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BEYOND ANTITRUST

By Paul L. Joffe*

Before he converted and became the New Deal's trustbuster, Thurman Arnold said that the chief effect of antitrust rhetoric is "to promote the growth of great industrial organizations by deflecting the attack on them into purely moral and ceremonial channels. . . ."1

These sentiments are not in vogue today. Enthusiasm for antitrust has returned to Washington with all the fervor of the revival of an old time religion. In 1976 Congress passed the Hart-Scott-Rodino Antitrust Improvements Act,2 dealing primarily with enforcement procedure. Among other things, the Act gives state attorneys general the power to bring treble damage suits on behalf of consumers.3 Antitrust advocates have advanced even more far-reaching proposals. Among the most controversial was one to split up the major oil companies,4 which passed the Senate Judiciary Committee in 1976. Deregulation in the aviation,5 natural gas6 and other industries is imminent.7


4. S. 2387, 94th Cong., 1st Sess., (1976), 121 CONG. REC. 29645 (1975). This highly controversial bill would have split up the 18 major oil companies by requiring them to select one of three areas of operation—production, transportation, or refining and marketing—and to divest themselves of all other operations. In addition, the bill prohibited major oil refiners from owning or operating retail service stations or other marketing assets which they did not own prior to January 1, 1976. For additional legislative proposals, see note 375 and accompanying text infra.
The reborn interest in antitrust shows signs of its long genealogy. President Carter's appointee as chairman of the Federal Trade Commission is Michael Pertschuk. In testimony before the Senate Antitrust Subcommittee, chaired by Senator Kennedy, Pertschuk sounded a theme older than the Sherman Act—pervasive distrust of the concentration of power in a few hands. There is a heretical aspect, however, to the new enthusiasm. When he convened his hearings in early 1977, Kennedy stated that "[t]here is a broad consensus of opinion that the economic and social objectives underlying the antitrust laws have fallen, and continue to fall, far short of attainment." Witnesses responded with a proposal for "no-fault" trustbusting. Some would rewrite section two of the Sherman Act to condemn firms with more than a specified share of any market unless they could demonstrate that they attained it through superior skill, industry, and foresight. As diverse a group as Michael Pertschuk, Griffin Bell and Ralph Nader told Kennedy's subcommittee that the Sherman and Clayton Acts may be inadequate to deal with shared monopolies.

The renewed interest in antitrust involves more than a questioning of the old statutes. There is revived debate concerning the premises of antitrust. In orthodox economic theory, the justification for the antitrust laws was the removal of artificial barriers to trade. Antitrust was viewed as a


New antitrust action has also produced counteraction. Attempts to rein in the FTC through budget cuts have been initiated by some congressmen. See, e.g., [1978] ANTITRUST & TRADE REG. REP. (BNA), at A-7 to A-8 and A-11 to A-12 (June 15, 1978).


10. Id. at 345, 492 (testimony of Donald I. Baker, Assistant Attorney General, Justice Dept., and prepared statement by Hon. Griffin Bell, Attorney General). A related proposal to abolish any requirement for demonstrating reprehensible behavior for persistent monopolies not attributable to economies of scale or scarce resources has also been suggested. The proposal envisions the use only of government equity suits since it is considered to be unfair to impose criminal sanctions or treble damages where reprehensible conduct is absent. 2 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 623 (1976).


   Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.


13. Id. at 457-63, 548.

14. See 2 AREEDA & TURNER, supra note 10, at ¶ 103.
means to halt monopolization and collusion, and to assist in restoring competition. Under this theory, numerous competitors in the market were necessary so that no single firm or group of firms could control prices. In this situation, prices for a given commodity would be driven to the point at which they just covered costs and a competitive profit. No one firm would charge less since it would lose money, and no one firm would charge more since it would lose customers to competition. Only if one firm cornered the market or a group of firms conspired to do so would this system be upset. At this point, the monopolist could restrict production and raise prices, resulting in the misallocation of resources in the economy as a whole. Such artificial restriction in the monopolized industry would force the use of resources both inside and outside the industry in ways less productive than under competitive conditions.\(^\text{15}\)

A properly functioning price mechanism, however, would ensure "allocative" efficiency in the sense that the price of goods would reflect all the sacrifices the economy must make to satisfy consumer preferences.

Although trustbusting has emphasized the allocative efficiencies gained from breaking up monopoly, some authorities have argued that "productive" efficiency is often enhanced by the increasing scale of big business.\(^\text{16}\) In this view, indiscriminate trustbusting threatens to undermine the economic growth and consumer welfare attributable to productive efficiencies. In response to these assertions, others have cautioned that efficiency should not be purchased with the sacrifice of social and political values.\(^\text{17}\) They argue that efficiency has never been the sole objective of antitrust enforcement but rather has co-existed with other goals, including opposition to

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15. Id. at ¶ 403; F. Scherer, Industrial Market Structure and Economic Performance 8-38 (1970); G. Stigler, The Theory of Price 176-215 (3d ed. 1966). Real-world examples of such conspiracies and their drastic effect on prices are not uncommon. In the 1960's the international quinine cartel raised prices up to 600 percent. M. Green, The Closed Enterprise System 162 (1972). There were also overcharges in the electrical equipment conspiracy that sent a Westinghouse vice-president and others to jail. Id. Critics of the oil industry argue that the major companies took advantage of the Organization of Petroleum Exporting Countries' (OPEC) price increases and hiked prices even further, reaping unwarranted monopoly profits. J. Blair, The Control of Oil 320 (1976). See Wash. Post, July 28, 1978, at 1, col. 3, for a report that Gulf Oil will pay the United States government $42.2 million in settlement of alleged overcharges related to the Arab oil embargo. It was also reported that the Department of Energy has brought claims for violations of price regulations totaling over $1 billion against various oil companies.

16. This point is elaborated upon in R. Bork, The Antitrust Paradox 104-06, 192-97 (1978). Allocative efficiency is the distribution of resources throughout the economy so as to ensure their use in those areas where their output is most valued by consumers. Productive efficiency denotes the effective use of resources by particular firms. Id. at 91. For a more detailed discussion of allocative efficiency and its antitrust implications, see Scherer, supra note 15, at 18; 2 Areeda & Turner, supra note 10, at ¶ 402b.1.

concentrated economic power. Thus, the tensions in antitrust enforcement have often reflected the divided American psyche—in quest of both material abundance and political liberty.

In his recent book, *The Antitrust Paradox*, antitrust scholar and former Solicitor General of the United States Robert Bork submits a brief on behalf of efficiency. He reconciles the dilemma of values by arguing, in effect, that liberty is the freedom to grow to efficient scale. The task, in his view, is to resist a trend whereby “the political order moves against the private order.” This trend is brought on by grasping for the unattainable goal of equality. The result of such misguided effort is the destruction of wealth and a shift of power to government “because of the necessity for increased governmental incursions into the private sphere if greater equality of condition is to be achieved.”

Illustrating the contrary view is *The Treatment of Market Power* by William G. Shepherd, scholar of industrial organization and former Special Economic Assistant to the Assistant Attorney General for antitrust. Existing industrial policies, concludes Shepherd, “often seem to be dubious ceremonials, which are ripe for revision or possible abolition.” Applying cost-benefit analysis to industrial policy, he argues that not only do the traditional economic goals of efficiency and equity matter, but that social goals, such as the value of work opportunity, are also important.

Although the Sherman Act was born in an age of populist political ferment, the American fear of concentrated power and its potentially corrupting effect on democratic politics is a fear even older than the Sherman Act. In a letter to James Madison written from France, Thomas Jefferson urged that the proposed constitution contain a bill of rights providing for “freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies . . . .” W. Garrett, *The Worlds of Thomas Jefferson* 129 (1971). Moreover, in vetoing the bill to recharter the Bank of the United States, Andrew Jackson asserted that the bank favored “a few hundred of our own citizens, chiefly of the richest class.” S. Morison, *The Oxford History of the American People* 439 (1965). As a result, Jackson said he refused to permit the “prostitution of our Government to the advancement of the few at the expense of the many.”

The controversy has been one among legal scholars (see authorities cited in notes 16 & 64 and 2 Areeda & Turner, supra note 10, at ¶ 104); economists (see authorities cited in notes 23, 61, & 101 infra); judges (see notes 72-77 & 90-102, and accompanying text infra) and enforcement officials (see note 28 infra).

20. See Bork, supra note 16.
21. Id. at 423.
22. Id.
24. Id.
25. Id. at 5. Shepherd offers a number of proposals to achieve these multiple goals. Among other things, he recommends a progressive tax on market share, a public investment bank to counter what he perceives as an alliance between large banks and large firms that keep capital from smaller competitors, and increased use of public corporations to create more competition. Id. at 183-224. For other discussions of the multiple goals of antitrust
Achievement of an appropriate relationship between economic and political power has been a recurring but elusive goal of antitrust policy. Responding to questioning at the time of his nomination to the Federal Trade Commission, Chairman Pertschuk said, "[e]fficiency is important, but so are such non-economic goals as maintaining multiple decision centers and structuring institutions in which democratic habits and life styles can thrive." Recognition of the multiple objectives underlying antitrust has come as well from the retiring Assistant Attorney General for Antitrust, Donald Baker. He told Senator Kennedy's Judiciary Subcommittee that the case for new legislation to achieve deconcentration rests "at least as much on Jeffersonian political beliefs as economic proof under the present state of knowledge."

The revival of interest in the political implications of antitrust policy confronts antitrust advocates with a central failure in the antitrust tradition. The Sherman Act was called a charter of freedom, but beyond this and other bromides, antitrust doctrine never developed an analytical framework for ensuring that economic power did not distort the political system and undermine political liberty. Implicitly, it was assumed that the decentralization mandated by antitrust in the economic sphere would foster a healthy democratic political system. But the guardians of antitrust orthodoxy never paused to consider what characteristics of economic decentralization made it desirable. Consequently, as pressure has mounted to depart from the decentralized market, antitrust affords little guidance to those who still adhere to its political goals.

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26. See note 30 infra.


28. 1977 Oversight Hearings, supra note 8, at 347. See also Address by Assistant Attorney General for Antitrust, John H. Shenefield, to the Los Angeles Bar Assoc. (Jan. 30, 1978), reprinted in [1978] ANTITRUST & TRADE REG. REP. (BNA), at A-14 (Feb. 9, 1978). Pertschuk's comments hark back to a theme which finds classic expression in Judge Learned Hand's 1945 remarks in United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). Hand stated that while it might have been adequate to condemn only those monopolies which could not show they were efficient, "that was not the way Congress chose; it did not condone 'good trusts' and condemn 'bad' ones; it forbade all. Moreover, in so doing it was not necessarily actuated by economic motives alone." Id. at 427. Hand further reasoned that for social and moral reasons, Congress rejected a system "in which the great mass of those engaged must accept the direction of a few." Id. Yet Judge Hand's decision has not been followed in its literal sense. See 2 AREEDA & TURNER, supra note 10, at ¶ 104.


30. One of the few serious discussions that attempts to address the political goals of
Considerations of efficiency may impel policy-makers to abandon the old antitrust desire for deconcentration and preservation of numerous competitors. Large scale organization or government intervention may be the price paid for efficient production or the achievement of other social objectives. Even when an industry contains enough firms to be reasonably competitive by antitrust standards, however, the industry may wield undue influence in the political process. Moreover, economic influence in the political arena is not necessarily constrained by deconcentration, and, as with the pervasive influence of advertising on social attitudes, it may be undisturbed by trustbusting. For all these reasons, antitrust policy has increasingly failed to come to grips with significant instances of economic influence on politics.

This failure, however, does not require the abandonment of traditional antitrust concerns about the relationship between economic and political power. Behind the origin of the antitrust laws lies a skeptical regard for economic power and an accompanying effort to constrain and hold it accountable. Though the law may be transformed, the policy should survive. Thus, this article will suggest an approach to furthering the political goals of antitrust when its traditional means are not available. It will examine the historic tension between the economic and political goals of antitrust and explore the reasons for antitrust's failure to provide guidance when efficiency and other pressures impel abandonment of orthodox antitrust approaches. Through an analytical model, it will provide an approach to minimizing unwarranted economic influence on politics when the traditional private market mechanism becomes inadequate or attenuated. It will examine specific policy alternatives to orthodox antitrust and inquire whether they hold any promise for achieving the political goals of antitrust in an era which, of necessity, must move beyond antitrust solutions.

antitrust appears in Bork, Bowman, Blake & Jones, supra note 25. The emphasis, however, is on the value of antitrust in avoiding more intrusive forms of government intervention in the economy and on entrepreneurial opportunity for small or rising businessmen. Little attention is given to whether antitrust goals can survive the demise of decentralized markets. Rather, the authors respond to criticism of antitrust on efficiency grounds by arguing that the occasional sacrifice of efficiency to political goals in antitrust cases is justified in order to maintain decentralized markets. Id. at 382-84, 425-36. By contrast, the present article focuses on the influence of economic power in the political process, especially when there is pressure to depart from decentralized markets. The task here is not so much to defend antitrust when it has preserved decentralization, but to inquire whether the antitrust concern with undue economic influence in the political process can still be implemented when traditional antitrust approaches fail.
I. AN OLD DILEMMA

Current debate regarding the sometimes conflicting political and economic goals of antitrust is but a revival of a controversy that has ebbed and flowed since the origin of the Sherman Act. Over the years, its economic and political objectives have been recognized simultaneously and have remained in continuous tension.

On March 21, 1890, John Sherman of Ohio took the floor of the United States Senate to answer critics of the bill which eventually bore his name:

The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition. These combinations already defy or control powerful transportation corporations and reach State authorities. ... If we will not endure a king as a political power we should not endure a king over the ... necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade.

He called the roll of the great trusts of the day: "the cotton trust, the whiskey trust, the sugar refiners' trust, the cotton bagging trust, the copper trust, the salt trust, and many others. ..." But it was unnecessary to list them all, said Sherman, for they had "recently been made familiar by the public press."

The debate in Congress reflected a spectrum of diffuse antitrust sentiment in the country. One element in the background of the Sherman Act was the concern with economic influence in the political process. A year before passage of the Sherman Act, W.S. Morgan summarized twenty years of agrarian protest in his History of the Wheel and Alliance, and the Impending Revolution: "The agricultural masses," he argued, "are fleeced by the exorbitant exactions of numerous trusts. ... Monopolies exist by law, are chartered by law, and should be controlled by law. A

32. 21 Cong. Rec. 2456-62 (1890).
33. Id. The sentiment against the trusts was so strong that opposition to Sherman was marshalled principally on the issue of the constitutional power of Congress to reach monopoly under the commerce clause. Only Senator Stewart seems to have challenged the antitrust principle itself, urging that combination "is the foundation of all civilized society." Thorelli, supra note 31, at 190. The experience in England with laws aimed at regulating combinations, said Stewart, was "that legislation would not reach the subject, but that it simply retards trade. ..." Id.
34. W. Morgan, History of the Wheel and Alliance, and the Impending Revolution (1889).
trust is a conspiracy against legitimate trade. . . . It is demoralizing in its influence, inconsistent with free institutions and dangerous to our liberties.\textsuperscript{35}

In the same year, the conservative Grover Cleveland also suggested the corrupting influence of economic power on government. In his fourth annual message: President Cleveland told Congress,

We discover that the fortunes realized by our manufacturers are no longer solely the reward of sturdy industry and enlightened foresight, but that they result from the discriminating favor of the government. . . . Corporations, which should be carefully restrained creatures of the law and the servants of the people, are fast becoming the people's masters.\textsuperscript{36}

Despite the concern over economic influence during the years just prior to passage of the Sherman Act, an ambivalent sentiment existed regarding monopoly. By some, it was skeptically regarded only if "procured through the arbitrary exclusion of competitors."\textsuperscript{37} If based on efficiency, however, some thought monopoly a "positive advantage to the community."\textsuperscript{38}

It is well-known that enforcement of the Sherman Act was lax in its early years.\textsuperscript{39} With the first dramatic efforts at serious enforcement came a resumption of the controversy regarding the potential conflict between efficiency and the deconcentration believed necessary for political liberty. Thus, when Theodore Roosevelt used the Sherman Act to strike down a railroad merger, the conflict in antitrust policy surfaced. Justice Holmes, dissenting in \textit{Northern Sec. Ry. Co. v. United States}, pointed out that "if the restraint on the freedom of the members of a combination caused by their entering into partnerships is a restraint of trade, every such combination, as well the small as the great, is within the act."\textsuperscript{40}

It was this dissent which is supposed to have provoked T.R.'s comment with respect to his appointee to the bench: "I could carve out of a banana a judge with more backbone."\textsuperscript{41} Nevertheless, Holmes' implicit view that efficiency considerations were forcing the collectivization of business\textsuperscript{42} is

\textsuperscript{35} \textit{Id.} at 15-17.
\textsuperscript{36} Fourth Annual Message to Congress from President Grover Cleveland (Dec. 1888), \textit{quoted in R. Hofstadter, The American Political Tradition} 183 (1948).
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Thorelli, supra} note 31, at 371-410.
\textsuperscript{40} 193 U.S. 197, 410-11 (1904) (Holmes, J., dissenting).
\textsuperscript{41} \textit{Quoted in C. Bowen, Yankee from Olympus} 370 (1944).
\textsuperscript{42} \textit{See Vegelahn v. Guntner, 167 Mass. 92, 104, 44 N.E. 177, 179 (1896) (Holmes, J.,}
one that T.R. did not really reject. In the campaign of 1908, T.R., the legendary trustbuster, urged reliance on “[f]ederal control over all combinations engaged in interstate commerce, instead of relying upon the foolish anti-trust law. . . .”

The fear that departure from the antitrust approach might have unacceptable political consequences, however, remained strong. Four years later, Woodrow Wilson rejoined that under T.R.’s approach, “there shall be two masters, the great corporation, and over it the government of the United States; and I ask who is going to be master of the government of the United States?”

The monopolies controlled the government, said Wilson, and it was no solution to say that the government would control the monopolies. The answer was antitrust.

Although the two great Progressives differed over means, they agreed that the industrial upheavals of the nineteenth century confronted the country with great dangers. A “combination of combinations,” said Wilson, had put power “in the hands of a few men” who “chill, check and destroy economic freedom.”

Roosevelt argued that, sheltered by a reactionary judiciary, business stood immune from public supervision. Thus, augmentation of the power of the state, perhaps even to the point of controlling industrial prices, was necessary to protect labor and consumers.

Dominating the antitrust landscape of the Progressive Era was the Supreme Court’s decision in the case against the Rockefeller empire, Standard Oil Co. of New Jersey v. United States. The company was dismem-

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43. Quoted in G. Mowry, The Era of Theodore Roosevelt 134 (1958). Thus Roosevelt put more faith in direct regulation of business than in the antitrust approach. He turned to the latter only when his congressional initiatives toward regulation were stymied. Id. at 133-34.

44. Quoted in Hofstadter, supra note 36, at 257.

45. Id. at 254.


47. Id. at 290.

48. The antitrust enforcement efforts of the Progressive Era were remarkably extensive, although the ultimate results were less impressive. Between 1906 and 1920, in addition to the attack on railroad mergers, nearly every major instance of high market share was challenged, including a majority of the ten largest industrial corporations. The list included tobacco, oil, gunpowder, corn products, cans, steel, telephones, meatpacking, sugar, shoe machinery, and farm equipment. Oligopoly, as opposed to monopoly, was not the prime target, and after 1913 dissolution rarely resulted. Shepherd, supra note 23, at 188.

49. 221 U.S. 1 (1911). Coercion of railroads into granting preferential rates, price dis-
bered and Justice White's long and involved opinion became a landmark for its enunciation of the "Rule of Reason." Justice White declared that the operation of a competitive market would itself be "the most efficient means for the prevention of monopoly." He proposed a "standard of reason" by which courts in the exercise of their judgment would protect the operation of the market and discern those arrangements which fostered monopoly. Freedom of contract was to be protected, but only when "not unduly or improperly exercised."

It remained to state what exercise was unreasonable, undue, or improper. Justice White concluded that the expansion of the New Jersey company to dominate the market created a prima facie showing of intent which was confirmed by the predatory practices. From this a reader might infer that a dominant firm would not be condemned in the absence of predatory practices. Absent such practices, the market mechanism would prevent monopoly from arising. If this were true, then conversely, only those practices could be condemned as predatory which were inconsistent with market efficiency. In this reading, Standard Oil's rule of reason and the efficiency test are one and the same.

It is not clear from Standard Oil, however, what Justice White would have done if confronted with an example of a firm which rose to dominate an industry without engaging in Rockefeller's practices. His understanding of the objectives of the antitrust laws was such that he might have sacrificed productive efficiency to control massive size. The law, he said, was designed to protect competitive conditions, develop trade, protect the general public as well as the rights of individuals, and also prevent practices which would enhance prices. So stated, the objectives of the law are too broad to conclude that White's single aim was efficiency.

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50. Id. at 62.
51. Id. at 60, 62.
52. Id. at 62. Thus, the Sherman Act could not be struck down on the claim that it would annihilate all contracts and thus all trade. See Northern Sec. Ry. Co., 193 U.S. at 410-11 (Holmes, J, dissenting) and text accompanying note 40 supra.
53. 221 U.S. at 76. In rejecting the notion that the trust lacked an intent to monopolize, Justice White concluded that exclusive control over the transportation, marketing and distribution of oil "leads[s] the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention." Id. at 77.
54. See text accompanying note 50 supra.
55. See BORK, supra note 16, at 34.
56. 221 U.S. at 58.
57. See id. at 42-43. The idea that White might find occasion to condemn monopoly unaccompanied by predatory practices finds support in his discussion of those practices. He
Probably the Court's grasp of the matter was intuitive and cannot be fitted into the mold of rigorous economic theory. Groping for standards to implement the broad terms of the Sherman Act, the opinion continued to bind in an uneasy relationship the objectives of efficiency and the protection of some vaguely defined interest of "the general public" and "the rights of individuals."\textsuperscript{58} Unfortunately, by emphasizing the flagrantly predatory behavior of Standard Oil as evidence of its intent, Justice White appeared to be distinguishing between "good" and "bad" trusts. If this were true, under Standard Oil, a monopoly might not be condemned if its rise to power were more cautious and unaccompanied by the practices in issue. The subsequent failure of the government's case against U.S. Steel\textsuperscript{59} seemed to confirm these fears. In contrast, if intent were important, even a firm whose size was justifiable on efficiency grounds might run afoul of antitrust zealots because, by some definition of wrongful intent, its purpose in expanding was illegal.\textsuperscript{60} Thus, the proponents of antitrust enforcement thought White had emasculated the Sherman Act, but business interests thought he had set them adrift on a sea of doubt and uncertainty.\textsuperscript{61}

The result was a series of compromises which gave rise to the Clayton Act\textsuperscript{62} and Federal Trade Commission Act.\textsuperscript{63} The echoes of Standard Oil were apparent in the public discussion. Anybody who read the newspapers, said Woodrow Wilson, knew what the evil practices were and "any decently equipped lawyer" could propose legislation "by which the whole business can be stopped."\textsuperscript{64} Thus a list of forbidden practices found its stated that not only was there a prima facie case against Standard because of its size, but culpable intent was confirmed by the predatory practices. \textit{Id.} at 75. He insisted, however, that these practices were considered not for whether they were illegal in themselves, "but solely as an aid for discovering intent and purpose." \textit{Id.} at 76. This suggests that culpable intent might exist even without such practices.

