

Spring 1981

The No-Conduct Approach to Monopoly Power and Its Application to Oligopoly

Robert E. Nielson

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

Robert E. Nielson, *The No-Conduct Approach to Monopoly Power and Its Application to Oligopoly*, 15 Val. U. L. Rev. 529 (1981).

Available at: <https://scholar.valpo.edu/vulr/vol15/iss3/3>

This Notes is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



THE "NO-CONDUCT" APPROACH TO MONOPOLY POWER AND ITS APPLICATION TO OLIGOPOLY

INTRODUCTION

The recent Presidential Commission¹ on antitrust laws and procedures provided a useful forum for the presentation of numerous and varied opinions on current problems in antitrust litigation. One of the more vigorously debated topics was the "no-conduct" monopoly concept. Growing frustration over protracted litigation in section 2 Sherman Act,² monopolization cases and the seeming inability to effectively diminish the current level of economic concentration under section 2, has led to the formulation of several proposals designed to rectify these section 2 deficiencies.³ In essence these proposals advocate that section 2 of the Sherman Act be amended in a manner that would allow the government to prosecute a section 2 monopolization case without the necessity of proving unlawful conduct. The additional suggestion that structural remedies should be employed whenever possible is also a prominent feature of these proposals. Proponents of the "no-conduct" approach envision that this type of amendment would facilitate the government's ability to prosecute successfully the large single firm and to ameliorate the effects of its monopoly power.

While large single, monopoly-type⁴ firms are exceedingly visible, they do not comprise a very large percentage of the total industrial population.⁵ Oligopoly⁶ tends to be the more predominant market structure.⁷ The government has been only partially successful in dealing with anticompetitive abuses perpetrated by firms within an oligopolistic setting.⁸ In prosecuting oligopolistic firms that have unlawfully restrained trade through collusive agreements

1. REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES (Jan. 22, 1979) [hereinafter cited as COMMISSION REPORT], reprinted in 897 ANTITRUST & TRADE REG. REP. (BNA) (Special Supplement) (Jan. 18, 1979) [hereinafter cited as Special Supp.].

2. See note 15 *infra*.

3. See note 36 *infra*.

4. A pure monopoly is a market structure in which there is only one seller and no good substitutes exist for the good produced by the single seller. See generally P. SAMUELSON, ECONOMICS (1980).

5. See note 53 *infra*.

6. An oligopoly is a market structure populated by a few large firms. See generally J. KOCH, INDUSTRIAL ORGANIZATION AND PRICES (1980).

7. See note 50 *infra* and accompanying text.

8. See note 24 *infra*.

in violation of section 1 of the Sherman Act, the government has generally been successful.⁹ But absent proof of such explicit agreements, alleged anticompetitive abuses resulting from parallel behavior among rival firms has been more difficult to prosecute. The doctrine of conscious parallelism¹⁰ was advanced at one point as a means by which circumstantial evidence of parallel behavior could be used to infer the existence of a conspiracy among oligopolists. This doctrine appeared to offer a promising solution to the oligopoly problem, but it fell rather quickly into judicial disfavor and never successfully reemerged. Recently another theory has been advanced which suggests that the leading firms in a highly concentrated oligopoly should be treated as a "shared monopoly" and prosecuted as such.¹¹ The "shared monopoly" concept has yet to be tested, however, over a broad judicial spectrum.

This note attempts to explore the possible application of the proposed "no-conduct" approach to the oligopoly problem; that is, monopoly power collectively shared by two or more rival firms. An examination will first be made of the threshold structural criteria which would initiate a government inquiry of a suspect oligopoly.¹² Next, the possible difficulties which might be encountered in restructuring the oligopoly will be explored.¹³ Finally, consideration will be given to the efficiencies of scale defense.¹⁴ Although the no-conduct concept was conceived with the large monopoly-type firm in mind, the pervasiveness of oligopolistic market structures impels an examination of this latter structure vis-a-vis the no-conduct approach. The subsequent analysis suggests that the no-conduct approach to oligopoly is, presently, not a workable approach.

BACKGROUND OF THE "NO-CONDUCT" MONOPOLY CONCEPT

Criteria for a Section 2 Sherman Act Violation of Monopolization

Proponents of the no-conduct concept recommend that section 2 of the Sherman Act¹⁵ be amended in order to permit the government a more expeditious and efficacious method of dealing with monopoly

9. See note 61 *infra*.

10. Conscious parallelism is where several rival firms act in a similar manner each with the knowledge of what the others are doing. See generally L. SULLIVAN, ANTITRUST (1977).

11. See note 56 *infra*.

12. See notes 122-42 *infra* and accompanying text.

13. See notes 143-58 *infra* and accompanying text.

14. See notes 159-84 *infra* and accompanying text.

15. 15 U.S.C. § 2 (1976). "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize

power. At the present time the possession of monopoly power, without more, is not violative of section 2 of the Sherman Act.¹⁶ The current criteria for a section 2 violation were set forth by Justice Douglas in *United States v. Grinnell Corp.*:¹⁷

The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the provision of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.¹⁸

Under the *Grinnell* rule, in other words, anticompetitive conduct¹⁹ was as important as monopoly power in determining whether a section 2 offense had been committed.

Even though the structure-conduct criteria of section 2 are well-established, courts still grapple with the problem of a workable

any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . ."

16. The modern origins of this criteria can be traced back to Judge Learned Hand's decision in *United States v. Aluminum Co. of America*, 148 F.2d 416 (1945): Nevertheless, it is unquestionably true that from the very outset the courts have at least kept in reserve the possibility that the origin of a monopoly may be critical in determining its legality; . . . This notion has usually been expressed by saying that size does not determine guilt; that there must be some "exclusion" of competitors; that the growth must be something else than "natural" or "normal"; that there must be a "wrongful intent," or some other specific intent; or that some "unduly" coercive means must be used.

Id. at 429. Judge Hand, while acknowledging that the criterion of intent was included in § 2, explicitly rejected the criminal-law concept of "specific intent." "To read the passage [§ 2] as demanding any 'specific' intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing." *Id.* at 432.

Justice Douglas' decision in *United States v. Griffith*, 334 U.S. 100 (1948), also reiterated the more structuralist philosophy propounded in *Aluminum Co. of America*. However, Justice Douglas stopped short of intimating that monopoly power, per se, was violative of § 2:

So it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised. For § 2 of the Act is aimed, *inter alia*, at the acquisition or retention of effective market control. . . . Hence the existence of power "to exclude competition when it is desired to do so" is itself a violation of § 2, provided it is coupled with the purpose or intent to exercise that power.

Id. at 107 (footnote and citations omitted).

17. 384 U.S. 563 (1966).

18. *Id.* at 570-71.

19. See also Note, *The Conduct Standard for Legally Acquired Monopolies Under Section 2 of the Sherman Act*, 49 CIN. L. REV. 206 (1980).

interpretation. One of the latest cases to confront this problem was *Berkey Photo, Inc. v. Eastman Kodak Co.*²⁰ In *Berkey*, the circuit court ultimately determined that "mere possession of monopoly power does not *ipso facto* condemn a market participant; [however,] the firm must refrain at all times from conduct directed at smothering competition."²¹ The *Berkey* court stated that the rule of *Grinnell* should be read with the teaching of *Griffith*.²² Since the Supreme Court denied certiorari,²³ it might be concluded that the *Berkey* Court's interpretation did not seriously alter the structure-conduct criteria established by the Court in *Grinnell*.

Criticisms of Section 2

Two principal criticisms are directed at section 2 with respect to its usefulness in dealing with alleged monopoly power and with monopolization cases. First, critics charge that section 2 has been relatively ineffective in reducing market concentration.²⁴ Secondly, the time required to litigate the conduct issues in a section 2 case is excessive.²⁵ Proponents of the no-conduct approach contend that

20. 603 F.2d 263 (2d Cir. 1979), *aff'g in part, rev'g in part* 457 F. Supp. 404 (S.D.N.Y. 1978); *cert. denied*, ___ U.S. ___, 100 S. Ct. 1061 (1980).

21. *Id.* at 275. *But see* United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 342 (D. Mass 1953), *aff'd per curiam*, 347 U.S. 521 (1954). The court in *Berkey* cited a number of economic and antitrust treatises which would prove profitable reading for any serious student of antitrust law: P. AREEDA and D. TURNER, ANTITRUST LAW (1978); M. HANDLER, TWENTY-FIVE YEARS OF ANTITRUST LAW (1973); F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE (1970) (2d ed. 1980); L. SULLIVAN, note 10 *supra*.

22. *Berkey*, 603 F.2d at 274. *See* note 16 *supra* for *Griffith*.

23. *Berkey Photo, Inc. v. Eastman Kodak Co.*, ___ U.S. ___, 100 S. Ct. 1061 (1980).

24. F. SCHERER, *supra* note 21, at 540: "Between 1890 and 1970 structural reorganization has been ordered in only 32 § 2 cases—all but 7 of them before 1950." (Citing Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. LAW & ECON. 365, 406 (1970)). Scherer suggests that judicial reticence to impose harsh structural remedies and the preoccupation of § 2 restructuring precedents with dominant firms to the exclusion of more prevalent tight-knit oligopolies are responsible for this performance. F. SCHERER at 541.

25. 1 COMMISSION REPORT, *supra* note 1, a 152; Special Supp., *supra* note 1, at 45. *See also* 2 COMMISSION REPORT, *supra* note 1, at 95-96. Estimated time spent in proving elements of monopolization violation (% of trial time):

	<u>Definition of Relevant Market</u>	<u>Determination of Market Power</u>	<u>Conduct</u>
United States v. International Business Machines Corp., 69 Civ. 200 (S.D.N.Y. 1969) (3-year trial)	45-50%	less than 10%	40%

elimination of the conduct component from section 2 cases would considerably expedite the litigation, focus attention on the core issue—possession of monopoly power—and produce more effective remedies.²⁶ In sum, the concern of the no-conduct proponents appears to be the government's apparent inability to undertake and successfully prosecute the "big" antitrust case within a reasonable period of time, within budgetary constraints, and still effectuate a rigorous remedy.

The no-conduct approach is not without its detractors, however. Witnesses before the National Commission for the Review of Antitrust Law and Procedures [hereinafter cited as Commission] stated that the conduct requirement was not contrived and that even under a no-conduct approach substantial conduct evidence would be introduced.²⁷ Conduct evidence, it was asserted, would be

	Definition of Relevant Market	Determination of Market Power	Conduct
SCM Corp. v. Xerox Corp., Civ. No. 15,807 (D. Conn. 1973) (14-month trial)	20-25%	3-5%	30-40%
Berkey Photo, Inc. v. Eastman Kodak Co., 74 Civ. 424 (S.D.N.Y. 1973) (6-month trial)	15-25%	3-5%	45-60%

Dougherty, *Elimination of the Conduct Requirement in Government Monopolization Cases*, 48 ANTITRUST L.J. 869, 871 (1979) [hereinafter cited as Dougherty Proposal] reprinted in 10 ANTITRUST L. & ECON. REV. 37, 39 (No. 3 1978).

