

Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration

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Trustbusting is the Sherman Act's¹ most alluring and enduring mirage. Since 1890 the deconcentration possibilities suggested by the statute's ban on monopolization² have enticed generations of distinguished antitrust scholars and government policymakers. Federal enforcement officials have mounted memorable campaigns to disassemble leviathans of American business, yet the tantalizing goal of improving the economic and political order by restructuring dominant firms frequently has eluded its pursuers.³ To most students of antitrust, the history of Sherman Act deconcentration endeavors is largely a chronicle of costly defeats and inconsequential victories.⁴ Even the lustre of the government's greatest

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1. 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1982)).

2. Section 2 of the Sherman Act states in part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony . . ." 15 U.S.C. § 2 (1982).

3. A representative assessment of the situation has stated that the "government has since 1890 attacked and defeated monopolies in courtrooms across the country. Yet despite some notable successes, American monopoly policy in practice has fallen short of its promise." W. ADAMS & J. BROCK, *THE BIGNESS COMPLEX* 198 (1987); see also ROWE, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511, 1537 (1984) ("Antitrust's Big Case is doomed to a tragic cycle: by the time the barbecue is fit for carving, the pig is gone.").

4. The antitrust literature is replete with negative assessments of the country's experience with the Sherman Act as a deconcentration tool. See W. ADAMS & J. BROCK, *supra* note 3, at 198-203; ROWE, *supra* note 3, at 1535-40; see also STAFF OF SENATE TEMPORARY NATIONAL ECONOMIC COMM., 76TH CONG., 3D SESS., *INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER: A STUDY OF THE CONSTRUCTION AND ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS*, MONOGRAPH No. 38, at 84 (Comm. Print 1941) (written by M. Handler) [hereinafter TNEC MONOGRAPH No. 38] ("It is common knowledge . . . that the [monopolization dissolution] decrees have rarely succeeded in restoring competition."); D. DEWEY, *MONOPOLY IN ECONOMICS AND LAW* 247 (1959) ("Taken together the so-called big cases fought by the antitrust agencies in the last twenty years reveal a pattern of 'legal victory-economic defeat.'"); K. ELZINGA & W. BREIT, *THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS* 47 (1976) ("the consensus so far is that structural relief has been attempted in only a few cases, and that it has been performed rather badly in those"); R. POSNER, *ANTITRUST LAW—AN ECONOMIC PERSPECTIVE* 85 (1976) ("The picture that emerges of what antitrust divestiture [in monopolization cases] has meant in practice is not an edifying one."); L. SULLIVAN, *ANTITRUST* 141 (1977) ("it is not an easy thing to point to significant remedial successes in Section 2 proceedings"); ADAMS, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 IND. L.J. 1, 31 (1951) ("the relief obtained by the Government in Section 2 cases under the Sherman Act has generally been inadequate . . . the Government . . . has won many a law suit but lost many a cause"); O'Connor, *The Divestiture Remedy in Sherman Act Section 2*

triumphs—for example, the dissolution of Standard Oil in 1911⁵ and the restructuring of AT&T in the 1980s⁶—often dims in the face of recurring criticism that the execution of admittedly sweeping relief was either counterproductive or essentially superfluous.⁷

As the Sherman Act's centennial approaches, it is tempting to conclude that this country's fascination with deconcentration has ceased. Recent experience provides abundant support for such an appraisal. From 1969 to 1982, the Department of Justice and the Federal Trade Commission (FTC)⁸ undertook an ambitious agenda of monopolization and attempted monopolization initiatives in which structural remedies⁹ were

Cases, 13 HARV. J. ON LEGIS. 687, 692-93 (1976) (concluding that "primary deficiency of current antitrust policy" is "inability or unwillingness of courts" to apply significant structural remedies such as divestiture upon finding a violation of Sherman Act ban on monopolization); 1 REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES 117 (1979) [hereinafter NCRALP REPORT] (noting that "structural relief has seldom been ordered in Section 2 cases"). For more sanguine appraisals, see D. WALDMAN, ANTITRUST ACTION AND MARKET STRUCTURE 155-65 (1978) (concluding that filing of monopolization suits in which divestiture might be ordered has caused dominant firms to adjust behavior in ways that lowered entry barriers and increased competition in several concentrated industries); 2 S. WHITNEY, ANTITRUST POLICIES: AMERICAN EXPERIENCE IN TWENTY INDUSTRIES 388-92 (1958) (concluding that dissolution actions have achieved valuable results in some instances when used to restructure single-firm monopolies); see also Baldwin, *The Feedback Effect of Business Conduct on Industry Structure*, 12 J. L. & ECON. 123, 128-37 (1969) (finding that imposition of conduct decrees in government monopolization suits occasionally served to erode market positions of dominant firms).

5. Standard Oil v. United States, 221 U.S. 1 (1911). Useful historical accounts of the dissolution of Standard Oil include G. GIBBS & E. KNOWLTON, HISTORY OF STANDARD OIL COMPANY (NEW JERSEY): THE RESURGENT YEARS 1911-1927, at 7-10 (1956); P. GIDDENS, STANDARD OIL COMPANY (INDIANA): OIL PIONEER OF THE MIDDLE WEST 126-37 (1955); G. WHITE, FORMATIVE YEARS IN THE FAR WEST: A HISTORY OF STANDARD OIL COMPANY OF CALIFORNIA AND PREDECESSORS THROUGH 1919, at 378-85 (1962).

6. United States v. AT&T Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983). The disassembly of the Bell System is described in S. COLL, THE DEAL OF THE CENTURY: THE BREAKUP OF AT&T (1987); P. TEMIN, THE FALL OF THE BELL SYSTEM (1987).

7. Conservative and liberal observers alike have questioned the impact of the Standard Oil dissolution as a stimulant to competition in the petroleum industry. See R. POSNER, *supra* note 4, at 85-86; Adams, *supra* note 4, at 2. The returns from the AT&T divestiture are far from complete, but the antitrust-inspired reorganization of the Bell System has drawn its share of critical or highly skeptical commentary. See A. STONE, WRONG NUMBER 332-38 (1989); P. TEMIN, *supra* note 6, at 353-66; Easterbrook, *Breaking Up Is Hard to Do*, 5 REG. 25, 30-31 (Nov.-Dec. 1981); MacAvoy & Robinson, *Losing by Judicial Policymaking: The First Year of the AT&T Divestiture*, 2 YALE J. ON REG. 225, 261-62 (1985).

8. The FTC enforces the Sherman Act ban on monopolization indirectly. The Commission's antitrust enforcement powers concerning monopolization flow from § 5 of the Federal Trade Commission Act, which authorizes the agency to proscribe "unfair methods of competition." 38 Stat. 719 (1938) (codified as amended at 15 U.S.C. § 45(a)(1) (1982)). Since at least 1948, it has been settled doctrine that § 5 allows the FTC to bar conduct that would constitute a violation of the Sherman Act. See FTC v. Cement Inst., 333 U.S. 683, 690-95 (1948); see also Averitt, *The Meaning of 'Unfair Methods of Competition' in Section 5 of the Federal Trade Commission Act*, 21 B.C.L. REV. 227, 239-40 (1980) (describing application of Cement Institute principle to FTC group boycott and price-fixing cases brought under § 5 of the FTC Act).

9. The principal form of structural relief is divestiture. See Fraidin, *Dissolution and Reconstitution: A Structural Remedy, and Alternatives*, 33 GEO. WASH. L. REV. 899, 901 (1965); Comment, *Aspects of Divestiture as an Antitrust Remedy*, 32 FORDHAM L. REV. 135, 136 (1963). When ordered as a remedy in monopolization litigation, divestiture ordinarily entails the

proposed to erode the market positions of dominant firms. The targets encompassed a breathtaking swath of American commerce, including major firms in the computer,¹⁰ telecommunications,¹¹ petroleum,¹² food,¹³

realignment of a single firm's assets into two or more competing entities. In some instances, this reorganization has involved the comparatively simpler process of what some courts and commentators have labelled "dissolution"—the liquidation of a stock holding company or the spinning-off of subsidiaries or divisions originally assimilated into the defendant's organization through merger. *See, e.g.,* United States v. Reading Co., 253 U.S. 26, 27-28 (1920) (dissolving intercorporate relations existing among railway carriers and coal companies); United States v. Union P.R. Co., 226 U.S. 61, 79-81 (1912) (directing disposition of dominant stock interest acquired by railroad in competing railroad); Standard Oil Co. v. United States, 221 U.S. 1, 78-81 (1911) (ordering stock transfer to subsidiary corporations). In other cases, divestiture decrees have compelled more difficult realignments, including the establishment of new companies out of the highly integrated operations of a single firm. *See* United States v. American Tobacco Co., 221 U.S. 106, 187-88 (1911) (ordering creation of new entities following dissolution of American Tobacco Co.); *see also* Wickersham, *Recent Interpretation of the Sherman Act*, 10 MICH. L. REV. 1, 17-19 (1911) (describing relative complexity of the Standard Oil and American Tobacco divestitures).

A second form of remedy with structural implications in monopolization litigation is compulsory licensing of property rights such as patents, sometimes on a royalty-free basis. *See* Hartford-Empire Co. v. United States, 323 U.S. 386, 413-18 (1945) (enjoining product distribution unless company agreed to license patent usage at reasonable royalty); United States v. General Elec. Co., 115 F. Supp. 835, 843-46 (D.N.J. 1953) (ordering royalty-free licensing of patents); Eli Lilly & Co., 95 F.T.C. 538, 546-52 (1980) (consent order requiring virtually unlimited, nonexclusive, royalty-free licensing of patents); Xerox Corp., 86 F.T.C. 364, 373-83 (1975) (consent order compelling limited royalty-free licensing of patents); *see also* Timberg, *Equitable Relief Under the Sherman Act*, 1950 U. ILL. L.F. 629, 640-47 (describing use of compulsory licensing of patents and related know how as a remedy in monopolization suits). Most commentators have concluded that compulsory licensing decrees generally have contributed little to the accomplishment of deconcentration objectives. *See* F. SCHERER, *INNOVATION AND GROWTH—SCHUMPETERIAN PERSPECTIVES* 207, 220 (1984) ("compulsory [patent] licensing under antitrust decrees had no significant impact in reducing concentration relative to the changes that might have been expected in any event, given the initial market structure, subsequent market growth, and the panoply of public policies (including antitrust actions) affecting manufacturing industry structures").

10. United States v. IBM Corp., [1961-1970 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,069 (S.D.N.Y. filed Jan. 17, 1969) (complaint alleging monopolization and attempted monopolization). The Department of Justice filed a stipulation of dismissal in 1982. *See In re International Business Machs. Corp.*, 687 F.2d 591, 593 (2d Cir. 1982) (ordering the issue of writ of mandamus directing district court to dismiss complaint in accordance with stipulation).

11. United States v. AT&T Co., [1970-1979 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,074 (D.D.C. filed Nov. 20, 1974) (complaint alleging monopolization, attempted monopolization, and conspiracy to monopolize), *consent decree entered*, 552 F. Supp. 131, 178-79, 225 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

12. Exxon Corp., 98 F.T.C. 453, 456-59 (1981) (complaint alleging agreement to monopolize and maintenance of noncompetitive market structure).

13. *See* International Tel. & Tel. Corp., 104 F.T.C. 280, 284-85 (1984) (complaint alleging attempted monopolization); General Foods Corp., 103 F.T.C. 204, 206-08 (1984) (complaint alleging attempted monopolization); Kellogg Co., 99 F.T.C. 8, 11-16 (1982) (complaint alleging maintenance of highly concentrated, noncompetitive market structure and shared monopolization); Sunkist Growers, Inc., 97 F.T.C. 443, 445-49 (1981) (complaint alleging monopolization, attempted monopolization, and maintenance of noncompetitive market structure); Borden, Inc., 92 F.T.C. 669, 671-72 (1978) (complaint alleging monopolization and maintenance of noncompetitive market structure), *aff'd*, Borden, Inc. v. FTC, 674 F.2d 498, 517 (6th Cir. 1982), *modified*, 102 F.T.C. 1147, 1147 (1983).

photocopier,¹⁴ chemical,¹⁵ and rubber¹⁶ industries. As a group, these cases seemed to offer a decisive response to critics who claimed that the federal enforcement agencies timidly had declined to seek necessary, broad based reductions in existing levels of concentration in major sectors of the economy.¹⁷

Never in antitrust history has so massive a litigation program yielded such disappointing results. Most of the government's deconcentration cases either collapsed before trial or failed to establish liability.¹⁸ The most noteworthy of the government's few victories received a mixed reaction, as commentators sharply disputed the merits of the relief obtained.¹⁹ While

14. Xerox Corp., 86 F.T.C. 364, 367-68 (1975) (complaint alleging monopolization, attempted monopolization, and maintenance of highly concentrated market structure).

15. E.I. du Pont de Nemours & Co., 96 F.T.C. 653, 654-55 (1980) (complaint alleging attempted monopolization).

16. United States v. Goodyear Tire & Rubber Co., and United States v. Firestone Tire & Rubber Co., [1970-1979 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,073 (N.D. Ohio filed Aug. 9, 1973) (complaints alleging attempted monopolization).

17. For example, in 1972 a Ralph Nader sponsored evaluation of antitrust enforcement commented:

the Antitrust Division remains soft on concentration. . . . The Division does sue some firms who bring you kosher hotdog rolls and chrysanthemums, but ignores opportunities to attack GM and Anaconda Copper. By focusing on the transgressions of the less powerful, the enforcement agencies aid and abet the real economic royalists.

M. GREEN, B. MOORE JR. & B. WASSERSTEIN, *THE CLOSED ENTERPRISE SYSTEM* 293-94 (1972).

18. The Justice Department lost in *United States v. IBM Corp.* See *In re International Business Machs. Corp.*, 687 F.2d 591, 593 (2d Cir. 1982) (affirming dismissal) and *United States v. Goodyear Tire & Rubber Co.*, and *United States v. Firestone Tire & Rubber Co.*, [1970-1979 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,073, at 53,542 (N.D. Ohio filed Mar. 2, 1976) (dismissing complaints). The FTC lost in *International Tel. & Tel. Corp.*, 104 F.T.C. 280, 451 (1984) (dismissing complaint); *General Foods Corp.*, 103 F.T.C. 204, 364-68 (1984) (dismissing complaint); *Kellogg Co.*, 99 F.T.C. 8, 269 (1982) (dismissing complaint); *Exxon Corp.*, 98 F.T.C. 453, 461 (1981) (dismissing complaint); *E.I. du Pont de Nemours & Co.*, 96 F.T.C. 653, 751 (1980) (dismissing complaint). The list of failures also might include the FTC's challenge to Borden's pricing and promotion strategies for its ReaLemon reconstituted lemon juice. *Borden, Inc.*, 92 F.T.C. 669, 808-09 (1978), *aff'd*, *Borden, Inc. v. FTC*, 674 F.2d 498, 517 (6th Cir. 1982), *modified*, 102 F.T.C. 1147, 1147 (1983). In *Borden* the FTC found liability but declined to order compulsory licensing of Borden's ReaLemon trademark and instead directed Borden to alter its pricing and promotion conduct. 92 F.T.C. at 802-09. The Sixth Circuit sustained the finding of liability, 674 F.2d at 516, but the Commission severely reduced the scope of its order, 102 F.T.C. at 1147-50, partly out of concern that the Justice Department might urge the Supreme Court to accept certiorari and reject the reasoning of the FTC and Sixth Circuit opinions. See *Recall*, FTC: WATCH, Sept. 24, 1982, at 1 (A. Amolsch & M. Madden eds.).

19. Most commentary has focused on the AT&T divestiture and the Xerox consent agreement. On the merits of the AT&T divestiture consent agreement, compare Easterbrook, *supra* note 7, at 30-31 (criticizing AT&T divestiture) and MacAvoy & Robinson, *supra* note 7, at 261-62 (same) with P. HUBER, *THE GEODESIC NETWORK—1987 REPORT ON COMPETITION IN THE TELEPHONE INDUSTRY* 1.20-.35 (Department of Justice Jan. 1987) (assessing the divestiture in generally favorable terms) and Crandall, *Telecommunications Policy in the Reagan Era*, REG. 28, 33 (1988) (same). The FTC consent order in Xerox compelled limited royalty-free licensing of Xerox' dry paper copying patent portfolio. *Xerox Corp.*, 86 F.T.C. 364, 374-75 (1975). Compare D. GINSBURG, *ANTITRUST, UNCERTAINTY AND TECHNOLOGICAL INNOVATION* 30-33 (1980) (criticizing consent order) and Goetz & Schwartz, *Industry Structure Investigations: Xerox's Multiple Patents and Competition*, in *THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR* 121 (1981) (same) with Bresnahan, *Post-Entry Competition in the Plain Paper Copier Market*, 75 AM. ECON. REV. 15 (May 1985) (finding favorable net effects from FTC consent order) and Scherer, *Antitrust, Efficiency, and Progress*, 62 N.Y.U. L. REV. 998, 1016-17 (1987) (same).

the benefits of rare litigation successes such as the *AT&T* case seemed uncertain, the costs of the failures were unmistakable and substantial. Most notably, the government's attacks upon IBM and the nation's leading petroleum refiners fruitlessly consumed vast resources and became notorious symbols of prosecutorial ineptitude.²⁰ When it announced the conclusion of the *AT&T* and *IBM* lawsuits on the same day early in 1982, the Justice Department seemed to draw the curtain on a century-long cause. Ralph Nader soon afterward observed that the "era of the big antitrust case is over, leaving a legacy of frustration and defeat for the Government's antitrust lawyers. No longer will the courts have a chance to restructure highly concentrated industries or oligopolies for more efficiency, innovation, and competition in pricing."²¹

This Article examines the history of this country's efforts to use the Sherman Act to achieve its deconcentration goals at a time when it is reasonable to suggest that government deconcentration litigation has entered a state of lasting repose. The Article recounts the history of Sherman Act deconcentration cases in three parts. Part I describes the major historical cycles of deconcentration activity and identifies the conditions that generated these cycles.²² Part II analyzes these cycles and their causes to assess the likelihood that deconcentration, despite its low standing

20. Donald Baker, who headed the Antitrust Division from 1976 to 1977, quoted Robert Bork as calling the *IBM* case "the Antitrust Division's Vietnam." Baker, *Government Enforcement of Section Two*, 61 NOTRE DAME L. REV. 898, 899 n.13 (1986). Baker pointed out that the lawsuit "spanned the terms of five Presidents, nine Attorney Generals, and seven Assistant Attorney Generals." *Id.* The numbing scope of the 13-year long *IBM* litigation also emerges in a study Dean Peter Gerhart prepared in January 1979 for the National Commission for the Review of Antitrust Laws and Procedures. Dean Gerhart reported that, through November 1978, the two parties had produced a total of approximately 91 million pages of documents in discovery and had taken more than 1300 depositions. The trial had consumed 568 calendar days of testimony and document presentation, and the trial transcript exceeded 84,000 pages. Gerhart, *Report on the Empirical Case Studies Project*, in 2 NCRAFP REPORT, *supra* note 4, at 1, 22-23 (Jan. 22, 1979). By the time the case was dismissed in 1982, the number of trial days had reached 700, the trial transcript exceeded 104,000 pages, and the parties had introduced 17,000 exhibits. The Justice Department's cost of litigating the suit, excluding expert witness fees, approached \$17 million. See *Post-Mortem on IBM Case Provides Forum For Conflicting Perspectives*, 42 ANTITRUST & TRADE REG. REP. (BNA) 310-11 (1982). IBM's cost to defend against the government's case surely exceeded this amount severalfold. See J. STEWART, *THE PARTNERS* 53-113 (1983) (discussing the size of IBM's litigation effort).