\textsuperscript{58} 221 U.S. at 58.
\textsuperscript{59} United States v. United States Steel Corp., 251 U.S. 417 (1920). \textit{See also} text accompanying notes 71-77 infra.
\textsuperscript{60} \textit{See Bork, supra} note 16, at 38.
\textsuperscript{61} \textit{See G. Stocking, Workable Competition and Antitrust Policy} 20-23 (1961).
\textsuperscript{63} 38 Stat. 717 (1914) (current version at 15 U.S.C. §§ 41-57 (1976)).
\textsuperscript{64} W. Wilson, \textit{The New Freedom} 172 (1913), \textit{quoted in} Stocking, \textit{supra} note 61, at 21. Others, however, were less sanguine about this approach and more fearful that the resourceful captain of industry could circumvent any list of specified forbidden acts. The solution was the creation of the Federal Trade Commission which could assess "the competitive effects likely to result from various dodges that powerful firms might adopt in their quest for market power." A. Neale, \textit{The Antitrust Laws of the U.S.A.} 179 (2d ed. 1970). It did not escape the defenders of business, however, that such an arrangement might not be all bad. One of J.P. Morgan's partners had told the Senate that what was needed was "a business court or controlling commission, composed largely of experienced businessmen," which would license corporations, immunizing them from antitrust attack.
way into law via the Clayton Act.\footnote{The Clayton Act, 15 U.S.C. §§ 12 to 27 (1976), forbids one corporation to acquire the stock or assets of another corporation when the effect of such an acquisition may be substantially to lessen competition between them. The Act also deals with tying arrangements, exclusive dealing agreements, and requirement contracts.}

The stress on specific kinds of business practices may have fit the temperment of the Wilson era and the President's own penchant for a moralistic approach to public policy. Apart from the merger provisions which were soon gutted by the Supreme Court,\footnote{Two notable decisions undermining the merger provisions of the Clayton Act were International Shoe v. FTC, 280 U.S. 291 (1930) and Arrow-Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587 (1934). In \textit{International Shoe}, the court narrowly defined the lessening of competition necessary to trigger the Clayton Act prohibition. Although competition might have been reduced by the merger, since a large portion of the business of the two firms was in different markets, there was no antitrust violation. See Neale, \textit{supra} note 64, at 181 n.1. In the \textit{Arrow-Hart} case the Supreme Court stated that the Clayton Act addressed acquisitions of stock not assets, and that the FTC could not deal with an asset acquisition even if it arose out of a stock acquisition. One commentator concluded: "Thus ended, for most practical purposes, any potential section 7 ever possessed as a limitation on mergers." L. Sullivan, \textit{Handbook of the Law of Antitrust} 590 (1977).} Perhaps no phrase better expresses the continuing tension in antitrust goals than does Wilson's declaration that he was "for big business" and "against the trusts."\footnote{Quoted in Hofstadter, \textit{supra} note 36, at 256.} It turned out that Wilson favored a return to a society of small business units no more than Roosevelt. Moralist that he was, Wilson's alternative to both fragmentation and regulation was amelioration of business behavior. Not free competition, but illicit competition, was at the root of monopoly. A business that grew large through superior industry and skill deserved to survive.\footnote{Miller, \textit{supra} note 67, at 137.}

Thus, while much ink had been spilled, it was not evident that during the Progressive Era the law had advanced beyond the \textit{Standard Oil} decision. Wilson and White apparently both cherished the belief that dangerous size would not exist in the absence of bad behavior. Should this belief prove wrong, however, large firms might emerge without engaging in the forbidden practices. Under the guise of efficiency, the economic chilling effect on freedom feared by Wilson might spread. This seemed to be the

\textit{Hearings on S. Res. 98, Before Senate Comm. on Interstate Commerce, 62d Cong., 1st Sess. 1092 (1911) (testimony of G.W. Perkins).}

\textit{65. The Clayton Act, 15 U.S.C. §§ 12 to 27 (1976), forbids one corporation to acquire the stock or assets of another corporation when the effect of such an acquisition may be substantially to lessen competition between them. The Act also deals with tying arrangements, exclusive dealing agreements, and requirement contracts.}

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\textit{67. The stress on behavior expressed itself for many years in the preoccupation of the FTC with unfair and deceptive practices. Ironically, these appear more frequently in the most competitive industries. See Address by J. Miller, Fordham University Wilson Centennial Lecture (April 26, 1956), reprinted in \textit{The Philosophy and Policies of Woodrow Wilson} 141 (E. Latham ed. 1958) [hereinafter cited as Miller].}

\textit{68. Quoted in Hofstadter, \textit{supra} note 36, at 256.}

\textit{69. Miller, \textit{supra} note 67, at 137.}
lesson of United States v. United States Steel Corp.\textsuperscript{70}

U.S. Steel was an agglomeration of one hundred and eighty previously independent firms. At the time of trial it controlled forty-one percent of the market and was America's first billion dollar corporation, making it "the greatest combination that had come out of the country's greatest combination movement."\textsuperscript{71} Nevertheless, the Supreme Court refused to condemn the steel company because "the law does not make mere size an offense or the existence of unexerted power an offense. It, we repeat, requires overt acts. . . ."\textsuperscript{72} The government had urged that even if U.S. Steel did not exercise its power over prices "the power it may have, not the exertion of the power, is an abhorrence to the law." Further, it claimed that the wrongful purpose present in Standard Oil was merely a "matter of aggravation."\textsuperscript{73} But the Court could not swallow this. Characterizing the government's proposition as "paternalism," the Court asked whether it would not lead to a situation in which business activities were "encouraged when militant, and suppressed or regulated when triumphant because of the dominance attained."\textsuperscript{74}

Thus, where power was unexercised and the "brutal"\textsuperscript{75} practices of the Standard Oil Company were lacking, the trust would not be condemned. It appeared that the question left open by Justice White in Standard Oil was resolved. Without bad behavior there could be no antitrust violation. Another aspect of the law that seemed clarified was the relevance of efficiency—at least as the Court now understood the term. Counsel for the company specifically referred to the aim of achieving economies of scale as the basis for the combination.\textsuperscript{76} It was "a vision of a great business . . .

\begin{thebibliography}{9}
\bibitem{70} 251 U.S. 417 (1920).
\bibitem{71} STOCKING, supra note 61, at 139.
\bibitem{72} 251 U.S. at 451.
\bibitem{73} Id. at 450.
\bibitem{74} Id.
\bibitem{75} Id. at 455.
\bibitem{76} Id. at 443. The Supreme Court gave weight to this argument in a way that had portent for the future. See note 102 infra and accompanying text. Although the Court noted that size alone was no offense, it nevertheless admitted that there was some appeal in the government's argument. 251 U.S. at 451. Thus, the Court proceeded to other grounds for its refusal to dismember the company. It was an equitable concern, said the Court, that prosecution had not been commenced until ten years after the origin of the combination. Id at 451. The consideration was not one of time, but "the many millions of dollars spent, the development made, and the enterprises undertaken; the investments by the public that have been invited. . . ." Id at 453. Moreover, the Court found the government's proposed remedy unworkable and inconsistent. The government would have exempted the foreign steel trade from the decree. The Court responded that it could not see how the Steel Corporation could be such a beneficial instrumentality in the trade of the world and yet have such an evil effect on United States trade as to merit destruction. Id. The Court therefore concluded that destruction of the combination would risk injury to the public interest, including
\end{thebibliography}
which by reason of the economies thus to be effected . . . could successfully compete in all the markets of the world." 77

The New Deal no more than the Progressive Era could find a satisfactory solution to the conflict between efficiency and the political goals of antitrust. This was not, however, for want of enthusiasm or effort. It is difficult in retrospect to recall the public animus toward business that could impel a president to excoriate "entrenched greed" and "resplendent economic autocracy." 78 Seriatim, the New Dealers tried a variety of weapons to bring business into line with what the second Roosevelt called government's obligation to create "a democracy of opportunity." 79 The results, however, were equivocal. First came the proponents of the National Recovery Administration (NRA). 80 If the vicissitudes of the market produced depression, and if large scale and coordinated action produced efficiency, then perhaps by replacing the rigors of the market with cooperation, NRA could end the depression. But even before the Supreme Court invalidated the NRA, 81 the Act was in trouble, not least from those who were most critical of business. Both the antitrusters and liberal planners

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77. 251 U.S. at 443.
79. Burns, supra note 78, at 272.
80. The National Recovery Administration was established by the National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933), as amended by S.J. Res. 113, 49 Stat. 375 (1935).
81. The Supreme Court invalidated the NRA in Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). Under the NRA, the President was authorized to formulate codes for fair competition in any industry when necessary, in order to effectuate the policy of the Act. In Schechter, the Court invalidated a criminal prosecution for violation of the Live Poultry Code issued under the NRA. The Court stated that the virtually unfettered discretion of the President in approving and prescribing codes was an unconstitutional delegation of legislative authority. Id. at 542.
found the NRA the worst of both worlds because it permitted cartelization without seeming to advance either consumer welfare or democratic political goals. The reason was not far to seek: since the codes were the result of bargaining among existing groups, the well organized, usually business, were favored.

After the demise of NRA, the play shifted to the trustbusters. Broadly speaking, they included not only those who wielded the power to enforce the antitrust laws, but a phalanx of New Dealers who believed in the decentralization of wealth and power. Their program included legislative reform of banking, the utilities companies, and securities regulation, and it reflected high aspirations for redistributing wealth through taxation. The centerpiece was the trustbusting of Thurman Arnold, but in the end the policy of decentralization did not prevail. Arnold's position embodied the old dilemma of the trustbusters. He was willing to countenance concerted action for the sake of efficiency. Small was not beautiful when the country faced continued depression. Large organization was good if it was efficient and seemed to benefit the consumer.

**Notes:**

82. Although the NRA encouraged the growth of new trade associations, it also fostered collusion and cartelization. As most planners viewed it, however, tacit government acceptance of private monopolistic schemes merely worsened the economic imbalance brought on by the depression. This imbalance resulted in reduced purchasing power, higher prices, and lower profits, and also fostered inefficiency. Hawley, supra note 78, at 132-33, 277.

83. Id. at 71, 136. Since the highly organized groups had formulated a cohesive set of demands, it naturally followed that the political bargaining process would favor their position over the unstructured and less organized. Comprehensive planning never had the support necessary to make it a reality apart from wartime. In piecemeal planning the pressure groups involved were usually producers and accordingly regulation often imposed restrictions on competition. This was true in agriculture where the aim was to support higher prices and reduce output and in labor relations where the aim was higher wages and job security. It was also true in natural resources and transportation where often the result was to foster inefficiency. Id. at 277. Similar difficulties were encountered with central planning in wartime. See note 255 infra. See also text accompanying notes 211-13 infra.


87. Hawley, supra note 78, at 344-59.

88. Id. at 428. Moreover, the momentum dissipated during World War II. The power to grant antitrust immunity was given to the War Production Board and the Antitrust Division cancelled investigation of major industries, including steel. Id. at 442. Political pressure groups often were more interested in exemption from competition than in enforcing it. The necessary support for prosecution could be mobilized only against groups that had precipitated widespread public hatred or in instances of conflict within business' own ranks. Id. at 302.
For all this, the fruits of the Arnold period were significant. Foremost was the decision in the suit against the Aluminum Company of America (Alcoa). Alcoa gave rise to an opinion by Judge Learned Hand that marked a new attempt to reconcile the economic with the non-economic goals of antitrust doctrine. Denying the argument that Alcoa could not be condemned because it had not earned monopoly profits, Judge Hand stated that the Sherman Act has "wider purposes than maintaining a lid on profits." Although Congress might have condemned only those monopolies which could not show they "had adopted every possible economy that was not the way Congress chose; it did not condone 'good trusts' and condemn 'bad' ones; it forbade all." Then the judge explicitly addressed the grounds for the purported sweeping condemnation of the trusts: those not necessarily based on economic motives alone. Hand recognized the possibility that Congress might prefer, because of its indi-

89. The years between 1938 and 1952 stand beside those of 1906 and 1920 as the second great wave of antitrust prosecution. Although the firms challenged were not as uniformly dominant as those subject to the first wave, the list included nearly all major firms with shares of the market over 50%. The assault was mounted in the aluminum, communications, motion pictures, cans, shoe machinery, fruit, tobacco, cellophane, and data processing industries. NBC had to divest the "network" that became ABC. National Broadcasting Co. v. United States, 319 U.S. 190 (1943). Pullman divested its sleeping car business. United States v. Pullman Co., 50 F. Supp. 123 (E.D. Pa. 1943), aff'd per curiam, 330 U.S. 806 (1947). Paramount's vertical integration was dismembered. United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948). DuPont was forced to give up its General Motors holdings. United States v. E.I. duPOnT deNemours & Co., 353 U.S. 586 (1957). DuPont was acquitted in the cellophane case, however, United States v. E.I. duPOnT deNemours & Co., 351 U.S. 377 (1956), and cases against Western Electric and IBM were abandoned. Again, oligopoly did not feel the brunt of the effort, and virtually no dissolution in manufacturing resulted. SHEPHERD, supra note 23, at 185-89.

90. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). The Second Circuit acted as a court of last resort because there was no quorum on the Supreme Court. Judge Hand's decision was later approved by the Supreme Court in American Tobacco Co. v. United States, 328 U.S. 781, 813-14 (1946). When suit was filed in 1937, Alcoa was the only domestic producer of virgin ingot. The charge was a violation of section 2 of the Sherman Act. See United States v. Aluminum Co. of America, 44 F. Supp. 97 (S.D.N.Y. 1944).

91. Hand accordingly viewed the issue of profits as "irrelevant." 148 F.2d at 427.

92. Id. This congressional approach would have implied "constant scrutiny and constant supervision, such as courts are unable to provide." Id.

93. Id.

94. Economic reasons could be given for a blanket prohibition on monopoly, said Hand. Id. at 428. The unexercised power of a monopoly was as dangerous as the admitted danger of a price fixing conspiracy. Id. The distinction between power alone and power accompanied by bad acts, he reasoned, was erased by the recognition in the Clayton Act that "practices harmless in themselves will not be tolerated when they 'tend to create a monopoly.'" Id. Moreover, the ban on monopolization stems from the further belief "that great industrial consolidations are inherently undesirable, regardless of their economic results." Id. Thus he saw the aim of the Act as "to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units . . . ." Id. at 428-29.
rect social or moral consequences, a system of small producers over "one in which the great mass of those engaged must accept the direction of a few."

Perhaps all of this discussion was meant only to provide the grounds for a presumption against size. Hand immediately conceded that the existence of monopoly did not necessarily mean there had been the "monopolization" forbidden by the words of the Sherman Act. The company "may not have achieved monopoly; monopoly may have been thrust upon it." Intent might therefore still be relevant. It turned out, however, that the kind of intent for which Hand would search was not the flagrant practices relied upon in *Standard Oil*. Size "magnified" to a monopoly and "utilized" for abuse was sufficient. 

"[N]o intent is relevant except that which is relevant to any liability, criminal or civil: i.e., an intent to bring about the forbidden act." 

*Alcoa* has been attacked for arrogating to the judiciary the power to make decisions regarding social and political objectives which, if made at all, can only be at a cost to consumers. Such non-economic objectives are said to be inappropriate, in any event, for judicial decision because they lack clear standards and should be left to the political process. 

95. *Id.* at 427.  
96. *Id.* at 429.  
97. *Id.* at 416. The "abuse" was not the equivalent of Rockefeller's behavior. Assuming no "moral derelictions," the only question was whether Alcoa had achieved monopoly without seeking it. The answer was clear: 

It was not inevitable that it should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. . . . [I]t face[d] every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel . . . . 

*Id.* at 431.  
98. *Id.* at 432.  
99. BORK, supra note 16, at 51-55, 82-84. *Alcoa* has also been attacked on the grounds that Judge Hand violated the teaching of the *Steel* case which, in his view, ruled that "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins." 148 F.2d at 430. See also Director & Levi, *Law and the Future: Trade Regulation*, 51 NW. U.L. REV. 281, 286 (1956). The opinion has also been criticized on the grounds that it invites oligopolistic behavior by discouraging successful firms from engaging in vigorous competition as they acquire dominant market position. GELLHORN, supra note 76, at 148, 150.

The contention that Judge Hand had invited oligopolistic behavior simply points up a central dilemma in the antitrust laws. Faced with a choice between monopoly and oligopoly, the law has chosen the latter as the lesser evil. It is a cliche that General Motors plans its conduct with one eye on the enforcement agencies lest it be blamed for eliminating American Motors. Hand simply confronted the riddle that Justice White had avoided by assuming that competition would inevitably prevent monopoly. The question was what to do if it did not.
toric context, however, *Alcoa's* implications seem less extreme. The actual record of enforcement after *Alcoa* does not warrant great alarm. The difficulty of dismembering a giant corporation has been compared to the task of unscrambling eggs, and the courts have paused before wielding the ultimate trustbusting weapon. Thus, although *Alcoa* altered the emphasis in the antitrust tradition, it hardly revolutionized the law or American industrial structure. The presumption in favor of size which had been announced in the steel case was finally laid to rest and perhaps reversed, but antitrust doctrine still vacillated between the poles of efficiency and social criteria staked out by Hand.

Merger law well illustrates the continuing tension between efficiency and social criteria in antitrust. After the Supreme Court's emasculation of the Clayton Act's merger provisions in the early 1930's, antimerger activity was quiescent until the FTC warned in a 1948 report that unless something was done about a perceived trend toward corporate concentration...
tion, "the giant corporations will ultimately take over the country." An amended and strengthened Clayton Act was applied in a series of stringent Supreme Court rulings.

In Brown Shoe Co. v. United States, the Court asserted that the basis for the new antimerger law was not only the fear of concentration, but a belief in the "desirability of retaining 'local control' over industry and the protection of small businesses." The antimerger rules became so strict that in United States v. Von's Grocery Co., Justice Stewart remarked that "[t]he sole consistency that I can find [in the cases] is that in litigation under [section] 7, the Government always wins." Nevertheless, in United States v. General Dynamics Corp., the Supreme Court returned to a more balanced consideration of whether specific market shares would actually have an anticompetitive effect. The antimerger campaign of the 1960's appears, therefore, to have abated.

104. See GELLHORN, supra note 76, at 304.
106. 370 U.S. 294 (1962). In Brown, the Government sought to enjoin the merger of two corporations on the grounds that it might substantially lessen competition in violation of § 7 of the Clayton Act, as amended in 1950. The Court looked to the legislative history of the 1950 amendments in concluding that Congress intended that a variety of economic and other factors should be considered in determining whether a merger was consistent with the provisions of the Act. The 1950 amendments to the Clayton Act were designed to prevent corporations from acquiring another corporation by means of the acquisition of its assets. See generally H.R. REP. No. 1191, 81st Cong., 1st Sess. (1949). Prior to the amendments, the law prohibited only the acquisition of the stock of a corporation. Since the acquisition of stock often resulted in control of the corporation's underlying assets, the Court stated Congress believed that a failure to prohibit the direct purchase of corporate assets abrogated the spirit of the law.
107. Id. at 315-16.
108. 384 U.S. 270 (1966). Justice Stewart's lengthy dissent charged the Court with turning its back on the two basic principles underlying the Clayton Act. First, Stewart argued, corporate acquisitions are to be viewed in light of the current economic context of the relevant industry. Second, § 7 of the Clayton Act was intended to protect competition, not competitors. Id. at 281-82 (Stewart, J., dissenting).
109. Id. at 301.
110. 415 U.S. 486 (1974). In General Dynamics, the Government charged that the acquisition of a large producer and supplier of coal by another coal producer was a violation of § 7 of the Clayton Act. The Supreme Court affirmed the district court's finding that the acquisition did not violate the Act and that while the Government's evidence—primarily statistical—supported a finding of "undue concentration," the district court was justified in considering other pertinent factors affecting the coal industry. Id. at 508-10. The Court looked to pre-acquisition evidence relating to changes and patterns of the coal industry which indicated that no substantial lessening of competition would result from the acquisition. Id. at 504.
111. Moreover, it is arguable that, by itself, a strict antimerger approach does not disturb, and may even consolidate, the position of dominant firms. The dominant firm has less to
Thus, the picture of antitrust that emerges from this historical survey is Janus-faced. Now, as from the beginning, it sometimes looks in opposite directions. Robert McCloskey wrote that in the field of constitutional law, the American delegation of power to the courts reflects a compromise between the doctrine of popular sovereignty and the doctrine of natural law.\footnote{112} Likewise with antitrust, Congress and the electorate have delegated to the courts the resolution of conflicting American desires for material abundance and a society structured to preserve political and economic liberty. The result has been a mild restraint upon business behavior with little disturbance of its underlying structure. Whether this is sufficient to preserve either abundance or liberty is doubtful.

In the case law, efficiency criteria have generally prevailed.\footnote{113} If other antitrust goals were implicitly recognized, it was assumed, as in Standard Oil, that the deconcentration necessary to achieve market efficiency would also achieve the social objectives of antitrust. Thus, as pressure mounted to depart from the deconcentration approach of antitrust, antitrust doctrine provided no principled way to decide whether the arguable efficiencies of large scale should be sacrificed in the name of other antitrust objectives. Even Alcoa, which explicitly recognized the non-economic goals of antitrust, stated only that in the case of a conflict with efficiency, social goals might prevail and divestiture might be ordered.\footnote{114}

In failing to analyze why deconcentration was socially desirable, antitrust doctrine provided no guide and suggested no alternative when the pressure to abandon the deconcentration approach became too strong to override or ignore. Moreover, in relying on deconcentration to achieve its political goals, antitrust doctrine simply ignored industries in which the number of firms was sufficient to foster competition and yet the industry was able to wield undue influence in the political process. In short, the cases either ignored the political goals of antitrust or failed to adumbrate an analytical framework to fulfill the underlying policy objectives of the law.

For the reasons which follow, the failure of the case law to deal with the conflicts in antitrust doctrine has become an increasingly serious problem. In a simplistic model of antitrust, economic and political goals might be attained simultaneously. The emphasis on deconcentration and preserv-
tion of numerous competitors might also minimize the influence of economics on political power. A situation of truly free enterprise would result. In a search for criteria to guide industrial policy, there is a certain appeal in the simplicity of this model of antitrust. Yet, this standard of the market was, in many instances, long ago abandoned, often because the market failed to operate to yield the competitive price and efficient allocation of resources portrayed by theory.

Moreover, although a considerable body of academic learning supports the proposition that large scale is not necessary for economic efficiency and that competition, rather than regulation, is the optimum approach, large

115. Where the market standard is abandoned, doesn't one "set sail on a sea of doubt" as Judge Taft wrote in 1898 in United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898). Thus, experience in regulation of public utilities indicates how difficult it is by non-market means to set rates which are not so low as to deny a fair return to investors or so high as to cheat customers. Most troubling, perhaps, is that the more commodities and services are priced by non-market means, the more difficult it becomes to set rates. Fewer reference points or prices exist which accurately reflect the sacrifices the economy must make to produce the item for which the government agency wishes to set rates. Is it possible to arrive at a reasonable rate for electricity when the price of oil to run the generators and produce the electricity is also fixed by non-market means? This raises the problem of so-called second best analysis. See 1 A. KAHN, THE ECONOMICS OF REGULATION 44, 69 n.17, 195-98 (1970). For general discussion of the economic defects of regulation see SHEPHERD, supra note 23, at 148-54, 225-58 and C. WILCOX, PUBLIC POLICIES TOWARD BUSINESS 463-78 (3d ed. 1966).

116. It was recognized at an early date that the market would yield a "natural monopoly" in some instances. This accounts for the recourse to regulation in utilities like electricity. It was also recognized that there are certain goods which will not be supplied unless they are supplied through collective effort. Examples of such goods are parks and national defense. Such goods are characterized by the "free rider" problem, with respect to which it is difficult for the producer to charge those who benefit. Those who refuse to pay, benefit regardless from the results for which others pay. If reliance is placed upon the market no one will find it worth his while to produce these so-called social goods. Samuelson, The Pure Theory of Public Expenditure, 36 Rev. Econ. & Stat. 387-89 (1954).

Another situation of market failure which precipitates government intervention is that of "ruinous competition," arising in situations of overcapacity and high fixed costs accompanied by low or decreasing incremental costs. The railroads exemplify this situation. Because plant investment in such an industry is enormous and immobile, when customer demand fluctuated, pressure was created to compete for customers in the only way available—through price wars. This included resort to price discrimination and predatory pricing below cost. Thus, investments were wiped out through price rivalry; customers were confronted with erratic prices and workers were faced with erratic employment. The pressures led to collusion and cartel. Jones, The Public Service Enterprise and the Deregulation Debate, 45 Antitrust L. J. 197, 200 (1976). In a sense, the market was operating, at least until cartel resulted; but the consequences of the market's operation were socially unacceptable and regulation was imposed. As will be discussed, something akin to the difficulties of the railroads may be recurring today in the steel industry. See text accompanying note 198 infra. See also 2 AREEDA & TURNER, supra note 10, at ¶ 412 (ruinous competition).

117. See Asch, Industrial Concentration, Efficiency and Antitrust Reform, 22 Antitrust Bull. 129, 131 n.10 (1977), and authorities cited therein. In many instances where the
scale firms persist.\textsuperscript{118} Although evidence indicates that some positions of market power are subject to natural erosion, most significant market power persists.\textsuperscript{119} Eastman-Kodak and General Electric have held their dominant positions since the beginning of the century; Coca-Cola, Campbell Soup and General Motors since the 1920's; Kellogg and Procter & Gamble since the 1940's.\textsuperscript{120} In spite of the theoretical possibility of smaller units of efficient scale, a number of factors militate in favor of large scale and buttress entrenched market power.\textsuperscript{121}

orthodoxy of competition was abandoned, there is now a clamor for a return to the faith through "deregulation." Regulatory agencies are accused of colluding with industry at the expense of the customer. It seems apparent, for example, that easier entry into the airline and trucking industries would yield benefits to the public almost immediately. See Weaver, \textit{Unlocking the Gilded Cage of Regulation}, \textit{Fortune}, Feb. 1977, at 179. Nevertheless those who seek sweeping deregulation face a paradox in the persistence of many large scale firms discussed in the text.