[P]roof of objectionable conduct is neither vital nor desirable. . . . First, [elimination of the current conduct requirement] would lead to faster, more efficient proceedings. . . . Yet I believe that litigation of these [conduct] issues is rarely necessary to the determination of the real issues—the existence of substantial, persistent monopoly power and the availability of effective and beneficial remedies. Second, elimination of the conduct requirement would produce more effective remedies.

See also Kingdom, *The "Big Antitrust Case": Thoughts on Procedural Reform*, 37 WASH. & LEE L. REV. 25 (1980).

26. Flynn, *Statement of John J. Flynn*, 48 ANTITRUST L.J. 845, 847 (1979) [hereinafter cited as Flynn Proposal].

[Elimination of the conduct requirement would: (1)] expedite considerably the litigation of monopolization cases by removing the necessity for complex and expensive exploration of the history of the firm and its industry in order to prove evil or exclusionary conduct; [and (2)] would focus the proceeding upon what should be—but seldom is—the central economic concern of monopolization cases: what ought to be done, if anything, about the possession of monopoly power.

27. 1 COMMISSION REPORT, *supra* note 1, at 152-53; Special Supp., *supra* note 1, at 45-46.

essential to a determination of relevant markets, a finding of monopoly power in those markets, and a determination of the existence of scale efficiencies.²⁸ These assertions were rebutted by other witnesses who contended that non-conduct evidence, such as market studies, profit margin analysis, and technical studies of plant economics, would be dispositive of the issues of relevant market, monopoly power, and efficiencies.²⁹ Furthermore, it was argued that the government would be unlikely to prosecute where, to prove its case, it had to rely heavily on evidence of culpable conduct.³⁰

After hearing and assimilating diversified points of view, the Commission endorsed the no-conduct approach.³¹ It conceded, however, that some conduct evidence would inevitably be admitted.³² The greatest benefit to be derived from the no-conduct approach was the potential for improving the effectiveness of the remedies obtained by the government in a monopolization proceeding.³³ Historically, the conduct-oriented approach had resulted in the courts' reliance upon injunctive remedies to stem section 2 abuses.³⁴ Elimination of the conduct issue would now permit the court to refocus its attention on structural remedies, which might be better suited to dissipate monopoly power.³⁵

PROPOSED "NO-CONDUCT" AMENDMENTS

Several proposals have been advanced that were designed to eliminate the necessity of litigating the conduct issue.³⁶ All of the

28. 1 COMMISSION REPORT, *supra* note 1, at 153; Special Supp., *supra* note 1, at 46.

29. *Id.*

30. *Id.*

31. 1 COMMISSION REPORT, *supra* note 1, at 154; Special Supp., *supra* note 1, at 46.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Federal Trade Commission, FTC Statement to NCRALP on Legislation to Eliminate Requirement under Sherman Act § 2 of Proving some Objectionable Conduct, 891 ANTITRUST TRADE & REG. REP. (BNA) (Nov. 30, 1980) [hereinafter cited as FTC Proposal] reprinted in 10 ANTITRUST L. & ECON. REV. 32, 33 (No. 3 1978):

1. Proof of objectionable conduct should not be required in proceedings under the statute where substantial, persistent, *single-firm* monopoly power is established by a government enforcement agency.
2. The remedy in such cases should be designed to create as much competition as is possible without causing any substantial loss of efficiencies.
3. Relief should not be ordered, however, where it would result in a sub-

stantial loss of efficiencies. Some defense should also be recognized for monopoly power based on patents.

4. Only the government should be permitted to commence proceedings under the statute and those proceedings should be equitable in nature, that is,

- (a) criminal sanctions should not be imposed;
- (b) monetary damages should not be awarded; and
- (c) private enforcement actions should not be permitted

Flynn Proposal, *supra* note 26, a 861-62:

Be it enacted, that Section 2 of the Sherman Act, is hereby supplemented by adding the following subsection:

Sec. 2A.

Every person who possesses monopoly power in any relevant market shall be subject to proceedings to be brought by the United States Department of Justice or the Federal Trade Commission. Such proceedings shall be commenced in—

[Herewith insert the technical language required to implement the choice of forum, procedure, jurisdictional requirements and review procedures the Commission believes best to implement this proposal and others the Commission may choose to make].

Upon a finding that the person possesses monopoly power, the [forum chosen] shall order the parties to the proceeding to propose remedies for the dissipation and elimination of the monopoly power found. Ordinarily, dissolution, divestiture or some other form of structure relief shall be the preferred remedy. In formulating such a remedy, the [forum chosen] shall attempt to create the maximum number of viable entities possible without loss of substantial economies of scale. The burden of establishing economies of scale shall be on the person found to possess monopoly power.

No punishment, civil or criminal, shall attach to a finding that a person possesses monopoly power, nor shall any penalty, civil or criminal, be imposed by virtue of the remedies selected by the court to dissipate and eliminate the power found. Nor shall prima facie effect be given the judgment of the Court pursuant to Section 5 of the Clayton Act, 15 U.S.C. § 16, or any res judicata or collateral estoppel effect be given such judgment in any other proceeding to the prejudice or injury of the person found to have monopoly power pursuant to this Section.

[Additional language should be considered to provide the forum with expert assistance, the authority to call upon other agencies of government (i.e., SEC, Treasury, and Labor) in fashioning decrees, and to provide for final review of orders by the forum.]

Dougherty Proposal, *supra* note 25, at 889-90, *reprinted in* 10 ANTITRUST L. & ECON. REV. 60-61 (No. 3 1978):

I. PURPOSE

Sherman Act Section 2A would permit the government to institute an expedited proceeding seeking structural (or other) relief where persistent, substantial monopoly power is not justified by patents or efficiencies of scale.

II. NATURE OF PROCEEDINGS

A. Proceedings could be instituted only by designated Federal agencies.

- B. The proceedings would be equitable in nature.
- C. Neither criminal sanctions nor civil penalties would be appropriate as remedies.

III. LIABILITY

To establish that a firm has substantial, persistent monopoly power, the government would have to demonstrate that:

- A. The firm has had monopoly power in a properly defined relevant market for the five years preceding the filing of the complaint; and
- B. Sales in the relevant market exceeded \$500,000,000 in the year immediately preceding the filing of the complaint.

IV. REMEDY

- A. After a finding of substantial, persistent monopoly power, the ordinary remedy would be structural relief sufficient to create as much competition as is feasible without substantial loss of efficiencies of scale.
 - 1. Structural relief would include such remedies as:
 - (a) Dissolution, including divestiture and spin-off;
 - (b) Patent licensing; and
 - (c) Trademark licensing or cancellation.Dissolution would be the preferred remedy (if feasible and constructive).
 - 2. Efficiencies of scale would be limited to those efficiencies which would be reduced or lost through operation of the structural relief under consideration.
- B. Under certain circumstances, monopoly power attributable to patents would be temporarily protected.
 - 1. Original patents—During the life of a patent which led to the original establishment of monopoly power, the running of the five-year period of persistence would be tolled.
 - 2. Improvement patents—The acquisition of a patent which prolongs the monopoly power conferred by an original patent would not toll the running of the five-year period or persistence, except in the case of a displacement patent.
 - 3. Displacement patents—A displacement patent is a patent so radically different from the original patent that it, in effect, confers a new monopoly. A displacement patent would be treated as an original patent.

3 AREEDA & TURNER, *supra* note 21, at ¶ 623.

Professors Areeda and Turner have also proposed that no-fault intervention be limited to those monopolies whose market power is both substantial and persistent. Monopolies that are inevitable—those based on economies of scale, indivisible scarce resources, or legal license—or monopolies based on superior skill should be immune from equitable remedies. Conservative definitions of “substantial” and “persistent” are recommended in order to minimize the equitable sanctions that would be imposed against the “innocent” monopolist. In determining how persistent is “persistent” monopoly power, Areeda and Turner suggested that the following temporal guidelines should be employed to determine whether or not government intervention is warranted: (1) Preclude any intervention until five years have elapsed since the monopoly was obtained. (That means five years after the expiration or obsolescence of patents creating or maintaining a legal monopoly); (2) Intervention would be allowed between five and ten years on a convincing showing that the monopoly is likely to persist; and (3) Absent unusual circumstances, intervention should certainly be undertaken against

proposals share a common goal—the elimination of persistent and substantial, single-firm monopoly power. The preferred remedy to accomplish this objective is some form of structural realignment. The imposition and/or extent of the structural remedy is to be balanced against any substantial loss of efficiencies. The various proposals do not concur, however, as to what types of scale efficiencies would be acceptable defenses against a restructuring order.³⁷

The current no-conduct proposals are specifically directed toward the elimination of substantial and persistent *single-firm* monopoly power. In his introductory remarks, one commentator stated explicitly that his proposal was not to be confused with any program aimed at the controversial topic of oligopoly.³⁸ Yet it would seem appropriate to examine the applicability of the no-conduct approach to any market structure in which monopoly-type characteristics might exist. Since the principal thrust of antitrust legislation, at least from an economic perspective, is the efficient allocation of resources, any modification of an existing antitrust statute should be examined as to its potential effectiveness in dealing with allocative inefficiencies, wherever they may be found.³⁹

OLIGOPOLISTIC MARKET STRUCTURES

Characteristics

A brief description of the salient features of an oligopoly will facilitate the subsequent discussion of the no-conduct approach.⁴⁰

non-inevitable or immune substantial market power which has persisted ten years or more.

37. Professor Flynn would permit engineering/plant economies of scale, but not managerial efficiencies, as legitimate defenses to structural remedies. 1 COMMISSION REPORT, *supra* note 1, at 171 n.35; Special Supp., *supra* note 1, at 45. Dougherty, however, would permit the defendant firm to raise any category of efficiency—engineering, marketing, managerial, or some other variety—as long as it was an efficiency of scale. Dougherty Proposal, *supra* note 25, at 875.

38. Flynn Proposal, *supra* note 26, at 848.

39. But see Justice Black's oft-quoted statement on the purpose of the Sherman Act:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4 (1958). See also 1 AREEDA & TURNER, *supra* note 2, at ¶¶ 103-13.

40. A complete examination of oligopolistic market structures is beyond the

Several characteristics distinguish an oligopoly from a purely competitive market or from a monopoly. An oligopoly is populated by a relatively few large firms which account for the majority of the industry's sales.⁴¹ The existence of a few large firms, however, does not preclude the inclusion of numerous smaller firms within the industry.⁴² One of the foremost characteristics of an oligopolistic market structure is "mutual interdependence"⁴³ among rival firms. Uncertainty is another factor with which the oligopolist must contend. Unlike a firm in a competitive industry whose price and output are determined by impersonal market forces or a monopolist who has no rivals with which to contend, the oligopolist confronts rivals whose actions he may not be able to predict.⁴⁴ The dynamics of price and output decisions are further complicated by the reality that not all rival firms in an oligopolistic industry may be motivated by a profit maximization goal.⁴⁵

The existence of imperfectly competitive market structures⁴⁶ may give rise to anticompetitive effects. The ability of a monopolist to charge a price higher than a competitive price⁴⁷ and/or to thwart potential entry into the market⁴⁸ is characteristic of a monopoly. Allocative inefficiencies may also be present in oligopolistic market structures.⁴⁹ Even though an oligopolistic market may be dominated by one or two large firms, this condition is generally not the case.⁵⁰

scope of this note. For a detailed analysis of the economics of oligopoly-market structure, conduct, and performance, see generally F. SCHERER, note 21 *supra* (particularly chs. 5-8); E. SINGER, ANTITRUST ECONOMICS, chs. 9-11 (1968); J. KOCH, *supra* note 6, at chs. 12-13.