The history of the FTC's *Exxon* case is even more discouraging. *Exxon* consumed eight years in discovery and other pretrial proceedings before it was dismissed. Even so, the Commission order dismissing the case noted that "both complaint counsel and respondents agree that completion of discovery is at least several years away." 98 F.T.C. at 460. Through early 1979, the FTC's cost to support the *Exxon* litigation surpassed \$13 million. See *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1980: Hearings before a Subcomm. of the House Comm. on Appropriations*, 96th Cong., 1st Sess. 823 (1979) (testimony of Alfred Dougherty Jr., Director of the FTC's Bureau of Competition). An attorney who represented one of the *Exxon* respondents estimated that the total cost of the litigation, for the FTC and the respondents combined, approached \$100 million. Porter, *The Federal Trade Commission v. the Oil Industry: An Autopsy on the Commission's Shared Monopoly Case Against the Nation's Eight Largest Oil Companies*, 27 ANTITRUST BULL. 753, 756 (1982).

21. Nader, *Ended: Big Antitrust*, N.Y. Times, Mar. 4, 1982, at A23, col. 1; see also Rowe, *Antitrust in Transition: A Policy in Search of Itself*, 54 ANTITRUST L. J. 5, 7 (1985) (stating that "the *AT&T* decree sounds deconcentration's last hurrah") (footnote omitted).

22. See *infra* notes 27-211 and accompanying text.

today as an antitrust objective, will reemerge as a focal point for antitrust policy.²³ Part III applies Sherman Act experience to suggest appropriate conditions for future use of the statute as a deconcentration device.²⁴ This part identifies theoretical and institutional obstacles that antitrust policy-making bodies must overcome if they are to choose sensible enforcement targets and devise appropriate structural remedies.²⁵ Despite the largely unsatisfactory results of the structural initiatives of the 1970s, Part IV concludes that deconcentration will reemerge as a significant policy concern in antitrust's second century.²⁶

I. CYCLES OF SHERMAN ACT DECONCENTRATION INITIATIVES

Since 1890 the federal government has initiated 136 lawsuits challenging single-firm monopolization.²⁷ In addition, federal enforcement agencies have alleged in nine other cases that two or more firms used collusive, parallel, or interdependent conduct to acquire or maintain monopoly power.²⁸ Collectively, this body of 145 single-and multi-firm monopolization initiatives constitutes the government's Sherman Act deconcentration experience.²⁹

23. See *infra* notes 212-46 and accompanying text.

24. See *infra* notes 247-65 and accompanying text.

25. See *infra* notes 253-65 and accompanying text.

26. See *infra* notes 266-76 and accompanying text.

27. I used the following methodology to derive this total. To begin, I consulted Richard Posner's studies of antitrust enforcement statistics dealing with government monopolization suits. See R. POSNER, *supra* note 4, at 81-85; Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. L. & ECON. 365, 404-08 (1970). For the period 1890-1974, Judge Posner found that the Justice Department filed 125 single-firm monopolization cases. R. POSNER, *supra* note 4, at 81. I then supplemented Judge Posner's total with (a) two single-firm monopolization cases the Justice Department has brought since 1974 and (b) nine FTC single-firm monopolization cases brought from 1914-1988. I added the Justice Department's post-1974 cases by reviewing the Commerce Clearing House looseleaf services that record and describe federal antitrust cases and consent agreements. See *United States v. Kentucky Utils. Co.*, [1980-1988 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,081 (D. Ky. filed Feb. 26, 1981); *United States v. Hercules, Inc.*, [1980-1988 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,080 (D.N.J. filed Jan. 11, 1980), *consent decree entered*, 1981-1 Trade Cas. (CCH) ¶ 63,968. To identify the nine FTC cases, I reviewed the Commission's annual reports and the official reports of the Commission's proceedings. As indicated below, most of the FTC single-firm monopolization matters occurred in the past 25 years. See, e.g., *L.G. Balfour Co.*, 74 F.T.C. 345, 348-50 (1968) (complaint alleging monopolization and attempted monopolization), *aff'd*, 442 F.2d 1 (7th Cir. 1971); see also *infra* note 108 and accompanying text.

28. See, e.g., *American Tobacco Co. v. United States*, 328 U.S. 781, 798-808 (1946) (challenging tacit horizontal conspiracy to fix prices of tobacco and cigarettes); *United States v. National Lead Co.*, 63 F. Supp. 513, 522-25 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947) (challenging horizontal allocation of territories and restrictive patent cross-licensing agreements); *Kellogg Co.*, 99 F.T.C. 8, 12, 14-15 (1982) (challenging parallel adherence to common policies concerning introduction of new brands, allocation of grocery store shelf space, pricing, and sales promotions); *Exxon Corp.*, 98 F.T.C. 453, 456-58 (1981) (challenging parallel adoption of crude oil production, refining, transportation, and marketing practices to exclude independent refining and marketing firms).

29. I treat FTC cases such as *Kellogg* and *Exxon* as part of the Sherman Act deconcentration experience, even though the FTC originally conceived them as efforts to establish new antitrust doctrine beyond the bounds of Sherman Act jurisprudence. When first filed, the complaints in the two "shared monopoly" cases rested heavily upon what might be called

When classified by outcomes, these deconcentration suits fall into three categories. The first category consists of thirty-four cases in which the government secured substantial divestiture.³⁰ This set contains such landmark decisions as *Standard Oil Co. v. United States*³¹ and *United States v. American Tobacco Co.*³² A second category of prosecutions consists of cases such as *United States v. Aluminum Co. of America*,³³ in which the government prevailed on liability but failed to gain significant divestiture.³⁴ The final

purely structural theories of liability. See *Kellogg Co.*, 99 F.T.C. at 15 (complaint alleging that respondents "maintained . . . a highly concentrated, noncompetitive market structure in the production and sale of [ready-to-eat] cereal, in violation of Section 5 of the Federal Trade Commission Act"); *Exxon Corp.*, 98 F.T.C. at 459 (complaint alleging respondents "restrained trade and maintained a noncompetitive market structure in the refining of crude oil into petroleum products . . . in violation of Section 5 of the Federal Trade Commission Act"). As the Commission initially depicted these lawsuits, proof of conspiratorial conduct probably would play, at most, only a subordinate role in establishing the respondents' liability. See *Kellogg Co.*, 98 F.T.C. at 18-20. Facing a growing conservatism in appellate monopolization decisions and increasing congressional opposition to its "novel" shared monopolization theories, the FTC later recast its theory of liability in more conventional doctrinal terms. See Hurwitz & Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 VAND. L. REV. 63, 139-50 (1982) (describing trend toward judicial acceptance of permissive conduct standards for dominant firms); Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement: A Historical Perspective*, in PUBLIC CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION 63, 92, 94 (1987) (discussing congressional reaction in the late 1970s to the *Exxon* suit and FTC efforts to gain structural relief in nonmerger cases). Thus, collusion, rather than mere structural interdependence, became the overriding focus. See *Kellogg Co.*, 99 F.T.C. at 21; Federal Trade Commission, Complaint Counsel's First Statement of Issues, Factual Contentions and Proof at 353-56, *Exxon Corp.*, 98 F.T.C. 453 (Oct. 31, 1980 Docket No. 8934) (alleging respondents collusively maintained and reinforced noncompetitive market structure and restrained trade in oil refining industry) (document on file with the author). By the time the Commission dismissed the *Kellogg* and *Exxon* complaints in the early 1980s, the FTC's litigation strategy essentially had abandoned the largely structural causes of action that initially distinguished the two cases.

30. Judge Posner's 1970 study counted 32 Justice Department monopolization cases that resulted in significant divestiture or dissolution. Posner, *supra* note 27, at 406; see also REPORT OF THE ATT'Y GEN.'S NAT'L COMM. TO STUDY THE ANTITRUST LAWS 352 (1955) [hereinafter ATTORNEY GENERAL'S REPORT] (reporting 24 instances of divestiture ordered in Sherman Act cases from 1890 through 1955). In his 1976 book, Judge Posner identified 24 instances in which the government had obtained "substantial divestiture" in the 118 Justice Department suits litigated to a decision or resolved by consent through 1974. R. POSNER, *supra* note 4, at 84. The 1976 volume did not reconcile explicitly its apparent departure from the results in the 1970 article, although it appears that the 1976 study may have applied a more stringent criterion in defining "substantial divestiture." See *id.* at 84 n.9. For this Article, I have erred on the side of a more encompassing definition and used the count from Judge Posner's original study (32) and added the AT&T divestiture consent agreement and the FTC's *Sunkist* consent order to reach a total of 34.

To these matters one might add a handful of monopolization cases such as *Xerox* in which the government did not secure divestiture, but the remedy required compulsory patent licensing that served to reshape the affected industry's structure. *Xerox Corp.*, 86 F.T.C. 364, 373-86 (1975); see also Bresnahan, *supra* note 19, at 16-18 (describing role of FTC consent decree in stimulating entry into copier market); Scherer, *supra* note 19, at 1016-17 (arguing that FTC-Xerox settlement did not weaken investors' confidence and resulted in greater innovation in copier market).

31. 221 U.S. 1 (1911).

32. 221 U.S. 106 (1911). For other cases involving orders mandating divestiture or other structural relief, see ATTORNEY GENERAL'S REPORT, *supra* note 30, at 354 n.13; O'Connor, *supra* note 4, at 711-13 & nn.81-83.

33. 148 F.2d 416 (2d Cir. 1945) [hereinafter *Alcoa*].

34. In addition to *Alcoa*, other Sherman Act cases frequently cited as "Pyrrhic victories" in

category includes cases such as *United States v. United States Steel Corp.* (U.S. Steel)³⁵ in which the government failed to establish the defendant's liability under the Sherman Act. This section identifies and analyzes the historical patterns in which these deconcentration measures have emerged. It begins with a review of the historical trends³⁶ and ends by attempting to explain their causes.³⁷

A. *Three Eras of Deconcentration Initiatives*

Most Sherman Act deconcentration suits, successful and unsuccessful alike, have taken place during three discrete historical periods: 1904-1920, 1937-1956, and 1969-1982.³⁸ Each deconcentration period followed years of federal antitrust enforcement policies that either welcomed new concentration or largely declined to disturb established dominant firms. Government monopolization and attempted monopolization litigation has surged cyclically in response to perceived failures to curb new, and dismantle existing, positions of private industrial might. Nonetheless, federal enforcement agencies seldom have achieved fundamental structural change in concentrated industries.

1. 1904-1920: Northern Securities to U.S. Steel

The earliest period of Sherman Act deconcentration activity was also the most prolific. Setting a pattern that later deconcentration eras would repeat, the first period of dissolution suits followed a wave of consolidation by acquisition and merger. A relative quiescence by public enforcement bodies also preceded this period of activism.

The Supreme Court's efforts to mold antitrust doctrine in the Sherman Act's first decade significantly influenced the process of consolidation that elicited a major round of deconcentration measures in the early twentieth century. The first formative influence was the Court's decision in *United States v. E.C. Knight Co.*³⁹ In *Knight*, the Court rejected the government's challenge to a series of acquisitions that afforded the Sugar Trust control over ninety-eight percent of the country's sugar refining capacity.

the deconcentration literature include *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 601-08 (1951) (finding Sherman Act violation, but refusing to order divestiture, therefore, doing little to alleviate monopolistic advantage) and *United States v. National Lead Co.*, 332 U.S. 319, 348-52, 359-60 (1947) (same). See Adams, *supra* note 4, at 6-24 (criticizing unwillingness of courts in *Alcoa*, *National Lead*, and *Timken* to order divestiture).

35. 251 U.S. 417 (1920).

36. See *infra* notes 38-102 and accompanying text.

37. See *infra* notes 103-211 and accompanying text.

38. This grouping generally is consistent with the chronological framework often used in the antitrust and industrial organization literature to describe the history of efforts to apply the Sherman Act to attack concentrated market structures. See F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 527-44 (1980); 1 S. WHITNEY, *supra* note 4, at 5-9; Flynn, *Monopolization Under the Sherman Act: The Third Wave and Beyond*, 26 ANTITRUST BULL. 1, 1-3 (1981); Rowe, *supra* note 3, at 1535-40; Shepherd, *The Economics: A Pep Talk*, 41 ANTITRUST L.J. 595, 598-99 (1972); Sullivan, *Monopolization: Corporate Strategy, the IBM Cases, and the Transformation of the Law*, 60 TEX. L. REV. 587, 591-98 (1982).

39. 156 U.S. 1 (1895).

The Court rested its decision on the view that mere "manufacturing" failed to constitute "commerce" within the meaning of the new antitrust statute, thus leaving the consolidation of sugar refineries beyond the law's reach.⁴⁰ Commentators quickly perceived that the statute would tolerate horizontal consolidations yielding virtually absolute control of an industry's productive capacity.⁴¹

The Court further enhanced the attractiveness of the merger to attain market power two years later in *United States v. Trans-Missouri Freight Association*,⁴² in which the Court outlawed a horizontal price-fixing agreement set by a cartel. To businessmen and their counselors, *Knight* and *Trans-Missouri* indicated that the Court would forbid price tampering and output limits adopted by "loose consolidations" such as cartels, but would tolerate sweeping integrations of ownership and control by acquisition or merger.⁴³ This realization helped trigger a wave of consolidations that saw many small and medium size companies combined into dominant or near dominant enterprises.⁴⁴ The era of "merger for monopoly," as characterized by George Stigler,⁴⁵ yielded such industrial titans as General Electric, International Harvester, Standard Oil, du Pont, Eastman Kodak, American Tobacco, and U.S. Steel, all of which became recurring targets for Sherman Act section two scrutiny by government enforcement agencies.⁴⁶

40. Justice Fuller's opinion pointed out that "[c]ommerce succeeds to manufacture and is not a part of it." *Knight*, 156 U.S. at 12.

41. See A. CHANDLER JR., *THE VISIBLE HAND* 333 (1977); H. SEAGER & C. GULICK JR., *TRUST AND CORPORATION PROBLEMS* 58-59 (1929); Adams, *Federal Control of Trusts*, 18 POL. SCI. Q. 1, 3-5 (1903). High officials in President Cleveland's Justice Department welcomed the outcome in *Knight*. Soon after the release of *Knight*, Attorney General Richard Olney commented: "You will have observed that the government has been defeated in the Supreme Court on the trust question. I always supposed it would be and have taken the responsibility of not prosecuting under a law I believe to be no good . . ." A. NEVINS, *GROVER CLEVELAND: A STUDY IN COURAGE* 671 (1932); see also H. THORELLI, *THE FEDERAL ANTITRUST POLICY* 383-89 (1954) (describing Olney's antipathy toward the Sherman Act).

42. 166 U.S. 290 (1897).

43. See A. CHANDLER JR., *supra* note 41, at 333. Despite its widespread acceptance, this interpretation of *Knight* and *Trans-Missouri* arguably misapprehends the holding of these and later cases such as *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898), and *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). As Professor Sklar points out, *Trans-Missouri*, *Joint Traffic*, and *Addyston* could be read to indicate that *Knight* did not preclude successful Sherman Act assaults upon "tight combinations" accomplished through mergers or acquisitions. M. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916*, at 161-63 (1988).

44. One leading study of merger movements in the United States identified approximately 3000 disappearances of individual manufacturing and mining firms through mergers from 1897 through 1904. See R. NELSON, *MERGER MOVEMENTS IN AMERICAN HISTORY, 1895-1956*, at 119-20 (1959); see also Markham, *Survey of the Evidence and Findings on Mergers*, in *BUSINESS CONCENTRATION AND PRICE POLICY* 141, 180 (1955) ("The conversion of approximately 71 important oligopolistic or near-competitive markets into near monopolies by merger between 1890 and 1904 left an imprint on the structure of the American economy that 50 years have not yet erased.").

45. Stigler, *Monopoly and Oligopoly by Merger*, 40 AM. ECON. REV. 23, 27 (1950).

46. See F. SCHERER, *supra* note 38, at 121. Two examples suggest the importance of these firms to future antitrust policy development. In this century, du Pont has been the subject of four significant government suits alleging monopolization, attempted monopolization, or conspiracy to monopolize. See *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 378 (1956) (alleging monopolization of cellophane); *United States v. National Lead Co.*, 332 U.S. 319, 325 (1947) (alleging conspiracy to monopolize titanium pigments); *United States v.*

The turn of the century merger movement ceased in 1904 with the Supreme Court's decision to invalidate the consolidation of the Northern Pacific and Great Northern railroads.⁴⁷ Contrary to the tenor of its ruling in *Knight*, the Court's opinion in *Northern Securities* indicated that the Sherman Act could bar mergers creating market dominance.⁴⁸ Along with the stock market crash of 1903, the *Northern Securities* decision stymied the establishment of new monopolies through horizontal acquisitions.⁴⁹ By then, however, the contours of American industry had been altered radically. As two prominent economists observed in 1912:

The mere size of consolidations which have appeared recently is enough to startle those who saw them in the making. If the carboniferous age had returned and the earth repeopled itself with dinosaurs, the change made in animal life would have scarcely seemed greater than that which has been made in the business world by these monster like corporations.⁵⁰

After *Northern Securities*, the foremost policy question facing the Justice Department and its newly formed Antitrust Division⁵¹ became how to treat firms that, through merger or internal growth, already had achieved monopoly or near-monopoly positions. The Department addressed this problem by undertaking a series of lawsuits seeking to undo large concentrations of economic power that had been assembled in the late nineteenth and early twentieth centuries. From 1906 through 1917, the Department initiated monopolization suits against Standard Oil,⁵² American Tobacco,⁵³

E.I. du Pont de Nemours & Co., 188 F. 127, 130 (C.C. Del. 1911) (alleging monopolization of explosives); E.I. du Pont de Nemours & Co., 96 F.T.C. 653, 655 (1980) (alleging attempted monopolization of titanium dioxide). Du Pont also figured prominently in other government antitrust suits in which market structure concerns animated the government's decision to prosecute. See *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 590 (1957) (vertical merger); *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 140 (2d Cir. 1984) (use of facilitating practices in a tight oligopoly). In the same period Kodak faced three government suits claiming monopolization or attempted monopolization. See *FTC v. Eastman Kodak Co.*, 274 U.S. 619, 625 (1927) (alleging monopolization of photographic equipment); *United States v. Eastman Kodak Co.*, 226 F. 62, 64 (W.D.N.Y. 1915) (same), *decree entered*, 230 F. 522, 524 (W.D.N.Y. 1916), *appeal dismissed*, 255 U.S. 578 (1921); *United States v. Eastman Kodak Co.*, 1954 Trade Cas. (CCH) ¶ 67,920 (W.D.N.Y. 1954) (alleging monopolization of film processing). In addition, both du Pont and Kodak encountered numerous private antitrust challenges in which their market power figured prominently. See, e.g., *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 267-68 (2d Cir. 1979) (alleging monopolization and attempted monopolization of cameras and photofinishing), *cert. denied*, 444 U.S. 1093 (1980); *Argus Inc. v. Eastman Kodak Co.*, 552 F. Supp. 589, 593 (S.D.N.Y. 1982) (alleging monopolization of photographic equipment market and flashcube development); *GAF Corp. v. Eastman Kodak Co.*, 519 F. Supp. 1203, 1209 (S.D.N.Y. 1981) (alleging monopolization of various aspects of amateur photography market).