118. Ten to fifteen percent of all manufacturing relates to military and space production and is, therefore, not even directly subject to market forces. At least half of American manufacturing takes place in industries where the leading four firms control 40% or more of the market—in other words oligopolistic industries. \textit{Scherer, supra} note 15, at 59-60. Without entering the debate over whether industrial concentration is increasing, it can be remarked that in 1962 the 100 largest manufacturing corporations held nearly half the total assets in the country. \textit{J. Blair, Economic Concentration} at 68, 74 (1972). In three-fifths of all industries, the 200 largest firms employ, on the average, nearly half the workers. \textit{Id. Scherer, supra} note 15, at 99, states that since World War II concentration has decreased in producer goods industries but increased in consumer goods. See also note 369 infra.

119. \textit{Shepherd, supra} note 23, at 113-20, 129.

120. \textit{Id.} at 117.

121. First, although production economies of scale are not thought to account for the existing large size of corporations, they are important in new industries. \textit{Shepherd, supra} note 23, at 218. Furthermore, while more firms might exist in mature industries, the picture is still not one approaching the image of the classical market, populated by a forest of competitors. As long ago as 1951, economies of scale indicated the possibility of as few as 40 United States plants of optimal scale in the steel industry and 10 in automobiles. \textit{Scherer, supra} note 15, at 83.

The prevalence of managerial and research and development (R & D) economies of large scale is debatable, but it seems likely that they are significant in some instances. A respected management concern called the Boston Consulting Group (BCG) advises clients to concentrate only on markets in which they are or can become one of the top three in market share. This approach seems to be based in part on findings that companies with high market shares have lower costs because they have greater experience. \textit{Unless You Can Be a Winner, Don't Play}, \textit{Forbes}, Oct. 15, 1977 at 132. See also \textit{Winter, Corporate Strategies Giving New Emphasis to Market Share, Rank}, Wall St. J., Feb. 3, 1978, at 1, col. 6; \textit{Symposium on the Economics of Internal Organization}, \textit{6 Bell J. of Econ.} (1975). With respect to the relationship between market share and profits, see \textit{Shepherd, supra} note 23, at 41-44, 92-105, 197-200.

Prevailing wisdom says that research and development is not a source of scale economies because small firms are likely to be the most innovative. Large firms may attempt to reap continued benefits from monopoly positions in the old technology. Yet, often it takes the resources of a large firm to develop the potential of an innovation initiated by a small firm.
Not the least important reason for this persistence of market power is the caution of the courts in dealing with such power. Whatever the theoretical possibility of massive trustbusting, such an effort has not materialized. The caution of judges is reinforced by disagreement among economists. It is argued by some that a merger or increase in scale which achieves even minor decreases in costs will offset significant price increases, resulting in a net efficiency gain. Others assert that efficient scale varies from firm to firm, and that whatever a firm’s size may be is the size efficient for that firm. Economists Elzinga and Breit, however, conclude that efficiency provides no clear guide to divestiture policy.

Accompanying the caution against dismemberment of large firms is the argument that the persistence of large firms and oligopolistic industries does not produce the evils envisioned in the orthodox model of antitrust. “Workable” competition, it is said, can take place with only a few firms in

1Thus, major advances in efficiency of diesel engines were only made after General Motors bought out two small companies that initiated the technical improvements. Scherer, supra note 15, at 357.

A significant force encouraging large-scale may be the imperfection of capital markets. It has been argued that large firms develop ongoing relationships with large banks and that a bias is created against lending to smaller firms. Shepherd, supra note 23, at 27-28. A wave of banking mergers between 1950 and 1963 created a highly monopolistic structure in banking which may tend to “replicate itself” in the industries with which the banks have relations. Id. at 29, 174.

There is substantial consensus that advertising, especially TV advertising, and design and model changes, contribute to concentration in consumer goods industries. See Blair, supra note 118, at 308-38; W. Comanor & T. Wilson, Advertising and Market Power (1974). The same is true of patents, sundry grants and privileges received from the government. Blair, supra note 118, at 372-402; Shepherd, supra note 23, at 218-19.

Finally, as old regulatory forms wither, contemporary views regarding the tolerable side effects of market functioning create new pressure to displace the market. In effect, many goods and services which were previously left to the market are now considered social goods with which the market does not deal satisfactorily. Housing, urban mass transit, health care, energy resource development and pollution control may fall into this category. The list of these social goods seems to lengthen as society becomes more complex and social attitudes evolve. Thus, the prospects increase for greater displacement of the market. See note 174 and accompanying text infra. In some instances the efforts to ameliorate social problems actually aggravate other tendencies toward increasing corporate size. For instance, compliance with pollution control requirements can now amount to 10% of investment for new plants in the steel industry, thereby increasing the difficulty of obtaining necessary capital in an industry already characterized by enormous capital costs. W. Hogan, The 1970s: Critical Years for Steel 34 (1972).

122. See note 101 supra.
124. Id. at 106.
125. Elzinga & Breit, supra note 101, at 106 concluded: “The conceptual underpinnings of the economics involved can be articulated with a modicum of precision, but the application of this analysis to specific [divestiture] problems would be extremely complicated.”
the market.\textsuperscript{126} The conclusion which emerges is that the old antitrust emphasis on deconcentration to maintain numerous firms in the market is misguided because it reduces productive efficiency and because competition is "workable" with few firms.

From these conclusions emerges an argument for the presumptive legality of large size. Where there is doubt regarding the efficiency of a particular arrangement, the tie goes to the trust. "Cases may occur," states Professor Bork, "primarily in the fields of horizontal mergers and horizontal ancillary restraints, in which chances seem roughly equal that the activity is beneficial or harmful."\textsuperscript{127} In such cases it would be the "sheerest folly" to resolve the doubt by banning the conduct: "private restriction of output may be less harmful to consumers than mistaken rules of law that inhibit efficiency."\textsuperscript{128} Moreover, "when no affirmative case for intervention is shown, the general preference for freedom should bar legal coercion."\textsuperscript{129}

Thus, in the guise of the efficiency argument, the old presumption in favor of size, announced in the \textit{Steel} case and interred in \textit{Alcoa}, has been exhumed. Efficiency, as always, is a two-edged sword. The trustbusters invoke it to support their efforts, but so do those who contend that efficiency and large size are compatible. Proponents of antitrust may thus look with suspicion on recent cases like \textit{GTE Sylvania},\textsuperscript{130} which signalled the Supreme Court's renewed emphasis on the efficiency criterion. While

\begin{itemize}
\item \textsuperscript{126} See \textit{Scherer}, \textit{supra} note 15, at 36, 408. Areeda and Turner assert that it is "highly unlikely" that four-firm concentration ratios of 50 to 55\% will confer substantial market power. 2 \textit{Areeda \& Turner}, \textit{supra} note 10, at \S 407d. For a critique of the "workable competition" doctrine, see \textit{Stocking}, note 61 \textit{supra}.
\item \textsuperscript{127} \textit{Bork}, \textit{supra} note 16, at 133.
\item \textsuperscript{128} Id.
\item \textsuperscript{129} Id.
\item \textsuperscript{130} Continental T.V. v. \textit{GTE Sylvania}, 433 U.S. 36 (1977). Sylvania, in marketing its television sets, required its franchised dealers to sell Sylvania products only from the location at which they were franchised. Following the rule of United States v. Arnold Schwinn \& Co., 388 U.S. 365 (1967), the trial judge instructed the jury that it must find Sylvania's practice illegal if it restrained Sylvania's dealers by limiting the locations from which they could resell television sets. 433 U.S. at 40-41. No defense based on the reasonableness of the restraint was permitted. In other words, Sylvania could not argue that the restraint increased its competitive efficiency. The Supreme Court said this view of competition was too shortsighted. Noting that since instituting its location policy, Sylvania had improved its share of national T.V. sales from about two percent to approximately five percent, the Supreme Court concluded that some restraint of trade among its dealers might make Sylvania better able to compete with other manufacturers and improve overall efficiency in the market. \textit{Id.} at 38-39. See also United States v. General Dynamics Corp., 415 U.S. 486 (1974), discussed at note 110 \textit{supra}; \textit{National Soc. of Professional Engrs. v. United States}, 435 U.S. 679 (1978) (professional ethical canon which prohibits members from submitting competitive bids on its face restrains trade in violation of section 1 of the Sherman Act; public interest considerations other than competition policy not relevant).
\end{itemize}
in these cases, the Supreme Court has not given its imprimatur to the theory of presumptive legality of large scale, the emphasis on efficiency criteria may provide a basis on which proponents of the presumptive legality theory can build. For example, defenders of the oil industry contend that dismemberment of the major oil companies sought in the FTC's Exxon case and in some pending legislation would decrease efficiency and result in increased costs to consumers. Similarly, some proposals for resolving current difficulties in the steel industry envision relaxation of antitrust merger law to allow steel to benefit from the supposed increased efficiencies of larger scale operations. If efficiency is to be the polestar of antitrust policy, deconcentration in some industries may be doomed.

When, for efficiency or other reasons, pressure mounts for a departure from the deconcentration model, the antitrust tradition provides little in the way of guidance. In the past, when cases did not simply ignore the political goals of antitrust, such goals were assumed to be consistent with efficiency goals. Economic and non-economic objectives could be endorsed on the assumption that a program of deconcentration would achieve both. When it can be demonstrated, however, that efficiency requires a departure from deconcentration, antitrust has little to offer beyond the suggestion that efficiency goals may have to be sacrificed to social goals. This is a legitimate contention; but this doctrine—the doctrine of Alcoa—has never been fully implemented. Now, distinguished authority asserts that the economic costs of any significant program to disperse political power through antitrust enforcement would be prohibitive.

To the degree that this assessment of the effects of deconcentration overestimates the costs in efficiency, antitrust theory must still deal with the

132. See notes 4, 5 and accompanying text, supra.
134. See notes 184, 193-95 and accompanying text infra.
135. See notes 100, 114 and text accompanying notes 103 & 111 supra.
136. Areeda and Turner state:
Reasoning about the possible utility of pursuing populist goals must begin with the premise that antitrust policy is simply not going to sacrifice consumer welfare to the point of guaranteeing a very large number of producers in every market. . . . Once massive sacrifices of efficiency to preserve more numerous inefficient firms are ruled out, what remains is not likely, even to a committed populist, to make enough difference to be worth the effort. . . .
2 Areeda & Turner, supra note 10, at ¶ 111a. The authors offer no proof for the assertion that "massive sacrifices of efficiency" would be required to achieve "populist" goals. Id. at ¶ 111, 111a. Indeed, elsewhere in arguing the minimal significance of economies of scale, the authors suggest efficiencies gained from large scale are not pervasive. Id. at ¶ 408d. Nor do they, in view of their conclusion that antitrust cannot achieve populist goals, offer an alternative means to achieve those goals through industrial organization.
contention that consideration of the political factor mandated by *Alcoa* is no business of the courts. Professor Bork contends that *Alcoa* improperly authorized unfettered discretion for courts "to do good as the judge sees the good" with "no more guidance than that public injury is to be weighed against private benefit. . . . "  

He argues that judges should not arrogate to themselves such "legislative" authority, and that consideration of non-economic criteria results in the protection of inefficient firms and the imposition of a tax on consumers.  

The contention, however, that to weigh criteria other than efficiency protects inefficient firms and taxes consumers, even if true, merely restates the problem. Such a formulation ignores the fact that human beings exist as citizens as well as consumers and have interests in the former capacity as well as the latter.  

Failure to consider social and political criteria may protect unwarranted political power and tax the citizen's political influence. Moreover, as the previous discussion of the historical record reveals, actual implementation of non-economic considerations by the courts has been relatively restrained. The dialectic in antitrust between economic and social-political criteria has persisted. Although efficiency considerations have predominated, the other goals of antitrust policy have not been completely ignored. Such consideration of social-political criteria, as well as economic factors, appears to approximate the tenor of Congress and its diverse constituencies more closely than does some single-factor approach.  

Nevertheless, as has already been suggested, the antitrust approach may not provide adequate protection against unwarranted economic influence on politics for several reasons. Of primary significance is the existence of economic and social pressure to depart from the market. Also significant, and addressed at greater length below, is the possibility that the degree of deconcentration consistent with the economic goals of antitrust may not preclude the industry from wielding undue influence in the political process. Finally, there may be modes of economic influence on politics, such as the effect of advertising on popular attitudes, which are simply not significantly constrained by the antitrust approach. To the degree that antitrust fails to surmount these obstacles to enhancing democratic politics, it is therefore not enough to say that an antitrust court may legitimately consider the political goals of antitrust. Nor is it enough to assert that antitrust increasingly fails in pursuit of its political goals. Some alternative must be

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139. *Aristotle*, IX *Nicomachean Ethics* ch. IX, § 3: "[N]o one would choose to have all the good things of the world in solitude: man is a being meant for political association. . . . "
found. The obvious alternatives, however, are not attractive. The experience of countries in which total government ownership of industry prevails indicates great inefficiencies in such an approach and raises the spectre of concentrated governmental power and economic regimentation. This is the very opposite of Pertschuk's "pervasive distrust of concentration of power in a few hands" and of Learned Hand's abhorrence of "the direction of a few."

The task for the antitrust enforcement agencies and for those concerned about the influence of economic strength on political power is to weigh the political factor in choosing among alternative forms of industrial organization. Especially when economic and social imperatives are moving policy away from the market and away from deconcentration, it is necessary to discover how the salutary political effects of the competitive market can be reproduced without reliance on the classical market. The point is not that the market can never be relied upon, but that when it cannot, the old political goals of antitrust should not be abandoned. In order to devise means of avoiding unwarranted economic influence on the political system, however, it is necessary to consider the character of the influence which is to be prevented—an inquiry to which we now turn.

II. ANALYZING ECONOMIC INFLUENCE ON POLITICS

Although the political goals of antitrust have not been clearly defined, their significance in historical terms may have been crucial. Franz Neu-

140. Areeda and Turner argue that where efficiencies are the cause of large scale, antitrust efforts to maintain many small firms will be futile, since such efforts are contrary to economic imperatives. They also contend that preservation of the small inefficient firms is counterproductive in populist terms because it creates a special-interest pressure group seeking to retain its governmental protection. 2 Areeda & Turner, supra note 10, at ¶ 111, 111b. The first point, concerning the pressures to favor efficiencies over "populist" goals, suggests the need to explore means other than antitrust to achieve those goals—the purpose of the present article. The second argument—that preserving a dependent class of inefficient small firms conflicts with populist goals—is not self-evident. Populists might argue that the pressure of many inefficient firms is preferable to the clout of a few giants and furthermore that Areeda and Turner have set up a straw man. Populism might be satisfied with a tie-breaker rule that favors deconcentration in doubtful cases. Even from the standpoint of efficiency, however, the self-correcting capability of a market composed of numerous competitors is likely to be greater than a concentrated market. Finally, to the degree that antitrust or various social policies do result in maintaining special interest pressure groups, it is necessary to examine how the wider interests of the public can be achieved by other means. See notes 154, 167, 256 and accompanying text infra.

mann suggested in 1942 that the rise of fascism in Germany was facilitated by the absence of an antimonopoly tradition. The middle class did not oppose cartelization, and labor, following socialist ideology, favored concentration. One result, according to Neumann, was a lack of opposition to authoritarian control within the business world. In this historical perspective, the recent excesses of American big business are particularly troubling. For example, political campaigns inflated by illegal corporate contributions have impugned the integrity of democratic electoral machinery.

One big company attempted to insinuate itself into the making of foreign policy toward Chile in circumstances suggesting an effort to subvert and negate a foreign election.

The antitrust tradition is ill-equipped to respond to these new abuses of economic power, for it was an axiom of antitrust doctrine that decentralization in the economic sphere would further democratic political goals. Although the assumption was never entirely true, as a rule of thumb, the decentralization axiom was sound enough. But because the principal of decentralization was considered axiomatic, antitrust doctrine contains no analysis of its desirability from the perspective of politics.

This analytical gap might have been harmless if decentralization were always possible. For reasons suggested above, however, this is not the case. Accordingly, antitrust provides no general theory of the relationship between industrial organization and democratic politics which would provide guidance when social and economic conditions impel a departure from a policy of deconcentration. Even this might not have been a serious failure if public policy other than antitrust reflected such a theory. To a great extent, however, the limits of antitrust theory reflected the limits of

143. Neumann, supra note 142, at 22-33.
146. A major shortcoming of the assumption was that an industry may be competitive in economic terms yet wield undue influence in the political process. Moreover, there might be modes of economic influence on politics, such as advertising, that are not significantly constrained by trustbusting.
broader political-economic theory.\footnote{147} In the years following World War II, the weaknesses in antitrust doctrine did not cause much concern. Prevailing wisdom in political science took a serene view of economic influence on politics.\footnote{148} If the antitrust tradition provided an independent caution regarding the effects of economic power, it received little support from the social sciences. Indeed, not the least disturbing aspect of recent business malfeasance is that it was largely unanticipated by the prevailing academic analysis of business influence on politics. One sophisticated team of scholars concluded in 1963 that big business influence had declined during the preceding fifty years;\footnote{149} that its participation in the political process was relatively restrained;\footnote{150} that legislators were largely insulated from pressure tactics;\footnote{151}

\begin{footnotesize}
\footnote{147} Louis Hartz suggests that from the beginning, the “trust” problem reflected a pervasive tension between the America of liberal imagination and “a real social world that was beginning to deny it . . . .” \textit{L. HARTZ, THE LIBERAL TRADITION IN AMERICA} 237-39 (1955). In this view, the trust became a Progressive obsession because Americans sought to define economic reality in terms congenial to the inherited social orthodoxy of decentralization, familiar in liberal philosophers such as John Locke. \textit{Id.} at 232. Whatever the realities of industrial development, in theory, “[i]f the trust were at the heart of all evil, then Locke could be kept intact simply by smashing it.” \textit{Id.}

\footnote{148} In 1955, surveying “The Age of Reform,” the historian Richard Hofstadter said that while the hopes of the Progressives had not been fulfilled, their fears had not materialized either. The Progressives feared that beyond the expropriation of economic decision from the entrepreneur lay the increasing possibility of expropriation of political decision from the people. From the perspective of the 1950’s, however, the picture looked rosier. For one thing, aspirations had changed—few men felt the absence of opportunity for entrepreneurship as a great deprivation. Big business was thought to be technologically more progressive compared with smaller units. The change in methods of capital formation was said to have diffused the problem of the money trust. Labor had grown up as a countervailing force opposed to capital. The new class of salaried managers had more humane objectives than mere profits. \textit{R. HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R.} 254-55 (1955).

With the elapse of another twenty years, the complacence of the 1950’s seems a curiosity. In inflationary times, the countervailing power of organized labor against capital often seems to be transformed into a collusive force for raising prices at the expense of most consumers. The identity between size and efficiency seems variable in the wake of the dramatic failures of Lockheed and others. As for the objectives of the managerial generation that displaced the entrepreneurs, adventures in the overthrow of foreign governments and the illegal bankrolling of political candidates revive the nightmare of the Progressives—strangulation of democracy. Finally, and perhaps most important, there has been a resurgence of individualism and a resistance to the crushing collectivism of industrial and political bureaucracy. Regarding the conflicts between the demands of these bureaucracies and individual desires for self-expression, see \textit{D. BELL, THE CULTURAL CONTRADICTIONS OF CAPITALISM} (1976) at xxv.

\footnote{149} \textit{R. BAUER, I. POOL, \& L. DEXTER, AMERICAN BUSINESS AND PUBLIC POLICY} 488 (1963).

\footnote{150} \textit{Id.}

\footnote{151} \textit{Id.} at 455.
\end{footnotesize}
and that the all-powerful pressure group was a creature of myth.\textsuperscript{152}

These conclusions reflected a pervasive consensus in the orthodox political science of a dozen years ago concerning the nature of political power in what had come to be called pluralist democracy.\textsuperscript{153} Even when they recognized a potential problem, the political scientists offered no remedy. The market place was thought to be superior in formulating social policy even as it was the best approach to economic efficiency.\textsuperscript{154} In contrast with some sort of "central decision-making model," a choice made through competitive decision-making was believed to canvas more alternatives and reward those most interested in pursuing a goal.\textsuperscript{155} The competitive decision-making approach was thought particularly well suited to more complex social issues for which there could be no "public interest" because they embodied many incompatible goals. Any choice by a central decision-maker among such goals would necessarily be arbitrary.\textsuperscript{156}

But was it not possible that a more inclusive representation of diverse interests could be created? Moreover, what was to be done if social or technological imperatives forced departure from the market? How then would democratic values be preserved? Since prevailing orthodoxy recognized no problem, not surprisingly it proffered no solution. Only with the return of concern over the impact of economic power\textsuperscript{157} has attention focused upon the spectrum of policy options available.

\textsuperscript{152} Id. at 487-88.

\textsuperscript{153} Addressing the problem of the influence of wealth on politics in 1961, Robert Dahl portrayed a political system redundant with checks and balances. R. Dahl, \textit{Who Governs} (1961). While urban politics was not as equalitarian as a prior rural America, it was more so than in the old days of city oligarchies. Economic notables operated in an environment of "dispersed" rather than "cumulative" inequalities. \textit{Id} at 85. They might be particularly influential on matters affecting business, but their influence did not extend much further. They participated little in politics, and suffered from the "fatal defect" of small numbers. \textit{Id} at 76. Dahl suggested that although the "living conditions and the belief system of the community" had not thus far generated demands for policies antagonistic to the goals of businessmen, if such demands did develop, numbers would probably prevail and the notables would go down to defeat. \textit{Id} at 84.

Dahl was at least addressing the issue of business influence. As he himself remarked, although the issue produced "no dearth of important and even urgent questions . . . political scientists [did] not, by and large, seem to be searching for answers." Dahl, \textit{Business and Politics: A Critical Appraisal of Political Science}, in \textit{Social Science Research on Business, Production and Potential} 44 (1959). There were, of course, dissenters from the prevailing view. See, e.g., H. Kariel, \textit{The Decline of American Pluralism} (1961); T. Lowi, \textit{The End of Liberalism} (1969); C. Mills, \textit{The Power Elite} (1956).


\textsuperscript{155} \textit{Id}. at 334-35.

\textsuperscript{156} C. Lindblom, \textit{The Intelligence of Democracy} 137-48, 151-52, 182, 332 (1965).

\textsuperscript{157} As William Shepherd notes, "doubts have multiplied" concerning the "central folk belief" that the competitive enterprise system is unique and superior. \textit{Shepherd, supra} note 23, at 5.
Political scientist Charles E. Lindblom has recently issued a revised and deeply troubled report. In Politics and Markets, he contends that business occupies a privileged position in our society. Because "jobs, prices, production, growth, the standard of living, and the economic security of everyone" rest in the hands of business, he argues that government cannot be indifferent to business needs. Moreover, the market does not respond spontaneously to supply and demand but must be carefully nurtured by government. Thus, his argument indicates that the careful studies of the last decade concerning business influence did not look far enough:

Any government official who understands the requirements of his position and the responsibilities that market-oriented systems throw on businessmen will therefore grant them a privileged position. He does not have to be bribed, duped, or pressured to do so. Nor does he have to be an uncritical admirer of businessmen to do so. He simply understands, as is plain to see, that public affairs in market-oriented systems are in the hands of two groups of leaders, government and business, who must collaborate and that, to make the system work, government leadership must often defer to business leadership.

This underlying imperative is implemented through the superior organization and resources of business. The ease with which business executives can channel funds into interest-group and electoral activity is a "remarkable feature" of market-oriented politics, with "no rationale in democratic theory." Finally, beyond all these more or less concrete modes of influence, Lindblom discerns a pervasive business influence on public ideology and belief. The public is indoctrinated through advertising and other means to overlook business' privileged position, and business' attempts to create a "dominant opinion" that will remove significant issues from debate. Thus Lindblom concludes: "The large private corporation fits oddly into democratic theory and vision. Indeed, it does not fit."

