlawfully collusive.

The primary areas for legal development are in the articulation of intelligible standards for testing the reasonableness of those restraints subject to the rule of reason.\textsuperscript{106} Current decisions do not provide such guidance.\textsuperscript{107} Starting from the premise that any restraint of trade arises from a belief on the part of the parties that one or both could gain an advantage therefrom—which in turn implies that one or both probably possess some market power\textsuperscript{108}—to uphold any restraint as reasonable is to allow a clog on the free market. Such clogs may be useful—even essential—but courts must recognize their inherent anticompetitive effect and fashion an analysis which limits the right to restrain trade to only those situations where such restraint is socially useful.\textsuperscript{109}

As a practical enforcement matter, clarifying the analysis to be used in testing the reasonableness of a restraint, especially if it restricts such justification to demonstrably ancillary restraints, will facilitate and substantially encourage investment of enforcement resources in this area.

A second doctrinal innovation is where the conduct of firms is collusive in character, but no purely conduct-oriented decree is likely to be effective. In such cases, appropriate relief should include dissolution and restructuring of the firm or firms in-

\textsuperscript{106} See Turner, Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655 (1962); see also Dept. of Justice Memo, supra note 89.


\textsuperscript{100} See Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, 74 Yale L.J. 775 (1965).
volved.110 Such a remedy requires that the evidence show that the restructured firm be viable. If restructuring is viable, there should be little reluctance to remedying bad conduct by altering the structure that made it possible.111

3. Single firm market power—Individual firm power presents a significant legal problem. Many firms have significant market power based on locational or relational advantages. The remedy for such power will frequently require jurisdiction over firms acting unilaterally, although in the case of restrictive distribution arrangements, collusion would exist. The jurisdictional mandate is section 2 of the Sherman Act, which outlaws monopoly, but such firms may not fit the traditional definition of a monopolist. Such firms may appear to be merely parts of a large industry, and thus to lack the market share traditionally associated with a monopolist in spite of the kind of power they wield. Nevertheless, assuming the existence of a remedy, we can say that such a firm possesses more power than is necessary to its existence, and that its power is socially harmful. An expanded definition of monopoly would help courts to examine the conduct of powerful firms and ascertain if that power could be reduced without adverse efficiency effects.

A redefinition of monopoly would not necessarily involve a “no fault” monopoly standard, since it is entirely consistent with this suggestion that the prosecutor show actual use of market power in wrongful ways. The concept of wrongfulness would have to expand to embrace the kind of inflexible-price, flexible output-and-employment conduct which is the core of the macroeconomic objection to monopoly.

Potential problems do, however, exist with an expanded definition of the meaning of a single firm monopoly.112 It might create undesirable insecurity among managers of leading firms. It is, however, also possible that to the extent that the trigger for a challenge was actual abuse of position as revealed in price increases above some norm, the effect might be to induce firms which feared potential liability to try to limit price increases by emphasizing cost control. Such a shift in internal incentives is generally recognized to be the most desirable and effective way


111 The general doctrine on remedy is that any remedy may be prescribed even if it goes beyond the contours of the offense charged so long as its intended effect is restoration of a competitive market. Ford Motor Co. v. United States, 405 U.S. 562 (1972).

to control market power misuse. Nevertheless, to the extent that reducing market power requires challenges to single firm power, the present legal doctrines are not well structured to do the job.

An alternative to dealing with the legal issues discussed here is to adopt additional, specific legislation aimed at authorizing both conduct and structural remedies aimed at dissipating market power. Some proposals in both the merger and oligopoly structure area have been made.113 No fault monopoly rules have also been suggested.114 It suffices to say that specific legislative endorsement of useful remedies is helpful, but the effectiveness of such remedies is of primary concern.

D. Enforcement of the Antitrust Laws

It is not enough merely to prescribe investigation of power and remedy, and to revise legal doctrine. It is vital that a systematic program of enforcement exist. Such a program requires increased resources for enforcement, a clear policy directing the use of those resources at targets relevant to the macro objectives being sought, a willingness to act on the part of those charged with overseeing this effort, and sufficient political support for the program.