47. *Northern Securities Co. v. United States*, 193 U.S. 197, 325, 360 (1904).

48. *Id.* at 325-54.

49. See A. CHANDLER JR., *supra* note 41, at 333-34.

50. J.B. CLARK & J.M. CLARK, *THE CONTROL OF TRUSTS* 14-15 (1912).

51. The Antitrust Division was created as a distinct unit in 1903. See STAFF OF SENATE TEMPORARY NATIONAL ECONOMIC COMM., 76TH CONG., 3D SESS., *INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER: ANTITRUST IN ACTION*, MONOGRAPH No. 16, at 23-26 (Comm. Print 1940) (written by W. Hamilton and I. Till) [hereinafter TNEC MONOGRAPH No. 16]; H. THORELLI, *supra* note 41, at 536-37; I S. WHITNEY, *supra* note 4, at 6.

52. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

53. *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

Eastman Kodak,⁵⁴ International Harvester,⁵⁵ du Pont,⁵⁶ U.S. Steel,⁵⁷ United Shoe Machinery,⁵⁸ American Can,⁵⁹ Corn Products Refining,⁶⁰ and railroads that dominated anthracite coal production in the northeastern United States.⁶¹ In all of these suits, the Department sought divestiture.⁶² Although the government occasionally failed to establish a Sherman Act violation,⁶³ these cases usually resulted in a finding of liability and the entry of a decree for structural relief.⁶⁴

In 1920 two developments ended this period of initiatives. The Supreme Court's decision to absolve U.S. Steel of liability for monopolization⁶⁵ discouraged further government assaults on corporate size and signaled the Court's unwillingness to approve additional measures to undo existing levels of concentration.⁶⁶ Judicial acceptance of a more tolerant legal standard anticipated a corresponding shift in executive branch enforcement philosophy as Warren Harding's election to the presidency began a reorientation of federal antitrust policy. For eight years

54. *United States v. Eastman Kodak Co.*, 226 F. 62 (W.D.N.Y. 1915), *decree entered*, 230 F. 522 (W.D.N.Y. 1916), *cert. denied*, 255 U.S. 578 (1921).

55. *United States v. International Harvester Co.*, 214 F. 987 (D. Minn. 1914), *petition for additional relief denied*, 10 F.2d 827 (D. Minn. 1926), *aff'd*, 274 U.S. 693 (1927).

56. *United States v. E.I. du Pont de Nemours & Co.*, 188 F. 127 (C.C. Del. 1911).

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

58. *United States v. United Shoe Mach. Co.*, 247 U.S. 32 (1918).

59. *United States v. American Can Co.*, 230 F. 859 (D. Md.), *petition for dissolution decree denied*, 234 F. 1019 (D. Md. 1916).

60. *United States v. Corn Prods. Ref. Co.*, 234 F. 964 (S.D.N.Y. 1916), *appeal dismissed*, 249 U.S. 621 (1919).

61. *See United States v. Lehigh Valley R.R.*, 254 U.S. 255 (1920); *United States v. Reading Co.*, 253 U.S. 26 (1920).

62. *See Lehigh Valley*, 254 U.S. at 257; *Reading*, 253 U.S. at 40-41; *U.S. Steel*, 251 U.S. at 436, 454-57; *United Shoe*, 247 U.S. at 46-47; *American Tobacco*, 221 U.S. at 149-50; *Standard Oil*, 221 U.S. at 43; *Corn Prods.*, 234 F. at 1015-18; *American Can*, 230 F. at 862, 902-04; *Eastman Kodak*, 226 F. at 64; *International Harvester*, 214 F. at 1001; *du Pont*, 188 F. at 154-55.

63. *See U.S. Steel*, 251 U.S. at 455-57 (absolving defendant of liability); *United Shoe*, 247 U.S. at 41, 66-67 (same).

64. *See, e.g., Lehigh Valley*, 254 U.S. at 270-71 (dissolution ordered); *American Tobacco*, 221 U.S. at 187-88 (parties ordered to provide trial court with "plan or method of dissolving the combination and of recreating, out of the elements now composing it, a new condition which shall be honestly in harmony with and not repugnant to the law"); *Standard Oil*, 221 U.S. at 77-82 (dissolution ordered); *Corn Prods.*, 234 F. at 1015-18 (dissolution ordered, with parties to submit divestiture plan to FTC acting as master in chancery); *du Pont*, 188 F. at 154-56 (dissolution ordered, with parties to provide court with divestiture plan). *But see United States v. American Can Co.*, 234 F. 1019, 1020-22 (D. Md. 1916) (despite finding of liability, dissolution decree denied).

65. *U.S. Steel*, 251 U.S. at 457 (1920).

66. *See Keller, The Pluralist State: American Economic Regulation in Comparative Perspective, 1900-1930*, in *REGULATION IN PERSPECTIVE* 56, 75-76 (T. McCraw ed. 1981) (noting judicial acceptance of large enterprise well-established by 1920s); Levi, *The Antitrust Laws and Monopoly*, 14 U. CHI. L. REV. 153, 159-60 (1947) (arguing Supreme Court did little to stem economic concentration). The permissive implications of *U.S. Steel* were underscored seven years later in *United States v. International Harvester Co.*, 274 U.S. 693, 702 (1927). In *International Harvester*, the Court relied upon the *U.S. Steel* decision in affirming a lower court's refusal to grant the Justice Department's request that a 1918 consent decree be modified to require the separation of International Harvester into at least three corporations. *Id.* at 708-09; *see also H. SEAGER & C. GULICK JR., supra* note 41, at 270-80 (discussing remedial history of farm machinery litigation).

the scope of federal antitrust enforcement narrowed sharply as Harding and Calvin Coolidge showed extreme solicitude for business community preferences and respect for the accomplishments of large industrial concerns.⁶⁷ As one commentator declared in 1928, "[t]his is the day of big business. . . . The day of the blatant trust-buster is definitely over."⁶⁸

2. 1937-1956: Alcoa to AT&T

The economic crash in 1929 eliminated the aura of legitimacy and respect American business institutions enjoyed in the 1920s.⁶⁹ The Depression fostered a major public policy debate about the government's role in guiding business activity. To some, the collapse discredited the competitive model and demonstrated the need for more comprehensive public regulation.⁷⁰ Particularly in Franklin Roosevelt's first term as president, this impulse manifested itself in collective planning solutions such as the National Industrial Recovery Act⁷¹ and the cartelization of specific indus-

67. See T. BLAISDELL JR., *THE FEDERAL TRADE COMMISSION: AN EXPERIMENT IN THE CONTROL OF BUSINESS* 75-78 (1932) (concluding transfer of presidency from Democrat to Republican in 1920 imbued FTC with more conservative policy preferences); P. HERRING, *PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST* 125-38 (1936) (describing impact of conservative Coolidge appointees upon policies of FTC); J. HICKS, *REPUBLICAN ASCENDANCY 1921-1933*, at 64-66 (1960) (stating Harding and Coolidge appointees to federal regulatory bodies reflected view that business knew best course for country); W. LEUCHTENBURG, *THE PERILS OF PROSPERITY 1914-1932*, at 96-97 (1958) (noting Coolidge policy to give business free reign). The laissez faire proclivities of Harding and Coolidge were not the sole intellectual basis for antitrust's retreat in the 1920s. A second limiting force was the ascent of associationalism, which urged the displacement of competition-oriented policies with greater business-government cooperation to guide the nation toward preferred economic ends. Born in regulatory programs of the War Industries Board in World War I, associationalism promoted more extensive reliance upon industry self-regulation under government supervision. See Cuff, *Business, the State, and World War II: The American Experience*, in *THE ORDEAL OF TWENTIETH-CENTURY AMERICA—INTERPRETIVE READINGS* 48 (J. Schwartz ed. 1974) (analyzing formation of new business-government relationships through preparedness programs during World War I); Hawley, *Three Facets of Hoover Associationalism: Lumber, Aviation, and Movies, 1921-1930*, in *REGULATION IN PERSPECTIVE* 95 (T. McGraw ed. 1981) (analyzing corporate self regulation); Hawley, *Herbert Hoover, the Commerce Secretariat, and the Vision of an "Associative State," 1921-1928*, 61 J. AM. HIST. 116, 118 (1974) (analyzing Hoover's associational order that functioned through entities other than public enterprise); Himmelberg, *The War Industries Board and the Antitrust Question in November 1918*, 52 J. AM. HIST. 59, 61 (1965) (describing sentiment of some business leaders to extend wartime relaxation of antitrust enforcement beyond conclusion of World War I).

68. Marx, *New Interpretations of the Anti-trust Law as Applied to Business, Trade, Farm and Labor Associations*, 2 U. CIN. L. REV. 211, 222-23 (1928).

69. See A. SCHLESINGER, *THE CRISIS OF THE OLD ORDER 1919-1933*, at 156-204 (1956).

70. See Miller, Walton, Kovacic, & Rabkin, *Industrial Policy: Reindustrialization Through Competition or Coordinated Action?*, 2 YALE J. ON REG. 1, 14-15 (1984) (identifying former War Industries Board members and younger policymakers who laid foundation for government coordination of economic activity in Franklin Roosevelt's first Administration).

71. 48 Stat. 195 (1933) (codified at 15 U.S.C. §§ 702-02f (repealed 1966)). The statute created the National Recovery Administration (NRA), which established industry codes governing output, prices, wages, working conditions, and trade practices. The NRA and its code-making activities are described in E. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY* 19-71 (1966); L. LYON, P. HOMAN, G. TERBORGH, L. LORWIN, C. DEARING & L. MARSHALL, *THE NATIONAL RECOVERY ADMINISTRATION* 8 (1935); C. ROOS, *NRA ECONOMIC PLANNING* 39 (1937). Two years after the Act's enactment, the Supreme Court struck down the enabling statute as an unconstitutionally broad delegation of legislative power. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1935).

tries through measures such as the Motor Carrier Act of 1935⁷² and the Civil Aeronautics Act of 1938.⁷³

A second group of policymakers attributed the crash and the sluggish pace of economic recovery in the 1930s to the domination of American industry by a small number of large corporations.⁷⁴ They felt the solution to the vice of corporate gigantism was not additional planning or regulation, but rather the dismemberment of existing structures into smaller commercial entities. Legislative measures such as the Glass-Steagall Banking Act of 1933,⁷⁵ the McKellar-Black Air Mail Act of 1934,⁷⁶ and, most dramatically, the Public Utility Holding Company Act of 1935⁷⁷ relied on deconcentration to prevent the reappearance of the abuses that many saw as causes of the Depression.

Within the Justice Department, the deconcentration orientation began to exert a significant influence in the late 1930s. In 1937, at the end of Robert Jackson's tenure as Assistant Attorney General for Antitrust, the government sued Alcoa for monopolizing the manufacture of aluminum and sought extensive divestitures of the firm's production facilities.⁷⁸ Although the World War II mobilization slowed the aluminum case and blunted antitrust enforcement generally, the Second Circuit's *Alcoa* decision in 1945 rehabilitated section two enforcement possibilities that had remained dormant since *U.S. Steel* in 1920. The government never obtained a decree to restructure *Alcoa*,⁷⁹ but the court's treatment of liability issues

72. 49 Stat. 543 (1935) (codified as amended in scattered sections of 49 U.S.C. (1982)).

73. 52 Stat. 973 (1938) (codified as amended at 49 U.S.C. §§ 1301-1542 (1982)).

74. See E. HAWLEY, *supra* note 71, at 283-303 (identifying principal architects of expanded reliance on antitrust enforcement and competition-oriented initiatives during FDR's presidency).

75. 48 Stat. 162 (1933) (codified as amended at 12 U.S.C. §§ 377-78 (1982)). The Glass-Steagall Act required banks belonging to the Federal Reserve System to divorce themselves from their securities affiliates, forced private banks to choose between deposit and investment banking to the exclusion of the other, and limited the underwriting activities of commercial banks to general obligation bonds of federal, state, and municipal bodies or government corporations. See V. CAROSSO, *INVESTMENT BANKING IN AMERICA: A HISTORY* 368-75 (1970); Hawke, *The Glass-Steagall Legacy: A Historical Perspective*, 31 N.Y.L. SCH. L. REV. 255 (1986).

76. 48 Stat. 933 (1934) (codified as amended in scattered sections of 39 U.S.C. (1982)). The McKellar-Black statute required all air mail contract carriers to divest themselves of their manufacturing and other aviation interests, thus separating air carriage services from aircraft manufacturing. See F. SPENCER, *AIR MAIL PAYMENT AND THE GOVERNMENT* 76-100 (1941); Freudenthal, *The Aviation Business in the 1930's*, in *THE HISTORY OF THE AMERICAN AIRCRAFT INDUSTRY* 93-98 (G. Simonson ed. 1968).

77. 49 Stat. 803 (1935) (codified as amended at 15 U.S.C. §§ 79a-z (1982)). The Holding Company Act required the dissolution of certain gas and electric holding companies into simplified, integrated utility systems. See generally R. RITCHIE, *INTEGRATION OF PUBLIC UTILITY HOLDING COMPANIES* (1954) (analyzing Holding Company Act's dissolution requirements and their implementation); Blair-Smith & Helfenstein, *A Death Sentence or a New Lease on Life? A Survey of Corporate Adjustments Under the Public Utility Holding Company Act*, 94 U. PA. L. REV. 148 (1946) (same).

78. See *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 421 (describing procedural history of *Alcoa* litigation). The filing of *Alcoa* was one of several steps Jackson took in laying the foundation for Thurman Arnold's heralded revival of federal antitrust enforcement during his tenure as head of the Antitrust Division from 1938 through 1942. See E. HAWLEY, *supra* note 71, at 374-76.

79. See *United States v. Aluminum Co. of Am.*, 91 F. Supp. 333, 416-19 (S.D.N.Y. 1950)

greatly diminished the burden of proof government prosecutors need bear to establish section two liability.⁸⁰

Alcoa strengthened ongoing Sherman Act monopolization prosecutions and invigorated Justice Department efforts to expand section two enforcement.⁸¹ In 1946 Attorney General Tom Clark told a Senate subcommittee that "the times require that where the elimination of competition is threatened or actual that it be restored by the seldom-used processes of divestiture, divorce, and dissolution."⁸² Through greater recourse to structural remedies, the government would "establish complete and independent units of enterprise which can and will in fact compete one with the other."⁸³ The future Supreme Court justice emphasized that "[t]his is

(denying government request for divestiture).

80. Judge Learned Hand's opinion stated that the possession of monopoly power, without more, did not constitute illegal monopolization. "A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry," Judge Hand wrote. "[T]he successful competitor, having been urged to compete, must not be turned upon when he wins." *Alcoa*, 148 F.2d at 430. The crucial feature of Hand's analysis, however, was its broad definition of conduct that rendered the acquisition or maintenance of monopoly power illegal. In the following passage, the court condemned *Alcoa's* efforts to expand its aluminum production capacity:

It was not inevitable that [*Alcoa*] should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections, and the elite of personnel. Only in the case we interpret "exclusion" as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not "exclusionary." So to limit it would in our judgment emasculate the [Sherman] Act; would permit just such consolidations as it was designed to prevent.

Id. at 431. The court then concluded that this pattern of capacity expansion violated § 2 of the Sherman Act:

In order to fall within § 2, the monopolist must have both the power to monopolize, and the intent to monopolize. To read the passage as demanding any "specific" intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing. So here, "*Alcoa*" meant to keep, and did keep, that complete and exclusive hold upon the ingot market with which it started. That was to "monopolize" that market, however innocently it otherwise proceeded.

Id. at 432. The Supreme Court endorsed *Alcoa's* reasoning one year later in *American Tobacco Co. v. United States*, 328 U.S. 781, 811-14 (1946).

81. By one count, between December 1936 and August 1954, the government filed 44 civil lawsuits in which it sought divestiture. See D. DEWEY, *supra* note 4, at 246. *Alcoa* bolstered ongoing § 2 cases and inspired new government monopolization proceedings by approving a liability standard that substantially increased the likelihood that the Justice Department could establish a violation of the Sherman Act. Frederick Rowe observed that the "postwar antitrust programs against concentration gained thrust from *Alcoa's* synthesis of law and economics into antimonopoly norms. The fusion of Populist ideology with oligopoly learning's linkage of concentrated market structures and anticompetitive behavior propelled ambitious antitrust aims." Rowe, *supra* note 3, at 1535.

82. *Departments of State, Justice, Commerce, and the Judiciary Appropriation Bill for 1947: Hearings on H.R. 6056 Before the Subcomm. of the Senate Comm. on Appropriations*, 79th Cong., 2d Sess. 959, 960 (1946) (testimony of Attorney General Tom Clark).

83. *Id.*

the only way to maintain free enterprise."⁸⁴ From the beginning of World War II until the mid-1950s, subjects of Justice Department monopolization actions included the distribution and exhibition of motion pictures,⁸⁵ cellophane,⁸⁶ shoe machinery,⁸⁷ Pullman sleeping cars,⁸⁸ telephone equipment,⁸⁹ film processing,⁹⁰ and bananas.⁹¹ To a considerable degree, *Alcoa* foreshadowed the outcome of other deconcentration initiatives in this period. Despite notable setbacks such as *du Pont*,⁹² the government ordinarily prevailed on liability issues. As in *Alcoa*, however, the high remedial expectations that attended the government's post-war antimonopoly program went unfulfilled.⁹³

3. 1969-1982: IBM to AT&T

The third and most recent round of Sherman Act deconcentration initiatives took root in the recommendations of President Johnson's Task Force on Antitrust Policy.⁹⁴ Chaired by Dean Phil Neal of the University of Chicago Law School, the Task Force proposed a dramatic program to restructure large sectors of the American economy.⁹⁵ It deeply influenced the thinking of public enforcement officials and helped focus the energies of the Justice Department and the FTC on developing large structural cases to achieve deconcentration ends.

The first result of this reorientation was the Justice Department's challenge to IBM's position as the country's preeminent manufacturer of electronic computing equipment. Filed in 1969 on the final day of the Johnson Administration, the suit proposed that IBM be broken up into several independent companies.⁹⁶ The case proved to be more than a

84. *Id.* In his annual report for fiscal year 1946, Attorney General Clark observed: "In regard to monopolies, I have encouraged the application of the remedies of divestiture and divorcement in civil suits brought under Section 2 of the Sherman Act, as the most expeditious means of eradicating this economic evil." 1947 ATT'Y GEN. ANN. REP. 8.

85. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *Schine Chain Theatres v. United States*, 334 U.S. 110 (1948); *United States v. Griffith Amusement Co.*, 334 U.S. 100 (1948); *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944).

86. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).

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

88. *United States v. Pullman Co.*, 50 F. Supp. 123 (E.D. Pa. 1943), *aff'd per curiam*, 330 U.S. 806 (1947).

89. *United States v. Western Elec. Co.*, 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J. 1956).

90. *United States v. Eastman Kodak Co.*, 1954 Trade Cas. (CCH) ¶ 67,920 (W.D.N.Y. 1954).

91. *United States v. United Fruit Co.*, 1958 Trade Cas. (CCH) ¶ 68,941 (E.D. La. 1958).

92. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 399-404 (1956) (concluding that du Pont lacked monopoly power necessary to establish liability for monopolization).

93. See D. DEWEY, *supra* note 4, at 247; Rowe, *supra* note 3, at 1534-36 (discussing uneven prosecution and application of laws and untimeliness of remedies); see also Flynn, *supra* note 38, at 10 (describing second deconcentration era as "doctrinally significant" but "economically insignificant").

94. See WHITE HOUSE TASK FORCE REPORT ON ANTITRUST POLICY, reprinted in 2 ANTITRUST L. & ECON. REV. 11 (1968-69) [hereinafter NEAL TASK FORCE REPORT].

95. *Id.* at 14-15, 65-76.

96. See *United States v. IBM Corp.*, [1961-1970 Transfer Binder] Trade Reg. Rep. (CCH)

freakish political gesture by an outgoing administration. The prosecution of IBM represented the first of an extraordinary round of deconcentration initiatives begun by the Nixon and Ford Administrations.⁹⁷ During President Nixon's tenure, the FTC launched "shared monopoly" cases seeking structural relief against the petroleum⁹⁸ and breakfast cereal industries.⁹⁹ The Ford Justice Department brought suits to restructure AT&T¹⁰⁰ and the nation's leading tire manufacturers.¹⁰¹ With rare but important exceptions, such as the restructuring of AT&T, the deconcentration cases of the third era failed to achieve their structural aims.¹⁰²

B. *Formative Conditions*

The cycles of deconcentration initiatives described above share three basic characteristics. First, each cycle followed a period of perceived indifference or permissiveness on the part of enforcement officials and judges toward the existence and conduct of large firms. Second, each cycle coincided with events that discredited business institutions and created a political climate amenable to attacks on large accumulations of economic power. Finally, the emergence of an appealing intellectual framework for dissolving dominant firms into smaller constituent parts served as a powerful catalyst for each deconcentration era.

1. *Response to Permissiveness*

Policies that tolerate or welcome corporate size have played a major role in seeding the clouds for deconcentration. The move to restructure dominant firms can be explained as an effort to cure the excesses of a period of permissiveness or indifference by antitrust enforcement agencies

¶ 45,069 (S.D.N.Y. filed Jan. 17, 1969). The government's original complaint and its amended complaint, both of which requested divestiture, are reprinted in their entirety in F. FISHER, J. MCGOWAN & J. GREENWOOD, *FOLDED, SPINDLED, AND MUTILATED—ECONOMIC ANALYSIS AND U.S. v. IBM* 353-68 (1983).

97. See *supra* notes 8-21 and accompanying text. Perhaps the most notable early indication of an emerging Nixon Administration campaign against concentration came in a widely reported speech given by Attorney General John Mitchell in 1969 to the Georgia Bar Association. Mitchell declared: "I believe that the future vitality of our free economy may be in danger because of the increasing threat of economic concentration by corporate mergers. . . . The danger that this super-concentration poses to our economic, political and social structure cannot be overestimated." Address by John Mitchell, Georgia Bar Association (June 6, 1969), reprinted in *Economic Concentration: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 5122-23 (1970).

98. *Exxon Corp.*, 98 F.T.C. 453 (1981). The Exxon complaint is analyzed in Note, *Structural Shared Monopoly Under FTC 5: The Implications of the Exxon Complaint*, 26 CASE W. RES. 615 (1976); see also *supra* notes 12, 18, 20 and accompanying text.

99. *Kellogg Co.*, 99 F.T.C. 8 (1982). The Kellogg complaint is analyzed in Note, *Oligopolies, Cereals, and Section Five of the Federal Trade Commission Act*, 61 GEO. L.J. 1145 (1973); see also *supra* notes 13, 18 and accompanying text.

100. *United States v. AT&T Co.*, [1970-1979 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,074 (D.D.C. filed Nov. 20, 1974); see also *supra* notes 6, 11, 19 and accompanying text.

101. *United States v. Goodyear Tire & Rubber Co.*, and *United States v. Firestone Tire & Rubber Co.* [1970-1979 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,073 (N.D. Ohio filed Aug. 9, 1973); see also *supra* notes 16, 18 and accompanying text.

102. See *supra* notes 18-20 and accompanying text.

and the courts to the perceived problems of corporate size. As Morton Keller observed in his study of American economic regulation: "[A]ntitrust response follows consolidation challenge as night follows the day."¹⁰³

This response pattern is most evident in the first two cycles of Sherman Act deconcentration measures. The 1904-1920 round of cases followed on the heels of a merger movement that yielded monopolies or near monopolies in numerous industries. The establishment of dominant firms received strong impetus from the Supreme Court's decision in *Knight*, which signaled the Court's receptivity to large consolidations.¹⁰⁴ The flood of large horizontal mergers that followed *Knight* faced few impediments from a Justice Department that, owing to scant resources and presidential indifference, was ill-positioned to stem the tide.¹⁰⁵

The 1936-1956 deconcentration era similarly followed a period of permissiveness toward large firms. Judicial antitrust decisions in the 1920s—most notably, *U.S. Steel*¹⁰⁶—suggested that courts would allow large firms considerable latitude in choosing business strategies and would leave all but the largest aggregations of capital undisturbed. Furthermore, the Supreme Court rejected efforts by the FTC to use section five of the FTC Act¹⁰⁷ to close the "assets loophole" created by the Clayton Act's antimerger provision, which forbade anticompetitive stock acquisitions.¹⁰⁸

103. Keller, *supra* note 66, at 94.

104. *United States v. E.C. Knight Co.*, 156 U.S. 1, 16-18 (1895); see also *supra* notes 39-41 and accompanying text.

105. See H. FAULKNER, *POLITICS, REFORM AND EXPANSION 1890-1900*, at 101-02 (1959) (discussing permissive executive branch enforcement attitudes); H. THORELLI, *supra* note 41, at 380-410 (same); TNEC MONOGRAPH No. 16, *supra* note 51, at 23-26 (discussing paucity of antitrust enforcement resources); see also M. SKLAR, *supra* note 43, at 162-63 ("It was not the law as judicially construed that facilitated or encouraged corporate consolidation; it was, rather, business and political policy—the decisions of capitalists and their lawyers in the private sector, and the decisions of the executive branch . . . under presidents McKinley and Roosevelt, and up to a point under Taft, not to prosecute or to prosecute selectively.").

106. *United States v. United States Steel Corp.*, 251 U.S. 417, 457 (1920); see also *supra* notes 65-66 and accompanying text.

107. 15 U.S.C. § 45 (1982).

108. As enacted in 1914, § 7 of the Clayton Act prohibited mergers achieved through the purchase of the target firm's stock. 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. § 18 (1982)). Companies soon began using asset acquisitions to carry out consolidation strategies. See G. HENDERSON, *THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW* 40, 321 (1924) (describing business awareness that asset acquisitions would avoid the Clayton Act's antimerger prohibitions). In *FTC v. Eastman Kodak Co.*, 274 U.S. 619 (1927), the FTC sought to fill this gap by using the § 5 ban on "unfair methods of competition" to force Kodak to divest three recently acquired film processing plants. *Id.* at 623. The Supreme Court ruled that the FTC lacked authority to order divestiture under § 5, thereby vitiating the provision's usefulness as an enforcement tool for undoing the effects of consummated asset acquisitions. *Id.* at 623-25; see Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 *TULSA L.J.* 587, 614 (1982) (discussing *Kodak's* limiting effect upon the Commission's use of § 5 as an antimerger enforcement tool). Nearly four decades later, the Court reversed its field, concluding that subsequent cases interpreting generic grants of authority to administrative agencies had "repudiated" *Kodak*. *FTC v. Dean Foods Co.*, 384 U.S. 597, 606 & n.4 (1966) (dictum) (rejecting *Kodak*); see also Averitt, *Structural Remedies in Competition Cases Under the Federal Trade Commission Act*, 40 *OHIO ST. L.J.* 781, 788-92 (1979) (tracing erosion of *Kodak*). This adjustment in the Court's assessment of the Commission's remedial powers under § 5 provided a crucial basis for FTC efforts in the 1970s to use § 5 to attack "shared monopolies."

These decisions received strong reinforcement from Harding and Coolidge antitrust enforcement policies that disdained aggressive intervention and treated large firms as valued engines of economic and social progress. Together with favorable stock market conditions, the tolerant executive branch and judicial attitudes toward corporate size in the 1920s created a favorable climate for mergers.¹⁰⁹ From 1924 to 1928, this country witnessed a wave of acquisitions equal in intensity to the first merger movement at the turn of the century. Unlike the first wave, the second movement involved a smaller number of multi-firm consolidations and produced relatively few transactions yielding a single dominant enterprise.¹¹⁰ The second wave's distinguishing characteristic was the creation of oligopolistic market structures through mergers that formed strong "number two" firms in industries formerly controlled by a single company and reinforced some existing, comparatively weak oligopolies. The second wave also consisted of more mergers in which vertical integration, geographic and product line extension, and conglomerate diversification were strong features.¹¹¹

The most recent deconcentration era is explained less easily as a reaction to lax antitrust policy,¹¹² but some important elements of perceived permissiveness toward corporate size nonetheless can be identified. Despite the government's pursuit of an occasional monopolization divestiture suit in the late 1950s¹¹³ and early 1960s,¹¹⁴ antitrust policy in this period rarely attempted to deal with concentrated market structures that had taken shape earlier in the century. The government's failure to bring substantial resources to bear upon restructuring tight oligopolies and instances of single-firm market power was seen as evidence of a serious policy default.¹¹⁵

The increased frequency of conglomerate mergers in the 1960s also contributed to the sense that antitrust policy had lost its ability to limit corporate size. By the mid-1960s, the prevailing merger jurisprudence had established stringent limits upon horizontal and vertical acquisitions, leaving conglomerate transactions as the principal focus of corporate dealmaking.¹¹⁶ From 1964 through 1968 this country witnessed a sharp increase in postwar merger activity, with conglomerate acquisitions accounting for the bulk of the acquired assets.¹¹⁷ Although they added little to horizontal concentration, these transactions produced large conglomer-

109. See Marx, *supra* note 68, at 221 (explaining judicial and executive receptiveness to combinations promoting public interest).

110. Eis, *The 1919-1930 Merger Movement in American History*, 12 J. L. & Econ. 267, 279-80 (1969).

111. See F. SCHERER, *supra* note 38, at 122.

112. See, e.g., T. KOVALEFF, *BUSINESS AND GOVERNMENT DURING THE EISENHOWER ADMINISTRATION: A STUDY OF THE ANTITRUST POLICY OF THE ANTITRUST DIVISION OF THE JUSTICE DEPARTMENT* 155 (1980) (concluding that "[i]n the context of the mid-twentieth century, the Eisenhower Administration, incontrovertibly, oversaw a period of vigorous and innovative enforcement of the antitrust laws by the Justice Department's Antitrust Division.").

113. See, e.g., *International Boxing Club v. United States*, 358 U.S. 242 (1959).

114. See, e.g., *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

115. See *infra* notes 199-203 and accompanying text.

116. See Rowe, *supra* note 3, at 1524-28.

117. See F. SCHERER, *supra* note 38, at 123-24.

ate enterprises whose existence suggested that antitrust policy was seriously deficient in dealing with sheer corporate size.

2. *Political Sentiment Disfavoring Bigness*

Periods of Sherman Act deconcentration activism have paralleled peaks in public distrust toward large corporate enterprise.¹¹⁸ Passage of the Sherman Act and the government's trailblazing deconcentration initiatives after the turn of the century occurred amid strong public antipathy toward the trusts.¹¹⁹ Provocative government reports and popular exposés extensively recounted corporate misdeeds,¹²⁰ and the efforts of new industrial combines to attain greater economies of scale dislocated small businesses and farmers, thus creating a vocal antitrust constituency. The onset of the Depression discredited the business community and convinced many that the unconfined discretion of large companies triggered the economic collapse. And by the late 1960s, the efforts of a new generation of consumer advocates such as Ralph Nader generated formidable public support for expansive government intervention to curb perceived excesses of the business community.¹²¹

118. The importance of public perceptions about the business community to the scope and direction of antitrust enforcement and other regulatory policies is explored in L. GALAMBOS, *THE PUBLIC IMAGE OF BIG BUSINESS IN AMERICA, 1880-1940*, at 253-69 (1975) (empirical study demonstrating shifts in public opinion of corporations); R. HOFSTADTER, *What Happened to the Antitrust Movement?*, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 188-237 (1965) (discussing temporal coincidence of decline of popular antitrust movement and growing antitrust enforcement efforts); Hayes, *Political Choice in Regulatory Administration*, in *REGULATION IN PERSPECTIVE* 124 (T. McCraw ed. 1981) (explaining economic regulation as political choice); Baker & Blumenthal, *Ideological Cycles and Unstable Antitrust Rules*, 31 *ANTITRUST BULL.* 323, 337-38 (1986) (urging incremental change rather than ideologically driven reform).

119. See S. HAYS, *THE RESPONSE TO INDUSTRIALISM 1885-1914*, at 4-93 (1957) (explaining how different socio-economic groups' reactions to industrialization shaped government policy); R. HOFSTADTER, *THE AGE OF REFORM* 213-69 (1955) (describing public dependence on federal regulation to curb perceived evils of big business); H. THORELLI, *supra* note 41, at 54-163, 235-368 (discussing how political, social, and economic change caused public antipathy toward trusts and how that antipathy influenced federal antitrust policy); R. WEIBE, *THE SEARCH FOR ORDER 1877-1920*, at 1-163 (1967) (noting anxiety over growing industrialization that manifests itself through antimonopoly sentiment); Millon, *The Sherman Act and the Balance of Power*, 61 *S. CAL. L. REV.* 1219, 1224-28 (1988) (explaining that many Americans viewed growth of monopolies as threat to vitality of democracy itself).

120. See H. FAULKNER, *THE DECLINE OF LAISSEZ FAIRE 1897-1917*, at 177-78 (1951) (describing popular magazine articles from 1902-1907); R. HIGGS, *CRISIS AND LEVIATHAN* 111 (1987) (analyzing relationship between muckrakers' articles and subsequent antitrust statutes). Scrutiny of the petroleum industry provides a representative illustration. Standard Oil's climb to power was documented in two studies requested by Congress. See DEPARTMENT OF COMMERCE AND LABOR, *REPORT OF THE COMMISSIONER OF CORPORATIONS ON THE TRANSPORTATION OF PETROLEUM* (1906); DEPARTMENT OF COMMERCE AND LABOR, *REPORT OF THE COMMISSIONER OF CORPORATIONS ON THE PETROLEUM INDUSTRY, PART I, POSITION OF THE STANDARD OIL COMPANY IN THE PETROLEUM INDUSTRY* (May 20, 1907); DEPARTMENT OF COMMERCE AND LABOR, *REPORT OF THE COMMISSIONER OF CORPORATIONS ON THE PETROLEUM INDUSTRY, PART II, PRICES AND PROFITS* (Aug. 5, 1907). These studies followed publication of Ida Tarbell's muckraking attack upon John D. Rockefeller's petroleum empire. See I. TARBELL, *THE HISTORY OF THE STANDARD OIL COMPANY* (1904) (two volumes); see also B. DEWITT, *THE PROGRESSIVE MOVEMENT* 49-50 (1915) (describing impact of Tarbell's studies on Standard Oil).

121. The emergence of broad public support in the 1960s for more encompassing federal intervention in the affairs of business is recounted in M. PERTSCHUK, *REVOLT AGAINST REGULA-*

One way to gauge public attitudes toward dominant firms is to consider the level of deconcentration activity within Congress during a given period. Since passing the Sherman Act in 1890, Congress seriously has considered legislation dealing with economic concentration roughly every other decade.¹²² These periods of congressional activism have paralleled the peak periods of deconcentration litigation. In 1914 Congress passed the Clayton Act¹²³ and the Federal Trade Commission Act¹²⁴ to cure, among other perceived deficiencies, the Sherman Act's apparent inability to prevent or dismantle monopoly power.¹²⁵ With its enumeration of specific forbidden commercial practices and its ban on certain stock acquisitions, the Clayton Act sought to thwart the attainment of dominant market positions achieved by Standard Oil, American Tobacco, and other defendants in the first series of deconcentration suits.¹²⁶ The FTC Act also contained several provisions designed to arrest and redress concentration. The Act gave the Commission broad information gathering and reporting powers in the hope that research would identify promising targets for

TION—THE RISE AND PAUSE OF THE CONSUMER MOVEMENT 5-45 (1982).

122. The decades of legislative activism were the 1890s, 1910s, 1930s, 1950s, and 1970s. This is not to suggest the complete absence of legislative enactments with deconcentration overtones in the other decades. Two examples come to mind. Among other requirements, the Hepburn Act of 1906 forbade railroads to haul goods, except timber for their own use, in which they had a direct or indirect interest. 34 Stat. 584, 585 (1906) (codified at 49 U.S.C. § 1 (repealed 1978)). Known as the "commodities clause," this provision sought to prevent the anthracite railroads from exploiting their dual positions as public carriers and private shippers to the detriment of independent coal operators by forcing the railroads to divest their ownership of coal producing properties. See G. KOLKO, *RAILROADS AND REGULATION: 1877-1916*, at 127-54 (1965).

A second example is the Surplus Property Act of 1944. 58 Stat. 765 (1944) (codified as amended at 40 U.S.C. §§ 471-511 (1982)). For the disposition of certain government-owned facilities, the statute required a ruling by the Attorney General that the contemplated sale would not violate the antitrust laws. *Id.* § 488(a). Pursuant to this measure, the War Assets Administration transferred a substantial part of government-owned aluminum capacity built during the war to Alcoa's rivals. See 2 S. WHITNEY, *supra* note 4, at 96-98. These moves significantly strengthened the competitive positions of the Reynolds and Kaiser aluminum interests, helping to erode Alcoa's prewar status as the country's sole producer of primary aluminum. See J. BLAIR, *ECONOMIC CONCENTRATION—STRUCTURE, BEHAVIOR AND PUBLIC POLICY* 384 (1972); M. PECK, *COMPETITION IN THE ALUMINUM INDUSTRY, 1945-1958*, at 11-19 (1961).

123. 38 Stat. 730 (1914) (codified as amended in scattered sections of 15 U.S.C. (1982)).