158. LINDBLOM, supra note 141, at 175. See also Dahl, On Removing Certain Impediments to Democracy in the United States, Dissent, Summer, 1978, at 310-24.
159. LINDBLOM, supra note 141, at 172.
160. Id. at 175. For a thorough discussion of the bargaining relationship between government and business, see S. BEER, BRITISH POLITICS IN THE COLLECTIVIST AGE, ch. XII (1965). For a recent example in the United States, see Bargain Offered Oil Firms, Wash. Post, April 15, 1978, A, at 7, col. 1. The proposed bargain contemplated increased oil company revenues produced by rewriting price regulations in return for support for the administration's proposed excise tax on crude oil.
161. LINDBLOM, supra note 141, at 194.
162. Id. at 203-04.
163. Id. at 356.
It is a fair question for those satisfied with the existing order to inquire into the supposed political dangers of concentrated economic power. The authors of antitrust doctrine never really paused to analyze this issue. Much of the concern with business influence on politics at the birth of the Sherman Act seems to have been a concern that business was twisting government to obtain special economic advantages. Beyond this, however, the critique becomes a diffuse denunciation of "plutocrats" and a lament about the diminution of the isolated individual's integrity.\textsuperscript{164}

The Progressives of twenty and thirty years later emphasized the additional concern that economic influence might be translated into control over public policies other than those of a strictly economic character. The investigations into war profiteering after the First World War evinced a concern that business might be affecting the decisions regarding war and peace.\textsuperscript{165} A full appreciation of the possible ultimate effects of the interlock of economic and political power awaited the emergence of totalitarian dictatorships.\textsuperscript{166}

A third concern, overlapping the first two and yet more general, was the concern that business dominance was preventing the emergence of policies reflecting the public interest. In a book entitled \textit{The Public and Its Problems}, John Dewey argued in 1927 that the state had been captured by large organizations which left the democratic public still inchoate and unorganized. Thus, Dewey long anticipated and answered the argument that the public interest could only be defined arbitrarily. He argued not for some absolutist definition of the public interest, but simply for the democratic expression of a general interest wider than that of industrial organization. The wider public, he said, could not yet identify itself in the complexities of the age.\textsuperscript{167} Only through improved communication could society identify common interests by clarifying the symbols which guide public life. Dewey identified democracy with community and contended that the prerequisite for a healthy democracy was the desire for and experience of shared existence. The great problem, he concluded, was to devise a means of communication which would bring to the fore shared interests and overcome those that divide.\textsuperscript{168}

The revived concern with the problem of the public interest, as framed by Dewey, is concisely stated by Lindblom:

\begin{itemize}
  \item \textsuperscript{164} \textit{See} N. Pollack, \textit{The Populist Response to Industrial America} 18-19 (1962).
  \item \textsuperscript{165} \textit{See} Special Senate Comm. Investigating the Munitions Industry, Pt. 13, 74th Cong., 2d Sess. (1934).
  \item \textsuperscript{166} \textit{See} Friedrich & Brzezinski, \textit{supra} note 141, at 177-236.
  \item \textsuperscript{167} J. Dewey, \textit{The Public and Its Problems} 30-34 (1927).
  \item \textsuperscript{168} \textit{Id. at} 149, 173.
\end{itemize}
The emerging peril to the survival of polyarchy [pluralist democracy] is that vetoes are increasingly cast not simply against proposed redistributions but against proposed solutions to collective problems. A veto of a redistribution—say, of new school budgets—is disappointing to some groups. A veto of a solution to a collective problem—say, of an energy policy—may put society on the road to catastrophe.\textsuperscript{169}

Moreover, if Lindblom is right, support for specific vetoes is fostered by a more general influence of business upon the context of ideology and belief through advertising and other means. Such influence may extend to the vocabulary of the debate over democracy itself. Arguably, one of the greatest achievements of business in this respect has been the identification of the corporation with the individual, clothed with the rights won in the long struggle for individual liberty.\textsuperscript{170}

These, then, are some of the historic concerns which social critics have voiced about the relationship between economic and political power. There is a concern that economic influence will purchase economic advantage; that it will buy control over non-economic public policy; and that it will constrict and exclude all attitudes and interests other than its own.

Having sketched the effects which economic influence can have on politics, the question of how to deal with these effects arises. A particular society's response to this economic influence depends upon its values. At a minimum, a democratic society which seeks a government based on consent will be concerned that economic power not distort the mechanisms for registering and implementing popular will. At a minimum, a society concerned to protect liberty, "the freedom to live as one prefers,"\textsuperscript{171} will desire that no segment of society becomes so powerful that it could deprive indi-

\textsuperscript{169} Lindblom, supra note 141, at 347.

\textsuperscript{170} Thurman Arnold explained this identification when he noted that at the very moment when massive corporate organization most threatened individualism, people refused to face up to the threat:

It is a familiar social phenomenon to see the symbols of the habits of pioneer times transferred as a social philosophy to later institutions to prove that we still are following the examples of our fathers. . . . The laissez faire religion, based on a conception of a society composed of competing individuals, was transferred automatically to industrial organizations with nation-wide power and dictatorial forms of government.

Arnold, supra note 1, at 188-89. Thus, the present author believes Robert Bork falls into what might be called the fallacy of personification in fearing, as noted earlier, a trend whereby "the political order moves against the private order." See Bork, supra note 16, at 3-11. See also text accompanying note 21 supra. The difficulty for the "private" individual is the emergence of organization everywhere—in business as well as government—and the mutual adjustment of these organizations to exclude all interests but those defined by their organizational imperatives.

\textsuperscript{171} See Bell, supra note 148, at 258-61 regarding various definitions of "liberty."
individuals of the ability to exercise the essential rights which the society equates with human dignity.

These statements of the minimum principles of liberal democracy conceal myriad potential conflicts regarding who is to give consent and how, and who has what rights to be protected. How these conflicts are viewed determines the extent and nature of the concern for economic influence on politics. For example, if the right to engage in economic activity is viewed as a primary one, then there may be less concern that the unrestrained exercise of such a right may impinge on other rights.

A full adumbration of the principles that would guide the resolution of these conflicting values has been called a "public philosophy." There was a time when antitrust doctrine represented a keystone in the American public philosophy regarding the proper relationship between economic power and political liberty. Ideally, the abuses of economic power could be checked by division. Individual initiative, efficient production, and political liberty were all to be furthered simultaneously. If a distinction was recognized between private wants and public needs, the collective action necessary to achieve the latter was viewed as a necessary exception—but still only an exception—to the self-regulating operation of the market.

The social context in which antitrust policy is imbedded has changed, however. In this new context the old antitrust concern with economic influence on political power becomes more urgent than ever, since both social and economic forces increasingly compel resort to the political mechanism for allocative decisions in society. Alternatives to the market mechanism are sought to foster social control. Traditional antitrust, however, does not provide a satisfactory guide to deflecting the old economic threat to the political process in these new circumstances. It hardly could


172. BELL, supra note 148, at 251.
173. The distinction between wants and needs can be traced to Aristotle. This distinction might be summarized as one between necessities and luxuries. Id. at 223-24, 254.
174. As Daniel Bell points out, societal commitment to conscious control of economic growth, furtherance of science and technology, and the commitment to social welfare programs have expanded the public sphere. BELL, supra note 148, at 224-25. In this new social context "the basic allocative power is now political rather than economic." Id. at 226 (emphasis in original). Characteristic of this situation is a struggle between the middle and working class over allocation of the public budget. Id. at 240. The public sphere becomes "the arena for the expression not only of public needs, but also of private wants." Id. at 226 (emphasis in original). The point is significant because it recognizes that merely shifting decisions to the political process does not necessarily produce outcomes that are in the public interest. See text accompanying note 254 infra.
be expected to do so because the new social context is so often inconsistent with the market oriented premises of antitrust.

Thus, the current situation requires a new set of principles consistent with liberal democracy that will define the appropriate relationship between economic and political power. The task is to find new rules of thumb to supplement the market decentralization axiom of antitrust. That axiom was based on the old American belief that the health of democracy depended on a distribution of resources, particularly wealth, so that no single group could bring about the "prostitution of our Government to the advantage of the few at the expense of the many."\textsuperscript{175} Although in some important instances, market decentralization may be of decreased relevance, the underlying antitrust concern with resource distribution is sound. In this respect, an old idea retains continued validity and suggests a broader framework for analyzing the relationship between economic and political power.

Whether in a market or non-market political economy, resources are the moving force of the political process, the "currency" of interaction.\textsuperscript{176} Resources include not only wealth, but information, organizational and technical skill, and strategic position.\textsuperscript{177} Strategic position is used here to mean the leverage gained by one participant in the political process over others by possession of resources that others desire. An example, discussed below, is the capability of a faltering but enormous enterprise to provide jobs to thousands of workers. Whether the firm is a government firm or private company, politicians feel great political pressure to prevent the firm from going out of business.

By itemizing the resources available to participants in the political process we have a simple conceptual tool of great utility. Unlike the more general principle of decentralization, resource analysis can be applied to various institutional arrangements. The method is to examine all these arrangements, whether apparently centralized or decentralized, to deter-

\textsuperscript{175} See note 18 supra.
\textsuperscript{176} K. DEUTSCH, THE NERVES OF GOVERNMENT 117 (1966).
\textsuperscript{177} Resources have been catalogued under various labels by different authors. S.E. Finer speaks of organization, riches, access, patronage (derived from the dependency of others on the firm's largess), and "surrogateship" (performance of public tasks by the firm). Finer, The Political Power of Private Capital, 3 SOC. REV. 287 (1955), discussed in, E. EPSTEIN, THE CORPORATION IN AMERICAN POLITICS 191-212 (1969). As employed in the present article, the phrase "strategic position" seems useful to distinguish those resources which are conditioned by multiple social and economic factors as opposed to those such as wealth, which are typically thought of as tangible or intangible possessions. Thus, the influence of a given group may derive from its ability to provide jobs in a recession or military necessities during war, even though the group possesses no more wealth than another group.
mine whether or not resource distribution serves democratic purposes.\textsuperscript{178}

This leads to the second analytical tool employed: role allocation analysis.\textsuperscript{179} Here, the inquiry focuses on the impact of industrial structure on the allocation of roles in decision-making among voters, elected politicians, appointed administrators, and the managers and leaders of private institutions. Role analysis is a way of determining who is responsible for what—a central issue in the search for a democratic balance in society. The nature of this balance becomes of increasingly greater concern to a democratic society as more tasks are removed from resolution by market forces to the political sphere.

In democratic theory, the appropriate roles are relatively clear. Government officials are responsible to the electorate. The choice among conflicting values and purposes is one that the lay voter and the lay politician are as able to make as the expert familiar with industrial organization and technology.\textsuperscript{180} Accordingly, in the governmental process the interest

178. There is, of course, no automatic relationship between resources and political influence. The impact of resources may be augmented or deflected by various other factors. \textit{See Epstein, supra} note 177, at 191. Concentration of resources, however, has been viewed in the antitrust tradition as the key variable. This theory has rarely been tested in a systematic way, but a recent study suggests some reasons for the significance of resource aggregation. Furthermore, it finds confirmation for the hypothesis by scrutinizing the relationship between size of firm and effective corporate tax rates. \textit{Salamon & Siegfried, Economic Power and Political Influence: The Impact of Industry Structure on Public Policy,} 71 \textit{Am. Pol. Sci. Rev.} 1026 (1977). As noted in the text, however, large scale business is not the only source of difficulty for democratic politics.


Due to the complexity of political systems, however, any effort to generalize about the consequences for democratic politics of any particular industrial structure is necessarily incomplete. The same industrial structure might produce quite different political consequences, depending upon a complex of other variables in the political system. For instance, the political consequences of government regulation of business differ in the United States and England because of the greater coherence in England of political parties and the lesser significance of the legislature in administrative oversight. \textit{S. Beer & A. Ulam, supra} at 62-63. A focus here on resources and role allocation, however, is only partly for purposes of analytical simplicity. Additionally, it can be argued that these two variables are of primary significance. Resources are the motivating force of the political process. Role allocation is the essence of the democratic balance—who is responsible for what.

group leader, bureaucrat or manager should carry no particular weight in the ultimate choice of overall social objectives. Rather, these people are the experts of production, organization and technical skill. They perform the functions of assisting in identification of options and finding means to match ends within the framework chosen by politicians.

The real world of democracy is a shadow of this ideal. There are, however, certain kinds of institutional arrangements which are more likely than others to assist the electorate in performing its role as the ultimate arbiter of social objectives. Mechanisms are needed to provide for the widest participation and the broadest reconciliation of conflicting individual interests. Moreover, for the electorate to play its democratic role, choices must be framed at a level of generality that makes the alternatives understandable to the lay voter. Finally, the political process is the most likely arena for expression of the sense of the community on those "social goods" which depend upon collective action and which would not be produced by individuals or groups acting independently in pursuit of their own interests. Accordingly, institutional arrangements are needed to facilitate the expression of these community interests, which would otherwise be drowned amidst the clatter of contending special interests.

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Taken together, the objective of these institutional arrangements can be characterized as an expression of the public interest. The task of a liberal democracy is to achieve the expression of this public interest and to strike a balance between it and the rights and interests of individuals. The remainder of this article examines alternative approaches to industrial organization and control to determine their compatibility with these political objectives. The occasion for this inquiry is the conviction, already ex-


181. It has been suggested that one reason for the important influence of business in the American political process is the fragmented character of our politics. Salamon & Siegfried, supra note 178, at 1029. Integrative forces are weak and policy is commonly made in subsystems linking bureaucrats, congressional committees, and organized clientele. Thus, effective access is limited to those with the resources which can support key actors in the process. Moreover, the predominance of administrative rulemaking, as opposed to legislative action, puts a premium on technical expertise which reposes with organizations, not the lay voter or politician. Id at 1030 & n.15. This analysis indicates that concern over the impact of economic power on the political process calls for scrutiny of such potential integrative mechanisms as more disciplined political parties, improved budgeting techniques and more frequent resort to strategic programming. Since the present article addresses industrial organization and its impact on politics, rather than the political machinery itself, the discussion of integrative mechanisms below is limited to economic policy programming. The issue examined is whether the possibilities for a balance between the roles of layman and expert, consistent with democratic theory, can be enhanced by improving the integrative capability of economic policymaking and overcoming the perverse effects of a fragmented political process.
pressed, that the antitrust approach to this problem, with its preoccupation with market deconcentration, is inadequate. To illuminate the inadequacies and the alternatives, three examples are discussed. First is the steel industry, which represents a situation in which strong pressures exist to depart from the decentralized market model. Second is the oil industry, which, in spite of competition arguably sufficient to satisfy the economic standards of antitrust, may nevertheless wield undue influence in the political process. Finally, the subject of advertising is addressed as an example of economic influence which does not necessarily correlate with concentration and which may not be significantly constrained by trustbusting.

In examining each of these examples, resource and role analysis are employed. The method is to ask, with respect to the various alternative approaches to industrial organization and control, what effect is had on resource distribution, and how the organization and resulting resource distribution affects role allocation. In particular, the inquiry focuses on those approaches which are most likely to enhance the role of the electorate, and which would foster expression of the public interest and the objectives of liberal democracy.

A policy designed to minimize undue economic influence in the political process cannot rely entirely on orthodox antitrust remedies. Thus, the question posed is what industrial structure is congenial to democracy when the market does not sufficiently promote democratic results or when departure from the market occurs. The brief consideration provided in the next section cannot provide definitive answers; it can, however, attempt to illustrate the questions and begin the search for new rules of thumb regarding the relationship between economic and political power.

III. Weighing the Political Factor

A. Steel

"The tariff is the mother of trusts," went the old saying, but the steel industry in the United States is now desperately seeking protection from what it says is unfair foreign competition. Faced with what the New York Times called the "worst crisis in the last two decades" in steel, the following actions, among others, were taken in the fall of 1977: Youngstown Sheet and Tube announced severe cutbacks at the Youngstown, Ohio plant accompanied by a permanent furloughing of 5,000 production workers; Bethlehem Steel and Armco Steel announced the closing of shops and the elimination of 8,000 jobs in New York, Pennsylvania, and Ohio; United States Steel, the giant of the industry, reported a fifty-two percent
earnings drop in the first half of 1977. To help it get back on its feet, the steel industry looked to Washington not only for the restriction of imports, but also for tax breaks to encourage investment, less government interference on pricing decisions, and a relaxation of antitrust opposition to mergers and joint ventures.

In June, 1978, the Attorney General rejected the recommendation of the Antitrust Division and approved a merger of Lykes and Ling-Temco-Vought (LTV), thus permitting creation of the fourth largest steel producer out of the two firms' subsidiaries—Youngstown (Ohio) Sheet and Tube and Jones & Laughlin Steel. Reports suggested that the prospect of massive steelworker unemployment if Youngstown were allowed to fail may have figured prominently in the merger approval.

The latest efforts to aid the steel industry were presented in a Treasury Department Task Force Report to the President, which recommended the "trigger price" mechanism that was eventually adopted. The report

183. *Id. See also Steel's Sea of Troubles*, BUSINESS WEEK, Sept 19, 1977, at 66 [hereinafter cited as *Sea of Troubles*].
184. *See* business review letter and Department of Justice letter in 5 TRADE REG. REP. (CCH) § 50, 381 (June 26, 1978).
185. Wash. Post, June 22, 1978, § A, at 1; [1978] ANTITRUST & TRADE REG. REP. (BNA), at A-21 (June 22, 1978). The relationship between unemployment and antitrust policy was recently highlighted in two other contexts. An FTC Administrative Law Judge denied a motion by the American Federation of Grain Millers (AFL-CIO) to intervene in the cereal case. F.T.C. Dkt. No. 8883. The union argued that some 2,650 cereal plant jobs could be lost if the divestiture relief proposed by the FTC staff were implemented. It was also reported that in two different instances in the last year, firms responded to FTC opposition to sale of a corporate division with threats that plants would have to be closed. At least one of the firms evidently suggested that the FTC would deserve the blame for resulting unemployment.
186. TASK FORCE CHAIRED BY TREASURY UNDERSECRETARY ANTHONY SOLOMON, REPORT TO THE PRESIDENT: A COMPREHENSIVE PROGRAM FOR THE STEEL INDUSTRY (1977) (on file at Catholic University Law Review office) [hereinafter cited as *SOLOMON REPORT*].
187. *Id.* at 13. The reference price approach is only the latest step to be criticized for its anticompetitive effects. The government's action in protecting steel from foreign imports has been the subject of controversy for years. *See Sea of Troubles*, supra note 183, at 78. It has been argued that high tariffs on crucial imports have been sought by steel in order to limit the profits of firms on the fringe of the steel oligopoly. Ginman & Costello, *Vertical Market Power, the Structure of Tariffs and Antitrust Policy*, 19 ANTITRUST BULL. 421, 428-29, 434 (1974). In this way the dominant vertically integrated firms prevent others from challenging them through backward vertical integration. *Id.*

The steel industry has also obtained the assistance of the executive branch in negotiating voluntary import restraints by foreign producers. One presidential statement indicated that such action is designed to deal with "the serious problem that excessive imports have posed for our steel workers and our steel industry." Press statement of President Nixon on May 6, 1972, cited in, *Cartelization, Executive Sanction, and the Antitrust Laws: The Steel Import Case*, 18 ANTITRUST BULL. 853 (1973) [hereinafter cited as *Cartelization*].
explained that the mechanism would provide the Secretary of the Treasury with a basis for initiating antidumping investigations without prior industry complaint.188 The trigger prices would be based on the costs of production of the most efficient foreign steel producers. Investigation would be undertaken when prices below the trigger are found.189 In part, this new procedure was evidently a response to industry criticism of the cumbersome nature of existing antidumping procedures.190 The report also recommended, among other measures, tax benefits in return for industry commitment to steel plant modernization,191 expedited Justice Department consideration of proposed joint ventures and mergers,192 and possible government funding of research and development.193

Arguably, the steel industry's plight is the result of market failures which operate in an oligopolistic industry. Although steel claims it is subject to unfair competition from Japanese and European firms dumping their products below cost in American markets, critics of the industry indicate that its difficulties are more attributable to antiquated plants and technology.194 Thus, it may be argued that the sluggish pace of steel

proper exercise of presidential power and a violation of the Sherman Act. Consumers Union v. Rogers, 352 F. Supp. 1319, 1322-23 (D.D.C. 1973), modified and aff'd sub nom., Consumers Union v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974), cert. denied, 421 U.S. 1004 (1975) (despite dictum that Sherman Act was not intended to preempt presidential authority over foreign commerce, the Sherman Act issue was not resolved since plaintiff stipulated dismissal of that issue). Likewise, there has been debate over whether the antidumping laws, (19 U.S.C. § 160 (1976)), which allow private firms to institute penalty proceedings against foreign producers selling below “fair value”, are anticompetitive. Epstein, The Illusory Conflict Between Antidumping and Antitrust, 18 ANTITRUST BULL. 1 (1973); and comments in response and reply at 19 ANTITRUST BULL. 369, 377 (1974).

188. SOLOMON REPORT, supra note 186, at 14. “Dumping” is defined as:

sales in the United States below ‘fair value’ that injure or are likely to injure a U.S. industry. Fair value is generally established from the home market prices of the exporter . . . [H]ome market prices as a reference for determining the ‘fair value’ of imported merchandise may be disregarded if substantial sales in the home market have been made at prices below the cost of production not permitting the recovery of all costs within a reasonable period of time. If such home market prices are disregarded, fair value is, as a rule, to be established from the ‘constructed value’ of the product, meaning its cost of fabrication, plus statutorily mandated minimum additions of 10% for overhead and 8% for profit.

Id. at 10-11.

189. See id at 12-14.

190. The report attempted to head off antitrust critics with the assertion that policy toward steel must “expedite relief from unfair import competition . . . in a manner which will not preclude healthy competition in the U.S. market.” Id. at 8.

191. Id. at 22-23.

192. Id. at 33.

193. Id. at 34.

194. 80% of Japanese steel and 72% of German steel is produced through the advanced basic oxygen furnace process as compared with 63% of United States-made steel. The remainder of domestic steel continues to be made in the older open-hearth furnaces. Sea of
technology's development in the United States is attributable to the oligopoly conditions under which the industry operated until foreign competition became severe.

The view that the steel industry is noncompetitive domestically and as a result requires special dispensations to meet competition abroad is not, however, universally shared. A recent FTC staff study concludes that foreign producers have made inroads into the American market because of lower costs, not dumping. Accordingly, the study is strongly critical of "reference prices" which would impose a tariff on steel priced below cost. The study contends that such minimum pricing would invite the creation of a foreign steel cartel if the minimum price is set higher than some firms might otherwise charge. Although the Carter administration's trigger price policy does not establish actual minimum prices, the prospect of antidumping proceedings for pricing below cost could arguably induce pricing behavior similar to that which would prevail if actual minimum prices were set.

The optimistic view of existing competition in steel and the opposition to reference prices expressed in the FTC staff report implies a conclusion that traditional antitrust enforcement approaches will adequately protect consumers without damaging the industry. In steel, however, relying on market forces augmented by trustbusting is at least questionable for two reasons. First, as with the ruinous competition among the railroads of

Troubles, supra note 183, at 74. For years the American steel industry has been criticized for its poor innovation record by academic economists. Adams & Dirlam, Big Steel, Invention and Innovation, Q.J. OF ECON. 167 (May 1966). A recent report from within the business community authored by Charles A. Bradford of Merrill Lynch, Pierce, Fenner & Smith, Inc., concluded that ultimately it is not steel imports but differences in costs and efficiency that are at the root of the problems in the industry. See Sea of Troubles, supra note 183, at 74. Japanese labor productivity, the report contends, is 50% above that of the United States on a ton-per-man-per-year basis, and Japanese coke-making is also more efficient. Id

195. FEDERAL TRADE COMMISSION, BUREAU OF ECONOMICS, THE UNITED STATES STEEL INDUSTRY AND ITS INTERNATIONAL RIVALS 239 (1977) [hereinafter cited as FTC STUDY].

196. Id. at 559-63.

197. The FTC study was evidently prepared prior to issuance of the Administration's trigger price proposal and cannot, accordingly, be viewed as commenting directly on that proposal. See Administration's Comprehensive Program For the Steel Industry, Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means, 95th Cong., 2d Sess. 65 (1978). Nevertheless, the thrust of the argument in the FTC study suggests a different understanding of the "healthy competition" which is the expressed goal of the Solomon Report.