41. P. ASCH, ECONOMIC THEORY AND THE ANTITRUST DILEMMA, 49 (1970).

42. *Id.* See generally texts cited in note 40 *supra*.

43. P. ASCH, *supra* note 41, at 49.

[A]ny oligopolistic firm is influenced by the behavior of its rivals, and . . . its own behavior in turn influences those rivals. The firm, then, must consider not only what its opponents happen to be doing at the moment, but also the way in which rivals may respond to its own actions.

44. P. ASCH, *supra* note 41, at 50.

45. For alternate theories of firm motivation, see generally P. ASCH, *supra* note 41, at ch. 4; and J. KOCH, *supra* note 6, at ch. 3.

46. An imperfect market structure is one in which sellers have some control over the price of their goods, i.e., each firm faces a negatively sloped demand curve. See generally, P. SAMUELSON, *supra* note 4.

47. *Id.*

48. *Id.*

49. F. SCHERER, *supra* note 21, at ch. 17. See also INDUSTRIAL CONCENTRATION: THE NEW LEARNING, (H. Goldschmid, H. Mann, J. Weston eds. 1974), for a recent discussion on the controversies over the implications of industrial concentration.

50. BUREAU OF ECONOMICS, FEDERAL TRADE COMMISSION, MARKET SHARES, CONCENTRATION, AND COMPETITION IN MANUFACTURING INDUSTRIES 11 (1978). The average

Oligopolistic market structures may exist where the size distribution of firms precludes any one firm from dominating the industry. But several firms acting in concert may be able to thwart competition by dividing market shares, setting price, or inhibiting potential entry.⁵¹ Such concerted action may take the form of outright collusion—overt or covert—or parallel conduct which may or may not result from independent decisions on the part of competing oligopolists.⁵²

A true monopoly is rare. While it is possible to find examples of single-firm monopolies in very narrowly defined product categories, a single-seller is virtually nonexistent.⁵³ Oligopolistic market structures, on the other hand, are relatively abundant.⁵⁴ Some economists contend that when the leading four firms control forty percent or more of the total market, oligopoly is emerging from its nascent stage.⁵⁵ Various labels are used to describe dif-

4-firm concentration ratio for 314, 4-digit manufacturing industries was 39.8 percent. The average 8-firm concentration ratio was 52.6 percent.

51. 3 AREEDA & TURNER, *supra* note 21, at ¶ 840a, and 2 AREEDA & TURNER, *supra* note 21, at ¶ 404.

52. See generally F. SCHERER, *supra* note 14, at ch. 6. Overt collusion might be seen in the form of a cartel while covert collusion might be the result of a secret agreement among rival firms to fix prices. Parallel conduct, not resulting from independent decisions, might be evidenced in a situation where rival firms reacted in a similar fashion to a certain condition, each firm operating with the knowledge that his rivals also knew of that condition; see, e.g., Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).

53. A narrowly-defined chemical or drug category, for example, may produce a single seller but a single seller is almost totally absent from any nationwide U.S. manufacturing industry of appreciable size. An analysis of 314 4-digit manufacturing industries revealed that on average the largest firm accounted for 17.5 percent of the market with a range from 1.1 percent to 68.7 percent (footnote omitted). F. SCHERER, *supra* note 21, at 67.

54. Based on 1972 data, 43% of the 450 4-digit SIC manufacturing industries had 4-firm sales concentration ratios of 40% or more. *Id.*

The Standard Industrial Classification (SIC) categorizes industries into several subdivisions, assigning a certain number of digits to each subdivision, e.g.:

<u>SIC Code</u>	<u>Designation</u>	<u>Name</u>
20	Major industry group	Food and kindred products
201	Industry group	Meat products
2011	Industry	Meat-packing (slaughtering) plants
20111	Product-class	Fresh beef
20111-12	Product or (Commodity)	Whole carcass beef

See, e.g., P. ASCH, *supra* note 41, at 172. A description of all of the SIC categories may be found in: OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, STANDARD INDUSTRIAL CLASSIFICATION MANUAL (1972).

55. F. SCHERER, *supra* note 21, at 67.

ferent "degrees" of oligopoly.⁵⁶ While these structural labels are convenient for some categorizations, they should not be considered as dispositive of industry conduct or performance.

Even though the price-output equilibrium for either a competitive market or a monopoly can generally be explained by an appropriate model, the same cannot be done for an oligopoly. Mutual interdependence, uncertainty, nonprice variables such as advertising and product differentiation, and nonprofit maximization goals combine to yield a rich variety of possible models. No single model has yet been able to incorporate the diversity of oligopolistic characteristics and outcomes. Consequently, many different theoretical models have been developed that purport to explain oligopolistic pricing and output behavior.⁵⁷ Empirical studies of various oligopolistic industries have also identified performance outcomes ranging from monopoly-type pricing patterns to price warfare.⁵⁸ Because of these varied outcomes, the traditional cause and effect structure-conduct-performance model of industrial organization analysis has not been universally accepted.⁵⁹

56. There is no universally agreed upon concentration value that automatically marks the beginning of an oligopoly. The "degree" of oligopoly is more easily defined on a sliding scale. *See, e.g.*, W. SHEPHERD, *THE ECONOMICS OF INDUSTRIAL ORGANIZATION* 62-64 (1979):

TIGHT OLIGOPOLY (Shared Monopoly): the 4-firm concentration ratio equals or exceeds 50 percent.

LOOSE OLIGOPOLY: the 4-firm concentration ratio is between 15 and 40 percent.

C. KAYSEN AND D. TURNER, *ANTITRUST POLICY* 26-29 (1965):

TYPE I OLIGOPOLY	8-firm C.R. ≥ 50%	20-firm C.R. > 75%
TYPE II OLIGOPOLY	≥ 33 1/3 %	≤ 75%
UNCONCENTRATED	< 33%	

A concentration ratio is defined as the percentage of the total value of industry shipments (industry sales) accounted for by the largest (4, 8, 20, or 50) firms ranked in order of industry share. *See generally* F. SCHERER, *supra* note 21, at 56.

The F.T.C. has labeled the leading firms in the cereal breakfast food industry, SIC 2043, as a shared monopoly. The 4-firm concentration ratio is 90 percent. [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,898.

57. *See generally* J. KOCH, *supra* note 6, at ch. 12; F. SCHERER, *supra* note 21, at chs. 5-8; G. STIGLER, *THE ORGANIZATION OF INDUSTRY* (1968).

58. F. SCHERER, *supra* note 21, at 151. *See generally* 2 AREEDA & TURNER, *supra* note 21, at ¶ 404; *INDUSTRIAL CONCENTRATION AND THE MARKET SYSTEM* (E. Fox and J. Halverson, eds. 1979); H. GOLDSCHMID, note 49 *supra*; *ESSAYS ON INDUSTRIAL ORGANIZATION IN HONOR OF JOE S. BAIN* (R. Mason and P. Qualls, eds. 1976).

59. J. KOCH, *supra* note 6, at 90-91. Professors Kaysen and Turner have also asserted this contention:

Ideally, we should like to make a complete analytical chain from market structure (including conduct) to processes to performance, we

The structure-conduct-performance model is a vital but vulnerable assumption to the economic rationale of the no-conduct proposals. Implicit in all of the proposals is that some threshold firm size (market power) connotes an unacceptable level of anticompetitive performance which can be remedied by restructuring the firm. While this assumption may stand on somewhat firmer footing as regards the large single firm, this footing is much more insubstantial as regards oligopoly.⁶⁰ Given the potential for greater dynamic interaction among rival firms in an oligopoly as compared to the lack of such dynamism in a market dominated by a single large firm, the no-conduct concept based on the structure-conduct-performance model appears to be somewhat more tenuous when applied to an oligopoly.

Legal Approach to Oligopoly

Antitrust enforcement against actual or perceived competitive abuses has met with varied success when directed at oligopolies.

would then be able to both deduce present performance from observation of present structure, and to predict what alterations in performance would result from particular changes in structure. . . . In practice, our analytic apparatus is inadequate to the task of providing such correlations in the study of actual markets. . . . We can neither predict market performance from market structure, nor can we tell from structure alone how competitive the processes of the market are.

KAYSEN & TURNER, *supra* note 56, at 60-61. For a recent discussion on the structure-conduct-performance controversy, see, McKie, *Market Structure and Function: Performance versus Behavior*, in *INDUSTRIAL ORGANIZATION AND ECONOMIC DEVELOPMENT: IN HONOR OF E.S. MASON* 3-25, (J. Markham and G. Papenek, eds. 1970); Phillips, *Structure, Conduct, and Performance—and Performance, Conduct, and Structure?*, *Id.* at 26-37.

60. This is not to say, however, that empirical studies have not shown a correlation between structure and performance. See, e.g., COLLINS & PRESTON, *CONCENTRATION AND PRICE-COST MARGINS IN MANUFACTURING INDUSTRIES* (1970); Weiss, *The Concentration-Profits Relationship and Antitrust* in H. GOLDSCHMID, *supra* note 49, at 184; Rhoades, *The Concentration-Profitability Relationship: Policy Implications and Some Empirical Evidence*, 18 *ANTITRUST BULL.* 333 (1973). However, the fact that a correlation exists between structure and performance cannot be interpreted as connoting an actual cause and effect relationship, i.e., that performance is dependent on structure. See, e.g., M. DUTTA, *ECONOMETRIC METHODS* 99 (1975). See also D. WYNN, *INDUSTRIAL MARKET STRUCTURE AND PERFORMANCE 1960-1968* (1975), for an in-depth discussion of statistical techniques applied to structure-performance analyses. *But cf.* J. MCGEE, in *DEFENSE OF INDUSTRIAL CONCENTRATION* (1971). McGee offers an opposing point of view to the traditional structure-performance models and to some of the empirical studies based on them. See also Koch, *Industry Market Structure and Industry Price-Cost Margins*, in 2 *INDUS. ORGANIZATION REV.* 189 (No. 3, 1974). For a recent discussion on the structure-performance controversy, see *Is There a Relationship Between Concentration and Competition?*, in E. FOX, *supra* note 58, at 79-161.

Section 1 of the Sherman Act⁶¹ has been used effectively against oligopolistic firms which have conspired to restrain trade. The courts have held that outright attempts to fix prices⁶² or otherwise rig the market⁶³ are illegal per se. Those kinds of agreements overt or covert, among rival oligopolists are particularly susceptible to legal sanctions under current antitrust legislation. The no-conduct approach would be of little, if any, use in these types of anticompetitive situations since conduct—conspiratorial behavior—is the central issue; and formal conspiracies may arise regardless of market structure.