124. 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. § 45 (1982)).

125. See M. THOMPSON, *TRUST DISSOLUTION* 131 (1919) ("The almost complete ineffectiveness of the merely legal dissolution of the Standard Oil Company is a striking example of the lack of adaptation on the part of the courts for the work of reorganizing complicated industries. . . . This dissolution, which largely overshadows the good accomplished in its policy of suppressing the trusts, has been a large factor in bringing into existence additional trust legislation and the Federal Trade Commission."); D. MARTIN, *MERGERS AND THE CLAYTON ACT* 43-46 (1959) (explaining underlying reasons for Clayton Act).

126. The background and aims of the Clayton Act are discussed in H. SEAGER & C. GULICK JR., *supra* note 41, at 413-45. Enactment of the statute's prohibition of specific practices fulfilled one objective Woodrow Wilson identified during the 1912 presidential campaign. Wilson proposed "to prevent private monopoly by law, to see to it that the methods by which monopolies have been built up are legally made impossible." W. WILSON, *THE NEW FREEDOM* 132 (1961). He explained that "[e]verybody who has even read the newspapers knows the means by which these men built up their power and created these monopolies. Any decently equipped lawyer can suggest to you statutes by which the whole business can be stopped." *Id.* at 105.

deconcentration, and that publicity would discourage recourse to predatory conduct and alert potential entrants to lines of commerce that had generated large profits.¹²⁷ Because Congress feared that limited expertise might disincline judges to devise and order effective divestiture remedies in monopolization suits, the FTC Act also provided that the federal district courts could ask the Commission for advice in crafting dissolution decrees.¹²⁸

Congressional efforts to deconcentrate the American economy also intensified during the second period of deconcentration initiatives. Following a hiatus in legislative activity in the 1920s, Congress enacted several major pieces of deconcentration legislation in the 1930s. The dispersal of economic power animated the key operative features of the Glass-Steagall Act,¹²⁹ the Air Mail Act,¹³⁰ and the Public Utility Holding Company Act.¹³¹ Following another lull in activity in the 1940s, Congress in 1950 passed the Celler-Kefauver Act,¹³² whose strengthening of the Clayton Act's antimerger provision stemmed partly from congressional perceptions that the

127. 15 U.S.C. §§ 46, 49 (1982). The House report on the FTC Act, for example, anticipated that publication of business profits would attract entry into lucrative markets and depress prices. See H.R. REP. NO. 533, 63d Cong., 2d Sess. 4 (1914), reprinted in 5 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3900, 3902 (E. Kintner ed. 1982). But see Kovacic, *supra* note 108, at 615 (discussing judicial narrowing of FTC's investigative and reporting powers).

The enactment of provisions designed to collect and disseminate information occurred at a time when a number of leading economists such as Arthur Hadley and Alfred Marshall believed that publicity about the activities of dominant firms would curb abusive trade practices and promote competition. See, e.g., G. STIGLER, THE ECONOMIST AS PREACHER AND OTHER ESSAYS 43 (1982) (describing Alfred Marshall's endorsement of information-gathering and publicity as regulatory tools); H. THORELLI, *supra* note 41, at 322-23, 575 (discussing confidence of Arthur Hadley and other economists in publicity as device for deterring exclusionary conduct).

128. 38 Stat. 722 (1914) (codified at 15 U.S.C. § 47 (1982)). The FTC Act states: "In any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of the opinion that the complainant is entitled to relief, refer said suit to the Commission, as a master in chancery, to ascertain and report an appropriate form of decree therein." *Id.* § 7, at 722. The Senate Report recommending passage of the 1914 statute noted that dissolution decrees in previous monopolization cases

have apparently failed in many instances in their accomplishment simply because the courts and the Department of Justice have lacked the expert knowledge and experience necessary to be applied to the dissolution of the combinations and the reassembling of the divided elements in harmony with the spirit of the law.

S. REP. NO. 597, 63d Cong., 2d Sess. 12 (1914), reprinted in 5 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3900, 3909 (E. Kintner ed. 1982). Since 1914 this provision has been invoked once to assist a court in devising structural relief. In 1916 Judge Learned Hand called upon the FTC to assist in framing relief in the *Corn Products* monopolization suit. See *United States v. Corn Prods. Ref. Co.*, 234 F. 964, 1018 (S.D.N.Y. 1916).

129. 48 Stat. 188-89 (1933) (codified as amended 12 U.S.C. §§ 377-78 (1982)).

130. 48 Stat. 933 (1934) (codified as amended in scattered sections of 39 U.S.C. (1982)).

131. 49 Stat. 803 (1935) (codified as amended at 15 U.S.C. §§ 79a-z (1982)). One also might add the Robinson-Patman Act of 1936 as an antibigness measure. 49 Stat. 1526 (codified as amended at 15 U.S.C. § 13 (1982)). Congress passed the statute mainly to arrest the expansion of chain stores as the chief conduits for the distribution of consumer goods. See E. HAWLEY, *supra* note 71, at 249-54.

132. 64 Stat. 1125 (1950) (codified as amended at 15 U.S.C. § 18 (1982)).

country was undergoing a significant trend toward greater economic concentration.¹³³

The pattern of alternating decades of congressional activity also dovetails with the final era of deconcentration litigation. Congress initiated no major deconcentration measures in the 1960s, but the 1970s marked another period of legislative activism. As it had done in 1950, Congress strengthened the government's antimerger enforcement tools to forestall increases in existing levels of concentration. Among other provisions, the Hart-Scott-Rodino Antitrust Improvements Act of 1976¹³⁴ required firms to notify the FTC and the Justice Department before carrying out mergers that exceeded certain size thresholds.¹³⁵ The 1976 statute also created a mandatory waiting period for firms attempting specified acquisitions and tender offers.¹³⁶

During the 1970s, congressional oversight committees aggressively pressed the government enforcement agencies to bring cases to restructure dominant firms. Congressional attention focused on the FTC, whose elastic substantive mandate seemed best suited for attacking oligopolistic market structures.¹³⁷ Despite a steady flow of ambitious monopolization initiatives from the Antitrust Division and the FTC in the first half of the 1970s,¹³⁸ many legislators complained that traditional antitrust litigation would not suffice to achieve important deconcentration goals. As Senator Robert Packwood pronounced in 1975:

The present antitrust laws . . . even if rigorously enforced, will not achieve what is necessary in this country: A breakup of the concentrations of power in the major industries in this country, oil and otherwise, so that we might return to the numerous, small- and medium-size competitive industries that made this country grow, and continue to be needed to make this country great.¹³⁹

The sentiments of Senator Packwood and many other liberal and moderate legislators spawned several deconcentration bills that, though never enacted, commanded widespread attention in Congress. Most of these measures originated in the Senate Judiciary Subcommittee on Antitrust and Monopoly¹⁴⁰ under the Chairmanship of Senator Philip

133. See Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 130-31 (1982); see also Fisher & Lande, *Efficiency Considerations in Merger Enforcement*, 71 CALIF. L. REV. 1580, 1588-93 (1983) (discussing congressional endorsement of incipency antimerger standard in 1950).

134. 90 Stat. 1390 (1976) (codified as amended at scattered sections of 15 U.S.C. (1982)).

135. 15 U.S.C. § 18a(a).

136. *Id.* § 18a(b).

137. Legislative guidance urging the FTC to attack concentrated industries and the Commission's response to that guidance are documented in Kovacic, *supra* note 108, at 635-39, 645-48.

138. See *supra* notes 8-21 and accompanying text.

139. *Hearings on S. 2387 and Related Bills Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 50 (1975) (statement of Sen. Packwood).

140. From its formation in the mid-1950s through the 1970s, the Senate Antitrust and Monopoly Subcommittee served as the principal forum for congressional inquiry concerning deconcentration. Over a 25-year period, the Subcommittee conducted extensive hearings on economic concentration and provided an arena in which the nation's leading antitrust lawyers

Hart.¹⁴¹ The most prominent of these bills was the Industrial Reorganization Act, which called for the restructuring of seven basic domestic industries, subject to limited defenses.¹⁴² The Industrial Reorganization Act never came up for a vote in the Subcommittee, but it catalyzed debate within the antitrust community about the desirability of deconcentration.¹⁴³ In 1976 Senator Hart also introduced the Monopolization Reform Act of 1976, which proposed to eliminate consideration of the defendant's conduct in Sherman Act cases involving persistent monopoly power.¹⁴⁴ Senator Hart's "no-fault" monopolization bill received no hearings in Congress, but it focused attention within antitrust circles upon the possibility of dispensing with the conduct requirement in certain monopolization cases.¹⁴⁵

In addition to deconcentration proposals of broad applicability, Congress in the 1970s seriously considered several proposals dealing with specific industries. In particular, public rancor over high gasoline, natural gas, and fuel oil prices created a fertile environment for legislation to restructure the petroleum industry.¹⁴⁶ In the fall of 1975 forty-five senators voted for a measure to require the vertical divestiture of this country's leading oil companies.¹⁴⁷ The following year the Senate Judiciary Committee endorsed a bill to force the twenty largest domestic petroleum firms to participate in one of three designated segments of the oil industry—production, transmission, or refining/marketing—to the exclusion of the others.¹⁴⁸ Proposals to bar large oil companies from owning substantial interests in competing energy sources also received close attention during this period.¹⁴⁹

and industrial organization economists discussed the structure and operation of the economy. See J. BLAIR, *supra* note 122, at vii-viii, 709-13. The printed volumes from the Subcommittee's hearings constitute one of the richest sources of material on the modern intellectual and political history of deconcentration.

141. Hart headed the Antitrust Subcommittee from 1963 until his retirement from the Senate in 1976. He was the intellectual and spiritual leader of congressional deconcentration advocates, and the legislative proposals strongly bear the imprint of his work. See *infra* notes 142, 144 and accompanying text.

142. See *Hearings on S. 1167 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 3 (1973). The bill created a rebuttable presumption of monopoly power for seven industries—chemicals and drugs, electrical machinery and equipment, electronic computing and communications equipment, energy, iron and steel, motor vehicles, and nonferrous metals—when rates of return and four-firm concentration ratios exceeded specified levels. See Note, *A Legislative Approach to Market Concentration: The Industrial Reorganization Act*, 24 SYRACUSE L. REV. 1100 (1973); Note, *The Industrial Reorganization Act: An Antitrust Proposal to Restructure the American Economy*, 73 COLUM. L. REV. 635 (1973).

143. See, e.g., INDUSTRIAL CONCENTRATION: THE NEW LEARNING 339-426 (1974) (including essays by Harlan Blake, Walter Adams, Phil Neal, Almarin Phillips, and Richard Posner) [hereinafter INDUSTRIAL CONCENTRATION].

144. S. 3429, 94th Cong., 2d Sess. § 3, 122 CONG. REC. 13,872 (1976).

145. See *infra* notes 209-11 and accompanying text.

146. See R. SHERRILL, *THE OIL FOLLIES OF 1970-1980*, at 69-278 (1983) (describing emergence of strong public antipathy toward oil industry from 1970-1975).

147. See 121 CONG. REC. 32,289-96 (1975); see also R. SHERRILL, *supra* note 146, at 276-78 (describing Senate consideration of oil industry divestiture measures in 1975).

148. See PETROLEUM INDUSTRY COMPETITION ACT OF 1976, S. REP. NO. 1005, 94th Cong., 2d Sess. 161. The Senate Judiciary Committee approved the bill, S. 2387, by an eight to seven vote. One member of the majority, however, Senator Robert Byrd, stated he would oppose the measure during consideration by the full Senate. *Id.* at 179. The bill never reached the Senate floor.

149. See, e.g., *Hearings on S. 489 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 6 (1975) (reprinting S. 489, the Interfuel Competition Act of 1975). S. 489 would have forced producers or refiners of petroleum or

The cyclical coincidence of deconcentration litigation and congressional consideration of deconcentration-related legislation suggests how enforcement agency actions correspond to the political mood of the time. High levels of public dissatisfaction with the business community and its largest firms create a climate that tolerates or even welcomes antitrust initiatives to reduce the power and influence of dominant enterprises. Conversely, when public sentiment toward large companies is favorable, government assaults on dominant firms are less likely.

3. *Intellectual Foundation*

Since 1890 the strength of deconcentration as an antitrust ideal has hinged substantially on the outcome of a contest of ideas.¹⁵⁰ Each deconcentration cycle derived significant force from the ascent of an intellectual vision that justified strong government efforts to restructure major firms. These visions have served as the foundations upon which academicians, antitrust practitioners, and politicians have built the case for deconcentration. Despite serious contemporaneous opposition, each vision has imparted crucial force to government efforts to divide dominant firms into smaller constituent parts.

The earliest turn of the century efforts to create and apply a federal antitrust regime occurred amid considerable intellectual ferment concerning public policy toward newly developing large firms.¹⁵¹ A broadly accepted intellectual rationale for dissolving dominant firms emerged only gradually over the Sherman Act's first quarter century. Most professional economists and academicians expert in corporate law initially treated the passage of the Sherman Act and its early enforcement with indifference or outright disapproval.¹⁵² The works of many contemporary economists

natural gas to divest their interests in other energy sources, including coal, nuclear power, geothermal steam, and solar power. This bill was the subject of limited hearings and never came up for a vote within committee. A similar proposal, however, received 39 votes on the Senate floor in October 1975 when submitted as an amendment to a pending piece of natural gas legislation. See 121 CONG. REC. 33,635 (1975).

150. The debate over the desirability of deconcentration has focused upon essentially five issues:

- 1) The sources of concentration: how much do efficiency considerations determine concentration levels?
- 2) Economic performance: how does concentration affect profitability and innovation?
- 3) Political implications: does concentration confer undue political power upon large firms?
- 4) Merits of structural relief: are problems arising from concentrated market structures best resolved by structural relief, conduct remedies, or regulatory controls?
- 5) Feasibility of implementing structural relief: how substantial are the transaction costs associated with carrying out structural remedies?

151. Passage of the Sherman Act paralleled the enactment of state antitrust laws, whose enforcement was the chief focus of antitrust activity in the United States until the 1910s. See May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495, 497-502 (1987) (describing the contributions of state antitrust enforcement during the early years of the Sherman Act).

152. See J. CLARK, *THE FEDERAL TRUST POLICY* 78-108 (1931) (noting Congress neglected

echoed the assessment of Richard T. Ely, who declared "[i]f there is any serious student of our economic life who believes that anything substantial has been gained by all the laws passed against trusts . . . this authority has yet to be heard from."¹⁵³

Academic disapproval of antitrust intervention, however, was not universal during the Sherman Act's formative period.¹⁵⁴ A small number of academicians favored prohibiting discrete types of conduct, such as local price discrimination, that were believed to facilitate the attainment and maintenance of monopoly power.¹⁵⁵ This approach was grounded substantially in the view that most monopolies were "unnatural" phenomena and could be sustained only through "artificial" means such as publicly imposed tariffs or private contrivances such as predatory conduct.¹⁵⁶ If one removed the artificial buttresses, monopolies necessarily would collapse. By this logic, the solution to "unnatural" monopolies formed by merger would be a decree banning the continuation of the corporate union—i.e., the dissolution of the combination.

The first widely recognized intellectual justification for trustbusting emerged in the 1910s. By 1912, intellectual discourse on the trust question had crystalized around two competing views of appropriate government policy toward corporate bigness. These positions emerged most sharply in the presidential debates between Theodore Roosevelt and Woodrow Wilson.¹⁵⁷ Roosevelt, the Progressive Party candidate, had built a reputa-

economists' advice in favor of public opinion); W. LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA* 71-77 (1965) (explaining that while they differed in detail, most economists were convinced that attempts to prohibit trusts would be "either unnecessary or futile"); G. STIGLER, *supra* note 127, at 41-43 (stating that "skepticism was shared by probably a majority of economists of the period"); H. THORELLI, *supra* note 41, at 117-32, 311-29, 574-75 (finding economic authors of the time expressed opinions on antitrust laws ranging from "relative indifference" to "contempt"); May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257, 258-59, 287 (1989) (recognizing scholars "generally disapproved of antitrust litigation, declaring it to be unnecessary, ineffectual, or counterproductive"); Phillips & Stevenson, *The Historical Development of Industrial Organization*, in 6 *THE HISTORY OF POLITICAL ECONOMY* 324, 330 (1974) (highlighting "veritable flood" of works published about antitrust following passage of Sherman Act).

153. R. ELY, *MONOPOLIES AND TRUSTS* 243 (1900). Ely went on to observe: "The writer does not hesitate to affirm it as his opinion that efforts along the lines which have been followed in the past will be equally fruitless in the future." *Id.* at 244. See also G. STIGLER, *supra* note 127, at 41 ("A careful student of the history of economics would have searched long and hard, on the unseasonably cool day of July 2, 1890, the day the Sherman Act was signed by President Harrison, for any economist who ever recommended the policy of actively combatting collusion or monopolization in the economy at large.").

154. See Scherer, *Efficiency, Fairness, and the Early Contributions of Economists to the Antitrust Debate*, 29 WASHBURN L.J. (forthcoming 1989) (discussing economists' views considered sympathetic to antitrust controls on business conduct).

155. See *id.* (identifying economists who favored antitrust intervention); see also Bullock, *Trust Literature: A Survey and a Criticism*, 15 Q.J. ECON. 168, 204-05 (1901) (calling for controls on local price discrimination).

156. See May, *supra* note 151, at 569-71; Millon, *supra* note 119, at 1264-69. As suggested above, antitrust solutions appealed to a minority of economists who favored public intervention to control abusive conduct by dominant firms. See *supra* notes 154-55 and accompanying text. Most of those who supported government intervention proposed public ownership or comprehensive public utility regulation. See Millon, *supra* note 119, at 1271-75.

157. See Miller, *Woodrow Wilson's Contribution to Antitrust Policy*, in *THE PHILOSOPHY AND POLICIES OF WOODROW WILSON* 132, 136-38 (1958); Kovacic, *supra* note 108, at 603-05.

tion as a trustbuster during his presidency.¹⁵⁸ After leaving office, however, he embraced the thinking of Charles Van Hise, Jeremiah Jenks, and others who regarded immense corporate size as a necessary, albeit foreboding, feature of the political economy.¹⁵⁹ The correct solution to the trust problem was not further efforts at atomization, but rather, more effective tools for regulatory control. Roosevelt promised to dissolve "bad trusts" whose position rested upon sharp practices,¹⁶⁰ but he advocated formation of a federal commission to oversee and regulate the conduct of "good trusts" whose size flowed from the imperative to realize the benefits of large scale enterprise.¹⁶¹

Wilson attacked the former president's proposal on two fronts. The first concerned the trusts' impact on the political process and their significance for the soundness of public administration. Addressing the plan for a national regulatory body, Wilson warned that Roosevelt's commission would foster a dangerous alliance between the government and business. Wilson predicted that within a short time Roosevelt's "avowed partnership" between government and the trusts would be turned to private advantage, as large business concerns corrupted and manipulated the regulatory process.¹⁶²

158. Roosevelt's Justice Department prosecuted *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904), and initiated the dissolution suits in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), and *United States v. E.I. du Pont de Nemours & Co.*, 188 F. 127 (C.C. Del. 1911).