198. Surprisingly, the study reads in some parts like a defense of the industry. See FTC STUDY, supra note 195, at 44 (concentration is declining); id. at 67 (profits have been below average rather than excessive); id. at 168, 220 (prices after 1960 have "mimicked" competition and are not "administered"); id. at 482 (the pace of innovation in the steel industry has been "efficient."). See also C. ROWLEY, STEEL AND PUBLIC POLICY (1971).
old, the social consequences may be unacceptable. If inefficient steel firms are allowed to fail, investments may be wiped out and thousands of steel-workers may be unemployed, followed by shock waves through the rest of the economy. A Treasury study noted that “[m]assive worker layoffs . . . represent a serious human tragedy for many families and can cause severe disruptions for whole communities.”

The reference in both past and present presidential statements to the need for protection for both business and labor from unfairly priced imports indicates that however theoretically plausible, the completely competitive solution is probably not politically feasible. This view was apparently adopted in the approval of the Lykes-LTV merger.

Second, in the current state of the industry, its proponents may be right that mergers and joint ventures are necessary. Merger allows a company that is strong in one phase of production but weak in another to remedy its weaknesses without unduly augmenting the overall capacity of the industry through duplication of facilities. An example is the 1971 merger between National Steel and Granite City Steel. National’s Portage, Indiana plant had obtained hot rolled coils from National’s Great Lakes plant, but the system was thrown out of balance as the Great Lakes plant became able to use more of its own coils. Thus, National looked elsewhere and purchased coils from other firms including Granite City, which had a greater capacity for producing coils than its remaining relatively obsolete facilities could absorb. The relationship was eventually cemented by merger.

Increased merger activity in steel, however, could aggravate the already concentrated character of the industry. Currently, small steel companies face a serious problem in obtaining access to ore supplies because deposits are largely owned by the major firms and require huge amounts of capital to develop. Increased concentration in steel could give the industry even greater control over prices and inhibit the already sluggish pace of innovation.

201. An author of a portion of the FTC Study cautioned elsewhere that “[j]oint ventures or even mergers among all but the largest enterprises may have to be tolerated.” Mueller, Book Review, 19 Antitrust Bull. 901, 915 (1974) (Steel-Industry Economics: An International Review of Some Recent Literature).
202. Hogan, supra note 121, at 29-30. Mergers and joint ventures may allow United States firms to duplicate the advantages obtained by steel in Japan as a result of government planning. In Japan, the government owned central bank funnels investment to the companies which, in its view, should expand. See Sea of Troubles, supra note 183, at 78.
Thus, the steel industry well illustrates the difficulties of achieving the objectives of antitrust without trustbusting. If the antitrust laws are relaxed to assist the steel industry, some mechanism should be found to prevent economic exploitation of any resulting increase in market power. The choice among alternative approaches should consider the potential consequences for economic influence on political decisions. The steel industry is a specific illustration of a “strategic position” exercised in the political process to achieve economic benefits. The layoff of thousands of workers and the prospect of major economic dislocation was a “resource” rapidly translated into responsive action by the government. The Carter administration quickly acted to accommodate the steel industry with various benefits including merger approval and the “trigger price” mechanism to afford increased protection from low-priced foreign imports. This action does little to diminish the influence of steel on subsequent political decisions, and may not be in the economic interest of the consumer.

It is important to recognize that whether or not the major steel companies exercise decisive power in a market context, does not necessarily determine their influence in the political sphere. Optimistic assessments of trends away from tight oligopoly may be largely irrelevant in judging political influence. This is because the ultimate source of influence is not “big business” or businessmen, but a complex of economic forces. Due to these forces, the steel companies, the steel workers, and their allies, possess the resource of strategic position, which gives them significant influence in the political process. The lack of congruence between conventional measures of market power and political power may even become an inverse relationship. Decline in market power may, at least temporarily, become a source of political leverage. It may be that dominant firms resort to the political process to shore up their positions because of declining market power. That the health of the nation requires that dominant firms not be permitted to fail is a claim which a politician ignores at his peril.

The steel industry epitomizes the dilemmas faced by antitrust enforcement officials concerned with the ultimate impact of economic power on the political process. Even if the industry is sufficiently decentralized and competitive to satisfy antitrust standards, these standards are evidently not

204. See note 190 and accompanying text supra. There have been additional reports that the Administration's receptivity to steel industry desires for tax benefits and other government assistance accompanied industry decisions to relent in its opposition to the Administration's position on natural gas deregulation. Wash. Post, Sept. 7, 1978, § A, at 2, col. 1. It has also been reported that steel firms have complained that the trigger price program was not being implemented to stop the rising level of imports. Critics of the industry argued, however, that the continuing high level of imports was due to unwarranted price hikes by domestic firms. Wall St. J., Sept. 1, 1978, at 12, col. 1.
enough to forestall the industry from wielding significant influence in the political process. On the other hand, if departure from the market is required through relaxation of the antimerger laws and protection from imports, the salutary effects of decentralization on democratic politics are attenuated. The question, in either case, is what additional or substitute policy toward the steel industry is available which would be consistent with maintenance of democratic politics.

One alternative to private enterprise is government ownership of the entire steel industry as has been attempted in Britain and elsewhere.\textsuperscript{205} A compelling argument can be made, however, that the economy is just too complex for administrators, however wise, to duplicate the performance of the market, much less surpass it.\textsuperscript{206} Moreover, the substitution of concentrated economic power in government hands is no more appealing from a political point of view than is such concentration in private hands. Nonetheless something less than total government ownership of the steel industry might introduce a new competitive element into the industry. One possibility is for the government to set up a competing firm on the TVA model. Another, perhaps more plausible, suggestion is government takeover or purchase of controlling ownership in an existing firm.\textsuperscript{207} Shepherd suggests this might be accomplished through a national development bank with its own capital and authority to arrange consortia with other financial units.\textsuperscript{208} From the standpoint of competition, even the possibil-

\textsuperscript{205} SHONFIELD, MODERN CAPITALISM 96 (1965).
\textsuperscript{206} See authorities cited supra note 141.
\textsuperscript{207} The different ways of constituting government corporations, including the varying degrees of governmental and private stock ownership and administrative controls, are surveyed in WILCOX, supra note 115, at 464-93; Miller, \textit{Public and Private Enterprise in the U.S.}, in PUBLIC AND PRIVATE ENTERPRISE IN MIXED ECONOMIES (W. Friedmann ed. 1974); M. FAINSOD, L. GORDON, & J. PALAMOUNTAIN, JR., GOVERNMENT AND THE AMERICAN ECONOMY 737-51 (3d ed. 1959). The scope of government enterprise in the United States includes railroads in Panama and Alaska, electric power in the Tennessee Valley, the profitable Government Printing Office, banking and credit (Public Works Administration, Reconstruction Finance Corporation), operation of public lands, the largest life and annuity business in the world (Social Security), the Post Office, COMSAT, and the Corporation for Public Broadcasting. A former manager of British Steel recently remarked that “[t]here’s more hidden nationalization in the U.S. than there probably is in [Britain].” State Ownership European Style, \textit{N.Y. Times}, May 28, 1978, § 3, at 1, 2, col. 5. [hereinafter cited as European Style].

In connection with the Lykes-LTV merger, a Youngstown community coalition proposed to purchase the Campbell Works. The Attorney General called the local effort “fundamentally important.” [1978] \textit{ANTITRUST TRADE REG. REP. (BNA)}, at A-22 (June 22, 1978).

\textsuperscript{208} SHEPHERD, supra note 23, at 204. For a similar proposal modeled on the New Deal’s Reconstruction Finance Corporation and offered by a partner in the financial house of Lazard Freres, see Rohatyn, \textit{A New R.F.C. Is Proposed for Business}, \textit{N.Y. Times}, Dec. 1, 1974, § 3, at 1, 12. Mr. Rohatyn recognizes the potential in his proposal for economic planning and suggests that by allocating equity capital the R.F.C. could “facilitate major restruc-
ity of takeover by outside management would end the de facto immunity from takeover enjoyed by large firms and thus introduce a spur to improved performance. Government control could be limited by law to a certain number of years to reduce the likelihood of creating new vested interests.²⁰⁹

Another option short of total government control was tried with some success in the United States during World War II. At that time the Controlled Materials Plan²¹⁰ covered steel, copper, and aluminum as points of leverage that would affect the rest of the economy.²¹¹ Still another option is partial central planning, whereby the government could funnel investment to companies in need of expansion in order to achieve balanced development.²¹² This option could be accompanied by price controls to protect consumers. During the war, for example, it was found that price controls worked best in oligopolistic industries.²¹³ Nevertheless, these approaches may contain some of the defects which have been encountered with existing regulatory schemes.²¹⁴

One variant on price controls that has been employed in England is to condition price rises on an outside efficiency audit of management, which would help assure, presumably, that increases are justified.²¹⁵ Another technique for constraining the effect of market power on prices is a proposal for steering private enterprise to public objectives through tax incentives.²¹⁶ Instead of setting prices through a regulatory commission, incentives would be provided for a firm to price steel in a manner necessary for the public purpose.” ¹²  Id. at 12, col. 3. For a discussion of similar thinking during the New Deal, see A. SCHLESINGER, JR., THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL 432 (1958).

²⁰⁹  SHEPHERD, supra note 23, at 203-04.

²¹⁰  Under the Plan, the government concentrated its efforts on these industrial materials on the assumption that the use of other resources could be adapted interactively without benefit of such planning. LINDBLOM, supra note 141, at 316.

²¹¹  Id.

²¹²  This is done, for example, in Japan. See Sea of Troubles, supra note 183, at 78.

²¹³  SCHERER, supra note 15, at 415. Prices are probably easier to police where few firms are involved.

²¹⁴  See notes 223-24 & 255 infra.

²¹⁵  SHEPHERD, supra note 23, at 212. For similar reasons, outside audits of public enterprise are employed in France. See SHONFIELD, supra note 205, at 195.

²¹⁶  G. MEANS, PRICING POWER AND THE PUBLIC INTEREST 296-321 (1962). The tax incentive approach could be applied not only to steel, but to any industry identified as one in which oligopoly has proceeded to the point where prices are not subject to market forces. One variant of the tax incentive approach would subject the 2000 largest firms, comprising 85% of United States business output, to tax incentive wage guidelines. Firms reaching settlements over the guidelines would be penalized by raising corporate taxes or disallowing deductions. Silk, How Carter Can Stop Inflation, N.Y. Times, June 18, 1978, § 6 (Magazine), at 12, 91-92. As Silk notes, economists Henry Wallich, Sidney Weintraub, and Arthur Okun have each advanced similar proposals. Id. at 91.
sary to achieve a targeted fair rate of return based upon the estimated cost of capital. Firms that did not meet this requirement would be subject to an excess profits tax and those that satisfied the guideline would receive tax benefits. For example, management salary programs which key compensation to economic performance, measured by the degree to which prices reflect costs, would receive favorable tax treatment. Business could also be given the alternative of voluntary divestiture or breakup. If efficiencies would not be lost by return to a more competitive atmosphere, management and stockholders might prefer such a course.

Yet another proposal which might minimize the adverse effects of market power envisions incentives provided to firms which would decentralize their operations, creating autonomy of ownership and accounting. The goal is to substitute administrative decentralization and accountability for that of the market.

Each of these alternatives may be assessed in terms of their success in achieving the objectives which would be fulfilled by a fully competitive market—that is, in terms of its consequences for efficiency and consumer welfare. Since each alternative involves government participation and a different relationship between economic and political institutions, each approach should also be evaluated for its political consequences.

It was suggested earlier that important consequences of economic power include influence over matters in the immediate interest of the economic group, influence over other matters of national policy, and influence over the attitudes of the electorate. Important resources affecting these outcomes were designated as strategic position, wealth, information, and organizational skill. A crucial aspect of the political process through which resources are converted to outcomes was identified as the allocation of roles between expert managers, technicians and bureaucrats, and lay voters and politicians. It was also suggested that institutional arrangements should be sought to express the public interest and enhance the ability of the electorate to play its democratic role as the ultimate arbiter of social goals.

Application of this analytical framework to the options for dealing with the steel industry makes it clear that generalized categories like private and

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217. Means, supra note 216, at 301-03.
218. Id. at 313.
219. Shepherd, supra note 23, at 221. For an attempt to impose such decentralization on AT&T, see [1977] Antitrust & Trade Reg. Rep. (BNA), No. 806 at A-4. For an argument that such autonomy could more readily be created if the firms in question were first nationalized, see Martin, Does Nationalization Hold Any Promise for the American Economy?, 11 J. of Econ. Issues 327, 333 (1977).
220. See notes 179-181 and accompanying text, supra.
public, or regulated and deregulated, do not provide a sufficient guide for action. Private ownership and government ownership present two different approaches to accountability with respect to the use of resources. Each, in varying degrees, is subject to both market forces and governmental supervision or regulation. In the private form, management is held accountable in some greater or lesser degree by stockholders and by the danger of potential loss of market position or threat of takeover. Outside governmental supervision exists in varying degrees and for varying purposes. In its public incarnation, business may be subject to market forces, but it is also subject to internal governmental controls. A flow of information is channeled to and from the relevant supervisory agency, and goals may be set in varying degrees by statute and coordinated by governmental bodies.\(^{221}\)

The more autonomy a government corporation has and the more its performance is assessed in terms of the traditional standards of the market such as growth and profits, the more it resembles a private firm. The more the private firm is subject to government supervision and the more the standards for measuring its performance are set by statute and regulation, the more it resembles a government enterprise. Obviously the terms "private" and "public" or "regulated" and "deregulated" are oversimplifications. In reality, the contrasting modes of accountability are but two ends of a spectrum. Thus, the decisive distinction for purposes of social control of economic resources is not private versus governmental ownership. When market forces are minimal and resources are concentrated in a few hands—whether private or governmental—management will probably be subject to weak constraints and will have wide discretion in the use of resources.\(^{222}\)

If we turn from broad labels, however, to the various kinds of regulation and government ownership, more precise conclusions are possible. From the standpoint of economic influence on politics, the situation of moderate governmental supervision we call regulation is often as unsatisfactory as private or government monopoly. Under such regulation, governmental involvement has sometimes been employed to limit accountability through market forces and yet resources are left primarily in the hands of private companies which are able to use them for their own purposes. This is

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221. SHEPHERD, supra note 23, at 203-04.

222. Thus, close administrative supervision through government channels, with all the bureaucratic diseconomies it entails, is more necessary for government monopolies than for government firms participating in a mixed enterprise market and subject to the discipline of competition.
familiar in the transportation industries, but the same phenomenon can be observed in steel. The quiescence of antitrust enforcement is accompanied by the use of tariff and antidumping laws to protect the industry from competition. At the same time, the control of the industry over wealth, information, skill, and strategic position is largely undisturbed. These resources can be used to extract further benefits, such as merger approval or tax breaks from the political system.

Moreover, these resources are available to influence foreign policy, domestic elections and other matters as they may impinge on the interests or the personal predelections of steel and its allies. While this observation is not intended to impugn the motives of those associated with the steel industry, it does recognize that in the political sphere as in the economic, unexercised power may one day be exercised and that an absence of past abuse cannot be a complete defense.

The traditional regulatory mode also has perverse effects on the roles of the electorate and politicians in the political process. In democratic theory, the exercise of political power must be accountable to the electorate. While the role of experts and managers is to clarify and implement choices, the electorate and its representatives have the responsibility for ultimate value judgments. In order for the electorate to exercise this responsibility, however, political choices must be framed at a level of generality that is understandable to the lay person. In order for the options presented to include the widest range of interests, there must be some coordination and integration of proposals. Thus, it has been said that in order to hold political power accountable, it must, to some degree, be focused.

This point of view is exemplified in the frequent observation that the presidency is often a more representative institution than the Congress. The electorate is best able to perceive and choose alternatives framed in the general terms typical of presidential initiatives which are only subsequently addressed by Congress. Because the President's constituency is national, when initiative lies with the President, the likelihood of inclusive interest aggregation (that is, consideration given to the widest spectrum of interests) is increased. In the traditional regulatory situation, however, the

224. See notes 183-185 and accompanying text supra.
225. Mr. Justice Douglas made this point in the economic context in United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940). In the absence of continued administrative supervision, those who fix reasonable prices today could set unreasonable ones tomorrow.
226. See note 181 and accompanying text supra.
independent agency form insulates decision making from presidential initiative. This does not, of course, remove the agency from politics. Instead, political influence takes place on an ad hoc basis through congressional committees, individual lobbyists, congressmen, or White House staff. In formal proceedings, issues are often framed in narrow, technical terms and thus it is difficult for the general public to exert its wider interest.\footnote{228}

The steel example demonstrates, however, that the independent agency form is not wholly responsible for the exclusion of broader interests from policymaking. In the wake of private litigation challenging the Executive's arrangement of voluntary import restraints among foreign steel companies,\footnote{229} Senator Phillip Hart complained to the Attorney General that the administration's position in the private suit amounted to an attempt to arrogate congressional lawmaking authority by ignoring the Sherman Act.\footnote{230} Concern about the balance of payments and loss of jobs due to imports should not, the Senator said, lead to "tossing out" the separation of powers.\footnote{231} Thus, Senator Hart's complaint that the Executive was ex-


A recent draft proposal of the Commission on Law and the Economy of the American Bar Association may be valuable in improving the degree to which traditional regulatory processes are responsive to wider public interests. Recognizing that traditional regulatory agencies have frequently been given narrow missions which conflict with other public policies, the ABA Commission's draft proposal recommends that the President be authorized to direct an agency to take up, decide, or reconsider regulatory issues which are of major significance to statutory goals other than those of the particular agency. \textit{Draft Report by Commission on Law and the Economy, American Bar Association, Federal Regulation: Roads to Reform} 101 (1978). Under the proposal, the President could modify or reverse agency action on the designated issues. \textit{Id.} Congress would have seventy days to react. Although Congress would not be permitted a legislative veto of the President's decision, the President's general authority would expire unless renewed by Congress, and Congress could withhold renewal if the President were persistently unresponsive to congressional will. \textit{Id.} at 105. The ABA Commission draft also proposes an executive order directing all federal agencies to conduct an inter-agency review under presidential auspices to assess the impact of major regulatory actions on all relevant statutory goals. \textit{Id.} at 107. With respect to both of the foregoing proposals the ABA Commission draft reflects the concern of the present article in urging that in balancing conflicting policy goals, "[t]he final authority ought to be an elected official, directly accountable at the polls for the success or failure of his policies." \textit{Id.} at 110.

\footnote{229} See Cartelization, supra note 187.

\footnote{230} \textit{Id.} at 872-73.

\footnote{231} \textit{Id.} Senator Hart further complained to the Secretary of State that there were reports that the State Department was encouraging foreign steel firms to ignore the district
cluding both Congress and the courts from the policymaking process suggests that presidential involvement is no easy solution to the perverse effects on the political process of attempting to hold economic power accountable through regulation. The Senator's reference to steelworker jobs and to his lack of information indicate the continuing problem of developing policy that reflects diverse interests when firm industry control of resources remains.

Government regulation which is more narrowly directed toward affecting industry control of resources may help minimize domination of the political process by special interests. Reporting requirements such as those under the securities laws,232 administrative inquiry pursuant to authority such as that granted by the FTC Act,233 and requests by the public under the Freedom of Information Act,234 facilitate accountability by revealing information about industry conditions. Although a certain amount of protection for confidential business information is necessary, the current situation appears skewed unduly in favor of confidentiality.235

An older form of regulation aimed at limiting resource accumulation in private hands is taxation. Current proposals contemplate using tax incentives to mimic competition, as with incentives for cost-related pricing.236 These proposals are appealing and generate much interest237 because they dispense with the traditional regulatory apparatus and envision using regulation to induce competition rather than preclude it. The proposal for inducing pricing in steel based on a fair rate of return, however, has some of the same defects as traditional rate regulation and trigger pricing. Regulators with an accommodating attitude toward the industry might be persuaded to set a "fair rate" that acts as a floor, thus suppressing price competition.238 Moreover, the tax incentive approach, unless specifically directed at market share or revenues,239 often seems simply to grant new

235. For example, "[b]ecause the Census Bureau secrets all data on individual companies, agencies lack direct and timely information, and they must conduct their own research. . . ." SHEPHERD, supra note 23, at 147.
236. See notes 216-218 and accompanying text supra.
238. BLAIR, supra note 118, at 670 criticizes Means' proposal further for lack of explanation of the bonus mechanism. See MEANS, supra note 216 and accompanying text.
239. See SHEPHERD, supra note 23, at 198-200.
benefits to existing successful firms, thus protecting the status quo.\textsuperscript{240}

Government ownership or control can appear in such a variety of forms that the political consequences are not subject to easy generalization. Indeed, as already stated, government operation is simply one end of a spectrum of managerial autonomy and government supervision. In the United States we have tended to create government corporations in instances where they do not directly compete with private firms.\textsuperscript{241} Not surprisingly, this often has the same perverse effects on performance as monopoly in private hands.\textsuperscript{242} Government participation in the market through competing government firms or equity shares in “private firms,” in contrast with government monopoly, provides a number of potential advantages.\textsuperscript{243} In broad terms, it establishes competing bases for accountability regarding the use of resources.\textsuperscript{244} To the degree that the market

\textsuperscript{240} Thus, for example, the proposal to impose charges for different kinds of pollution, thereby creating incentives to reduce pollution, rewards the steel firm with the lowest costs for reducing pollution. This is “precisely what is needed to achieve any given environmental standard at the lowest national cost.” Schultze, \textit{supra} note 237, at 56. The inefficient steel firm, however, may have to close its older coke ovens. Workers may be laid off. Moreover, when the ease with which a firm absorbs pollution charges or adjusts to avoid them depends on its position of market power, the use of incentive controls may further existing anticompetitive tendencies. In that case, assisting the polluter to modernize rather than go out of business may be an efficient long run approach. A government subsidy in the form of a temporary share in ownership might be an appropriate vehicle and would be easier to monitor than the disguised subsidy of protection from imports.

\textsuperscript{241} Miller, \textit{supra} note 207, at 298.

\textsuperscript{242} The policy dilemma for those concerned with the impact of economic power on politics is well illustrated by the weapons industry. The current situation is often one of public risk taking and private profits. Complete government ownership, however, might aggravate political pressures from communities dependent on the weapons industry for employment. The bureaucratic principle of expanding domain might provide as much stimulus for overinvestment and overexpansion in weapons as the profit motive. SHEPHERD, \textit{supra} note 23, at 265. \textit{See also} text accompanying note 207 \textit{supra}.

\textsuperscript{243} One author states that “there is strong evidence in the public utility arena that competition between the two systems of organization [government and private firms], like competition among private businesses, is highly conducive to improved performance.” (emphasis in original). 2 KAHN, \textit{supra} note 115, at 104. The idea that government enterprise could function in a market context is an old one. See O. LANGE & F. TAYLOR, \textit{ON THE ECONOMIC THEORY OF SOCIALISM} 98-99 (1938) for a discussion of marginal cost pricing by government firms. For purposes of allocative efficiency it is competition, rather than the form of ownership, which is decisive. \textit{See} A. LERNER, \textit{THE ECONOMICS OF CONTROL} (1944). Thus it is possible to have a market composed almost entirely of government firms, as was the case during the “New Economic Policy” in Soviet Russia and as is presently true in Yugoslavia. G. GROSSMAN, \textit{ECONOMIC SYSTEMS} 99 n.5, 100-04 (1967). \textit{See also} WILCOX, \textit{supra} note 115, at 567. The degree to which market socialism mimics the market composed of private firms may be illustrated by the fact that it is plagued by one of the same diseases—monopoly. The Yugoslavs found it necessary to enact an antitrust law, although critics believe it is not vigorously enforced. Sichel, \textit{The Threat to Market Socialism: The Case of Yugoslavia}, 16 \textit{ANTITRUST BULL.} 389 (1971).

\textsuperscript{244} Advantages are lost by going too far in either direction toward all private firms or
malfunctions in disciplining private industry, there is available to the public a source of skill and information to test industry claims. This is the real meaning of the term "yardstick competition" made familiar by the TVA. Government participation in steel production would be one way of testing the claim that prices actually reflect costs and that foreign firms are dumping in the United States market.

The competition of government firms is also a way of undermining collusive attempts to restrict competition. By distributing resources among competing bases of competition, the old antitrust objective of dividing resources can be served even where numerous private firms cannot exist.

all government. As Arthur Okun said recently in a related context, "a sound and viable society will not put all its eggs in one basket. It will rely on many mechanisms for decision making. . . ." A. OKUN, FURTHER THOUGHTS ON EQUALITY AND EFFICIENCY 30 (1977). The aim of achieving competing forms of accountability may not be attained where dominant private businesses actually control the government firm. For example, the Communications Satellite Systems (COMSAT) was established as a hybrid corporation—privately owned and operated for profit but with some of its directors appointed by the President and subject to presidential supervision in its relations with foreign governments. Miller, supra note 207, at 310-12. The Antitrust Division of the Justice Department sought to have the major communications carriers such as American Telephone & Telegraph (AT&T) relinquish their control of COMSAT. Not the least objection to the interlock is that AT&T has cable communications interests which conflict with COMSAT objectives. Id. at 316, 320, 321. Amtrak is another instance where private carriers hold the stock of a quasi-public company, heavily financed by the government. The arrangement has been criticized as a vehicle for imposing responsibility on the government without authority. Friedmann, Some Comparative Observations, in PUBLIC AND PRIVATE ENTERPRISE IN MIXED ECONOMIES 368 (W. Friedmann ed. 1974).