Section 5 of the Federal Trade Commission (F.T.C.) Act⁶⁴ has also been employed successfully against oligopolists engaged in unfair methods of competition. The F.T.C. has obtained convictions under the rubric of “unfair methods of competition”, both in situations where a formal conspiracy has been found⁶⁵ and in situations where it has not.⁶⁶ While the language of section 5 allows for a broad

61. 15 U.S.C. § 1 (1976):

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony. . . .

62. *E.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). Twelve corporations were convicted of price fixing in the oil refining industry. Justice Douglas, in condemning price fixing for its effect on the market, noted:

Those who controlled the prices would control or effectively dominate the market. And those who were in that strategic position would have it in their power to destroy or drastically impair the competitive system. . . . The [Sherman] Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference.

Id. at 221; United States v. Trenton Potteries Co., 273 U.S. 392 (1927). Twenty-three manufacturers of sanitary pottery were convicted of price fixing and of restraining trade by limiting sales to a special group known as “legitimate jobbers.”

63. *E.g.*, Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951). Timken and other roller bearing manufacturers allocated territories among themselves on a worldwide basis; Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899). Six leading manufacturers of iron pipe conspired to allocate territories among themselves.

64. 15 U.S.C. § 45 (1976), “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.”

65. *E.g.*, Federal Trade Comm’n v. National Lead Co., 352 U.S. 419 (1957). Manufacturers of lead pigment conspired to adopt a zone-delivered pricing system which resulted in identical prices among rival firms.

66. *E.g.*, Triangle Conduit & Cable Co. v. Federal Trade Comm’n, 168 F.2d 175 (7th Cir. 1948). Each of 14 manufacturers of rigid steel conduit concurrently adopted a basing point price system that unreasonably restrained trade among them.

interpretation of what constitutes "unfair" practices, most of the cases brought under section 5 could probably have been brought under the Sherman Act as well.⁶⁷

Conscious Parallelism

Absent proof of an outright conspiracy or "unfair methods of competition", the government has enjoyed only limited success in prosecuting oligopolists. Where successful prosecutions were obtained, the government was able to adduce sufficient circumstantial evidence to prove "conscious parallelism"⁶⁸ of action among rival firms. Conscious parallelism received legitimacy in *Interstated Circuit, Inc. v. United States*.⁶⁹ No formal conspiracy was found, but the Court, in assessing the circumstantial evidence of parallel behavior among the firms, inferred that a conspiratorial agreement did exist.⁷⁰ *Interstate Circuit* also stood for the proposition that the lack of a formal accord did not preclude a finding of a section 1 Sherman Act violation.⁷¹ An unlawful concert of action could be inferred from the behavior of the rival firms.

The tacit conspiracy theory embodied in the concept of "conscious parallelism" received additional support in *American Tobacco Co. v. United States*.⁷² The Court in *American Tobacco* also found an unlawful conspiracy from circumstantial evidence presented by the government. Proof of a section 1 Sherman Act violation was again inferred from the companies' behavior.⁷³ No showing of a formal

67. 2 AREEDA & TURNER, *supra* note 21, at ¶ 305-07.

68. See note 10 *supra*.

69. 306 U.S. 208 (1939).

70. It taxes credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity such far-reaching changes in their business methods without some understanding that all were to join, and we reject as beyond the range of probability that it was the result of mere chance.

Id. at 223.

71. It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. (citations omitted) Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.

Id. at 227 (citations omitted).

72. 328 U.S. 781 (1946).

73. No formal agreement is necessary to constitute an unlawful conspiracy. . . . The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in any exchange of words. (citation omitted). Where the cir-

agreement had to be made. *American Tobacco* was also significant as one of the two leading section 2 Sherman Act cases to touch on the oligopoly problem.⁷⁴ Although the Court did not address the issue of monopoly power in terms of an oligopolistic market structure, the three leading cigarette manufacturers on trial would have constituted a "shared monopoly" using current terminology.⁷⁵ In finding a section 2 violation of monopolization, the Court held that proof of actual exclusion of existing or potential competitors was unnecessary.⁷⁶

The last major case in which the courts enthusiastically embraced the concept of conscious parallelism was *United States v. Paramount Pictures, Inc.*⁷⁷ *Paramount* was the other leading section 2 case in which the problem of monopoly power in an oligopolistic setting was confronted by the court.⁷⁸ But in *Paramount* as in *American Tobacco*, the Court did not employ an oligopoly structure orientation. The holdings of *Interstate Circuit* and *American Tobacco* were reaffirmed as to the finding of an unlawful conspiracy without the existence of a formal agreement.⁷⁹ On remand the lower court made a specific finding of unlawful monopoly power in violation of section 2, but, more importantly, made the finding with respect to the defendants collectively.⁸⁰

cumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified.

Id. at 809-10.

74. 2 E. KINTNER, FEDERAL ANTITRUST LAW 308 (1980). The other leading case was *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

75. *American, Liggett, and Reynolds* accounted at all times for at least 68 percent and usually more than 75 percent of domestic cigarette production during the years in question, 1931-1939. *American Tobacco Co. v. United States*, 328 U.S. at 795.

76. *Id.* at 810. The Court supported its holding by citing, with approval, previous authorities which had held that a § 2 violation of monopolization existed even when prices were not actually raised or competitors actually excluded. It was only necessary to show that the power existed and could be exercised when it was desired to do so. *Id.* at 811.

77. 334 U.S. 131 (1948).

78. 2 E. KINTNER, *supra* note 74, at 308.

79. 334 U.S. at 142. "It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that defendants conformed to the arrangement."

80. *United States v. Paramount Pictures*, 85 F. Supp. 881, 894 (1949). "In respect to monopoly power, we think it existed in this case. . . . [D]efendants were all working together. . . . In these circumstances, the defendants must be viewed collectively rather than independently as to the power which they exercised over the market. . . ."

Notwithstanding the successful application of conscious parallelism against an oligopoly, the remedial sanction of diverstiture⁸¹ carried even more significance. It was a marked departure from the previous remedial action taken in *Interstate Circuit* and *American Tobacco*. In these two cases, either conduct was enjoined⁸² or fines were imposed.⁸³ The impetus that *Paramount* gave to the concept of conscious parallelism proved, however, to be only ephemeral. From then on, conscious parallelism was viewed by the courts with increasing skepticism.

Demise of Conscious Parallelism

Courts after *Paramount* became exceedingly reluctant to infer a conspiracy solely from conscious parallelism of action. While *Interstate Circuit*, *American Tobacco*, and *Paramount* established that consciously parallel conduct could imply an unlawful concert of action in violation of the Sherman Act, additional elements were also present in each case.⁸⁴ The court in *C-O-Two Fire Equipment Co. v. United States* referred to these additional elements as "plus factors."⁸⁵ The Court in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*⁸⁶ essentially dismissed conscious parallelism as a legally viable concept which standing alone could support a finding of conspiracy under the Sherman Act.⁸⁷

81. *Id.* at 895.

82. *Interstate Circuit Inc. v. United States*, 306 U.S. at 232.

83. *American Tobacco Co. v. United States*, 328 U.S. at 783.

84. Each case contained one or more of the following: a proposal for joint action; a complex yet identical set of responses; direct communication or an opportunity for it; failure to deny agreement; a set of circumstances which made each participant aware that it was in its interest to participate if all did, but adverse to its interests to participate if others did not. L. SULLIVAN, *supra* note 10, at 317.

85. 197 F.2d 489, 497 (1952). See also Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 658 (1962). "[C]onscious parallelism is never meaningful by itself, but always assumes whatever significance it might have from additional facts."

86. 346 U.S. 537 (1954).

87. In finding for the defendant-distributors, Justice Clark stated: To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. (citations omitted) But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely.

Id. at 540-41 (footnote omitted). See also *Syufy Enterprises v. National Gen. Theatres, Inc.*, 575 F.2d 233, 236 (9th Cir. 1978) "[M]ere parallel conduct, in and of itself, does not

Although parallel behavior may be indicative of unlawful conspiracy, such behavior can also represent perfectly legal conduct. Given that rival oligopolists may exhibit similar cost functions, produce relatively fungible products, or aspire to the same goals, it is not unlikely that they might respond in a similar but independent manner to a change in a particular business condition.⁸⁸ This parallel behavior, while giving the appearance of illegal conduct, is not violative of section 1 of the Sherman Act.⁸⁹ By requiring additional evidence of illegal conduct—"plus factors"—in conjunction with circumstantial evidence of conscious parallelism, the courts appear to have given greater recognition to the economic forces which could lead to similar but independent decisions on the part of rival firms.

In cases where oligopolistic conduct has resulted in parallel behavior, the courts have refused to find an unlawful conspiracy under section 1 of the Sherman Act without additional supporting evidence.⁹⁰ This does not present a problem from an economic perspective if firms which engaged in this kind of parallel behavior *also* manifest economic performances which approach a competitive norm. However, where anticompetitive performances are alleged⁹¹

equate with proof of a conspiracy."; *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 445 (3d Cir. 1977) "[P]roof of conscious parallel business behavior is circumstantial evidence from which an agreement . . . can be inferred but . . . without more, is insufficient."; *Kreager v. General Electric Co.*, 497 F.2d 468, 471 (2d Cir. 1974), *cert. denied* 419 U.S. 861 (1974) "[P]arallel behavior, without more, does not establish an illegal agreement in violation of the Sherman Act."

88. *Turner, Conscious Parallelism*, *supra* note 85, at 663-73.

89. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. at 540 "The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express."; *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 884 (8th Cir. 1978) "An inference of conspiracy is not warranted where the conduct is at least as consistent with legitimate business decisions. . . ."; *Modern Home Institute, Inc. v. Hartford Accident and Indemnity Co.*, 513 F.2d 102, 110 (2d Cir. 1975) "Such parallel conduct is consistent with independent competitive decisions or at most reflects a non-consensual decision not to compete."; *Pevely Dairy Co. v. United States*, 178 F.2d 363, 369, *cert. denied* 339 U.S. 942 (1950) "We are clear that mere uniformity of prices in the sale of a standardized commodity . . . is not in itself evidence of a violation of the Sherman Antitrust Act."

90. *See* note 87 *supra*.

91. For informative discussions on the concentration-performance relationship, *see, e.g.*, 2 AREEDA & TURNER, *supra* note 21, at ¶ 404b; KAYSER & TURNER, *supra* note 56, at 82-86; F. SCHERER, *supra* note 21, at ch. 17; Fox, *Economic Concentration, Efficiencies and Competition: Social Goals and Political Choices*, in E. FOX, *supra* note 58, at 137; Scherer, *Structure-Performance Relationships and Antitrust Policy*, in E. FOX, *supra* note 58, at 128; Weiss, *Concentration-Profit Relationship* in H. GOLDSCHMID, note 49 *supra*. For discussions questioning the validity of the concentration-performance

but where only mere parallel behavior is adduced, antitrust violations have been difficult to prove. Section 1 is of little use under these posited conditions, given the courts' great reluctance to find a conspiratorial enterprise from mere parallel conduct. In addition, section 2 of the Sherman Act has traditionally been directed only at single firms.⁹² To date section 2 has not been used successfully against an oligopoly or "shared monopoly."⁹³ Although *American Tobacco* dealt with a tight oligopolistic market structure and the Court in *Paramount* talked about collective monopoly power, in neither case did the Court explicitly confront the structural concept of oligopoly.⁹⁴ Instead, its attention was focused mainly on the conscious parallelism issue even though section 2 violations were also found to exist.