159. Van Hise wrote:

Concentration and cooperation in industry in order to secure efficiency are a world-wide movement. The United States cannot resist it. If we isolate ourselves and insist upon the subdivision of industry below the highest economic efficiency and do not allow cooperation, we shall be defeated in the world's markets.

C. VAN HISE, *CONCENTRATION AND CONTROL: A SOLUTION OF THE TRUST PROBLEM IN THE UNITED STATES* 277 (1912). Van Hise noted that the country "must modify our present obsolete laws regarding concentration and cooperation" and replace them with comprehensive administrative controls. *Id.* at 278. "Concentration and cooperation are conditions imperatively essential for industrial advance," he explained, "but if we allow concentration and cooperation, there must be control in order to protect the people, and adequate control is only possible through the administrative commission." *Id.* Jenks likewise believed government regulation would enable society to gain the benefits of large corporate enterprise while suppressing abusive behavior. M. SKLAR, *supra* note 43, at 60-61. The influence of Van Hise on Roosevelt's thinking is described in A. SCHLESINGER, *supra* note 69, at 22. Jenks's role in shaping Roosevelt's policy views is stated in M. SKLAR, *supra* note 43, at 334-35.

160. T. ROOSEVELT, *AUTOBIOGRAPHY* 462-500 (1913).

161. Roosevelt presented the framework of his policy in Roosevelt, *The Trusts, the People, and the Square Deal*, 99 *THE OUTLOOK* 649 (1911).

162. W. WILSON, *supra* note 126, at 122-23. Wilson cautioned:

If the government is to tell big business men how to run their business, then don't you see that big business men have to get closer to the government even than they are now? Don't you see that they must capture the government, in order not to be restrained too much by it?

Id. at 122. Wilson was not the first to focus on the corruptibility of regulatory systems. Earlier in the century, economists concerned with the growth of the trusts had warned that the emergence of manufacturing monopolies would create pressure for the establishment of regulatory controls of doubtful effectiveness. See, e.g., Bullock, *supra* note 155, at 214 ("Remedy there will be none, save public ownership or public regulation; and past experience raises uncomfortable doubts whether, under the second method, the government or the trusts would be the regulating power.").

Wilson's second line of opposition to comprehensive regulatory control was more fundamentally economic. Wilson half-heartedly accepted the notion that some firms grew and remained large principally through superior efficiency and pledged not to tamper with such enterprises.¹⁶³ It is doubtful, however, that Wilson thought that "good trusts" truly existed—perhaps his sharpest difference with Roosevelt. Unlike his opponent, Wilson apparently believed that massive corporate size had little to do with efficiency and could not be attained or sustained without resort to predatory behavior. Little would be lost, and much would be gained, through an antitrust policy that proscribed predatory conduct and systematically sought to disaggregate dominant firms whose preeminence stemmed from "unnaturally" exclusionary behavior.¹⁶⁴

The architect of Wilson's position on the trust question was Louis Brandeis, whose views ultimately shaped the enactment of the Clayton and Federal Trade Commission Acts in 1914 and animated the government's continued efforts to attack dominant firms until the entry of the United States into World War I.¹⁶⁵ The Brandeisian perspective toward large corporate size exerted a powerful influence on future deconcentration cycles. Its chief tenets—size begets political corruption and superior performance never accounts for dominance, while predatory conduct invariably does¹⁶⁶—gave deconcentration advocates robust confidence in the

163. W. WILSON, *supra* note 126, at 101-15.

164. Kovacic, *supra* note 108, at 603-05. These views subsequently gained broad acceptance in Congress as it considered new antitrust legislation during Wilson's first term in office. For example, the final report of the House Conference Committee on the FTC Act stated: "It is now generally recognized that the only effective means of establishing and maintaining monopoly, where there is no control of a natural resource as [sic] of transportation, is the use of unfair competition." H.R. CONF. REP. NO. 1142, 63d Cong., 2d Sess. 18-19, 51 CONG. REC. 14,924 (1914).

165. Arthur Link wrote:

It was Brandeis who clarified Wilson's thought and led him to believe that the most vital question confronting the American people was preservation of economic freedom in the United States. Brandeis taught, and Wilson agreed and reiterated in his speeches, that the main task ahead was to provide the means by which business could be set free from the shackles of monopoly and special privilege.

A. LINK, *WOODROW WILSON AND THE PROGRESSIVE ERA, 1910-17*, at 20-21 (1954) (footnote omitted); see also A. LINK, *WOODROW WILSON: THE NEW FREEDOM* 423-42 (1956) (describing efforts to revamp Sherman Act under Brandeis's tutelage); A. MASON, *BRANDEIS—A FREE MAN'S LIFE* 399-408 (1946) (noting that Brandeis was a major force behind Wilson's antitrust policies); T. McCRAW, *PROPHETS OF REGULATION* 80-147 (1984) (discussing history of the FTC and Brandeis's antitrust efforts). Many of Brandeis's writings on the question of corporate size are collected in L. BRANDEIS, *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS* (O. Fraenkel ed. 1934) [hereinafter L. BRANDEIS, *CURSE OF BIGNESS*].

166. Brandeis wrote that "no monopoly in private industry in America has yet been attained by efficiency alone. No business has been so superior to its competitors in the process of manufacture or of distribution as to enable it to control the market solely by reason of its superiority." L. BRANDEIS, *Competition*, in *CURSE OF BIGNESS*, *supra* note 165, at 114. He went on to explain the rationale for dissolving dominant firms:

The attempt to dismember existing illegal trusts is not, therefore, an attempt to interfere in any way with the natural law of business. It is an endeavor to restore health by removing a cancer from the body industrial. It is not an attempt to create competition artificially, but it is the removing of the obstacle to competition.

Id. at 115-16.

advantages of proposals designed to restructure major segments of American industry.

The Brandeisian distrust of dominant firms played a major role in the antitrust revival of Franklin Roosevelt's second term and the beginning of the second major era of deconcentration. Brandeis's perspective shaped the thinking of important Roosevelt advisors such as Felix Frankfurter, Thomas Corcoran, and Benjamin Cohen.¹⁶⁷ Corcoran and Cohen helped craft the Administration's major deconcentration legislation of the mid-1930s and encouraged Roosevelt's retreat from the planning and coordination policies that characterized the recovery programs of the early New Deal.¹⁶⁸ These views gained additional force in the late 1930s from the work of the Temporary National Economic Commission (TNEC),¹⁶⁹ which produced a number of monographs concluding that monopoly and collusion deserved much of the blame for the sluggish pace of economic recovery. Several TNEC monograph authors decried the failure of past deconcentration efforts and called for more effective policies to redress and prevent monopoly.¹⁷⁰

The wartime mobilization program interrupted, but did not end, the formation of an intellectual consensus favoring vigorous antitrust enforcement and a revival of deconcentration as a central element of national competition policy. Postwar intellectual support for deconcentration derived its strength from three sources. The first was *Alcoa*.¹⁷¹ To many observers, *Alcoa* rehabilitated deconcentration possibilities the Supreme Court had foreclosed in 1920 in *U.S. Steel*.¹⁷² Learned Hand's condemnation of *Alcoa*'s capacity expansion strategy,¹⁷³ coupled with the Supreme Court's endorsement of Hand's analysis one year later in *American Tobacco*,¹⁷⁴ inspired an outpouring of legal scholarship advocating new government efforts to use "the new Sherman Act" as a deconcentration

167. See W. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL 1932-1940*, at 148-49, 154-56, 163 (1963).

168. See E. HAWLEY, *supra* note 71, at 325-43; J. LASH, *FROM THE DIARIES OF FELIX FRANKFURTER* 52-53 (1975); B. MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION* 152-85 (1982).

169. The formation and operation of the Commission are recounted in E. HAWLEY, *supra* note 71, at 404-19.

170. See TNEC MONOGRAPH No. 38, *supra* note 4, at 84; STAFF OF SENATE TEMPORARY NATIONAL ECONOMIC COMM., 76TH CONG., 3D SESS., *INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER: COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY*, MONOGRAPH No. 21, at 309 (Comm. Print 1940) (written by C. Wilcox) [hereinafter TNEC MONOGRAPH No. 21].

171. *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945); see also *supra* notes 78-81 and accompanying text.

172. *United States v. United States Steel Corp.*, 251 U.S. 417 (1920); see also *supra* notes 65-66 and accompanying text.

173. 148 F.2d at 431.

174. *American Tobacco Co. v. United States*, 323 U.S. 781 (1946). The Court's endorsement of the Hand opinion was important in light of *Alcoa*'s unusual procedural history. Following a trial that included 358 days of hearings and testimony, the district court in 1942 absolved *Alcoa* of liability on all counts. *United States v. Aluminum Co. of Am.*, 44 F. Supp. 97 (S.D.N.Y. 1942). The government appealed, but four members of the Supreme Court recused themselves, denying the Court a quorum to hear the appeal. Congress enacted an emergency measure allowing the final appeal to be taken to the circuit court of appeals in which the trial took place. See 2 S. WHITNEY, *supra* note 4, at 89. By this mechanism, the *Alcoa* appeal was heard by a Second Circuit panel consisting of Learned Hand, Augustus Hand, and Thomas Swan.

device.¹⁷⁵ As its most important feature, *Alcoa's* broad conception of conduct that would constitute monopolization¹⁷⁶ appeared to foreshadow reliance on essentially structural liability standards. This paved the way for the government to establish section two liability in many other industry settings.¹⁷⁷

A second stimulus for renewed interest in deconcentration arose from experience with the Public Utility Holding Company Act of 1935.¹⁷⁸ To many commentators, efforts to implement the statute's dissolution commands demonstrated convincingly that it was possible to execute large-scale antitrust divestitures without dire economic consequences.¹⁷⁹ Positive assessments of the Act's divestitures meshed with the work of scholars such as George Hale, whose reinvestigation of the court-ordered structural remedies in the first era of deconcentration suits concluded that massive, antitrust-mandated reorganizations could be carried out without undue administrative costs or economic dislocation.¹⁸⁰

175. In a representative reaction, Eugene Rostow declared that *Alcoa* and *American Tobacco* "mark the new birth of Section 2." Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567, 577 (1947); see also Levi, *supra* note 66, at 183 ("Today . . . as a result of an increased awareness of the monopoly problem, and as a result of the *Alcoa* and *American Tobacco* decisions we appear to have a new interpretation of the [Sherman] [A]ct, closer probably to its original intention, which can give the act strength against monopolies as such, and also against control by three, four or five corporations acting together."). Rostow's support for broader exploitation of the Sherman Act's deconcentration possibilities proved particularly influential. See Rowe, *supra* note 3, at 1522 & n.64.

176. See *supra* notes 79-80 and accompanying text.

177. Rostow's 1948 book on the petroleum industry said recent cases showed that "the Supreme Court is putting less and less emphasis on conduct which hurts individuals by driving them out of business, or restricting their opportunities, and more and more emphasis on arrangements which result in market control, however benevolently exercised." E. Rostow, *A NATIONAL POLICY FOR THE OIL INDUSTRY* 124 (1948). One year earlier Rostow wrote that:

The old preoccupation of the judges with evidence of business tactics they regarded as ruthless, predatory, and immoral has all but disappeared. We have come a long way towards assimilating the legal to the economic conception of monopoly. We are close to the point of regarding as illegal the kind of economic power which the economist regards as monopolistic.

Rostow, *supra* note 175, at 575.

178. 49 Stat. 803 (1935) (codified as amended at 15 U.S.C. §§ 79a-z (1982)).

179. See, e.g., E. Rostow, *supra* note 177, at 144; Trienens, *The Utility Act as a Solution to Sherman Act Problems*, 44 Nw. U.L. REV. 331, 338-39 (1949) (noting that Utility Act set out standards of size and achieved results demonstrating program's wisdom to affirmatively reduce concentration of economic power). The career of Howard Trienens involved one of the many ironies of Sherman Act deconcentration experience. In the 1949 article, Trienens criticized the failure of antitrust policymaking institutions to exploit the full deconcentration potential inherent in the Sherman Act. He argued that the Public Utility Holding Company Act experience pointed the way toward more expansive applications of divestiture to achieve deconcentration goals. Decades later, Trienens became vice president and general counsel for AT&T and managed the company's legal defense against the Justice Department's ultimately successful effort to restructure the Bell System. See P. TEMIN, *supra* note 6, at 204, 217-76 (discussing Trienens's role in the AT&T litigation).

180. In 1940, Hale wrote that:

whatever doubts may be entertained as to the efficacy of dissolutions of the past, it seems clear that the mechanics of separating monopolistic combinations, in the degree of "atomization" heretofore attained, has not presented insuperable problems. Thus it is difficult to prove that more vigorous dissolution would be disastrous from the point of view of the technique of separating productive assets.

The third source of support for a new round of deconcentration initiatives came from an emerging branch of economic scholarship in industrial organization.¹⁸¹ Though other scholars made important contributions,¹⁸² the economics faculty of the University of Chicago supplied the principal economic foundation for the new deconcentration movement.¹⁸³ From the 1930s through the early 1950s, Chicago academicians such as Frank Knight, Henry Simons, Jacob Viner, and George Stigler developed economic arguments for expanded attacks on bigness.¹⁸⁴ These economists influenced the thinking of young legal scholars such as Ward Bowman, who argued that modern economic learning justified a presumption of illegal monopoly power for firms with market shares as low as ten to fifteen percent.¹⁸⁵

Taken as a whole, the revival of deconcentration thinking in the 1930s and 1940s strongly reflected elements of the Brandeisian view of economic

Hale, *Trust Dissolution: "Atomizing" Business Units of Monopolistic Size*, 40 COLUM. L. REV. 615, 631-32 (1940).

181. See E. HAWLEY, *supra* note 71, at 292.

182. See generally G. STOCKING & M. WATRINS, *MONOPOLY AND FREE ENTERPRISE* (1951) (encouraging more extensive antitrust enforcement to control dominant-firm conduct); Adams, *supra* note 4 (advocating greater use of monopolization suits to restructure dominant firms); cf. Oxenfeldt, *Monopoly Dissolution: A Proposal Outlined*, 36 AM. ECON. REV. 384 (1946) (disfavoring dissolution of production facilities and proposing creation of additional "independent" selling entities to sell output of concentrated producers).

183. It is one of the historical ironies of antitrust that the "Chicago School" today commonly is associated with the view that "competition is prevalent and market dominance is weak, short-lived and often beneficial." Shepherd, *Three 'Efficiency School' Hypotheses About Market Power*, 33 ANTITRUST BULL. 395, 396 (1988) (footnote omitted). The transition from the early Chicago trustbusting tradition—most closely associated with the work of Henry Simons—to its later, better known efficiency perspective—built substantially upon the thinking of Aaron Director—is traced in *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970*, 26 J. L. & ECON. 163 (1983) [hereinafter *Fire of Truth*] (panel discussion); see also G. STIGLER, *supra* note 127, at 166-70 (describing influence of Henry Simon and change in perspective fostered by Aaron Director and Milton Friedman); Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 932-48 (1979) (describing content of modern Chicago School antitrust analysis).

184. Stigler observed in his memoirs that "Until the 1950s I accepted the prevailing view of my profession that monopoly was widespread. . . . I was an aggressive critic of big business." G. STIGLER, *MEMOIRS OF AN UNREGULATED ECONOMIST* 97 (1988). Stigler added that in 1950 he "believed monopoly posed a major problem in public policy . . . and that it should be dealt with boldly by breaking up dominant firms and severely punishing businesses that engaged in collusion." *Id.* at 99. In recounting his advocacy in the early 1950s for the dismantling of U.S. Steel, which held 30% of the market, Stigler explained: "Economists (including me) generally believed that this level of industry concentration [four-firm steel industry concentration ratio of 60%] allowed a substantial amount of noncompetitive behavior, but the belief rested more upon consensus than upon evidence." *Id.* at 99-100. The consensus to which Stigler referred built substantially upon the work of Simons, who proposed far-reaching programs of deconcentration. See H. SIMONS, *ECONOMIC POLICY FOR A FREE SOCIETY* 81-83, 246-49 (1948).

185. See Bowman, *Toward Less Monopoly*, 101 U. PA. L. REV. 577, 589, 641 (1953); see also *Fire of Truth*, *supra* note 183, at 182 (acknowledgment by Ward Bowman of how Henry Simons's views on deconcentration influenced Bowman's work). Bowman was a research associate at the University of Chicago Law School when his article appeared in 1953. As was the case of mentors such as Levi and Stigler, Bowman's views toward concentration changed dramatically in the late 1950s and early 1960s. See Bork & Bowman, *The Crisis in Antitrust*, 65 COLUM. L. REV. 363 (1965) (advocating retreat from antitrust doctrines and enforcement approaches that promote economic decentralization at expense of efficiency).

concentration.¹⁸⁶ In purely economic terms, a program to dismantle dominant firms and concentrated market structures promised substantial improvements in performance with little danger of destroying valuable efficiencies. Eugene Rostow wrote in 1947 that "[t]here is a great deal of evidence, in fact, that on the whole Big Business is less efficient, less progressive technically, and relatively less profitable than smaller business."¹⁸⁷ Deconcentration "would not in any sense represent a turning back to the horse and buggy days in technology and business organization," but rather would help "eliminate the wastes, the non-use of capacity, and the restrictionism of monopolistic industrial organization."¹⁸⁸

Equally important were the political returns to a program to restore the primacy of smaller scale enterprise. As Rostow explained:

One of the major problems requiring a social decision in our time is whether we achieve a wider dispersal of power and opportunity, and a broader base for the class structure of our society, by a more competitive organization of industry and trade, in smaller and more independent units.¹⁸⁹

The National Recovery Administration's experience revealed the hazards of fostering alliances between big business and large regulatory entities. By contrast, Rostow argued that "it should be easier to achieve the values of democracy in a society where economic power and social status are more widely distributed, and less concentrated, than in the United States today."¹⁹⁰ In a similar vein, Henry Simons maintained that "the compelling

186. Deconcentration thinking in the 1930s and 1940s differed from that of Brandeis in an important respect. Brandeis placed great faith in the power of prohibitions upon specific types of exclusionary conduct to erode and prevent monopoly power. "Diagnosis shows monopoly to be an artificial, not a natural product," Brandeis wrote. "Competition, therefore, may be preserved by preventing that course of conduct by which in the past monopolies have been established." L. BRANDEIS, *Competition*, in CURSE OF BIGNESS, *supra* note 165, at 123-24. By contrast, in deconcentration's second era, authorities such as Rostow and Levi preached the futility of focusing antitrust analysis on searching for and prohibiting exclusionary conduct. See *supra* notes 171-77 and accompanying text; see also Dorsey, *Free Enterprise vs. The Entrepreneur: Redefining the Entities Subject to the Antitrust Laws*, 125 U. PA. L. REV. 1244, 1248 (1977) ("By 1945 it was no longer credible to assume that the centrifugal and centripetal forces of the market would inevitably prevent concentrations so long as the government prevented anticompetitive acts."). Thus, the chief purpose of Sherman Act monopolization litigation should be to identify the existence of monopoly power and to eliminate it directly with structural remedies such as divestiture.