245. The term "yardstick" derives from the intent to use a system of public power to measure the performance of private firms which could not be tested by the market. HAWLEY, supra note 78, at 325, 328, 329, 341. The value of government participation in the market does not depend on exact comparability of costs and rates, which may be difficult, although not impossible to achieve, since the government firm may have different rights and liabilities. In Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), the Supreme Court found preservation of municipal power companies as competition for a regulated private firm protected by the antitrust laws, even though the municipal firms obtained some power at special low rates from the Bureau of Reclamation. See Note, 87 HARV. L. REV. 1720, 1741 (1974). For reasons set forth in the text accompanying note 251 infra, however, if the government enterprise is employed as a tool to enhance competition it should be required ordinarily to cover its own costs and should be given no excessive advantage or disadvantage in relation to its competitors.

246. British Steel represents a policy of total nationalization rather than public-private competition and thus is illustrative of the present proposal. Nevertheless, British Steel provides an example of the value of public access to information. Recently public pressure brought about the release of company data concerning expected losses. See European Style, supra note 207. If public action must be taken to shore up the steel industry, it seems reasonable that it be predicated on full information. During the coal strike in the United States in early 1978, miners who advocated government takeover of the industry argued that such takeover would facilitate a public review of coal company "books" and reveal whether the companies could afford the benefits demanded by the union.
Government firms have been known to participate in collusion,247 but the incentives to do so may be less, or at least the likelihood of detection greater.248 Moreover, a vigorous government firm reintroduces the spur of competition in an oligopolistic industry. Referring to the Swedish owned tobacco firm, Svenska Tobaks, the chairman of Philip Morris of Sweden recently called the firm, “very tough, very efficient, very clever . . . . There's not a bureaucrat in the house . . . .”249

Government participation in an industry may also diminish the advantage of the strategic position held by private firms. This is not to say that government control will eliminate the possibility of special interests taking advantage of strategic position,250 but once again, the advantage of government participation is in providing an alternative source of accountability. The speed with which the Executive Branch met the steel industry's initial demands in the autumn of 1977 and the 1978 approval of the Lykes-LTV merger must be largely attributed to the visible nature of the steel crisis, in sagging market positions and mass layoffs. A government company could assist in determining whether the layoffs were justified in business terms and could provide alternative means of cushioning the shock if they were. If there is to be a departure from market forces, the old antitrust instinctive opposition to concentration of resources counsels against perpetuating continuing concentration of resources in the same hands. In this case the resource is strategic control of jobs.

Nevertheless, employing the government firm to cushion market forces must be undertaken with restraint or the firm may become the captive of new special interests. This raises the general issue of the impact of public enterprise on the balance of electoral and managerial roles in the political system. Although one purpose of public enterprise may be to provide a degree of responsiveness to the public not found in the private firm, management nevertheless, requires a degree of autonomy to accomplish its tasks. Indeed, if the government firm is to be judged by its performance in the market, management should not ordinarily be distracted with responsi-

247. The government-owned British Petroleum reportedly engaged in payoffs to Italian politicians, and Renault, the French-owned auto company, apparently conspired with its private competitors to hold up prices. ENGLER, THE BROTHERHOOD OF OIL 216 (1977); LINDBLOM, supra note 141, at 113.

248. Much depends on the balance struck between competition and accountability. See note 251 infra.

249. See European Style, supra note 207. Kahn states that the salutary effect of the rivalry of the government firm with private firms is a function not only of competition for the same customers and the example of the yardstick, but the ultimate threat of government takeover. 1 KAHN, supra, note 115, at 104.

250. A public employee strike, for example, is particularly effective in a monopoly industry such as transportation, due to the lack of realistic alternatives for many users.
bility for implementing myriad other social policies. This suggests that there may sometimes be a conflict between the use of public enterprise to act as a check on private political power and its use for welfare purposes. One of the weaknesses of left-wing theory has been its disregard for the adverse political consequences of overreliance on government ownership of industry to achieve welfare goals. Ordinarily, the best approach would be to implement particular social objectives through regulation imposed from the outside on a public firm just as it would be on a private firm. For example, the state-owned Svenska Tobacks in Sweden is subject to the same rule applicable to private firms that cigarettes may not be advertised by showing pictures of cigarettes in a "natural environment."

Once government ownership and participation in a given industry is invoked, another aspect of the relationship between economic and political power must be faced. The existence of government ownership will not automatically resolve the lack of policy focus referred to earlier as a weakness in traditional regulation. Where market forces are slight, any resolution of issues must be raised to a high degree of generality and responsibility must be focused, if the electorate is to perceive and react to the conduct of government firms. Otherwise, one may have merely substituted management by unaccountable government oligarchs for unaccount-

251. See Shepherd, supra note 23, at 287. A slight degree of governmental administrative oversight in the nature of periodic GAO and OMB audits and competition reviews by the antitrust enforcement agencies could make for greater public accountability than is now available with the private firm. This degree of accountability is worth some sacrifice in efficiency. Involvement of the supervisory government department in the details of enterprise operation, however, risks diverting the firm from its competition enhancing role and subjecting it to the political influences of powerful private pressure groups. For example, the public corporations in Britain have had to strike a balance between "the two objectives of businesslike management and political accountability." See Wilcox, supra note 115, at 566-68, 573.

252. See European Style, supra note 207, § 3, at 3, col. 1. The conflicting objectives imposed upon government corporations are well illustrated with respect to the Tennessee Valley Authority by the Hearings Before the Subcomm. on Special Small Business Problems of the House Select Comm. on Small Business, The Impact of the Energy and Fuel Crisis on Small Business, 91st Cong., 2d Sess. (1970), in which the following, sometimes conflicting objectives were all discussed: keeping down costs to consumers, providing more contracts to small coal operators, paying enough for coal to cover the costs of strip mine reclamation, earning enough to cover all costs consistent with the Tennessee Valley Authority Act. Id. at 146-50. See also National Resources Defense Council, Inc. v. TVA, 367 F. Supp. 122, 128 (E.D. Tenn. 1973), aff'd, 502 F.2d 852 (6th Cir. 1974) (TVA environmental impact statement adequate); Save Our Cumberland Mountains, Inc. v. TVA, 374 F. Supp. 846 (E.D. Tenn. 1972), aff'd without opinion, 480 F.2d 926 (6th Cir. 1973), cert. denied, 415 U.S. 914 (1974) (TVA not responsible for enforcing state statute pertaining to overloading trucks); and TVA v. Hill, 435 U.S. 902 (1978) (Endangered Species Act, § 7, 16 U.S.C. § 1536 (1976), prohibited completion of TVA dam which would eradicate snail darter fish even though dam virtually completed).
able private ones, and nothing is gained. This is the advantage of general legislation such as the Humphrey-Hawkins bill\textsuperscript{253} and the Carter energy package.\textsuperscript{254} Without addressing the merits of either program here, they serve to illustrate the importance of comprehensive policy approaches in the expression of interests in the process.

One weakness in the policy process relating to steel imports, however, is that the imports have been treated in isolation from antitrust policy, aid to steel workers, and rationalization of production. Now that the government has attempted such reconciliation, the opportunity for public debate exists. Comprehensive treatment of the issues with the widest participation of interests would be facilitated if the program were submitted to Congress as a package. To the extent the Executive has authority to act without congressional approval, some body such as the Congressional Budget Office, Joint Economic Committee, or General Accounting Office (GAO) should conduct periodic reviews of policy toward steel with particular attention to whether policy reflects consideration of, and an attempt to reconcile diverse interests.

In assailing government planning,\textsuperscript{255} conservatives have viewed it as an


\textsuperscript{255} For surveys of the variety of planning employed in the western democracies, see SHONFIELD, \textit{ supra} note 205 and GROSSMAN, \textit{ supra} note 243. The extent of American experience with central planning during the world wars is often forgotten. \textit{See} G. SOULE & V. CARROSSO, \textit{American Economic History} 497-511, 552-58 (1957); G. FITE & J. REESE, \textit{An Economic History of the United States} 513-22, 630-48 (2d ed. 1959); G. SOULE, \textit{Planning USA} 33-47, 133-41 (1967). The difficulty with these experiences, however, appears to be similar to the difficulty experienced with NRA and efforts at partial planning attempted by regulatory commissions. The fragmented nature of American politics meant that planning often amounted to delegating authority to business to supervise itself. One observer concludes the War Industries Board (WIB) of World War I was used by business for its own objectives. \textit{R. CUFF, The War Industries Board} 177-82 (1973). As a government organization the WIB had enough credibility to protect business from public scrutiny, but was too weak actually to control business. The decentralized administrative structure employed was an "imperial bureaucratic system," in which the guiding principle was to try to appoint administrative delegates who shared the values of the government, and "hope for the best."
unwarranted intrusion in private affairs.\textsuperscript{256} When resort is had to government involvement in the market, however, some degree of integrative programming may be crucial to ensure accountability. Economic power unaccountable either to market forces or to those of the democratic political process is the worst of both worlds, whether embodied in private oligopoly or the edict of a government official.

\textbf{B. Oil}

Application of the foregoing analysis to the oil industry provides a perspective on its structure which is ignored by much current debate. Students of the industry seem to agree on very little of significance. Some assert that the industry is not concentrated and has low profits.\textsuperscript{257} Others say the opposite.\textsuperscript{258} Some contend that government action is necessary to restore competition.\textsuperscript{259} Others are forever insisting that competition could break out at any moment and would do so if the government would only keep its hands off.\textsuperscript{260} Commentators cannot even agree on so basic a question of current debate as whether the administration's proposed Crude Oil Equalization Tax\textsuperscript{261} would produce an increase in prices to consumers.\textsuperscript{262}

\textit{Id.} at 182. A similar critique has been directed at the planning in World War II. O. \textsc{Graham}, Jr., \textsc{Toward a Planned Society} 73-75 (1976). Thus, despite considerable success with some aspects of planning such as rationalization of car distribution during government operation of the railroads, see \textsc{Fite} \& \textsc{Reese}, \textit{supra} at 644-45, the political implications of planning are ambiguous. Those concerned with the impact of economic power on politics should proceed cautiously toward increased planning. If the public interest is to prevail in the process, mechanisms of political integration may need to be enhanced first. See note 181 supra. For a similar commentary on the British planning experience, see \textsc{Shonfield}, \textit{supra} note 205, at 88-89.

\textsuperscript{256} F. \textsc{Hyack}, \textsc{The Road to Serfdom} (1945).

Recognition of the importance for democratic accountability of coordinated policymaking has come recently in the draft proposals advanced by the American Bar Association's Commission on Law and the Economy dealing with the traditional economic regulatory agencies. See note 228, \textit{supra}.

\textsuperscript{257} See \textsc{Mead}, \textsc{Private Enterprise, Regulation and Government Enterprise in the Energy Sector}, in Oil in the Seventies 129 (1977).

\textsuperscript{258} \textsc{Blair}, \textit{supra} note 15, at 257, 294-320.

\textsuperscript{259} \textit{Id.} at 399-400.

\textsuperscript{260} \textsc{Mead}, \textit{supra} note 257, at 137; \textsc{M. Adelman}, \textsc{The World Petroleum Market} 149, 159 (1972).

\textsuperscript{261} Originally proposed as part of the National Energy Act, the provision proposed a three stage excise tax on domestic crude oil. It was designed to equalize United States and world petroleum prices by 1980, and would have rebated tax proceeds to consumers. A final version of the energy proposal without the excise tax was enacted by Congress on October 14, 1978. See the Energy Production and Conservation Tax Incentive Act, Pub. L. No. 95-618, 92 Stat. 3174 (1978).

\textsuperscript{262} See \textsc{Lichtblau}, \textsc{Pricing U.S. Oil Products}, Wall St. J., Nov. 11, 1977, at 14, col. 3; \textsc{Phelps and Smith Respond}, Wall St. J., Nov. 11, 1977, at 14, col. 3.
One example of a favorable picture of the oil industry is that drawn by Walter J. Mead in a recent essay.\textsuperscript{263} Mead adheres to the view that the industry is not highly concentrated and that profits are not excessive. Additionally, he claims that the rate of innovation has been high, and that government intervention and regulation has been virtually all counterproductive. The only concession to an adverse role played by the oil industry comes when he accuses the federal government of introducing the monopoly element into the industry by "rigging" the market.\textsuperscript{264} Mead concedes that "[o]f course, such government rigging came about as a result of petitions from the oil industry."\textsuperscript{265}

A review of the history of oil since the turn of the century induces a degree of skepticism toward Mead's serene view of the prospects of a laissez faire policy toward oil. In fact, it induces a degree of skepticism about the likelihood of any policy toward oil. The truth may well be more complex than either the defenders of the market or the advocates of government intervention suppose—namely that the great oil companies have been able to turn every kind of policy to their advantage, frustrating attempts to achieve more inclusive policy goals. Thus, in the oil industry the need to weigh the political factor gains particular relevance. Without resolving the issue of whether vigorous competition is theoretically possible, it is essential that whatever course is followed, programs should be selected which redress the balance of interests reflected in the policy-making process.

The 1911 decision of the Supreme Court in \textit{Standard Oil Company of New Jersey v. United States}\textsuperscript{266} sealed the fate of the old Standard Oil trust. The trustbusters, however, like Hercules in the Greek myth, soon found that the hydra once slain had sprung many heads where before there had been one.\textsuperscript{267} During the depression, state prorationing programs\textsuperscript{268} were used by companies to restrict production and to maintain prices. Restriction, however, bore little relationship to the ostensible conservation objec-

\textsuperscript{263} See Mead, supra note 257.
\textsuperscript{264} Id. at 138.
\textsuperscript{265} Id.
\textsuperscript{266} 221 U.S. 1 (1911). See text accompanying notes 49-55 supra.
\textsuperscript{268} The first such plan was passed in Oklahoma in 1927 and other states soon followed suit. Production overcapacity led to efforts to maintain prices through state rationing. Although justified on conservation grounds, the withdrawal rate was not calculated to minimize waste. An attempt to provide the Secretary of the Interior with prorationing authority was initially supported by major oil companies, but they backed off, in part due to the Secretary's alarming remarks about turning the oil industry into a public utility. \textit{Hawley}, supra note 78, at 212-18.
ative of those laws. In California, where voters rejected a proration law, the producers set up a "private" system. Coupled with use of the tariff and voluntary restrictions on imports, the Senate Small Business Committee found the national system a "perfect pattern of monopolistic control over oil production, the distribution thereof among refiners and distributors, and ultimately the price paid by the public." 270

When World War II broke out, petroleum was one of the industries in which the Antitrust Division shelved projected suits. 271 During the war, when the military became uneasy about shortages, industry spokesmen were able to quash proposals for United States acquisition of oil company holdings in Saudi Arabia and for construction of a United States owned refinery and pipelines in the Near East. 272 In the early 1950's as a result of an FTC report, President Truman ordered suit to be filed against the international oil cartel, challenging monopolistic control of foreign production and curtailment of domestic production. 273 The case was progressively eviscerated, however, by the novel step of transferring supervision of the litigation to the State Department, and then curtailing the scope of the charges and barring the Justice Department from seeking relief through divestiture. At one point an Eisenhower aide explained that it had to be assumed that enforcement of the antitrust laws against the oil companies operating in the Near East was "secondary to the national security interest..." 274 Arguments at the time that national security would be advanced by enforcement, however, were ignored. 275

More recently, the Justice Department has been criticized for permitting Continental Oil to acquire Consolidated Coal, allowing three major petroleum companies to dominate both the North Slope reserves and the Alaskan pipeline, and failing to oppose British Petroleum's acquisitions in the United States. 276 Ralph Nader's Study Group on Antitrust Enforcement compiled a long list of cases not filed by the Justice Department, cases lost against the oil industry, or settled with what the Group thought were weak consent decrees. It also indicated instances in which permission was granted by the Justice Department through business review letters to tread

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269. _Id._ at 218.
270. _Id._ at 219 (quoting _Lynch, The Concentration of Economic Power_ (1946)).
271. _Id._ at 442.
274. _Blair, supra_ note 15, at 73.
275. _Id._ at 71-76.
276. _Engler, supra_ note 247, at 214.
beyond the boundaries of the law.\textsuperscript{277} Although arguments can be made to justify some of these outcomes, there is considerable evidence that over the years the oil industry has deflected most significant efforts to apply the principles of the antitrust laws to it.\textsuperscript{278}

Outside the antitrust field, the record since World War II indicates that the oil industry has frequently employed government to achieve its ends, not always employing the most savory of means. Import quotas were introduced in the 1950's and 1960's which supported high domestic prices.\textsuperscript{279} It was reported that the Secretary of the Treasury, who was also a member of the Cabinet Committee that recommended adoption of mandatory quotas, had a stake in increased oil prices due to transactions with oil interests entered into prior to joining the government.\textsuperscript{280} Persons associated with one oil firm reportedly gave $250,000 to the 1972 Nixon campaign. Apparently, after the election, efforts to revoke the firm's special import license ceased, and the firm obtained an increase in import allocations.\textsuperscript{281}


\textsuperscript{278} In July, 1973, the Federal Trade Commission, In re Exxon, once again brought an action against the major oil companies, charging them with monopolistic practices including raising barriers to entry, limiting the supply of crude oil to independent refiners, and inflating prices. Although already over five years old, the case is still in its preliminary stages. In re Exxon, complaint filed, No. 8934 (F.T.C., July 7, 1973). The complaint was printed in full in Eagman, \textit{FTC v. Exxon: Oligopoly in the Petroleum Industry}, 6 \textit{ANTITRUST L. \& ECON.} 67 (1973).

\textsuperscript{279} \textit{See} \textit{Mead}, supra note 257, at 153. In one view, import quotas, as well as proration plans, were the result of strong arm tactics by the dominant companies. \textit{See} \textit{Wash. Post}, July 16, 1970, § A, at 1, col. 1; \textit{BLAIR}, supra note 15, at 173-75. Another view, however, concludes that these policies were actually the product of pressure by domestic independents and local groups and that the majors would have been advantaged by being able to import more oil. \textit{ADELMAN}, supra note 260, at 149. This commentator observed that only when independents and local interests won protectionist constraints were such constraints utilized by the majors for price signaling purposes, which, in turn, surprised competition among those firms. \textit{Id.} at 198. It has been pointed out, however, that even when independent oil companies secured voluntary import restraints, they obtained the support of the majors by agreeing to base allocations on historical imports, a formula favorable to the majors. Thus, even if the majors are not always the principal initiators of restrictive practices, they have often been able to turn them to their advantage. Salamon \& Siegfried, \textit{The Relationship Between Economic Structure and Political Power: The Energy Industry}, in \textit{COMPETITION IN THE U.S. ENERGY INDUSTRY} 380 (T. Duchesneau, ed. 1975).


Three oil companies have been reported to have made illegal campaign contributions of $100,000 each during the 1972 presidential campaign.\footnote{282} The chairman of one firm explained to a Senate Committee that a contribution was needed because his company was not “a large factor” in its markets and it desired a “calling card” to obtain access to administrative officials.\footnote{283} Large contributions have also been given by oil interests to strategically placed politicians. Thus, four members of the Senate Finance Committee reportedly received no less than $330,000 collectively at the time of the 1974 campaigns.\footnote{284} Large political contributions of varying degrees of propriety have additionally been made by the oil companies in foreign elections.\footnote{285}

The interrelationship between oil interests and the making of United States foreign policy may be indicated by a few examples. Currently a foreign tax credit is given for certain taxes paid to foreign governments.\footnote{286} With respect to payments made to Middle East countries, this credit was partly designed to accommodate growing demands by producer countries for higher revenues from their own oil. Desirous of maintaining the good will of governments in the Middle East, the State Department, working with the National Security Council and the Treasury Department devised the tax credit with the concurrence of major oil firms.\footnote{287} The credit has been criticized as lacking justification as a credit against income because, in some instances, changed circumstances made the tax more like a royalty than a tax on profits.\footnote{288} United States income taxes paid by the international oil companies have been low, averaging, for example, less than five

\footnotesize{\begin{itemize}
  \item \footnote{284} News from Common Cause, March 11, 1975; Engler, supra note 247, at 64.
  \item \footnote{285} Hearings Before the Senate Subcomm. of Multinational Corporations of the Comm. on Foreign Relations, on Multinational Corps. and United States Foreign Policy, 93d Cong., 2d Sess., Pt. 12, at 4-58 (1974) [hereinafter cited as Hearings] (testimony of B.R. Dorsey, Chairman of the Board, Gulf Oil Corp.). See also Engler, supra note 247, at 110-13 & nn.32-36 and sources cited therein. For a further discussion of the politics of oil, see S. Freeman, Energy: The New Era 177-98 (1974).
  \item \footnote{286} For a recent ruling discussing the foreign tax credit and citing prior rulings, see Rev. Rul. 78-61, I.R.B. No 78-8 (Feb. 21, 1978). See also 26 U.S.C. §§ 901-908 (1976) and Rev. Rul. 55-296, 1955-1 C.B. 386.
  \item \footnote{287} Hearings, supra note 285, Pt. 4, at 83-128, Pt. 8, at 341-78. See also Engler, supra note 247, at 118.
  \item \footnote{288} Hearings, supra note 285, Pt. 4, at 83-128 (testimony of Stanford G. Ross) and Pt. 8, at 341-78. See also Engler, supra note 247, at 119.
\end{itemize}}
percent in 1972.289 Thus, the supposed benefits from maintaining cordial relations with the producer countries may have been purchased at the expense of the American public, although the interest in comity was perhaps as strong for the oil companies as it was for the State Department. When the Internal Revenue Service recently proposed tightening the tax credit rules, however, controversy within the Treasury Department was reported with respect to the impact of such a move on the Carter administration's relations with business.290

Foreign aid has been employed to assist the oil companies. The United States Information Agency prepared pamphlets for distribution in Ecuador by major oil firms, extolling the benefits of private enterprise to forestall criticism of United States' investments as imperialistic.291 Suspension of foreign aid to various countries has also been employed as a stick to produce compliance with the demands of private oil companies.292 Reportedly, one such action weakened a moderate government in Peru.293

The United States government seems to have seen its role in the Middle East as principally one of maintaining amicable relations with the producer states rather than one of participating in negotiations concerning terms of trade in oil.294 On occasion, the United States government's deference to established commercial relationships in the Middle East has resulted in efforts to protect the domain of the major oil firms. Thus, in the 1960's the State Department persuaded one firm not to make an offer to Iraq for developing oil concessions, on the theory that the firm's actions would undermine negotiations by other firms which had lost their concessions.295 State also intervened with foreign governments, particularly Italy, when Iraq sought bids from foreign oil firms.296

289. Hearings, supra note 285, Pt. 4, at 104 (statistics compiled by committee staff); STAFF OF SENATE SUBCOMM. ON MULTINATIONAL CORPORATIONS, 93D CONG., 2D SESS., OIL CORPORATIONS AND UNITED STATES FOREIGN POLICY 92 (Comm. Print 1975) [hereinafter cited as REPORT]. See also ENGLER, supra note 247, at 119.


293. Hearings, supra note 292, at 91 (statement of Richard Goodwin); ENGLER, supra note 247, at 106.


295. REPORT, supra note 289, at 102; ENGLER, supra note 247, at 124-25.

296. ENGLER, supra note 247, at 125. See Hearings, supra note 285, Pt. 8, at 532-55; Wall St. J., Feb 15, 1974, at 1, col. 1; REPORT supra note 289, at 102.
To foster a desirable pro-Arab political climate, oil firms have supported groups such as the Americans for Middle East Understanding, which work among educational, business and church groups to promote understanding of Arab positions and culture. In a 1973 letter to stockholders and employees, one major oil company reportedly cautioned that many Arabs feel that Americans do not "hold in proper regard the national interests of the Arab states." The letter urged "that the United States should work more closely with the Arab governments to build up and enhance our relations with the Arab people. . . ." The oil firms have also applied direct pressure. When the October War of 1973 broke in the Middle East, a memorandum to President Nixon from four major oil companies warned against any new military aid to Israel.