Resurrecting Section 1 of the Sherman Act

One commentator has suggested that section 1 is adequate to deal with the anticompetitive effects of mere parallel behavior.⁹⁵ Posner contends that the "interdependence" theory of oligopoly is inadequate to explain parallel pricing or output behavior; that is, that such behavior is not conspiratorial.⁹⁶ He maintains that any non-competitive parallel behavior in price or output can only result from voluntary actions by the sellers.⁹⁷ Such voluntary actions need not take the form of express agreements; they can exist as tacit understandings between rival sellers.⁹⁸ Posner, therefore, sees no

relationship, see, e.g., R. BORK, *THE ANTITRUST PARADOX* (1978); MCGEE note 60 *supra*; R. POSNER, *ANTITRUST LAW* (1976); Bork, *Antitrust and the Theory of Concentrated Markets*, in E. FOX, *supra* note 58, at 81; Brozen, *The Concentration-Collusion Doctrine*, in E. FOX, *supra* note 58, at 90; Demsetz, *Two Systems of Belief About Monopoly*, in H. GOLDSCHMID, *supra* note 49, at 164.

92. Brodley, *Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy*, 19 STAN L. REV. 285, 295 (1967).

93. *Id.* Areeda and Turner suggest, however, that § 2 would embrace a "shared monopoly." 3 AREEDA & TURNER, *supra* note 21, at 364. The Federal Trade Commission (FTC) brought a complaint against the leading manufacturers of ready-to-eat (RTE) cereals alleging that these firms acted as a "shared monopoly" in controlling the RTE cereal market. The complaint, however, was based on § 5 of the FTC Act rather than § 2 of the Sherman Act. [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,898.

94. 2 E. KINTNER, *supra* note 74, at 308.

95. See Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN L. REV. 1562 (1969).

96. *Id.* at 1566-75.

97. *Id.* at 1575.

98. *Id.*

need to distinguish between explicit or tacit collusion.⁹⁹ Both would be susceptible to prosecution under section 1 of the Sherman Act;¹⁰⁰ tacit collusion would just be more difficult to detect.¹⁰¹

While detection and proof of tacit collusion would be difficult, Posner contends that the task would not be insuperable. In order to detect tacit collusion, Posner suggests a list of criteria for identifying those oligopolistic markets in which conditions for collusion are favorable.¹⁰² Once an industry meeting most of these criteria was identified, Posner suggests that tacit collusion could be proved by adducing certain kinds of economic and behavioral conditions.¹⁰³ Posner does concede, however, that proof of collusive pricing through the use of economic evidence is a formidable obstacle to overcome.¹⁰⁴ It is an obstacle which may be intractable to deal with, given, as Posner points out, the complex, technical, and often inconclusive nature of the proposed economic evidence.¹⁰⁵

Posner's proposal, however, has been criticized.¹⁰⁶ One commentator objected to the form of this proposal for two reasons. First, if the case is one of criminal conspiracy, conviction should not be imposed on an innocent firm simply because self-regarding but independent decisions, made within an oligopolistic setting, led to objectionable economics results.¹⁰⁷ Second, neither a criminal sanction

99. Posner uses the term "tacit collusion" instead of conscious parallelism.

100. *Id.*

101. *Id.* at 1575-87.

102. The criteria include the following: (1) a concentrated sellers' market, (2) an absence of smaller firms, (3) inelastic demand at the competitive price, (4) barriers to new entry, (5) many customers, (6) standard (fungible) product, (7) principal firms selling at the same level of distribution, (8) price competition, (9) high ratio of fixed to variable costs, (10) static or declining demand over time, (11) sealed bidding, and (12) the industry's previous antitrust history. R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 55-61 (1976).

103. These conditions include the following: (1) relatively fixed market shares maintained by the leading firms, (2) price discrimination, (3) exchanges of price information, (4) regional price variations, (5) identical bids, (6) price, output, and capacity changes at the formation of the collusive grouping of firms, (7) industry-wide resale price maintenance, (8) declining market shares of the leading firms, (9) infrequent and small changes in price, (10) relatively elastic demand at the market price, (11) level and pattern of profits, and (12) existence of basing point pricing. POSNER, *supra* note 102, at 62-71.

104. R. POSNER, *supra* note 102, at 75.

105. *Id.*

106. See L. SULLIVAN, *supra* note 10, at 321. See also Note, *Conscious Parallelism and the Sherman Act: An Analysis and a Proposal*, 30 VAND. L. REV. 1227 (1977).

107. L. SULLIVAN, *supra* note 10, at 321-22.

nor an injunction would rectify the finding of a conspiracy if the poor performance is in fact the result of an oligopolistic structure and interdependent pricing.¹⁰⁸ In addition to Sullivan's criticisms, it should also be noted that, notwithstanding Posner's view to the contrary, the interdependent theory of oligopolistic pricing has considerable support.¹⁰⁹

The Antitrust Division of the Justice Department recently announced a section 1 approach to the shared monopoly problem.¹¹⁰ A "facilitating devices"¹¹¹ approach would be employed to identify and challenge under section 1 of the Sherman Act parallel practices that facilitate the coordination of prices or production, or inhibit potential entry.¹¹² According to this approach, proof of a section 1 violation would require two factors: evidence to establish that a suspect practice had been adopted by agreement and a demonstration that the practice (facilitating device) would unreasonably restrain competition.¹¹³ Evidence of these two factors would be obtained by aducing certain evidentiary elements.¹¹⁴

The "facilitating devices" approach is not without its difficulties. As the Justice Department's memo itself points out, a crucial factor in the effectiveness of this approach will be the determination of whether a sufficient number of firms are using a practice to allow it to operate as a facilitating mechanism.¹¹⁵ Whatever the threshold number is, it would have to vary according to the firm population of the suspect industry. The point is made, however, that absent total industry acceptance of the device, submarkets might be

108. *Id.* at 322.

109. See, e.g., 2 AREEDA & TURNER, *supra* note 21, at ¶ 404; E. CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION 46-47 (1938); F. SCHERER, *supra* note 21, at 513-14; L. SULLIVAN, *supra* note 10, at ch. 4.

110. *Antitrust Division Memorandum on Identification and Challenge of Parallel Pricing Practices in Concentrated Industries*, reprinted in 874 ANTITRUST & TRADE REG. REP. (BNA) (July 27, 1978).

111. Examples of "facilitating devices" include the following: (1) information exchange mechanisms, (2) delivered pricing systems, (3) standard freight rates, (4) price formulas, (5) price books, (6) standardization of product definition, (7) bidding systems, (8) price protection clauses, and (9) competitor compensation requirements. *Id.* at F-2.

112. *Id.* at F-1.

113. *Id.* at F-2.

114. These evidentiary elements are: (1) a parallel course of conduct by firms in a concentrated industry through the use of a facilitating mechanism, (2) an awareness by each firm that its rivals are following a parallel course of action with respect to the facilitating device, (3) an anticompetitive benefit derived by each firm because of the parallel conduct, and (4) action contradictory to the self-interest of each firm. *Id.* at F-5.

115. *Id.*

identified by product or geographic location where the facilitating device is used more uniformly.¹¹⁶

An important and probably assailable assumption in this approach is that each firm is assumed to be a profit-maximizer.¹¹⁷ Proof that a suspect business practice is a facilitating device will be evidenced by the fact that the practice would not be profit-maximizing unless it was adhered to by most of the oligopolists.¹¹⁸ While profit-maximizing may be the goal of many firms, it is doubtful that it is the goal of every firm within the suspect industry.¹¹⁹ Profits are no doubt important, but a profit level less than a maximum may prove quite adequate for a firm pursuing other goals. Hence, an alleged facilitating device may be used by less than all of the oligopolists and still go undetected based on this profit-maximizing assumption.

Finally, it does not appear that this approach adds anything new to the conscious parallelism doctrine which is currently under judicial disfavor. While a facilitating device inquiry may provide a more systematic framework to analyze potential section 1 cases, the "plus factors"¹²⁰ must still be adduced. These additional factors are still necessary before the courts would be willing to infer the existence of a conspiracy.¹²¹ Unless the facilitating devices approach is able to provide these additional inculcating factors, it seems destined for a fate similar to that of conscious parallelism.

"NO-CONDUCT OLIGOPOLY"

Threshold Inquiries

Since the current no-conduct proposals are directed toward the "big" firm, the criteria for initiating governmental action are couched in single-firm terms. All of these proposals are concerned with curbing single-firm monopoly power which is both substantial and persistent.¹²² The terms "substantial" and "persistent" are, however,

116. *Id.*

117. *Id.*

118. *Id.*

119. See note 45 *supra*.

120. See note 85 *supra* and accompanying text.

121. See note 87 *supra* and accompanying text.

122. "Proof of objectionable conduct should not be required in proceedings under the statute where substantial, persistent, single-firm monopoly power is established by a government enforcement agency." FTC Proposal, note 36 *supra*; under the Flynn Proposal, "the government would be allowed to institute equity proceedings against any firm possessing persistent monopoly power," 1 COMMISSION

susceptible to a broad range of interpretations. Absent appropriate quantifications, these terms would allow the government too much discretion in selecting suspect firms. A single value might be assigned to each term or a range of values might be selected. The difficulty with either option is the determination of fair and meaningful values. Case history¹²³ and current commentators¹²⁴ suggest some quantitative limits to these terms.

The big, single-firm focus on structural threshold criteria¹²⁵ is not well-adapted to oligopolistic market structures. The market structure of an oligopoly or shared monopoly is not one which is dominated by a large, single firm. Therefore, the market percentages which Judge Hand enunciated in *Aluminum Company of America* would be of little guidance. However, aggregate market percentages appropriate to an oligopolistic structure could be substituted for single-firm values. The problem then becomes one of determining the appropriate values.¹²⁶ Selecting values which are

REPORT, *supra* note 1, at 171 n.35, Special Supp., *supra* note 1, at 45; "The risk of applying § 2 to mere monopoly would be impractical or economically wasteful can be minimized by confining intervention to market power that is both substantial and persistent." 3 AREEDA & TURNER, *supra* note 21, at ¶ 623; the Dougherty Proposal also focuses on a market situation "where a firm has substantial persistent monopoly power," Dougherty Proposal, *supra* note 36.

123. Judge Learned Hand's famous dictum in *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945), "That percentage [90] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not," gives some direction as to what constitutes substantial. The 64 percent figure was no doubt a reference to the Court's failure to previously find that *International Harvester Co.* had a monopoly with that percent of the market. *United States v. International Harvester Co.*, 274 U.S. 693 (1927).