187. Rostow, *supra* note 175, at 568; see also H. SIMONS, *supra* note 184, at 246 ("The efficiency of gigantic corporations is usually a vestigial reputation earned during early, rapid growth—a memory of youth rather than an attribute of maturity. Grown large, they become essentially political bodies, run by lawyers, bankers, and specialized politicians, and persisting mainly to preserve the power of control groups and to reward unnaturally an admittedly rare talent for holding together enterprise aggregations which ought to collapse from excessive size.").

188. Rostow, *supra* note 175, at 568.

189. *Id.* at 569.

190. *Id.* at 570. Other respected academicians such as Edward Levi warned that serious political misfortune would befall the nation if public enforcement agencies did not seize the opportunities *Alcoa* presented. Levi wrote in 1947:

It is doubtful if a free and competitive society can be maintained if the direction of concentration is to continue. . . . If the concentration problem in this country is to be dealt with by measures themselves not incompatible with free enterprise, it is probable that the hope lies in the new interpretation of the Sherman Act and an increased awareness of the responsibility of the courts to give adequate relief.

reason for stamping out private monopoly" was the tendency for monopoly to generate "an accumulation of government regulation which yields, in many industries, all the afflictions of socialization and none of its possible benefits; an enterprise economy paralyzed by political control; the moral disintegration of representative government in the endless contest of innumerable pressure groups for special favors; and dictatorship."¹⁹¹

The third major period of deconcentration activity also rested heavily upon an intellectual consensus supporting efforts to restructure concentrated industries. Two specific events were instrumental in eliciting the mixture of deconcentration litigation and legislation of this period. The first was the 1959 publication of Carl Kaysen and Donald Turner's *Antitrust Policy*.¹⁹² Recognized as the leading synthesis of legal and economic scholarship in antitrust of its time,¹⁹³ the Kaysen-Turner volume called for new legislation mandating the restructuring of concentrated industries.¹⁹⁴ The second major intellectual force of this period was the Neal Task Force,¹⁹⁵ which also recommended the enactment of far-reaching deconcentration legislation.¹⁹⁶ Both the Kaysen-Turner and Neal Task Force proposals rested upon a body of economic literature that suggested a strong positive relationship between concentration and profitability.¹⁹⁷ As debated in antitrust circles, both measures also heavily drew from subsequent studies indicating that a deconcentration program was unlikely to sacrifice significant scale economies or other efficiencies.¹⁹⁸

Levi, *supra* note 66, at 183. Levi later became dean of the Chicago law faculty and headed the Department of Justice during Gerald Ford's presidency.

191. H. SIMONS, *supra* note 184, at 87-88.

192. C. KAYSEN & D. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* (1959). Kaysen and Turner were knowledgeable students of government efforts applying § 2 of the Sherman Act to redress monopoly. Kaysen was a distinguished industrial organization economist and a professor on the Harvard economics faculty. Among other accomplishments, he served as a neutral expert to Judge Charles Wyzanski in *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). His experiences formed the basis for a cogent analysis of the government's efforts to dismantle United Shoe's machine manufacturing monopoly. See C. KAYSEN, *UNITED STATES V. UNITED SHOE MACHINERY: AN ECONOMIC ANALYSIS OF AN ANTITRUST CASE* (1956). Turner held a law degree and a doctorate in economics and was a professor at Harvard Law School. His analysis of the Supreme Court's decision in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956) established him as an authority in the field of Sherman Act jurisprudence. See Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281 (1956). Turner later headed the Justice Department's Antitrust Division from 1965 to 1968.

193. See, e.g., M. HANDLER, H. BLAKE, R. PITOFSEY & H. GOLDSCHMID, *CASES AND MATERIALS ON TRADE REGULATION* 92 (1st ed. 1975); L. SULLIVAN, *supra* note 4, at 15. For an essay on the history of antitrust law that places the contributions of Kaysen and Turner in their intellectual context, see Rowe, *supra* note 3, at 1520-40.

194. See C. KAYSEN & D. TURNER, *supra* note 192, at 110-19, 261-66. "The principal defect of present antitrust law is its inability to cope with market power created by jointly acting oligopolists." *Id.* at 110. Among other sources, Kaysen and Turner's structural policy proposals drew substantially from Joe Bain's influential analysis of entry conditions as determinants of industry performance. See J. BAIN, *BARRIERS TO NEW COMPETITION* (1956).

195. See *supra* notes 94-95 and accompanying text.

196. NEAL TASK FORCE REPORT, *supra* note 94, at 14-15, 65-76.

197. The relevant literature is summarized in Weiss, *The Concentration-Profit Relationship and Antitrust*, in *INDUSTRIAL CONCENTRATION*, *supra* note 143, at 184-272; Phillips, *Market Concentration and Performance: A Survey of the Evidence*, 61 NOTRE DAME L. REV. 1099 (1986).

198. See F. SCHERER, A. BECKENSTEIN, E. KAUFER & R. MURPHY, *THE ECONOMICS OF MULTI-PLANT*

In the late 1960s and throughout the 1970s, proposals for programs to deconcentrate American industry dominated debate over antitrust policy.¹⁹⁹ Broad, though not universal, intellectual support for deconcentration assured the preeminence of market structure issues in antitrust discourse. Although some individuals later abandoned or drastically modified such views, numerous prominent academicians at various times in this period endorsed generic deconcentration legislation. Proposals receiving approval included the Neal Task Force recommendations to restructure industries exceeding certain concentration thresholds;²⁰⁰ measures to reshape specific industries;²⁰¹ the application of "no fault" theories of monopolization liability;²⁰² and more aggressive applications of conventional Sherman Act doctrine and structural remedies to eliminate substantial concentrations of market power.²⁰³

OPERATION: AN INTERNATIONAL COMPARISONS STUDY (1975); Sherman & Tollison, *Public Policy Toward Oligopoly: Dissolution and Scale Economies*, 4 ANTITRUST L. & ECON. REV. 77, 78 (Summer 1971).

199. In 1978 Robert Bork wrote:

Issues of industrial concentration—of monopoly and, more especially, oligopoly—hold center stage in current debates over antitrust policy. They seem likely to prove the main battleground of policy in the coming decade. There are two possible paths to that battleground: The continuing judicial transformation of basic Sherman Act doctrine, or the effort to adopt one of the increasingly serious proposals for new antitrust legislation.

R. BORK, *THE ANTITRUST PARADOX* 163 (1978).

200. Academicians on the Neal Task Force who supported the panel's Concentrated Industries Act recommendation were Phil Neal, William Baxter, William Jones, Paul MacAvoy, James McKie, Lee Preston, and James Rahl. Of the Task Force's representatives from academia, only Robert Bork opposed the deconcentration proposal. NEAL TASK FORCE REPORT, *supra* note 94, at 53. Other academicians who were not members of the Neal Task Force also supported the Neal proposal or similar legislation. See, e.g., Blake, *Legislative Proposals for Industrial Concentration*, in *INDUSTRIAL CONCENTRATION*, *supra* note 143, at 340-60 (supporting deconcentration legislation).

201. See, e.g., J. BLAIR, *THE CONTROL OF OIL* 381-95 (1976) (petroleum industry); L. WHITE, A PROPOSAL FOR RESTRUCTURING THE AUTOMOBILE INDUSTRY, in *Hearings on S. 1167 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 1950-57 (1974) (automobile industry).

202. See 3 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶¶ 614-23 (1978); Flynn, *Do the Proposals Make Any Sense from a Business Standpoint? Pro No-Conduct Monopoly: An Assessment for the Lawyer and the Businessman*, 49 ANTITRUST L.J. 1255 (1980); Fox, *Separate Views of Professor Fox*, in 1 NCRALP REPORT, *supra* note 4, at 339-47; Sullivan, *Separate Views of Commissioner Sullivan*, in 1 NCRALP REPORT, *supra* note 4, at 413-14; Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1217-21 (1969); Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations*, 85 HARV. L. REV. 1512, 1527-30 (1972); Pitofsky, In Defense of 'No-Fault Monopoly' Proposals, Speech before the 20th Annual Law Symposium of the Columbia University Law School (Mar. 31, 1979) (mimeo) (copy on file with the author). See also Dougherty Jr., Kirkwood & Hurwitz, *Elimination of the Conduct Requirement in Government Monopolization Cases*, 37 WASH. & LEE L. REV. 83, 84 n.3 (1980) (noting Professors Phillip Areeda, Walter Adams, Harvey Goldschmid, Louis Schwartz, and Oliver Williamson testified in favor of no-fault measures in 1978 before the National Commission for the Review of Antitrust Laws and Procedures).

203. See, e.g., W. SHEPHERD, *THE TREATMENT OF MARKET POWER: ANTITRUST, REGULATION, AND PUBLIC ENTERPRISE* 215 (1975) (noting "with revised procedures and allied with tax incentives a 'new' Section 2 could be effective"); Baldwin, *supra* note 4, at 150-53 (endorsing mix of structural conduct remedies in Sherman Act litigation to reduce structural barriers to competition); Brodley, *Industrial Deconcentration and Legal Feasibility: The Efficiencies Defense*, 9 J. ECON. ISSUES 365, 370-72 (1975) (discussing treatment of efficiencies in antitrust divestiture

Although important in eliciting a major round of deconcentration measures, the intellectual consensus for intervention was neither stable nor lasting.²⁰⁴ The starkest portent of its disintegration occurred in 1974 in what came to be known as the Airlie House Conference on "the new learning" about industrial concentration. The Airlie House meeting supplied a forum for opponents of structural antitrust analysis to synthesize and highlight a developing body of literature that challenged the underlying economic assumptions of deconcentration policies.²⁰⁵ The results of the conference and related scholarship were seen by many as dictating caution in embracing an aggressive deconcentration agenda.²⁰⁶ Among the most important themes of the "new learning" was that, contrary to the conventional Brandeisian view of bigness, superior performance could, and typically did, account for the attainment and maintenance of large market shares over time.²⁰⁷ Erosion of the underlying theoretical and empirical economic support for deconcentration led many individuals who had supported structural solutions to withdraw their endorsement for expansive monopolization initiatives.²⁰⁸

The Airlie House conference and subsequent academic attacks on the structural model and its policy proposals severely attenuated the intellectual support underpinning the third deconcentration movement. Nonetheless, the deconcentration vision's continuing vitality was apparent as late as 1979 in the work of President Carter's National Commission for the Review of Antitrust Laws and Procedures (NCRALP). Headed by John Shenefield, Carter's Assistant Attorney General for Antitrust, the NCRALP panel proposed that Congress consider amending the Sherman Act to establish a "no-fault" monopolization cause of action to redress instances of persistent monopoly power not attributable to ongoing superior performance.²⁰⁹ The Shenefield Commission also recommended greater recourse to divestiture as a remedy in monopolization suits.²¹⁰ Although many commentators vigorously attacked these recommendations,²¹¹ the NCRALP proposals,

cases); Sherman & Tollison, *supra* note 198, at 90 (recommending efforts to restructure concentrated industries and concluding that, in the absence of scale economies, "there is no need for the public to endure the social and economic burdens associated with the inordinately high levels of industrial concentration found in an important group of American industries").

204. See Rowe, *supra* note 3, at 1540-47.

205. See, e.g., Demsetz, *Two Systems of Belief About Monopoly*, in INDUSTRIAL CONCENTRATION, *supra* note 143, at 164-84 (criticizing antitrust's preoccupation with market concentration and private exclusionary conduct).

206. See F. Scherer, On the Current State of Knowledge in Industrial Economics 4-11 (Aug. 1984) (unpublished discussion paper) (on file with author) (addressing the crumbling of the structure-conduct-performance paradigm on which many deconcentration proposals of the late 1960s and early 1970s rested).

207. For a representative synthesis of this view, see R. Bork, *supra* note 199, at 163-97.

208. See, e.g., Brozen, *The Concentration-Collusion Doctrine*, 46 ANTITRUST L.J. 826, 826-29 & n.8 (1978) (recounting retreat of some commentators from support for deconcentration policies); Panel Discussion, 54 ANTITRUST L.J. 31, 31-33 (1985) (discussing changes in the views of William Baxter, a supporter of the original Neal Task Force deconcentration proposals).

209. See 1 NCRALP REPORT, *supra* note 4, at viii-ix.

210. *Id.* at vi-vii.

211. See, e.g., Bork, *Statement of Robert H. Bork*, 48 ANTITRUST L.J. 891, 893-95 (1979) (disputing benefits of a no-fault monopolization cause of action and identifying costs of a program of dissolution suits); Decker, *Do the Proposals Make Any Sense From a Litigation*

coming amid the collapse of many divestiture initiatives begun in the late 1960s and early 1970s, demonstrated the continuing intellectual pull of deconcentration in the third period of activism.

II. THE FUTURE OF DECONCENTRATION: PROSPECTS FOR REVIVAL

Deconcentration now stands in one of its historical periods of decline. In view of recent experience, one cannot be faulted for concluding that the current dearth of activity is hardly temporary. Sobering enforcement failures such as the *IBM* case,²¹² the ambiguous welfare effects of the AT&T divestiture,²¹³ and the broad acceptance of Chicago School perspectives toward dominant firms all seem to signal the end of the section two government divestiture suit. Frederick Rowe, an experienced antitrust practitioner and student of deconcentration battles past, has said "the antitrust crusade against the concentration of economic power has foundered."²¹⁴

As a matter of positive historical analysis, I believe the burial of deconcentration as a central antitrust concern is wholly premature. Previous deconcentration cycles strongly suggest that the eclipse of the monopolization divestiture case is not lasting. Periods of relative inactivity lasting seventeen and thirteen years, respectively, followed this century's first two deconcentration eras. It has been nearly eight years since the settlement of the government's monopolization suit against AT&T²¹⁵ and the dismissal of the *IBM* case.²¹⁶ Notwithstanding its lowly status today as an antitrust concern, can a resurrection of deconcentration be expected toward the middle or end of the 1990s? I believe the underlying conditions that fueled the three previous eras of deconcentration activity could evoke a fourth—albeit probably a limited—round of government Sherman Act divestiture cases by the end of this century.

Standpoint? Con., 49 ANTITRUST L.J. 1245, 1251 (1980) (concluding adoption of a no-fault cause of action would not streamline monopolization litigation); Leary, *Do the Proposals Make Any Sense From a Business Standpoint? Con.*, 49 ANTITRUST L.J. 1281, 1282-85 (1980) (questioning soundness of structural tests used to trigger liability in no-fault proposals).

212. *United States v. IBM Corp.*, [1961-1970 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,069 (S.D.N.Y. filed Jan. 17, 1969) (complaint alleging monopolization and attempted monopolization). The Justice Department filed a stipulation of dismissal in 1982. See *In re International Business Machs. Corp.*, 687 F.2d 591, 593 (2d Cir. 1982).

213. See P. TEMIN, *supra* note 6, at 353-66. Public perceptions about the net effects of the Bell System divestiture promise to be significant in determining public receptivity to future deconcentration lawsuits. See Baker, *supra* note 20, at 926 (stating AT&T divestiture "has 'antitrust' written all over it. If the public (however wrongly) comes away with the feeling that the whole thing was a major disaster, the resulting political reaction may exact political barriers to future section 2 cases requesting divestiture remedies.").

214. Rowe, *supra* note 3, at 1539 (footnote omitted). Rowe similarly observed that "[o]nce hailed as a Charter of Freedom and an American 'national religion,' antitrust is sinking into decline. Its grandiose crusades against concentration of economic power are over, and a regime of retreat and revision is taking shape." *Id.* at 1512 (footnotes omitted).

215. *United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

216. *In re International Business Machs. Corp.*, 687 F.2d 591 (2d Cir. 1982).

A. Enforcement and Doctrinal Permissiveness

The first historical precondition for a deconcentration revival already has been satisfied. With exceptions, the period since 1981 has featured enforcement policies and doctrines that take a comparatively permissive approach toward evaluating single-firm conduct and horizontal mergers. During past lulls in deconcentration activity, the unwillingness or inability of public enforcement agencies and courts to curb dominant firm behavior, or to impose substantial limits upon horizontal mergers, facilitated the creation of market positions that later became the focus of Sherman Act section two scrutiny.

Tolerance for single-firm conduct and horizontal consolidation characterized federal antitrust enforcement policy during the Reagan Administration. Since 1981, the FTC and the Antitrust Division have disavowed past government enforcement philosophies due to their claimed tendencies to assume that "bigness is bad."²¹⁷ Reagan antitrust officials argued that, among other specific failures, a foolish preoccupation with concentration ratios and a pervasive suspicion toward fundamentally benign or procompetitive business conduct yielded unduly restrictive merger policies and a substantial collection of misconceived monopolization suits.²¹⁸

To reverse these enforcement trends, the Reagan antitrust agencies pledged themselves to apply more permissive merger standards and, with few exceptions, to withdraw the government from the section two enforcement arena.²¹⁹ Measured against this agenda, the Reagan Administration succeeded almost completely.²²⁰ From 1981 through 1988, federal section two enforcement efforts consisted of initiating three new actions²²¹ and settling the *AT&T* case.²²² Placed in historical context, this trio of new cases constituted the smallest number of monopolization and attempted monopolization prosecutions the federal agencies have initiated in any eight-year period since 1900.²²³ In addition to this dramatic retreat in the section two area, the Reagan antitrust agencies substantially loosened horizontal merger enforcement standards.²²⁴

In important respects, the rightward shift of federal enforcement practice has mirrored and reinforced the increasingly conservative tendencies of federal courts since the mid-1970s in deciding cases that deal with

217. See, e.g., REPORT OF THE FTC TRANSITION TEAM, reprinted in 127 CONG. REC. 21,349, 21,350 (1981) (report of Reagan transition team for the FTC).

218. See Kovacic, *Built to Last? The Antitrust Legacy of the Reagan Administration*, 35 FED. B. NEWS & J. 244, 245-46 (1988) [hereinafter *Legacy*]; Kovacic, *Public Choice and the Public Interest: Federal Trade Commission Antitrust Enforcement During the Reagan Administration*, 33 ANTITRUST BULL. 467, 477-78 (1988) [hereinafter *Public Choice*].

219. See Kovacic, *Legacy*, supra note 218, at 245-46.

220. *Id.*; see also Kovacic, *Public Choice*, supra note 218, at 480-81.

221. See *United States v. American Airlines, Inc.*, 743 F.2d 1114 (5th Cir. 1984); *United States v. Kentucky Utils. Co.*, [1980-1988 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,081 (D. Ky. filed Feb. 26, 1981); *AMERCO*, 109 F.T.C. 135 (1987) (consent order). In all of these matters, the government exclusively sought conduct remedies.