With the foregoing survey of the history of government policy toward oil, we can return to Professor Mead's proposals for a laissez-faire approach to oil. In dismissing alternatives as less efficient, Mead quotes a 1975 Federal Energy Administration report which asserted that there is "no basis" for concluding that public companies are more efficient and "evidence is available" to suggest the contrary. No concession or even recognition is given to the non-economic reasons, pro or con, for government regulation or public enterprise. Government is blamed for the monopoly element in the oil industry, but there is no elaboration of the role of the private firms in bringing this about beyond mentioning that the government action was at the "petition" of the industry.

Such narrow analysis has the virtue of simplicity, but appears unrealistic. Even if in some theoretical model, the oil industry presents a competitive picture, the record suggests that the companies are too large in resources to insulate government from their influence. If Exxon were to divest all but its crude oil and exploration facilities, it would still be the largest privately owned company in the world. In 1970, oil accounted for thirty percent of all American foreign investments, forty percent of

297. ENGLER, supra note 247, at 137. See STAFF OF HOUSE COMM. ON FOREIGN AFFAIRS, 93D CONG., 2D SESS., REPORT OF THE SPECIAL STUDY MISSION TO THE MIDDLE EAST 6 (Comm. Print 1974).
299. Id.
300. Reprinted in Hearings, supra note 285, Pt. 7, at 546-47; ENGLER, supra note 247, at 139.
302. See text accompanying notes 264-265 supra.
303. BLAIR, supra note 15, at 382.
American investments in underdeveloped countries, and sixty percent of American earnings from underdeveloped countries. Thus, the issue is not whether government will interact with the oil companies, but how, in fact, it will do so.

Thus, even if those who say oil is a workably competitive industry are correct, oil may be an example of an industry which illustrates that what is satisfactory from an economic standpoint may not be satisfactory for the health of democratic politics. Indeed, part of the political potency of the oil industry may be attributable to the community of interests on some issues among the major companies and smaller firms. The protection of small firms through existing regulatory and antitrust efforts may not be enough to protect the political process. As a result, policies supplementing the antitrust approach merit consideration.

There is reason to believe that public policy relating to oil reflects an imbalance of resources between public and private interests. The adverse effects of this imbalance are familiar—unwarranted influence over the political process in achieving the industry's economic objectives, excessive influence in other areas of public policy such as foreign policy, and undesirable influence in shaping the general climate of belief and opinion. Repeatedly, as with antitrust prosecutions and import quotas, the national security argument has provided the industry with the strategic position to achieve many of its objectives. The oil industry's monopoly of information resources has forced governmental reliance on CIA data, and, as noted, money has been liberally employed to achieve political objectives.


305. See note 280 supra. SALAMON & SIEGFRIED, supra note 279, at 382, suggest that the perversion of government regulation follows a pattern. When competition threatens, the majors foment a crisis atmosphere and urge that regulation is necessary to protect the "little guy." Id. If regulation becomes inconvenient it can be attacked later as anticompetitive. Id. Thus, government involvement can be used or discarded as private advantage dictates.

306. See Salamon & Siegfried, supra note 279, at 318 (discussing evidence linking oil firm size to successful tax avoidance). With respect to oil company influence on public opinion, Salamon and Siegfried note that the industry has spent millions of dollars to propagate their view of the "energy crisis." Id. at 383.

307. Herman Fanssen, an energy expert at the Library of Congress, and an official at the Department of Energy recently noted that there is little alternative to reliance on the CIA. Wash. Post, April 23, 1978, § A, at 1, col. 6. Yet the motives of the CIA have been criticized. There have been charges and speculation that its estimates were designed to support the Carter energy program or to influence United States relations with Israel and the Arabs. James Akins, former United States Ambassador to Saudi Arabia and former director of the Office of Fuels and Energy at the State Department, said that a report prepared by the CIA Bureau of Economic Research on Saudi Arabian oil fields was "pernicious" in giving the Saudis an excuse to cut production in the face of United States efforts to step up production to avoid a world oil shortage. Id. at 16, col. 6.
If the efficiency argument against public participation in the oil industry were much clearer than the cautious Federal Energy Administration statement quoted by Mead, there would still be a political case for such a public role.

Better access to industry information could be achieved by special audits or by special legislation which, although it would not alter the structure of the industry, would require the companies to accept public members on their boards. It could also be achieved by government ownership participation. Senator Adlai Stevenson once urged the creation of a public corporation to act as a costing yardstick, which would develop publicly owned gas and oil in competition with private enterprise. Another natural area for a government corporation is energy research and development, because the government already finances industry R&D efforts. In 1971, a proposal was advanced for a Coal Gasification Development Corporation, jointly managed and funded by government and industry.

The proposals for government participation have the advantage that they would not only help break the industry's hold over information, but could help lessen industry leverage over public policy, gained from its strategic position. It is possible that government companies would have joined in the pressure for oil import quotas in the 1950's, or urged the withholding of foreign aid to produce concessions, or advocated limitations on military aid to Israel. It is even possible that they might illegally

308. Senator Stevenson first proposed the creation of a federal oil and gas corporation on Nov. 7, 1973 in an amendment to the Oil & Gas Regulatory Reform Act of 1973, S. 2506, 93d Cong., 1st Sess. (1973). The purpose of the corporation was to "explore for, develop and produce the large deposits of oil, and natural gas on lands owned by the Federal Government." 119 CONG. REC. 36115 (1973). Stevenson emphasized that the legislation was not intended to provide a first step in nationalizing the American petroleum industry. Rather, it was designed to serve as "a spur, a yardstick, an incentive" for private oil companies and a device to restore competition in the private market. Id. at 36116. However, no action was taken on the measure. Similar proposals were introduced by Senator Stevenson on April 8, 1974, see 120 CONG. REC. 5398 (1974), and again on Feb. 17, 1975, see 121 CONG. REC. 3158 (1975). Again, no action was taken on either bill.


310. ENGLER, supra note 247, at 169. Freeman suggests that the government should serve as an energy "supplier of last resort." FREEMAN, supra note 285, at 320-22. He states that:

[o]rdinarily the public could expect competitive market forces to assure that supplies offered for sale would be ample. But bitter experience has shown us that clean energy supplies are scarce in relation to potential demand. As discussed earlier, government has become less able to carry out programs or enforce laws that Big Oil disapproves.

Id. at 320-21. He also suggests that a United States Fuels Supply Corporation could "buy energy from abroad, contract for development of fuels on federal lands... build refineries, develop synthetic plants..." Id. at 322.
contribute money to political campaigns. They would, however, be subject to different incentive systems and means of accountability.

Thus, government corporations might be utilized to implement competitive principles espoused by the antitrust enforcement agencies, much as those agencies advocate competition before regulatory commissions such as the Civil Aeronautics Board and the Interstate Commerce Commission. In a situation similar to the one in which oil import quotas were demanded by industry, the public companies could advocate a competitive approach. Employing their own resources of skill and information, the government companies could be in a position, when justified by the facts, to argue credibly that national security would not be adversely affected by following competitive principles. Moreover, although government funds can be as misused in political campaigns as private money, the scrutiny of the opposition party and of the various governmental auditing agencies would be at least as reliable as external review of private discretionary authority. Total reliance on one means of accountability would be foolish, but the current approach leaves too much potential for abuse beyond public scrutiny. Finally, although the tension between the government firm's political responsiveness and its role as a profit-making entity was noted earlier in connection with steel, there may be instances in which the capacity to give priority to political policy goals may be vital to the public interest. For example, it may have been desirable to accommodate Iraq's terms for their oil concessions in spite of reduced profits for American firms, since frustration by the United States of Iraqi efforts to obtain bids from firms not already established in Iraq may have contributed to the increased Soviet influence in Iraq. When oil interests impinge on foreign policy, and if the public must pay higher energy prices to accommodate either the oil interests or foreign policy objectives, it is important that the firms be subject to close public scrutiny. For these purposes, a properly accountable government firm may be necessary.

In addition to redressing the balance of resources between private and public interests, the previous analysis calls attention to the need for development of public policy at a level of generality that can be addressed by lay politicians and voters. This may require some degree of comprehensive programming as has been taking place in the presidential energy package proposals. For all the criticism of these proposals, they have provided some debate over major alternatives and an opportunity for a

311. For an example of such recent pro-competitive action by TVA, see text accompanying notes 382-83 infra.
312. See ENGLER, supra note 247, at 125.
313. For a brief description of the Carter administration proposals, see THE NEW REPUBLIC, April 30, 1977, at 5-8. See also note 254 supra.
much wider expression of interests than either a regulatory commission approach or total laissez-faire—“deregulation”—would allow. In contrasting the Ford and Carter proposals, one magazine remarked that both would make oil and gas more expensive. The Ford windfall profits tax would have been refunded to companies that invested in new energy projects, thus returning the increased revenue “back to the economy without changing the structure of the economy.” By contrast, Carter intends to distribute the windfall directly back to consumers, and by providing incentives for conservation and development of new energy sources, he would “channel money away from established patterns of investment.” These alternatives are at a level of generality that the layman can understand and accept or reject in Congress and at the polls.

The record of public policy toward the oil industry raises difficult questions for antitrust enforcement and other approaches to control the industry. The frustrating length of litigation in the Exxon case and the debate over whether divestiture would be consistent with efficiency are probably less important than the question of whether the public can ever control the industry through antitrust enforcement alone. The question is one of political reality: whether in the face of the political organization and influence wielded by a great and vital industry, antitrust enforcement can ever muster the popular support to sustain and win a long drawn-out struggle. Without abandoning antitrust, other means of introducing competition and accountability, including public corporations and continued comprehensive federal programming, should be employed. If these approaches are designed in a manner which will redress the balance of private and public resources and expand the range of interests heard in the policy making process, the power of the oil industry to resist legitimate antitrust enforcement may ultimately be reduced as well.

C. The Influence of Advertising on Public Opinion

The emphasis on deconcentration in antitrust is inadequate to deal with the influence of economic power on politics. The steel industry provides an example of a situation in which antitrust may be inadequate because strong economic pressures are forcing departure from the decentralized market approach. The oil industry illustrates yet another situation in which antitrust may fail to achieve its political goals, because the decentralization adequate for workable competition is inadequate to forestall unwarranted political influence. Advertising represents a third situation

314. Id. See also note 261 supra.
in which the antitrust approach fails to deal with the political influence of economic power.

The concern here is with advertising as a force which channels the energy of society in the direction of private consumption and wants as opposed to public needs. Because advertising attempts to project a vision of happiness linked to individual consumption, the deconcentration approach of antitrust is not likely to alter significantly the overall impact of the advocacy of private consumption by advertising.

It may be argued that this function of advertising is not objectionable and is not inconsistent with democracy. If people respond to advertising with their dollars, they indicate through "consumer sovereignty" that they desire a society oriented toward personal consumption. Sociologist Daniel Bell argues that the current theme of American society is hedonism—indeed that hedonism is all that is left of the triad of Protestant economic drive, sobriety, and a sense of destiny that gave America its purpose. But he suggests that this situation is dangerous because "[t]he foundation of any liberal society is the willingness of all groups to compromise private ends for the public interest." The alternative is polarization and group fighting, or cynical bargaining in which the powerful benefit at the expense of the weak.

The issue then, is not whether people have chosen the current situation, but whether, for the survival of a healthy liberal democracy, it is reasonable to consider an alternative which the electorate might also choose. Stated in terms of the analytical model employed above, the inquiry is whether resources can be channeled better to enhance those means by which the electorate can play its role in discerning and expressing common purposes.

Advertising is believed to be one source of barriers to entry and thus, excessive market power. The barriers may be erected intentionally, by proliferation of brands, or the barriers may result from the economies of large-scale promotion. To the degree that advertising does produce barriers to entry, it may affect the political process by augmenting economic power. Advertising may, however, have a more pervasive, though less readily measurable effect on politics through its influence on political attitudes and beliefs. As V.O. Key observed, "[t]he great political triumph

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317. BELL, supra note 148, at 21, 224, 281.
318. Id. at 245.
319. Id.
320. See note 181 and accompanying text supra.
321. For a discussion of advertising as a cause of barriers to entry, see COMANOR & WILSON, supra note 121. Regarding economies of large-scale promotion, see note 335 and accompanying text infra.
of large-scale enterprise has been the manufacture of a public opinion favorably disposed toward, or at least tolerant of, gigantic corporations."322

The favor curried by advertising may accrue not only to individual corporations, but also to the objectives and products of the market as opposed to those social goods which the market fails to provide. Although the United States is sometimes thought of as a "welfare state," in comparison with other industrial nations it has a low rate of expenditure on social programs, and a correspondingly poor record on such indices of civilization as infant mortality and the availability of housing and public transportation.323 Contrasted with America's condition of enormous overall wealth and material abundance, this situation has come to be known as one of "private wealth and public squalor."324

322. V.O. Key, Politics, Parties and Pressure Groups 108 (4th ed. 1959). For a discussion of business influence over the mass media apart from advertising, see Epstein, supra note 177, at 212. Advertising has also been criticized as socially wasteful and ethically repugnant. K. Boulding, Economic Analysis 513-14 (4th ed. 1966). In this view, much, if not most advertising is said to lack information content. Instead, it is designed "to build up in the mind of the consumer irrational preferences for certain brands of goods." Id. at 513. The advertiser juxtaposes liquor in association with flowers, cigarettes with beautiful women and so on, in an effort "to associate the commodity in question with something else which the consumer likes or with the avoidance of something which the consumer seeks to avoid." Id. at 620-21. A study of sixth grade school children revealed that about one-fifth of the children believed that commercials lie most of the time, and a large proportion of that one-fifth believed that all adults lie most of the time. Lane, Happiness, Virtue & Justice, Yale Alum. Mag. & J. 46, 48 (April 1978). Commenting on this study, political behaviorist Robert Lane said, "[p]erhaps the weakest link in the ethical defense of capitalism, then, is the license given to the 'self-regulating market' in advertising." Id. For a favorable view of advertising, however, see J. Backman, Advertising & Competition (1967).

323. See Harrington, The Big Lie About the Sixties, The New Republic, Nov. 29, 1975, at 15-19. According to a recent report by the Department of Commerce, the infant mortality rate in the United States is substantially higher than in other leading industrial nations. Based upon deaths which occurred under one year of age, per 1000 live births, the United States infant mortality rate was 18.5%, as compared with: Canada, 17.1%, Japan, 11.7% Finland, 12.0%, France, 13.3% and, Sweden, 10.8%. Office of Federal Statistical Policy & Standards, U.S. Dept. of Commerce, Social Indicators for 1976 at 213 (1977).

324. One obstacle in dealing with the imbalance between public and private goods is the difficulty in measuring the imbalance. (For the meaning of public goods see notes 116 and 121, supra.) Since, by definition, the availability of public goods cannot be measured by market means, it is impossible to determine whether public goods are over or under-produced. See Samuelson, Aspects of Public Expenditure Theories, 40 Rev. of Econ. & Stat. 335 (1958). As Alfred Kahn states, the determination of whether the allocation of resources produced by the market satisfies social welfare is a political or philosophical determination, not an economic one. 1 Kahn, supra note 115, at 67. It is probably true, however, for reasons stated in note 330 infra, that there is a tendency for public goods to be under-produced relative to voter preferences, and research and analysis can reveal people's preferences. This can aid in determining the appropriate quantity of public goods made through the administrative or political process. In discussing the trade-off between economic equality and efficiency, Arthur Okun urges "a crystallization of social attitudes toward
In the years since World War II there has been a significant increase in United States government expenditures—from 12.8% of the Gross National Product in 1945 to 22.4% in 1970. Federal welfare expenditures rose from $14 billion in 1950 to $180 billion in 1975. Nevertheless, most of the increase in welfare expenditures is due to the increase in payments to the elderly under social security, veterans' benefits and medicare. While these programs are desirable, the increased payments are largely a response to the legitimate claims of a growing elderly population rather than an increased national commitment to public goods generally. Indeed, such increases in public outlays as have developed appear to have precipitated resentment and conflict, as signified by Proposition 13, the California property tax cut referendum and other signs of “taxpayer revolt.”

Arguably one great contributing cause of this situation is the pervasive influence of private economic power in shaping the culture, partly through advertising, into one heavily oriented toward private consumption of goods. As Professor Galbraith puts it, “The advertising of the individual automobile company seeks to win consumers from other makes. But the advertising of all together contributes to the conviction that happiness is associated with automobile ownership.”

the trade-off" as a prerequisite for their implementation through the political process. Okun, supra note 244, at 32.

325. Bell, supra note 148, at 233 n.16.
326. Id.
327. Id.

328. The Jarvis-Gann Initiative, Propositions 13 on the California primary ballot, was passed on June 6, 1978 by a voter margin of 65-35%. The proposition amends Art. XIII of the California Constitution by limiting real property taxes to 1% of the property's "full cash value," and requires that any change in state taxes enacted for the purpose of increasing revenue must be imposed by an act passed by not less than two-thirds of all members elected to the legislature. The amendment also provides that no new ad valorem taxes on real property, or sales or transaction taxes on sales of real property may be imposed. The amendment became effective for the tax year beginning July 1, 1978. 39 State Tax Rev. (CCH) 1-2 (extra ed., June 8, 1978). For reactions to the amendment and predictions as to its impact, see Wash. Post, June 7, 1978, § A, at 1, col. 1; Id., Aug. 23, 1978, § A, at 3, col. 4.


330. J. Galbraith, Economics and the Public Purpose 140 (1973). There are, of course, other reasons for the imbalance in fulfilling private and public needs. The influence of business occasioned by its control of resources has already been discussed. See note 181
lications. Conceivably it might be the precondition for liberation from a compulsive concern with individual material well-being. Alternatively, however, by disassociating demand from physical needs, it might provide an endless field for exploitation by the persuasive power of advertising.\textsuperscript{331}

The current imbalance between private and public goods warrants efforts to foster a more inclusive vision of the good life than that projected by commercial advertising. If this effort only produced a greater willingness to sacrifice at current levels on behalf of the community, it might enhance social peace. Of course, willingness to sacrifice depends not only on a commitment to public goods, but on a belief that responsibility for financing public expenditures is fairly shared and that the agencies responsible for implementing public programs are competent.\textsuperscript{332}

Thus, while the problem of expenditure in the public interest is multifaceted, advertising represents a massive expenditure of resources in a way which may inhibit the electorate in performing its role of expressing the public interest. The instinct of antitrust when it finds concentrated resources is to divide them, but the advertising problem poses insurmountable difficulties for this approach to economic influence on politics. For example, antitrust advocates say that the automobile industry could be broken into eight or ten firms without sacrificing economies of scale.\textsuperscript{333} It is questionable, however, whether this would be a sufficient result from the standpoint of economic influence on politics. Each of the new firms would still rank in sales among the Fortune 500.\textsuperscript{334} Moreover, it is unclear whether the proposals for breakup account for the problem of economies of large-scale sales promotion thought to be present in consumer

\textsuperscript{supra}. It has also been suggested that the incentives for business action which will advance its interests are much greater than for dispersed members of the public to do the same. \textit{See} M. Olson, \textsc{The Logic of Collective Action: Public Goods and the Theory of Groups} 35 (1965). Also, individuals are more likely to be informed about matters affecting them in their capacities as income earners than on other subjects. Thus, political platforms tend to be composed of special interest planks, but their composition might differ if voters were more fully informed. \textit{See} Downs, \textit{Why the Government Budget is Too Small in a Democracy}, in \textsc{Private Wants and Public Needs} 90-95 (E. Phelps ed. 1965).

\textsuperscript{331.} J. Galbraith, \textsc{The New Industrial State} 202, 210 (1967). In 1977, $37 billion was spent throughout the United States economy on advertising. \textit{Advertising Age}, Jan. 19, 1978, at 88.

\textsuperscript{332.} Despite the current “tax revolt,” (see notes 328-29 \textit{supra}), a recent poll shows that Americans consider tax reform to achieve greater fairness as a more pressing item on the public agenda than tax reduction. \textit{Wash. Post}, Aug. 6, 1978, § D, at 5, col. 1. It is no accident that private interests have fought tax reform; but bureaucratic opposition to civil service reform may be equally contrary to the effort to gain enhanced support for public expenditures.

\textsuperscript{333.} \textit{See}, e.g., White, \textit{A Proposal for Restructuring the Automobile Industry}, \textsc{7 Antitrust L. & Econ. Rev.} 89-90 (1975).

\textsuperscript{334.} \textit{Id.} at 94.
goods industries. An antitrust decree breaking up the automobile companies could, perhaps, restrict advertising to prevent the economies of large scale promotion and the use of model changes from resulting in reconcentration. To the degree that effective competition is maintained, consumers would presumably pay less for cars; perhaps they might even buy more cars. But there is the dilemma and the irony. The antitrust approach can assist people as consumers in obtaining what is available in the market at a competitive price. It does not, however, assist people as citizens in obtaining what the market will not provide.

The dilemma for antitrust is different here from the one presented by the steel industry. In contrast to the steel industry, automobiles cannot be considered a sick industry. Profits have generally been well above average for a manufacturing industry, as has been the increase in labor productivity. In the classical model of antitrust, breaking up monopoly was supposed to improve performance and restore efficiency. In the steel industry, we find that relaxation of antitrust restraints may be necessary to improve performance. In the automobile industry—as well as in other consumer-oriented industries like soap, cosmetics, cigarettes, beverages, and toilet goods—the problem may not be low performance, but performance that is in a sense too high. At least, it is too high if one is concerned about the social imbalance between expenditures for consumer goods and public goods.

Although by itself the antitrust approach might not rechannel resources into the public sector, it may be consistent with reducing advertising.

335. Asch & Marcus, Returns to Scale on Advertising, 15 ANTITRUST BULL. 33 (1970). Advertising succeeds through repetition; thus, impact increases with expenditure. For a smaller firm, the expenditure on advertising attributable to one unit of production must be much higher if the smaller firm is to remain competitive. Thus, in the 1950's, General Motors and Ford Motor Co. each spent about $27 per car on advertising while comparable figures were $48 for Chrysler Corp., $64 for Studebaker-Packard, and $58 for American Motors. Scherer, supra note 15, at 96. By differentiating products through advertising, industry leaders can sustain five percent price margins over potential new entrants for as long as ten years. Id. There is some controversy over the degree of correlation between advertising and concentration. See Ekelund & Gramm, Advertising and Concentration: More on Tests of the Kaldor Hypothesis, 16 ANTITRUST BULL. 105 (1971); Miller, Advertising and Competition: Some Neglected Aspects, 17 ANTITRUST BULL. 467 (1972). But it is fairly clear that model changes have been a significant factor in concentration in the auto industry, Blair, supra note 118, at 338.


337. Professor Galbraith argues that the antitrust policy which could augment performance would also give the large manufacturing firms added leverage over market sectors with more numerous competitors: "If they fulfilled the hopes of their supporters . . . the antitrust laws would make development more unequal by stimulating development further in precisely those parts of the economy where it is now greatest." Galbraith, supra note 330, at 217.
There is evidence, for example, that concentration sometimes affects advertising intensity.\textsuperscript{338} Moreover, as already stated, limits on advertising could be incorporated in antitrust decrees.\textsuperscript{339} Nonetheless, since there is no recognition in antitrust cases of the political significance of advertising, any use of the antitrust laws to deal with these implications would depend on proof of advertising's consequences for competition. Such an ad hoc approach to enforcement is not well adapted to a form of economic influence on the political system which derives from the level of advertising in the economy as a whole, rather than from the influence of advertising on competitors.

A number of proposals to address the problem raised above may be considered. The first aims at limiting resources spent for advertising in contrast to the traditional antitrust approach of dividing them. In England in 1966, the Monopolies Commission recommended a forty percent decrease in advertising by Unilever, Ltd. and Procter & Gamble, accompanied by a twenty percent reduction in wholesale prices.\textsuperscript{340} In addition to legislating upper limits on advertising, a progressive tax on certain levels of advertising could also be considered.\textsuperscript{341} The problem with such restraint is that non-price competition would probably shift to other forms. Also, in view of the Supreme Court's recent and proper solicitude for "commercial speech,"\textsuperscript{342} there should be some hesitancy in limiting advertising in ways not related to such state interests as health, safety or veracity.