1. Resources and policy focus—Although resources for the FTC and Department of Justice have grown in recent years, any effort to try to have a noticeable impact on market power would require a quantum leap in the aggregate enforcement resources. Some of that increment might come through contracting investigations and cases to outside lawyers and economists. The United States Attorneys' offices can also play a role in a program which has formulated a clear list of objectives. The greatest need is that there be sufficient, competent legal and economic personnel to make the threat of action creditable. If the likelihood of antitrust action is high, settlement will be the likely result in many cases.

The second need is for a clear policy direction that will insure that the available resources are directed at targets which merit such investments. Efforts should be directed at significant sectors of the economy where the macro effects are likely to be sub-

113 See S. 600, 96th Cong., 1st Sess. (1979) (Kennedy conglomerate merger bill); see also note 94 supra.

stantial. Even overt price fixing of wooden toilet seats\textsuperscript{116} or Korean wigs\textsuperscript{116} ought not receive significant staff effort, yet too often antitrust aims at such targets of opportunity.

2. Political commitment—For enforcement to work there must be sufficient political support. No law enforcement program operates in a vacuum. When a program takes on powerful forces in society, moreover, it must have powerful support or its resources will be removed and its activities disrupted.

Although antitrust law has existed for nearly a century, major enforcement began barely four decades ago, and, because of World War II, was not a sustained program until the late 1940's. In those three decades, the antitrust laws have suffered from shifting judicial interpretations and uneven commitment from those charged with enforcement. The history of antitrust is therefore, not that of inherent failure, but rather of a relatively recent beginning followed by a less than total commitment.

The lack of commitment to antitrust enforcement might be viewed as evidence that such a program to tame corporate power can never achieve its objective despite its micro- and macroeconomic desirability. Some believe that the deck is stacked heavily against any effort to challenge corporate power. The strength of corporate political power may be exaggerated. In any event, if corporate power is capable of frustrating antitrust law, it may also frustrate any other effective regulatory program. There are risks that corporations could come to control a continuing regulatory process and use it for their advantage.\textsuperscript{117} This suggests that while both regulation and antitrust may be frustrated by effective corporate power the risks are greater that the regulatory approach can be both frustrated and subverted.

Viewed solely as a political issue, antitrust, arguably, has more political strength than regulation. An antitrust challenge to market power comports with long standing and deeply felt political views in this country.\textsuperscript{118} Moreover, such a challenge is basically a defense of the free and open market, ultimately unregulated, which is ideologically attractive in this country. In attacking this


\textsuperscript{116} United States v. Korean Hair Goods Ass'n of America, 1976-1 \textsc{trade cas.} ¶ 60,773 (S.D.N.Y. 1976).

\textsuperscript{117} \textit{See} B. Klein, \textit{supra} note 7, at 214-21; Posner, \textit{Taxation by Regulation}, 2 \textit{Bell J. Econ.} 22 (1971).

\textsuperscript{118} \textit{See}, \textit{e.g.}, Jackson's veto message on the second bank of the United States, 2 \textsc{compilation of messages and papers of the presidents} 1789-1897 576 (J. Richardson ed. 1896).
challenge, business has a difficult political message: it wishes freedom from the policemen of the market place. Antitrust, by proposing to eliminate power, thus offers a solution in which firms can be free to act unregulated, but the public need not be concerned because the businesses thus freed lack appreciable power.

Any effort to deal with the major macro problems that confront the economy requires challenges to existing political powers. To succeed, programs will have to work effectively where they have not in the past.

CONCLUSION

From whatever perspective one views macroeconomic problems, market power is a factor with an impact. A pro-competitive policy is desirable; experience in the last two decades suggests that many would find its importance greater if asked today then if asked twenty years ago. Nonetheless, that the stick of competition is more likely to serve the ends of macro-policy than the carrot of market power, despite the traditional consensus as to the desirability of competition, is not a universally held belief. Control of market power is just one factor in dealing with macroeconomic phenomenon. An active policy of reducing market power should be coupled with a willingness to encourage more government aid and support where needed by participants in the competitive process. Government must also stand ready to aid in establishment of alternative means to achieve economic functions and to help create different market solutions as the need emerges.

In discussing market power and its usefulness as a guide to policy, a recurring theme is the dynamic character of economic life. This dynamic suggests that even a greatly altered corporate world, aided by revised public support, could produce at least as efficiently as the incumbent economic order. Its potentially greater dynamism and reduced corporate power would make it a more socially attractive economic world in which to live.