124. Kaysen and Turner suggest that substantial and persistent monopoly power is manifested by any company which "accounts for 50 percent or more of annual sales in a market" for five or more years. KAYSEN & TURNER, *supra* note 56, at 267. Areeda and Turner would set the threshold figure at 75 percent with excessive price-cost margins or returns on investment over five years as an indicator of substantial and persistent monopoly power. 3 AREEDA & TURNER, *supra* note 21, at ¶ 804. Their 75 percent figure is a compromise based on a feeling that 90 percent was too high in *Alcoa* and 80 percent would probably have been misleadingly high in defining *du Pont's* share of the "Cellophane Market" in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).

125. See, e.g., Judge Hand's dictum, note 123 *supra*.

126. Several suggestions have been made including the following: "Market power . . . shall be conclusively presumed where, for five years or more . . . four or fewer companies have accounted for 80 percent of sales." KAYSEN & TURNER, *supra* note 56, at 267.

From the proposed "Concentrated Industries Act," S. 2614, 92d Cong., 1st Sess. (1971), reprinted in 4 ANTITRUST L. & ECON. 40 (Summer 1971):

(a) The term "oligopoly industry" shall mean a market in which

fair and meaningful on their face is not the only problem with regard to the crucial threshold criteria. Since no-conduct criteria for an oligopoly would have to be couched in multi-firm, as opposed to single-firm, terms, aggregate structural data would have to be employed.

The data generally relied upon for these structural values are concentration ratios¹²⁷ which are compiled by the Bureau of the Census.¹²⁸ Because concentration ratios are more readily available than alternate types of data,¹²⁹ they are the most frequently used index of concentration, and indicator of general market structure.¹³⁰ There are inherent drawbacks,¹³¹ however, in the usefulness of simple con-

(i) any four or fewer firms had an aggregate market share of 70% or more during at least seven of the ten and four of the most recent five base years; and

(ii) the average aggregate market share during the five most recent base years of the four firms with the largest average market shares during those base years amounted to at least 80% of the average aggregate market share of those same four firms during the five preceding base years, but shall not include any market in which the average aggregate sales of all firms during the five most recent base years declined by 20% or more from such average sales during the preceding five base years.

(b) The term "oligopoly firm" shall mean a firm engaged in commerce whose market share in an oligopoly industry during at least two of the three most recent base years exceeds 15%.

From the proposed "Industrial Reorganization Act (Hart Bill)," S. 1167, 93d Cong., 1st Sess. (1973):

(b) There shall be a rebuttable presumption that monopoly power is possessed . . . (3) if any four or fewer corporations account for 50 percentum (or more) of sales in any line of commerce in any section of the country in any year out of the most recent three years preceding the filing of the complaint.

127. See note 56 *supra*.

128. See Bureau of the Census, U.S. Dep't. of Commerce, CONCENTRATION RATIOS IN MANUFACTURING, MC72 (SR)-2 (1975).

129. See F. SCHERER, *supra* note 21, at chs. 3, 4, for other types of data which would be useful in assessing market structure and concentration. For a detailed discussion on the merits and results of concentration measures which, unlike the simple concentration ratio, take firm size and distribution into account, see 4 AREEDA & TURNER, *supra* note 21, at ¶ 913(b) (Herfindahl Index); R. NELSON, CONCENTRATION IN THE MANUFACTURING INDUSTRIES OF THE UNITED STATES (1963) (Herfindahl Index); and Finkelstein and Friedberg, *The Application of an Entropy Theory of Concentration to the Clayton Act*, 76 YALE L.J. 677 (1967) (Entropy Measure).

130. J. KOCH, *supra* note 6, at 176.

131. *Id.* at 175:

The SIC system, upon which the concentration ratios are based, may not accurately reflect economic markets for the following reasons: (1)

centration ratios which, if naively relied upon, might trigger an inquiry into an industry where none was warranted. Additionally, it should be recognized that most structural measures are static in nature and fail to take into consideration whatever intra-industry dynamics that exist.¹³²

Also in an oligopolistic setting, high aggregate structural indicators may mask or misrepresent the true intensity of competition. Such a condition may prevail where there is a fairly high turnover among the leading firms.¹³³ In this type of situation, restructuring an oligopoly would appear to be counterproductive. Intra-industry competition as evidenced by turnover militates against reliance upon structural variables as the sole *prima facie* evidence of noncompetitive activity. In this case a detailed behavioral inquiry would seem appropriate since extant competitive forces would belie the structural predictors. In assessing the deficiencies, it would appear that structural tests alone are not sufficient to measure accurately the alleged level of market power ascribed to a suspect oligopoly.¹³⁴

Concentration ratios do not reflect the presence of potential entry of competitors; (2) Concentration ratios are based upon national figures and therefore ignore regional market power and regional concentration; (3) Concentration ratios ignore the role of imports in domestic markets; (4) Concentration ratios ignore the export sales of domestic producers; (5) Concentration ratios do not describe the entire number and size distribution of firms, only a slice of it; (6) Concentration ratios give no information about the relative size and position of the group of firms included in a ratio; (7) Concentration ratios fail to reflect "turnover" (changes in the position and ranking of given firms); (8) Concentration ratios are structural indicators that describe a given slice of the number and size distribution of firms in a given market; they do not necessarily imply certain types of conduct by firms in that market.

See also 3 AREEDA & TURNER, *supra* note 21, at ¶ 847; F. SCHERER, *supra* note 21, at 59-64; and BUREAU OF ECONOMICS, FEDERAL TRADE COMMISSION, MARKET SHARES, CONCENTRATION AND COMPETITION IN MANUFACTURING INDUSTRIES (1978) (suggesting that for policy purposes a two-firm concentration ratio is sufficient to assess industry performance).

132. 3 AREEDA & TURNER, *supra* note 21, at 373. See also Note, *The Development of the Sherman Act Section 2 Market Share Test and Its Inapplicability to Dynamic Markets*, 49 S. CAL. L. REV. 154 (1975). But see Finkelstein, *supra* note 129, at 701 (an entropy measure is designed to take into account the number of small competitors in an industry on the assumption that very small firms might be significant competitors).

133. "High turnover is said by some economists to be an indicator of dynamic competition which may be present even when concentration ratios imply the absence of much competition in a static structural sense. (Footnotes omitted)." F. SCHERER, *supra* note 21, at 74. See also Caves and Porter, *Market Structure, Oligopoly, and Stability of Market Shares*, 26 J. INDUS. ECON. 289 (1978).

134. 3 AREEDA & TURNER, *supra* note 21, at ¶ 847-49.

Advocates of the no-conduct approach contend that a determination of monopoly power need not rest on market share data alone.¹³⁵ Indeed, "[w]here market share has not been persistently high, it would be appropriate to examine other factors, as current law permits."¹³⁶ The primary concern of the no-conduct proponents is to eliminate the necessity of an inquiry into a firm's conduct. Critics of the no-conduct proposals strongly disagree. These critics contend that the conduct element is essential to a monopolization case and that the pursuit of conduct evidence is not a mere strategem.¹³⁷ Even under a no-conduct approach, some opponents maintain that substantial conduct evidence would still have to be introduced.¹³⁸ This conduct evidence, it is claimed, would be relevant to a determination of the appropriate market and the existence of scale efficiencies.¹³⁹ Proof of these elements would require an examination into the behavior of each firm's reactions as regards each of its competitors.¹⁴⁰

If structural indicia are to be relied upon as the sole indicators of monopoly power, then the data will have to be greatly improved. The inherent deficiencies, noted in the simple concentration ratio, will have to be rectified. Census data¹⁴¹ will have to be more refined in terms of identifying individual firms and their performance. Also, it will have to define more accurately appropriate industry classifications.¹⁴² In addition, it will be necessary to collect the data

135. Dougherty Proposal, *supra* note 25, at 882 (footnote omitted).

[T]here are ways of establishing . . . market power . . . without embarking on the intensive appraisal of firm behavior necessitated by the current conduct requirement. . . .

Monopoly power could be established through evidence relating to: market share; profitability; price-cost margins; price discrimination; price rigidity or price increases in the fact of declining costs; internal inefficiency; and trends in these factors over time.

136. Dougherty Proposal, *supra* note 25, at 882 n.33.

137. 1 COMMISSION REPORT, *supra* note 1, at 152-53; Special Supp., *supra* note 1, at 45.

138. 1 COMMISSION REPORT, *supra* note 1, at 153 n.40 (citing testimony of Thomas Kauper and Judge Frederick Lacey); Special Supp., *supra* note 1, at 45.

139. *Id.*

140. Bork, *Statement of Robert H. Bork*, 48 ANTITRUST L.J. 891, 892 (1979).

141. For a discussion and an analysis of alternate sources of market share data, see Boyle, *Private Sources of Market Share Data and Their Utility to Antitrust Lawyers*, 47 ANTITRUST L.J. 1035 (1978).

142. Current 4-digit SIC Code categories may not accurately reflect the actual product market, e.g., cane sugar refining is classified as one industry, 2062, while beet sugar is classified as another, 2063. Even though cane and beet sugar are perfectly substitutable for most uses, the structural indicia of each industry would indicate a greater degree of monopoly power than actually exists. An analogous argument can be made for other industry classifications where products are relatively fungible across industry lines. See STANDARD INDUSTRIAL CLASSIFICATION MANUAL, note 54 *supra*.

on an annual basis in order to ascertain the persistence of the firm's alleged monopoly power.

Structural Remedy

Data problems are not the only difficulties that will have to be faced in a no-conduct approach to oligopolies. The question of remedies must also be addressed. Injunctive remedies, as compared to restructuring, have generally been eschewed in the no-conduct proposals.¹⁴³ It is suggested, however, that the existence of a feasible and effective remedy should be a prerequisite to the initiation of any action which contemplates a restructuring of an oligopoly or shared monopoly.¹⁴⁴ This recommendation differs from the other proposals. The others would examine the applicability of structural sanctions only *after* the liability phase of the suit had been successfully litigated against the offending oligopoly.¹⁴⁵

Procedurally, this prerequisite would place a much greater burden on the government. The difficulties which must be overcome to obtain adequate structural evidence that an oligopoly exhibits substantial and persistent monopoly power are already burdensome. With the addition of this prerequisite, the government would have to present further evidence of a feasible and effective structural remedy. This would appear to entail in itself at least as substantial an undertaking as the initial threshold inquiry. If an offending oligopoly was structured in such a manner that it would trigger a governmental inquiry, but its current structure was found not amenable to a feasible and effective restructuring, no governmental action would be initiated.¹⁴⁶ This procedural scheme would no doubt reduce the frequency with which a no-conduct amendment would be employed.

143. See note 36 *supra*.

144. 3 AREEDA & TURNER, *supra* note 21, at ¶ 850.

The government has on occasion begun proceedings against what it believed to be monopoly market structures without any clear idea whether restructuring would be desirable, feasible, or effective. That is an intolerable practice. The key objective of restructuring is to improve the competitive functioning of the market. Without reasonable confidence that the remedy would probably make a substantial improvement in a market's performance, such proceedings are pointless, and therefore wasteful of important public and private resources."

Id. at 377. For a discussion of the costs involved in antitrust litigation, see Reich, *The Antitrust Industry*, 68 GEO. L.J. 1053, 68-70 (1980).