Another approach would counter the resources spent by private firms on advertising by augmenting resources available for alternative sources of information. This could be accomplished through various means. The Chairman of the FTC recently said, "[W]e are more comfortable finding ways to give voice to counter messages than suppressing messages which raise such public issues as health, environment, energy, or resource

\textsuperscript{338} Miller, supra note 335, at 468-78.
\textsuperscript{340} Scherer, supra note 15, at 344. These recommendations met with only partial success, however. After respondents threatened to relocate their operations to the European continent, the government agreed to a compromise settlement which allowed the company to introduce new soap products priced 20% below existing brands. \textit{Id.} at 344-45.
\textsuperscript{341} \textit{Id.} at 345.
\textsuperscript{342} First Nat. Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (state could not bar corporation from expenditure to influence referendum); Bates v. Arizona State Bar, 433 U.S. 350 (1977) (prohibitions against the advertising of legal services violate constitutional right to free speech); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (commercial advertisement is constitutionally protected). Directly relevant to the present article was the Court's comment in \textit{Bellotti} that the dissent's view of the first amendment would allow the prohibition of "information advertising on such subjects of national interest as inflation and the worldwide energy problem." 435 U.S. at 782 n.18.
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waste. He suggested that the Commission is looking for ways to produce "counter advertising," perhaps with a first objective, the encouragement of energy conservation. One possible method along these lines is to subsidize groups attempting to present alternative views. Recently the Consumer and Corporate Affairs Minister of Canada announced the award of $48,000 to the Consumers Association of Canada to support work on behalf of consumers affected by Bell Canada's application for a telephone rate increase.

One means of increasing public exposure to differing sources of information is to provide information and advertising by government agencies and corporations. A recent symposium on the subject conducted by the American Enterprise Institute for Public Policy Research (AEI) reveals both the kinds of criticism leveled at public advertising and the far-reaching implications of the controversy.

Government advertising may be difficult to define, but from military recruiting, to zip code ads and Smokey the Bear posters, it already involves well over $100 million annually and places the government about seventeenth among advertisers in the United States. Sixty percent of these expenditures go for military recruiting. The next largest government advertisers are the National Aeronautics and Space Administration, the Postal Service, and the Department of Housing and Urban Development.

Throughout the AEI symposium, the various participants repeated several criticisms of public advertising. It was said that advertising by government lacks the check of competition that prevails in the market. In


346. THE POLITICAL ECONOMY OF ADVERTISING (D. Tuerck ed. 1978) [hereinafter cited as Tuerck].


348. Id. at 27.

349. Id.

350. See Tuerck, Introduction, in Tuerck, supra note 346, at 3 (public advertising limits consumer to single "brand"); Wagner, Advertising and the Public Economy: Some Preliminary Ruminations, in Tuerck, supra note 346, at 97 (absence of alternative suppliers strengthens the "selling position" of the government); Staaf, Homo Politicus and Homo Economicus: Advertising and Information, in Tuerck, supra note 346, at 135 (lack of independent sources of information causes distrust in public advertising). Theoretically, consumers cannot be duped for long by the persuasive arts of advertising in the private market since the availabil-
addition, bureaucrats were viewed as principally interested in expanding their own domain and thus prone to over-advertise and to use advertising with a low information content, designed primarily to persuade. Finally, participants stated that the character of public goods is such that even after their consumption, it is difficult to assess their quality, thus increasing the likelihood of oversupply.

The first of the above criticisms corresponds to an image of the market and of government which may frequently be false. Business is neither so efficient a check on business, nor is the government as monolithic as pictured in this image. One of the AEI commentators asserted that the public cannot obtain information on the relative efficiency of competing government bureaus “because there are no competing bureaus.” Experience, however, is to the contrary. Government bureaus are constantly disagreeing with each other, challenging each other, and even suing each other. On the private side, as has already been stated with respect to the automobile industry, one or a few large advertisers can sometimes drive others from the market and limit consumer choice, in part through the use of advertising. Thus, to characterize the contrast between the market and government, as did several AEI symposium participants, as the institutions of “exchange” versus those of “coercion” is myopic. Continuity of a better alternative product will lead the consumer to abandon a product purchased due to misinformation or some psychological ploy.


352. Wagner, supra note 350, at 96-97, 105 (symposium discussion); Wyse & Davies, supra note 351, at 150-530.


355. See note 335 supra. Another example of the limited character of the advertising messages received by consumers may be obtained from examination of advertising and sales promotion expenditures among the five top advertisers of soaps, cleansers and related products. For 1975 such expenditures (in millions of dollars) were Proctor & Gamble $360, Colgate-Palmolive $108, Lever Bros. $85, S.C. Johnson & Son $36, Clorox $26.7. ADVERTISING AGE, Aug. 23, 1976, at 1. These disbursements represent 7.9, 9.8, 11.0, 12.5 and 3.7% of the respective companies' incomes from sales.

cern that one view of reality will dominate information provided the public is a legitimate concern, whether the purveyor is business or government. Moreover, even if the market were more an arena of competition than it is and the government less, the one alternative that the market does not portray in its advertising is an alternative to itself. The public is entitled to some information about those things the market cannot provide.

The argument about bureaucrats expanding their own domain and manipulating advertising to persuade is not a criticism of government advertising but of all advertising and of the competitive personality. Moreover, bureaucrats are constrained by budgets, by political pressures, and occasionally by their consciences. A representative of the Advertising Council, which handles much public advertising, told the AEI group that during the thirty-three year life of the Smokey Bear campaign, the number of forest fires in the U.S. was cut in half while saving seventeen billion dollars in natural resources.\(^3\)

He also suggested that the Smokey campaign was not "seeking to aggrandize the United States Forest Service, or the National Association of State Foresters, or to perpetuate their job."\(^4\)

Finally, the argument about the difficulty of judging the quality of public goods is not an argument about advertising but an argument about public goods. The implication is that the mechanism by which people choose public goods—that is, the political process—does not adequately elicit and register voter preferences. As Arthur Okun has said, "Most contemporary arguments that oppose altering the market's verdict do not rely on enthusiasm for the market, but instead . . . vilify political decision making."\(^5\)

Without denying the many defects of the political process, total reliance on the market has never been possible or tolerable.

This leads to a more general reflection on AEI's critique of public advertising. The critique reflects an unwillingness to challenge power derived from sources other than the government. The fear is of a "monopolistic public sector that tends to encroach upon and drain the independence and vitality of the competitive private sector."\(^6\) This one-sided fear leads to a remarkable conclusion. In discussing regulation of political advertising, one AEI participant said, "the advantages of regulating political campaign contributions and expenditures to avoid another Watergate must be balanced against the loss of individual freedom. . . ."\(^7\)

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357. Wagner, supra note 350, at 101 (symposium discussion).
358. Id.
359. Okun, supra note 244, at 27.
reveals an unusual conception of the meaning of the word “freedom.” Freedom is evidently defined to mean the freedom of large campaign contributors; and any restraint imposed by government is considered a restraint on their freedom. However the exercise of choice by the voter is also freedom, and the restraint on large contributors imposed by the government is intended to widen the scope of the freedom of individuals.

Moreover, to the degree that criticism of the campaign finance laws for restricting freedom is directed at aspects of the law which restrict organizations such as corporations and unions, the critics fall into the fallacy of personification, referred to earlier, by equating a restraint on organizations with a restraint on individuals. The individual is preyed upon by organization in all forms—private and governmental. The dangers of both private and governmental propaganda are real. The task for intellect, however, is to discern means of controlling both private and public power so that the individual can thrive in a society that provides scope for the development of all aspects of personality.

Augmenting the public information or advertising role of government agencies is not a fool-proof method of countering the influence of narrow economic interests. As with virtually every other attempt to counter special interests, public advertising can be manipulated for private purposes. For example, a proposal for government funding for an Advertising Council campaign on the American free enterprise system was criticized recently for its business slant. Public advertising will not automatically be advertising which redresses the balance between public and private interests. Thus, following the Corporation for Public Broadcasting (CPB) example, public advertising should be held accountable through budget-

362. *See* note 170 and accompanying text *supra*. The fallacy causes some of those who wish to defend freedom to misperceive the character of the threat. As Professor Price states: The most fundamental disagreement between the nations of the Western political tradition and those of the Communist world does not turn on their attitudes toward private property. The greatest mistake in the Western political strategy consists in committing itself to the defense of property as the main basis for the preservation of freedom. Price, *supra* note 180, at 161-62. Price argues that the real difference between East and West is a differing attitude toward monopoly over interpretation of truth. *Id.* at 156-62. In the present context, the point is that the availability of different sources of information and different perspectives on the truth may be as important for freedom as unrestrained decision by private organizations.


364. *See generally* Miller, *supra* note 207, at 323-32. CPB was established by act of Congress to make non-commercial educational television and radio available nationwide. 81 Stat. 368 (codified at 47 U.S.C. § 5396 (1976)). CPB was a classic case of a political act designed to fill a gap in market performance. The commercial networks did not believe it
ing, auditing, and reporting and should emphasize information rather than exhortation. For instance, one form of "advertising" might be to subsidize academics willing to study and report on government programs. Another form might be to subsidize artistic representations of public programs.

Any augmentation of the public information function must accommodate the need for competing views. Otherwise one has merely substituted one unfettered advertising source for another. The government's propagation of its view of the Vietnam War became particularly repugnant because the government sought to control all available information and stifle criticism inside and outside the administration. Thus, agencies engaging in advertising should be required to make available all information which forms the basis for any claims. Opportunity should be available for rebuttal or criticism from other public agencies, as well as private parties.

Once public opinion has crystalized to the point where it has brought about the enactment of a program to deal with a social problem, it seems reasonable to provide the public with information about the program. Until now government advertising has principally been employed for military and space programs. There is a need for a more inclusive spectrum of information on matters of public interest—such matters as welfare, health, energy conservation, transportation, and environmental protection.

would be worth their while to seek the specialized audience thought to be interested in educational television. Fears of government domination were dealt with by barring CPB from owning stations and by prohibiting it from engaging in political activity, editorializing, or taking sides in support of a political candidate. The General Accounting Office conducts an annual audit of CPB and reports to Congress. Miller, supra note 207, at 325. CPB has produced several successful programs, and its funding to local stations was instrumental in starting the Public Broadcasting Environmental Centre which produces programs on the environment. Id. For a recent account of CPB's development and of its problems, see STAFF OF SUBCOMM. ON COMMUNICATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 95TH CONG., 1ST SESS. 227-75, OPTIONS PAPER, (Comm. Print 1977).


366. The problem of maintaining balance in the deluge of information directed at the public illustrates the difficulties created for liberty and democracy by technology—in this case, the technology of mass communications. The first amendment was not designed in contemplation of a technology and society in which the voices of a few could drown out that of the public. Nevertheless, an authority potent enough to restrain the loud voice of private advertising (other than to prevent deception or in the interest of health and safety) might itself drown out competing voices. Resort to counter advertising, through enhancing the information function of government, must be cautiously undertaken within carefully drawn guidelines. The task is to prevent the misuse of government to perpetuate the dominance of the voices of the few—whether they are the old powerful voices of the private sector or the voices of new governmental vested interests.
The problem of the balance of information directed at the public parallels the more general problem of the balance of political power. The difficulty of resolving defects in current relationships forestalls and obscures the costs of inaction. The worst approach would be to assume that safety can be found in a label; that power and dominance are dangerous when lodged in the government but not in a "private" institution. The task is to redress imbalance of power wherever it occurs. With respect to information, the current imbalance is toward the advertising of articles of private consumption.

The ultimate discovery by the public of itself, to use John Dewey's phrase, will be implemented by a shift in attitudes regarding taxing and spending. Industrial structure may decisively affect the balance of resources in society. It may also have some influence on the allocation of roles between the electorate and its representatives on the one hand and managers and administrators on the other. In the background, however, affecting both use of resources and performance of roles, is the nature of the attitudes and beliefs of the public. The public's discovery of itself is simply the discovery by the electorate that there are public interests. One step toward achieving this self-discovery may be a shift in the expenditure of information resources. When confronted with an imbalance of resources the antitrust approach traditionally is to divide them. But to discover itself the public must rather than divide redirect a flow of resources which projects a vision of reality tied to individual consumption, suggesting implicitly to the public that the only interests worthy of pursuit are private.

IV. ANTITRUST—AN OLD PURPOSE, A NEW ROLE

Columnist Richard Strout, a veteran of over forty years in the Washington press corps, recently observed that "a social trend may change nations but not cause headlines—not for a while at least." Strout was commenting on a recent Senate staff report that found most of America's top companies are linked together by interlocking directorates and on a report that the top two hundred corporations own two-thirds of all assets used in manufacturing.
About the time that Strout came to Washington, the aging Progressive scholar, Vernon Parrington, described the origins of Strout's social trend. The lost cause of slavery, said Parrington "carried down to defeat much more than slavery, it carried down the old ideal of decentralized democracies, of individual liberty . . ."\(^{370}\) With the great economic transformations during and after the Civil War, "the nation hurried forward along the path of an unquestioning and uncritical consolidation, that was to throw the coercive powers of a centralizing state into the hands of the new industrialism."\(^{371}\)

In the years that followed the Civil War, the defenders of the old values struggled to maintain them in the face of great social transformation. The Sherman Act was one such effort to maintain the old decentralization. But from the beginning there were those who counseled against trustbusting, arguing either that it would damage efficiency, or that only the regulatory powers of an activist state could keep industrial power at bay. In retrospect, it now appears that as controversy sharpened, the defense of democratic values went astray. Liberals placed too much faith on the state as a protector of individual liberty and conservatives too readily identified the individual with the great collectivist corporate organizations. As a more balanced and critical spirit has reasserted itself, it is perhaps no accident that the current President directed criticism during the 1976 campaign at both business and government. Now the country is propelled forward toward an increasing amalgamation of government and corporate power—but perhaps without the unquestioning attitude of which Parrington wrote.

For the old policy of antitrust and its proponents, a continuing issue is how to achieve the social and political objectives of antitrust when orthodox antitrust enforcement must be abandoned. The greatest weakness in the antitrust tradition—perhaps in our political philosophy—is that it provides no real theory for preserving liberty where economic or practical necessity obviate the possibility of reliance upon the market. At least as far back as Wilson, there is the ambivalent suggestion that while concentrated economic power might "chill, check and destroy" freedom, size itself is no offense.

Many liberals used to think that the weakness in our society was its ti-

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\(^{370}\) V. PARRINGTON, 2 MAIN CURRENTS IN AMERICAN THOUGHT 473 (1958 ed.).

\(^{371}\) Id. at 474.
midity in resorting to government action.\textsuperscript{372} Recent history, however, discloses that the problem is not failure to resort to government action, but a failure to do so in a way consistent both with the rights of individuals and broader public interests. Despite rhetoric and changing parties, the amalgamation of political and economic power continues. Conservatives decry this continuing trend, but offer no solution apart from turning back the clock.\textsuperscript{373} The modern history of liberty is tied to the market,\textsuperscript{374} but its future may be bleak if we cannot devise a theory of liberty apart from the market.

Here, paradoxically, in an emerging world beyond the classically competitive market, indeed, beyond the old antitrust, is a new role for antitrust policy. The antitrust tradition provides a source of support for those who seek a program aimed at controlling the political effects of economic power. The old idea was that such effects would be checked by the magic of deconcentration. But where deconcentration is not possible or where it is not enough, the task for the new antitrusters is to bring together the sources of popular feeling and the realities of a transformed society. Analytically what is necessary is a systematic assessment of the resources generated by the economic system and their potential impact on the balance of roles in the political process. The attempt to provide such an assessment above leads to the following tentative conclusions.

First, there is a role for vigorous enforcement of existing antitrust laws wherever their application is possible and for creativity in improving the traditional antitrust remedies. Many of the legislative initiatives currently under consideration fall into this category.\textsuperscript{375} These measures may be all to the good. They do not, however, deal with instances where deconcentration will not work or where undue economic influence on politics exists despite the presence of workable competition. Moreover, these measures

\textsuperscript{372} See, e.g., authorities cited in Hawley, \textit{supra} note 78, at 172-76.


\textsuperscript{374} See Lindblom, \textit{supra} note 141, at 162.

\textsuperscript{375} They are largely attempts to short-circuit the tortuous process of antitrust litigation and achieve the antitrust result through legislation. In addition to the "no-fault" monopoly bill discussed earlier, see note 10 \textit{supra} and accompanying text, consideration has been given to legislative limitations on horizontal integration by oil and gas companies seeking to acquire coal and uranium assets. Also, the Senate Antitrust Subcommittee is concerned about ownership of common carrier pipelines by integrated oil companies, and according to the chairman of the subcommittee, there is continuing interest in reducing immunities and increasing competitiveness in regulated industries. Finally, there is the hope that means can be devised of expediting antitrust litigation, either by simplifying proof requirements, or by procedural improvements. 329 \textit{Trade Reg. Rep.} (CCH) 9-10 (April 17, 1978).
may simply lack political viability. The various approaches to oil company divestiture have been tabled in both House and Senate.\textsuperscript{376} One long-time FTC staffer told a congressional committee that the reason behind the failure of the FTC to restructure any monopolized industry in its sixty years is the lack of congressional interest in such action.\textsuperscript{377} Quoting a former FTC Commissioner the staffer said, "When Congress tells the Commission to do something about the country's monopoly problem, the Commission will do it. Until then . . . you are wasting your time."\textsuperscript{378}

For all these reasons, various means were suggested above for simulating the results of the competitive market, including incentive regulation and competing government corporations. This is the second role for antitrust and the antitrust enforcement agencies—as advocates for competition beyond the traditional market. The agencies have already evidenced interest in this role in the regulatory process. Another, but largely untried field of action is the government corporation. Various ownership arrangements are possible. It has been argued, for instance, that some proportion of private ownership, as in the dynamic Dutch State Mines, produces a creative tension between public policy and commercial objectives.\textsuperscript{379} Whatever form it takes, the objective is for the public firm to act as "a gadfly, fulfilling a function rather like that which has been assumed by the Swedish co-operative movement in the field of consumer goods and services—looking for places where private enterprise is soft or where its prices are too high or its profits too large."\textsuperscript{380}

One criticism of this use of government corporations is that in Europe government companies have sometimes been as lacking in vigorous advocacy of competition as their private brethren.\textsuperscript{381} It is precisely here that an emerging role for antitrust exists. The European nations lack a strong antitrust tradition. In the United States, however, success may be more likely as antitrust takes a new lease on life, reincarnated as the advocate of competition within the government. Moreover, the public companies

\textsuperscript{376} [1978] \textit{Antitrust \& Trade Reg. Rep.} (BNA) No. 830, at A-2.
\textsuperscript{378} \textit{Id.} at 104.
\textsuperscript{379} \textit{SHONFIELD, supra} note 205, at 190 \& n.34. The success of the Dutch State mines was reflected in its development into the chemical field and other areas. Two-fifths of its share capital is privately owned. \textit{Id.}
\textsuperscript{380} \textit{Id.} at 191.
\textsuperscript{381} \textit{SCHERER, supra} note 15, at 420.
themselves can be given incentives to assume an aggressive competitive posture. Recently the Tennessee Valley Authority sued ten foreign and three domestic companies for fixing uranium prices, claiming damage to the agency amounting to $120 million.\(^{382}\) T.V.A. sued not only under the antitrust laws but under a statute banning conspiracies, collusion, and agreements to defraud T.V.A. or defeat its purposes.\(^{383}\) It is not difficult to imagine an economy with significant numbers of public corporations in which vigorous antitrust enforcement still exists.

A more serious difficulty in employing public enterprise in the manner suggested is political opposition by private business. There appears to be no legal obstacle to the proposal. T.V.A. and other public enterprises have survived legal challenges to their competition with private business.\(^{384}\) The history of T.V.A. indicates, however, that strong opposition from private business can be expected. The point can only be resolved through the political process. Legal analysis can assist, however, by establishing standards that will strike a fair balance between public and private enterprise.

There are developments in American law that could well form the basis for such a balance between public and private enterprise.\(^{385}\) In *United States v. General Electric Co.*,\(^{386}\) the federal district court held that T.V.A. is a "person" within the meaning of the Clayton Act and therefore entitled to sue for treble damages. The court quoted the explanation of the origin of government corporations provided by the Supreme Court in *Keifer & Keifer v. Reconstruction Finance Corp.*\(^{387}\) "Because of the advantages enjoyed by the corporate device compared with conventional executive agencies, the exigencies of war and the enlarged scope of government in


\(^{383}\) TVA has also been a vigorous advocate of increased competition in the coal industry. See *Tennessee Valley Authority, The Structure of the Energy Markets: A Report of TVA's Antitrust Investigation of the Coal and Uranium Industries*, (1977). TVA's action includes analysis, testimony before congressional committees and communication with the FTC and Antitrust Division of the Justice Department. *Id.* at 4-9.


\(^{385}\) Extensive law already exists on the subject in Europe. The gist of the outcome appears to be judicial requirements that public enterprise neither exceed nor abuse its statutory charter and adhere to such requisites of due process as stating the grounds for any action which conflicts with private rights. Friedmann, *supra* note 244, at 384, 387.


\(^{387}\) 306 U.S. 381 (1939).
economic affairs have greatly extended the use of independent corporate facilities for governmental ends." 388 Once created as a corporation, "you have a person, and as a person one that presumably is subject to the general rules of law." 389 Accordingly, as a "person," government corporations should be subject to suit under the antitrust and other laws just as they themselves can sue. 390

In addition to innovations in traditional trustbusting and new inititatives to simulate competition, the third task for antitrust is to recognize that its purposes may require methods which go beyond antitrust. There must be a recognition that proponents of political liberty cannot rely exclusively upon the market or even imitation of market processes. Because it is designed to maximize market forces, antitrust will be insufficient where the initial dissatisfaction is with the operation of the market, or where economic and social imperatives impel a non-market solution. The overall failure of the economy to generate sufficient social goods and the self-perpetuating barrage of consumer-oriented advertising were cited as one example. Ways of enhancing the public information function were discussed as possible remedies. It was also suggested that when government involvement with industry becomes necessary, either through public enterprise or regulation, that some enhancement of the coordinating capabilities of the political system may be necessary in order to make government involvement accountable to the democratic process. Some compromise may be necessary between the decentralizing objective of antitrust and the prerequisites for accountability through the political process.

390. Recent decisions taking a restrictive view of exemptions from the antitrust laws for regulated or municipal corporations point in the right direction. See, e.g., Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) (person, as defined by antitrust laws, includes cities, regardless of their plaintiff or defendant status in actions alleging antitrust violations); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) (state action exemption does not extend to utility company program despite Public Service Commission's approval). Exemptions should be explicit in the statute authorizing creation of a government corporation so that compensating measures can be effected to avoid undue impact on private interests. Alternatively, if private interests are to be overridden, it should be necessary for that result to be made explicit, ensuring that the result is accomplished, if at all, through the democratic process. K. Watson and T. Brunner offer interesting suggestions concerning the antitrust principles that should apply to the conduct of regulated utilities. Watson & Brunner, Monopolization by Regulated "Monopolies": The Search For Substantive Standards, 22 ANTITRUST BULL. 559 (1977). Many of these suggestions could apply to public enterprise as well.
Thus, the concern with economic influence on the political process leads one quite far—to scrutiny of the fragmented nature of our political parties and legislative process and to other legislative remedies such as campaign finance law and conflict of interest legislation. The contribution of the antitrust tradition is that it reflects an instinctive opposition to concentrated economic power, in part because of the potential influence of such power on the democratic process. The old instinct was sound. With increasing departures from the market, however, we are forced to supplement the old rule of thumb that safety for democracy lies in the decentralized market. What is required beyond the market is a systematic approach to minimizing the impact on the democratic process of the various resources generated by the economic system. It should be clear by now that the object is not merely one of controlling “big business.” The object is to render power accountable wherever it may arise.

Recently, economist and former presidential adviser, Walt Rostow, has suggested that impending natural resource shortages, as in oil, may soon threaten the strangulation of the advanced industrial economies. He argues that neo-Keynesian public policy will not be enough to cope with the threat and that centrally planned resource allocation will be necessary. The alternative, he argues, is rationing, severe unemployment, and a loss of social and political cohesion. In turn this portends a shattering of the strategic political-military balance in international affairs. This prediction is simply an extreme version of what has already occurred in many areas of our economic life. If we devote ourselves solely to arguing over the virtues of the market, we may find ourselves with literally no idea of how to preserve liberty when the market is swept aside.

The suggestion here is that we should think harder about the economic structures consistent with democratic government. This suggestion is

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392. Id. at 38-53, 219-20. Rostow suggests that Keynes himself would have modified his views in the face of changed circumstances.
393. Id. at 245, 249.
394. Id. at 38-53, 224-45.
based on the old recognition of "how unequal parchment provisions are to a struggle with public necessity." It is not on parchment, but on the relationships among people and institutions that the survival of liberty depends.

395. The Federalist No. 25 (A. Hamilton) at 169 (M. Dunne ed. 1901).