145. See note 36 *supra*.

146. See, e.g., 3 AREEDA & TURNER, *supra* note 21, at 378.

Even though a required prerequisite finding of an appropriate structural remedy would impede the use of a no-conduct amendment, it would not altogether prohibit its application. Furthermore, societal resources would be conserved¹⁴⁷ by not litigating cases which were not amendable to restructuring. By eliminating the need to litigate cases where no structural remedy is possible, financial and temporal savings would not only be realized in the private sector but scarce judicial resources would be conserved as well. If a viable structural remedy was found wanting after the government had successfully litigated its case, only a pyrrhic victory would have been won and a very expensive one in terms of public and private resources expended.

It is doubtful, though, that even if Congress enacted a no-conduct amendment it would saddle the enforcement agencies with two pretrial burdens. Consequently, the possibility of a pyrrhic victory exists where the government wins its case, but the oligopoly is found to be incompatible with a decree to restructure.¹⁴⁸ The tentative wording of the proposed amendments does not indicate, however, that restructuring is to be a mandatory remedy.¹⁴⁹ Should structural remedies prove unworkable, fines or injunctions proscribing certain conduct could be imposed.¹⁵⁰ Although, the imposition of behavioral-type remedies would probably require an examination of oligopoly conduct. It is difficult to predict whether, during the liability phase of litigation, this examination would be as intense as a conduct inquiry. However, if the same criteria of feasibility and effectiveness are imposed on a behavioral-type remedy, then a thorough analysis into the intricacies of the offending oligopolist's conduct would be essential.

The no-conduct proponents' concern with the kind of remedy that would be imposed appears to be due in large part to the

147. See generally Reich, note 144 *supra*.

148. *But cf.* Brodley, *Industrial Deconcentration and Legal Feasibility: The Efficiencies Defense*, 9 J. ECON. ISSUES 365, 378 (1975):

Even in those instances where no effective relief at all results, there is value in the proceedings, for they require concentrated economic power to account for its stewardship and to demonstrate that the continuance of such power serves the public interest.

149. See note 36 *supra*.

150. See K. ELZINGA AND W. BREIT, *THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS* (1976) (suggesting that the imposition of an optimal fine is the solution to the problem of efficient antitrust enforcement); Nye, *Can Conduct Oriented Enforcement Inhibit Conscious Parallelism?* 44 ANTITRUST L.J. 206 (1975) (suggesting that better efforts toward enforcement with present antitrust tools would not only be profitable but preferable to an economy-wide regime of deconcentration).

judiciary's traditional reluctance to impose structural sanctions.¹⁵¹ Other than prescribing fines or imprisonment, section 2 of the Sherman Act neither advocates nor proscribes the types of equitable remedies which courts may impose upon a firm found guilty of a section 2 violation.¹⁵² Hence, there is a desire on the part of the no-conduct advocates to counter this traditional reluctance by including a specific suggestion for structural relief as a first-best solution.¹⁵³ The proponents apparently feel that a legislative prod is warranted because of the failure of traditional remedies—fines and injunctions—to effectuate any significant change in past or current levels of economic concentration.

A perplexing problem for any no-conduct approach to oligopoly or shared monopoly is that more than one firm may be eligible for restructuring. This may be the most intractable problem to resolve. Unlike a dominant single-firm's structure, it is the aggregate structure of rival firms in an oligopoly that triggers a governmental inquiry. If a preliminary examination of an offending oligopoly's current structure is to be made with the goal of viably restructuring the industry, then the relative structural attributes of each suspect

151. See *United States v. National Lead Co.*, 332 U.S. 319, 353 (1947):

It is not for the courts to realign and redirect effective and lawful competition where it already exists and needs only to be released from restraints that violate antitrust laws. To separate the operating units of going concerns without more supporting evidence than has been presented here to establish either the need for, or the feasibility of, such separation would amount to an abuse of discretion.

But cf. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) (structural remedy imposed). The reluctance of the courts to impose structural remedies can be categorized into three tenets apparently held by the judiciary:

- (1) that conduct-related relief is sufficiently effective in dealing with monopolization offenses; (2) that divestiture is an extremely "harsh" remedy vis-a-vis alternative remedies; and (3) that the district courts are precedentially circumscribed in their ability to order divestiture relief.

O'Conner, *The Divestiture Remedy in Sherman Act § 2 Cases*, 13 HARV. J. LEGIS. 687, 714 (1976) (footnote omitted).

An additional reason for the courts' conservatism in the employment of structural remedies can be found in the background of many of the judiciary. Judges are commonly drawn from the legal-commercial strata. They are schooled in free enterprise and private property rights; consequently, they are often easily awed by business expertise and the "dangers" of disturbing the existing order. W. SHEPHERD, *THE TREATMENT OF MARKET POWER* 69 (1975).

152. See note 15 *supra*. Section 4 of the Sherman Act provides for the institution of proceedings in equity by the government to prevent and restrain violations of sections 1 to 7 of the Sherman Act. 15 U.S.C. § 4 (1976).

153. See note 36 *supra*. See also *Structural Relief*, 48 ANTITRUST L.J. 1099 (1979) (staff briefing paper on problems of structural relief to the Commission).

firm must be evaluated. Equity, in the popular sense, would also dictate that each firm should individually be allowed to exert whatever statutory defenses are permitted, such as efficiencies.

Once an oligopoly has been singled out and an overall structural remedy contemplated, concern should be given to the potential effect restructuring will have on interfirm competitive forces. Since the ultimate goal, at the very least, is not to dampen, but rather to enhance competitive forces, great care must be taken where structural remedies are involved.¹⁵⁴ There are conditions, generally intrinsic to most oligopolies, which naturally tend to limit coordination.¹⁵⁵ Unfortunately, not all of these conditions can be subsumed under the rubric of efficiency. Therefore, restructuring with only a concern

154. Judge Wyzanski's admonitions on restructuring should be scrupulously heeded, particularly under a no-conduct approach applied to oligopolies:

[A] trial judge's decree in attempting to recreate a competitive market should be drafted in the spirit which has been attributed to Lord Acton. . . . Of every proposal he would have asked, Is it just? Is it in accordance with the permanent will of the community? Is it practicable? Will it be efficient? (citation omitted).

. . . .

Judges in prescribing remedies have known their own limitations. They do not . . . have economic or political training. Their prophecies as to the economic future are not guided by unusually subtle judgment. They are not so representative as other branches of the government. The recommendations they receive from government prosecutors do not always reflect the over-all approach of even the executive branch of the government, sometimes not indeed the seasoned and fairly informed judgment of the head of the Department of Justice. Hearings in court do not usually give the remote judge as sound a feeling for the realities of a situation as other procedures do.

. . . .

A petition for dissolution should reflect greater attention to practical problems and should involve supporting economic data and prophecies such as are presented in corporate reorganization and public utility dissolution cases. Moreover, the petition should involve a more formal commitment by the Attorney General, than is involved in the divergent proposals that his assistants have made in briefs and in oral arguments addressed to the Court.

United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 347, 348 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

155. The following conditions tend to militate against oligopolistic coordination: (1) more firms and firms of equal size; (2) heterogeneous products; (3) different cost structures among the firms; (4) excess industrial capacity; (5) depressed industry sales; (6) infrequent and large orders; (7) inability of rival firms to quickly retaliate against each other with respect to price, product, or promotional changes; and (8) interpersonal differences among rival executives. F. SCHERER, *supra* note 21, at ch. 7.

for efficiencies may tend to weaken some of these limiting conditions among rival firms.

Since structure and not behavior is the offending factor, oligopolistic firms may find themselves singled out for restructuring regardless of the intensity of intra-industry competition or individual performance. Difficulty arises as to which firms should be selected for restructuring from among those which are eligible. Consider the following hypothetical oligopoly:¹⁵⁶

<u>Firm</u>	<u>A</u>	<u>B</u>	<u>C</u>	<u>D</u>	<u>E</u>
% market share	30	30	15	10	5
% profit rate (after tax 5-year average)	10	20	20	10	5
Minimum Efficient Scale (MES): 15%					
Percent increase in average cost at 50% MES: 8%					

Both A and B are equally eligible for remedial sanctions. Given that restructuring is a desired course of action, firm B, because of its greater profit rate, would appear more likely to survive the trauma of restructuring than would firm A. This is particularly the case where firm A might be an older, higher-cost firm.

In this illustration only one variable was included—average profit rate. Additional variables could have been included.¹⁵⁷ As more variables are included in the decision-making model, the more difficult it becomes to ascertain what effects restructuring will have on those factors which affect competition. Yet this is precisely what must be done if a restructured oligopoly is to remain a viable—and presumptively invigorated—competitive industry. But the possibility of error is ever present. A haphazard or misconceived structural remedy has the potential to debilitate the very competitive forces which it seeks to enhance.¹⁵⁸ Regardless of the structural norms

156. Based on an example by Areeda and Turner. 3 AREEDA & TURNER, *supra* note 21, at 378.

157. Other important performance variables which potentially could be affected are research and development, managerial expertise, brand name recognition, and availability of potential competitors. See generally F. SCHERER, *supra* note 21, ch. 4.

158. See Schmalensee, *On the Use of Economic Models in Antitrust: The Realemon Case*, 127 U. PA. L. REV. 994-95 (1979) (footnote omitted):

If antitrust law is to be at least partially concerned with efficient resource use, any judgment, whether by court or commentator, that some action should be found unlawful or some relief imposed in any particular case must be based, at least partially, on some explicit or implicit model that predicts the effects of the action or relief considered. Unless economic efficiency is held to be of no importance, one can no more avoid

employed, viably restructuring an oligopoly would, at the very least, be an heroic undertaking—even assuming the best of data.

Defenses

Every no-conduct proposal has allowed for only one possible defense to a restructuring decree:¹⁵⁹ efficiencies of scale.¹⁶⁰ The burden of proof for this defense is placed on the offending firm. The real problem, though, is that each proposal permits as a defense different kinds of efficiencies.¹⁶¹ For example, a defense restricted solely to engineering/plant¹⁶² efficiencies would focus only on the physical relationship between plant size and average costs of production.¹⁶³ A defense allowing any kind of efficiency—engineering, marketing, or managerial—would permit the introduction of structural determinants not purely physical in nature. Restructuring remedies, therefore, might vary considerably depending on which efficiencies are ultimately permitted.¹⁶⁴

the use of economic models in this context than one can avoid speaking prose. One can, of course, use an unsound or inappropriate model; the likelihood of doing this must logically depend on the set of alternative models explicitly or implicitly considered and on the methods used for choosing among them.

159. See note 36 *supra*.

160. Efficiencies (economies) of scale refer to the relationship between average cost of production and to the level (or scale) of the firm's output. Efficiencies of scale are said to exist when the firm's long-run average cost curve declines as the firm's rate of output increases. See generally J. KOCH, *supra* note 6, at 110.

161. See note 37 *supra*. The subject of scale efficiencies—types, measurement, and importance—has been covered extensively. See J. BAIN, *INDUSTRIAL ORGANIZATION* (1968); F. SCHERER, *THE ECONOMICS OF MULTI-PLANT OPERATION ON INTERNATIONAL COMPARISONS STUDY* (1975); G. STIGLER, note 57 *supra*; H. GOLDSCHMID, *supra* note 49, at ch. 2; Esposito, *Dissolution and Scale Economies: Additional Estimates and Analysis*, 5 *ANTITRUST L. & ECON.* 103 (Fall 1971); Miller, *Do Economies of Scale Attract Entry?* 25 *ANTITRUST BULL.* 583 (Fall 1980); Sherman and Tollison, *Public Policy Toward Oligopoly: Dissolution and Scale Economies*, 4 *ANTITRUST L. & ECON.* 77 (Summer 1971).

162. See, e.g., J. KOCH, *supra* note 6, at 113-20. It has not been explicitly defined but presumably under the engineering/plant classification the following economies of scale would be allowed: (1) product-specific, economies associated with the volume of any single product produced and sold; (2) plant-specific, economies associated with the total output (possibly including many different products) of an entire plant or plant complex; and (3) multi-plant, economies associated with an individual firm's operation of multiple plants. F. SCHERER, *supra* note 21, at ch. 4.

163. See generally F. SCHERER, *supra* note 21, at ch. 4.

164. A defense which permitted more than one type of efficiency would allow a suspect oligopolist a greater opportunity to defend itself against restructuring. If engineering/plant economies were not significant but managerial or distributional efficiencies were, restructuring could be staved off. However, if only engineering/plant ef-

The courts, furthermore, have not been hesitant to accept an efficiencies defense to a government prayer for a structural remedy. In the second *Alcoa* case, *United States v. Aluminum Co. of America*,¹⁶⁵ Alcoa petitioned for a decree that it was no longer guilty of monopolization. Simultaneously, the government petitioned to have Alcoa divested of sufficient properties and assets so that competition would be restored to the aluminum industry. The court was sympathetic to the government's prayer for relief but was unconvinced that divestiture was the proper remedy. In making its decision, the court was cognizant of the efficiencies argument.¹⁶⁶ The Court in *United States v. United Shoe Machinery Corp.*,¹⁶⁷ also noted that a defendant firm might escape statutory liability under section 2 by showing that its monopoly position was, inter alia, due to "economic or technical efficiency, (including scientific research)."¹⁶⁸

Although each no-conduct proposal permits an efficiencies defense,¹⁶⁹ the particular language used appears to weaken this defense considerably. In essence, restructuring should always be pursued where ever it is feasible, except in situations where there would be a *substantial* loss of efficiencies.¹⁷⁰ The import of the language suggests that an increase in the number of competitors is to be favored over any potential welfare loss.¹⁷¹ In other words,

efficiencies were allowed, then a suspect oligopolist would be a more likely candidate for restructuring regardless of other extant efficiencies. See also F. SCHERER, *supra* note 21, at 542-43.

165. 91 F. Supp. 333 (1950).

166. "A corporation, designed to operate effectively as a single entity, cannot readily be dismembered of parts of its various operations without a marked loss of efficiency." *Id.* at 416.

167. 110 F. Supp. 295 (1953).

168. *Id.* at 342.

169. See also Brodley, *The Efficiencies Defense*, note 142 *supra* (arguing the necessity of including an efficiencies defense in any industrial reorganization bill).

170. See note 36 *supra*.

171. It is not suggested that all oligopolies exhibit such cost structures or product market conditions where economies of scale dictate just a few large firms. However, in those highly concentrated oligopolies which are the result of scale economies, Areeda and Turner suggest that restructuring may lead to an overall welfare loss:

[T]he probability is high that the sacrifice of substantial economies of scale would cause a net loss to consumer welfare. Even if scale economies lead to monopoly pricing, the cost savings may be so substantial that the monopoly profit-maximizing price and output would be more favorable, or no less favorable, than if the market had a large number of less efficient firms.

2 AREEDA & TURNER, *supra* note 21, at 292.

It has been demonstrated that a relatively modest cost reduction will usually off-

higher costs and prices will have to be endured in order for "competition" to be enhanced by the creation of more firms.¹⁷² While this result may comport with Justice Black's interpretation of the Sherman Act,¹⁷³ it is not amenable to the type of economic performance competition seeks to achieve.

A brief comment should also be made concerning the problems which certainly will be encountered in measuring efficiencies of scale. At the present time there are three measurement techniques which are more widely used than others.¹⁷⁴ However, none of these techniques is completely accurate.¹⁷⁵ While they differ in difficulty of application, one common deficiency is inherent to them all—a paucity of accurate and accessible data.¹⁷⁶ But given that the no-conduct proposals place the burden of proving efficiencies of scale on the offending oligopoly firm, there would be a strong impetus for the generation of relevant data on the part of the firm. Pretrial discovery¹⁷⁷ should also allow the government access to these data

set a relatively large price increase. See Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs* 58 AM. ECON. REV. 18 (1968).

172. This interpretation is analogous to the Court's reasoning in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). While *Brown* must be distinguished from the cases considered in this note by the fact that it was a § 7 Clayton Act merger case, the Court, in interpreting the will of Congress, did appear willing to sacrifice some economic performance for more competitors:

It is competition, not competitors, which the [Clayton] Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business [retail shoe stores]. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.

Id. at 344. See also F. SCHERER, *supra* note 21, at 543-44.

173. See note 39 *supra*.

174. *Survivor Test*: competition in any given industry will in the long run drive out inefficient plants and firms. The "survivors" of this competition will be adjudged the ones whose size is the most efficient. *Statistical Studies*: a cross-section analysis of different plant sizes using historical cost-output data to make inferences about economies of scale. *Engineering Studies*: the cost-output relationships of various plant sizes are inferred from important technical relationships which are used in the estimation of alternate plant sizes. See J. KOCH, *supra* note 6, at 126-34. See also F. SCHERER, *supra* note 21, at 91-98; SCHERER, MULTI-PLANT OPERATION note 155 *supra*; G. STIGLER, *supra* note 57, at ch. 7; Weiss, *Optimal Plant Size and the Extent of Suboptimal Capacity*, in *ESSAYS ON INDUSTRIAL ORGANIZATION IN HONOR OF JOE S. BAIN* ch. 7 (R. Masson & P. Qualls, eds. 1976); section on *Economies of Scale as a Determinant* in N. GOLDSCHMID note 49 *supra*.

175. See generally J. KOCH, *supra* note 6, at 126-34; F. SCHERER, *supra* note 21, at 91-98.

176. *Id.*

177. See generally FED. R. CIV. P. 26-37 (1980).

for the purpose of checking the accuracy or relevancy of the evidence adduced by the firm with respect to its alleged efficiencies.

Nevertheless, the application of a no-conduct amendment may have a disincentive effect on beneficial conduct and performance. Judge Learned Hand's insightful observations in *United States v. Aluminum Co. of America*,¹⁷⁸ apply with equal force to competing oligopolists:

A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that although the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: *finis opus coronat*. The successful competitor, having been urged to compete, must not be turned upon when he wins.¹⁷⁹

Successful oligopolists will become more cautious in their competitive behavior as they approach the threshold structural values which would trigger governmental inquiry.¹⁸⁰ The closer an oligopolist comes to the structural limits, the less incentive to compete vigorously.¹⁸¹ Even supporters of the no-fault approach have conceded that the disincentive effects are of the greatest concern.¹⁸²

178. 148 F.2d 416 (2d Cir. 1945).

179. *Id.* at 430.

180. See 3 AREEDA & TURNER, *supra* note 21, at ¶ 622.

181. Separate Statement of Commissioner Hatch, 1 COMMISSION REPORT, *supra* note 1, at 363; Special Supp., *supra* note 1, at 103-04.

Moreover, the no-conduct proposals would have the effect of creating perverse disincentives for firms approaching whatever levels of size, market position or profitability are finally determined to constitute a demonstration of "monopoly power." Depending on the tests employed, firms approaching the peril points may lose an incentive to cut costs; they may avoid competition, restrain production or raise their prices. This effect will be most significant during the first decades of litigation, while the precise legal standards for liability are evolving.

See also McKinney, *The Case Against No-Conduct Monopolization*, 37 WASH. & LEE L. REV. 73, 80 (1980); R. BORK, *THE ANTITRUST PARADOX 196-97* (1978). *But cf.* Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations*, 85 HARV. L. REV. 1512, 1529 (1972). Williamson postulates that a firm in anticipation of a complaint which will result in its being restructured "may undertake programs designed to make the cost of divestiture exceedingly great. . . . Dominant firms that are anxious to forestall a dissolution order may be induced on this account to engage in excessive equipment specialization and plant size concentration."

182. Hatch, 1 COMMISSION REPORT, *supra* note 1, at 363, citing testimony of Prof. Williamson; Special Supp., *supra* note 1, at 104.

The disincentive claims made by opponents of the no-conduct proposals are, however, vigorously refuted by the no-conduct advocates. Proponents assert that "the preoccupation of current law with deterring and punishing objectionable conduct" is a greater deterrent to procompetitive conduct than would be a structural focus.¹⁸³ Furthermore, by eliminating criminal penalties and private enforcement of the proposed amendment, the claim is made that the no-conduct proposals are aimed, not at punishing the firm, but rather at identifying persistent, substantial monopoly power and determining whether viable restructuring remedies can be formulated.¹⁸⁴

It is questionable whether dissolution or divestiture for exceeding structural norms is any less of a deterrent to competition than are fines or injunctive sanctions for engaging in unlawful behavior. Absent structural norms, oligopolists could concentrate on besting their rivals through vigorous conduct—always with an eye for keeping within permissible behavioral standards. The imposition of structural norms would tend to divert attention away from intra-industry competition and toward a more myopic preoccupation with the firm's structural dimensions vis-a-vis some statutorily-imposed structural criteria.

CONCLUSION

An oligopolistic market structure is one which is resistant to both economic analysis and legal manipulation. No single model has yet been devised which completely explains the economic consequences of an oligopoly. This conceptual deficiency has no doubt contributed to the checkered success antitrust enforcement has had against this type of market structure. A no-conduct approach does not at this time appear to offer a workable alternative to the current structure-conduct approach.

There are a number of difficulties which militate against the use of a no-conduct approach to oligopolies. A paucity of critical structural data and the perplexities involved with formulating meaningful aggregate threshold criteria are just two of the more immediate problems which must be overcome. Additionally, the development of a viable restructuring scheme appears to be an

183. Dougherty, *Elimination of the Conduct Requirement in Government Monopolization Cases*, 37 WASH. & LEE L. REV. 83, 94 (1980).

184. *Id.* at 94-95.

almost insuperable task. Even though the no-conduct proposals permit an efficiencies defense, the facial language employed compromises the effectiveness of these efficiencies. Any attempt to dilute this defense would render it virtually nugatory. The welfare loss from a misguided or ill-conceived structural remedy could more than negate whatever savings might be realized by excluding the conduct component from section 2 litigation of an oligopoly. Until a comprehensive, unified oligopoly model is developed which will permit a more accurate structure-performance inference, it is suggested that the proposed section 2 no-conduct approach be eschewed in favor of the current enforcement policy which encompasses the conduct element.

Robert E. Nielsen