222. *United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

223. See Posner, supra note 27, at 405.

224. See Krattenmaker & Pitofsky, *Antitrust Merger Policy and the Reagan Administration*, 33 ANTITRUST BULL. 211, 225-28 (1988).

single-firm conduct. With rare, noteworthy exceptions such as *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,²²⁵ the federal judiciary has given dominant firms increasingly broad discretion to choose pricing, product development, promotion, and distribution strategies.²²⁶ This narrowing of section two liability reflects heightened judicial solicitude for efficiency concerns, particularly dynamic efficiency attributable to innovation.²²⁷ These tendencies have been reinforced since 1981 by Reagan Administration judicial appointments that have accounted for three current members of the Supreme Court and over fifty percent of all federal district and appellate court judges.²²⁸

From all indications, it is reasonable to assume that the Bush Administration will pursue an antitrust agenda similar to President Reagan's.²²⁹ The federal agencies probably will continue to de-emphasize most theories of monopolization and attempted monopolization and will maintain a comparatively tolerant view in reviewing mergers. Moreover, if past patterns repeat themselves, by 1992 President Bush probably will appoint as much as one quarter of the federal judiciary. Most of these appointees are likely to reflect the comparatively conservative antitrust preferences of the Bush Administration. In sum, by 1992, this country will have experienced a twelve-year experiment with enforcement agency policies—and witnessed a somewhat longer trend in conservative judicial analysis—that favor dominant firm discretion and accept substantial increases in concentration by means of horizontal merger.

Past deconcentration experience suggests that these and other Reagan-Bush regulatory policies have planted, or will sow, the seeds for the section two enforcement targets of the late 1990s and beyond. One readily can imagine, for example, future administrations turning the deconcentration lens toward the commercial airline industry—a sector shaped by Reagan Department of Transportation policies that allowed mergers to proceed on the basis of robust assumptions that ease of entry would frustrate output restriction schemes.²³⁰ Dislocations in the international trade arena—for example, the establishment of draconian tariffs or strin-

225. 472 U.S. 585 (1985); see also *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487 (11th Cir. 1988) (departing from recent trend in Sherman Act predatory pricing decisions by emphasizing importance of defendant's subjective intent in evaluating liability under § 2).

226. See Hurwitz & Kovacic, *supra* note 29, at 139-50; see also Liebler, *Whither Predatory Pricing? From Areeda and Turner to Matsushita*, 61 NOTRE DAME L. REV. 1052, 1054-68 (1986) (recounting defendants' success since 1975 in defeating predatory pricing claims).

227. See Kovacic, *Federal Antitrust Enforcement in the Reagan Administration: Two Cheers for the Disappearance of the Large Firm Defendant in Nonmerger Cases*, 12 RES. L. & ECON. 173, 180-81 (forthcoming 1989).

228. See KOVACIC, *THE REAGAN JUDICIARY EXAMINED: A COMPARISON OF ANTITRUST VOTING RECORDS OF CARTER AND REAGAN APPOINTEES TO THE FEDERAL COURTS OF APPEALS* (Washington Legal Foundation Working Paper Series No. 34, Apr. 1989).

229. See, e.g., *Looking Forward: Antitrust in the Bush Administration—Interview with Timothy J. Muris*, ANTITRUST, Spring 1989, at 6, 6 (predicting continuity between Reagan and Bush antitrust policies); Kovacic, *Steady Reliever at Antitrust*, Wall St. J., Oct. 10, 1989, at A18, col. 4 (noting that core elements of Reagan antitrust program probably will be conserved and consolidated).

230. This possibility is suggested in Baker, *supra* note 20, at 925-26; see also Valente & Rose, *Concern Heightens About the Airline Industry's March Toward Near Domination by Only a Few Major Carriers*, Wall St. J., Mar. 10, 1989, at A10, col. 1.

gent import quotas—also could boost the antitrust visibility and perceived market power of large domestic companies whose market significance has been discounted by analytical approaches that define markets in global terms to account for the competitive significance of foreign suppliers.²³¹

*B. The Political Environment and the
Stature of the Business Community*

Of the three formative conditions identified in Section I,²³² the future political environment is the least predictable, yet perhaps the most important. A major resurgence of popular sentiment against large corporations is only as far away as the next business scandal or economic crisis. The specific identity or timing of the triggering events may be unforeseeable, but their recurrence is not a matter of serious doubt. The requisite destabilizing events have occurred often enough in the past to allow confident predictions that they will happen again.²³³

Political upheaval can take at least two basic forms. One is a serious, general economic downturn, occasioned by either a slow decline in growth rates or a sudden shock along the lines of the October 1987 stock market plunge.²³⁴ A second source is highly focused public backlash against a pronounced increase in prices or deterioration in service within a specific industry.²³⁵ In either case, the comparatively permissive regulatory policies of the 1980s will supply an easily grasped collection of perceived causes, and large companies believed to have benefitted from lax government oversight predictably will draw close and hostile attention. One can expect critics of Reagan antitrust enforcement to recommend the realignment of dominant firms or highly concentrated industries to curb the abuses and cure the economic ills associated with policies that welcomed the assemblage and maintenance of substantial market power. Whatever form their

231. Modern analytical trends in accounting for foreign competition in defining relevant markets and measuring market power are discussed in ABA ANTITRUST SECTION, MONOGRAPH No. 12, *HORIZONTAL MERGERS: LAW AND POLICY* 247-54 (1986).

232. See *supra* notes 103-211 and accompanying text.

233. For example, the 1929 stock market crash severely damaged the status of the business community and helped set the foundation for the second deconcentration era. See *supra* notes 69-93 and accompanying text. Though less dramatic, the energy price increases of the early 1970s aroused political pressure that inspired the FTC's shared monopoly suit against the petroleum industry. See Kovacic, *supra* note 108, at 637-39 (describing political forces that shaped the FTC's decision to prosecute the *Exxon* case).

234. From Oct. 13-19, 1987, the stock market fell by 31%, representing a loss of approximately \$1 trillion in the value of all outstanding stocks in the United States. REPORT OF THE PRESIDENTIAL TASK FORCE ON MARKET MECHANISMS 1 (Jan. 1988). A presidential commission later concluded that the October 1987 crash "brought the financial system near to a breakdown." *Id.* at 59.

235. Possible candidates for public wrath could include the airline and cable television industries, both of which are experiencing significant consolidation in the aftermath of statutory and policy changes that relaxed public control of their activities. See Emshwiller, *Prying Open the Cable-TV Monopolies*, Wall St. J., Aug. 10, 1989, at B1, col. 3 (describing growing dissatisfaction with cable television companies); McGinley, *Republicans Grit Their Teeth and Call for Airline Regulation, Citing Higher Fares and Reduced Competition at Big Airports*, Wall St. J., Sept. 21, 1989, at A24, col. 1 (noting dissatisfaction with prices and service in domestic airline industry).

response takes, elected officials and heads of antitrust enforcement agencies are unlikely to ignore the political pressures a grave economic crisis or business scandal would generate.

C. *Intellectual Foundation*

Since the mid-1970s, the center of gravity in antitrust thinking has moved substantially to the right of the ideological spectrum.²³⁶ Propelling this shift has been a body of scholarship that, among other features, promotes the primacy of allocative efficiency as a decisionmaking criterion and rejects nonefficiency concerns as bases for establishing or applying antitrust rules;²³⁷ accords great weight to the "comparative advantage" of market forces, vis-à-vis government enforcement agencies and federal judges, in eroding market power and ensuring acceptable economic outcomes;²³⁸ and attributes the persistence of concentrated market structures chiefly to superior performance.²³⁹ Today these views frequently supply the point of departure for antitrust discourse and find little or no useful role for the Sherman Act as a tool for attacking single-firm exclusionary conduct or "shared" monopolization.²⁴⁰

The strength and direction of a future round of deconcentration initiatives will depend partly on the availability of a competing intellectual vision that commands support for monopolization suits to restructure dominant firms. To rebut the prevailing conservative intellectual orthodoxy in antitrust, proponents of more aggressive section two enforcement are likely to proceed along two lines of attack.²⁴¹ The first will be to look beyond allocative efficiency consequences and build enforcement programs that give heavy emphasis to wealth transfer effects and other nonefficiency concerns.²⁴² In its most expansive form, such an approach would assert that

236. I have traced this development in KOVACIC, *THE ANTITRUST PARADOX REVISITED: ROBERT BORK AND THE TRANSFORMATION OF MODERN ANTITRUST POLICY* (Washington Legal Foundation Working Paper Series No. 32, Feb. 1989).

237. The preeminent statement of this view appears in R. BORK, *supra* note 199, at 50-115 (examining goals of antitrust in light of argument that "responsibility of the federal courts for the integrity and virtue of law requires that they take consumer welfare as the sole value that guides antitrust decisions").

238. This concept has been developed most extensively and cogently in the writing of Judge Easterbrook. See Easterbrook, *Allocating Antitrust Decisionmaking Tasks*, 76 GEO. L.J. 305, 306-07 (1987); Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 14-17 (1984); Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1703-05 (1986).

239. This perspective has drawn support from recent historical studies that explain the emergence of some oligopolistic market structures as a natural consequence of efficiency-enhancing efforts to devise superior managerial systems. See, e.g., A. CHANDLER JR., *supra* note 41, at 484-90; Chandler Jr., *The Coming of Oligopoly and its Meaning for Antitrust*, in NATIONAL COMPETITION POLICY: HISTORIANS PERSPECTIVES ON ANTITRUST AND GOVERNMENT-BUSINESS RELATIONSHIPS IN THE UNITED STATES 61 (Federal Trade Commission 1981).

240. See, e.g., R. POSNER, *supra* note 4, at 94-95 (criticizing deconcentration as a Sherman Act policy goal); Easterbrook, *supra* note 7, at 30 (same).

241. The intellectual basis for a liberal or moderate redirection of antitrust policy is suggested in the published proceedings of the Airlie House Conference on the Antitrust Alternative held in 1987. The papers from the conference are collected in 76 GEO. L.J. 237-346 (1987) and 62 N.Y.U. L. REV. 931-1171 (1987).

242. See, e.g., Lande, *supra* note 133, at 69-70 (concluding Congress' central aim in enacting antitrust laws was to prevent unfair transfers of wealth from consumers to producers); Lande,

the political and social benefits of dispersing economic power deserve substantial weight in framing antitrust policy for concentrated industries.²⁴³

The second intellectual foundation for new deconcentration measures will come from recent literature that accepts the centrality of efficiency concerns but argues that efficiency considerations, properly analyzed, dictate greater efforts to address dominant firm strategic behavior and nonprice predation strategies.²⁴⁴ An efficiency-oriented approach or a philosophy that embraces nonefficiency values also could employ the no-fault monopolization theories developed by commentators such as Phillip Areeda, Donald Turner, and Oliver Williamson and given prominence in the NCRALP recommendations.²⁴⁵ The development of pro-enforcement theories also will draw upon recent empirical studies suggesting that substantial market power exists in some concentrated industries.²⁴⁶

III. LESSONS FOR THE FUTURE

The history of deconcentration initiatives suggests that this country has not seen the end of the section two divestiture suit. To anticipate some recurrence of deconcentration activism, however, is not to predict results that exceed the limited success of earlier trustbusting campaigns. A survey of past experience, particularly the outcomes from the 1969-1982 era, necessarily leads one to ask whether the section two divestiture suit should remain a component of the government's inventory of antitrust tools into the Sherman Act's second century.

As a matter of antitrust theory, the answer is yes. The availability of a monopolization or an attempted monopolization divestiture suit provides valuable symmetry in the modern enforcement landscape for two reasons.

The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust, 33 ANTITRUST BULL. 429, 464-65 (1988) (predicting demise of a single-minded efficiency approach to antitrust policymaking).

243. See, e.g., Curran, *Beyond Economic Concepts and Categories: A Democratic Refiguration of Antitrust Law*, 28 ST. LOUIS U.L.J. 349, 361 (1987) ("Current antitrust theories destroy democratic values and subvert justice to render the current social order politically illegitimate."); Flynn, *The Reagan Administration's Antitrust Policy, 'Original Intent' and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259, 306 (1988) ("the Sherman Act is an expression of basic social and political values to be followed in the private economic sphere").

244. See Encaoua, Geroski & Jacquemin, *Strategic Competition and the Persistence of Dominant Firms: A Survey*, in NEW DEVELOPMENTS IN THE ANALYSIS OF MARKET STRUCTURE 55 (J. Stiglitz & G. Mathewson eds. 1986) (describing effect of strategic investments on market structure); Hilke & Nelson, *Diversification and Predation*, 37 J. INDUS. ECON. 107, 110 (1988) (applying to predatory price analysis notion that sunk costs must be considered in entry decisions); Krattenmaker, Lande & Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 253-64 (1987) (proposing framework for evaluating strategies designed to raise costs of rival firms); Krattenmaker & Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209, 249-53 (1986) (describing use of anticompetitive, exclusionary rights agreement); Smiley, *Empirical Evidence on Strategic Entry Deterrence*, 6 INT'L J. INDUS. ORG. 167, 172-74 (1988) (detailing survey results concerning relative frequency of strategies employed by firms to limit entry into marketplace); Williamson, *Delimiting Antitrust*, 76 GEO. L.J. 271, 289-93 (1987) (identifying objectionable strategic behavior used to eliminate competition).

245. See *supra* notes 202, 209-11 and accompanying text.

246. See Bresnahan, *Empirical Studies of Industries with Market Power*, in 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 1011, 1051-53 (1989).

First, for nearly fifteen years, many commentators across the political spectrum have advocated liability standards that give single firms broad discretion in choosing business strategies, including the choice of pricing, promotion, and product development tactics. This trend primarily originated as a result of an influential article by Phillip Areeda and Donald Turner that proposed the use of an average variable cost test to screen out welfare-reducing predatory pricing claims.²⁴⁷ Widespread judicial and executive acceptance of this and other cost-based predation standards reflects a decision to ensure consumers the benefits of low prices in the short-term at some risk that permissive conduct standards might yield or protect market power over the longer run. The section two divestiture suit supplies a useful form of antitrust insurance if the prevailing wisdom about the extreme unlikelihood of successful predation, whether by price or nonprice strategies, proves incorrect, if only in rare but important instances.²⁴⁸

A second reason to retain the monopolization divestiture suit stems from recent merger enforcement policy. The Reagan Administration loosened the government's standards for reviewing horizontal mergers.²⁴⁹ Not only did the Reagan merger guidelines raise the nominal enforcement thresholds, but the Antitrust Division and the FTC also applied the guidelines' criteria in ways that created even broader zones of discretion for the business community.²⁵⁰ In a number of instances, parties undertaking horizontal transactions benefitted from extremely favorable enforcement agency assessments about the nature of entry conditions.²⁵¹ If recent enforcement policies erred in allowing transactions that ultimately yield genuine market power, the section two divestiture suit affords a valuable means for correction.²⁵²

In principle, there are sensible bases for keeping the section two divestiture suit in the government's antitrust arsenal. In practice, the case

247. Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 716-18 (1975). The significance of the Areeda and Turner article is discussed in Hurwitz & Kovacic, *supra* note 29, at 77-79; Liebler, *supra* note 226, at 1052-57.

248. Areeda and Turner have constructed a single-firm monopolization framework that provides a backstop should their predatory pricing test prove to be excessively permissive. As mentioned above, the two scholars have proposed a no-fault monopolization cause of action that would allow the government to seek the dissipation of substantial, persistent monopoly power without demonstrating that the monopolist engaged in "exclusionary conduct." See 3 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶¶ 614-23 (1978).

249. See *supra* note 224 and accompanying text.

250. See Leddy, *Recent Merger Cases Reflect Revolution in Antitrust Policy*, LEGAL TIMES, Nov. 3, 1986, at 17, col. 1 (showing how Antitrust Division, in practice, has established horizontal merger enforcement thresholds that substantially exceed nominal limits set out in government's guidelines).

251. See, e.g., Echlin Mfg. Co., 105 F.T.C. 410, 487-92 (1985) (relying on ease of entry to dismiss challenge to merger involving postacquisition market share of 46%).

252. Donald Baker has observed the Reagan Administration took "many more chances on horizontal mergers than its predecessors did." Baker, *supra* note 20, at 926. He predicts that "[t]aking some of those chances will likely prove to be clearly wrong, with distasteful monopoly consequences being paraded across the media in at least a few cases." *Id.* It would also be possible to rely on cases such as *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957) to use the Clayton Act's antimerger provisions to strike down a merger whose anticompetitive consequences become apparent some years after the transaction occurs.

for retention is relatively weak. Past deconcentration initiatives repeatedly have fallen victim to one or more of three well-chronicled problems: (1) the government chose the wrong cases or used an ultimately unsupportable theory;²⁵³ (2) the lawsuits took so long that ongoing changes in industry conditions undercut the government's suggested remedial plan;²⁵⁴ and (3) judges declined to order divestiture to remedy adjudicated violations of section two of the Sherman Act.²⁵⁵ Even when the government gains the relief it originally sought, doubts typically surround the divestiture plan's effects. The government's defeats are unmistakable, and its victories partial at best.²⁵⁶

Can one reasonably expect the federal enforcement agencies to do better in the future? Past deconcentration episodes indicate that the future success of federal section two divestiture enforcement will depend chiefly on the capabilities of the enforcement agencies responsible for selecting and adjudicating monopolization cases. If the government's pursuit of monopolization divestiture suits is to improve and serve useful public ends, two institutional prerequisites must be satisfied.

First, the government must recruit and retain skilled professionals, both in management and staff-related positions. Particularly in the third deconcentration era, public enforcement agencies suffered gravely from their inability to acquire and retain the human capital necessary to accomplish tasks vital to a successful deconcentration endeavor. These tasks include developing a theory of liability that is legally and economically sound, choosing appropriate industries and firms for application of the theory, litigating the lawsuit, and presenting a feasible plan for structural relief. Capable professionals who join and remain with the agencies supply the foundations of competence, judgment, and continuity on which a successful section two case is built.

Today there is little evidence that the antitrust agencies can fulfill this requirement.²⁵⁷ At all levels of the FTC and the Antitrust Division, the opportunity costs confronting skilled attorneys are enormous and growing steadily. The GS-11 entry level attorney today receives \$30,000 to \$45,000 less than his counterpart in a private law firm, and the highest antitrust agency official earns about \$81,000—less than the starting wage for a new associate in some major metropolitan areas.²⁵⁸ These massive salary differentials have two consequences: (1) they severely impede the recruitment of top quality attorneys at all levels, and (2) they guarantee a breathtaking

253. See, e.g., *Exxon Corp.*, 98 F.T.C. 453, 460-61 (1981) (complaint dismissed following eight years of pretrial discovery and motions practice).

254. See, e.g., *United States v. Aluminum Co. of Am.*, 91 F. Supp. 333, 416-19 (S.D.N.Y. 1950) (denying government request for divestiture in action brought in 1937).

255. See, e.g., *United States v. American Can Co.*, 230 F. 859, 903 (D. Md. 1916) ("I am frankly reluctant to destroy so finely adjusted an industrial machine as the record shows defendant to be").

256. For illustrations of unmistakable defeats, see *supra* notes 18, 20, 65 and accompanying text. For examples of victories whose net effects are disputed, see *supra* notes 5-7, 93 and accompanying text.

257. I develop this point in Kovacic, *supra* note 227, at 186-92; Kovacic, *Public Choice*, *supra* note 218, at 497-500.

258. See Kerlow, *Keeping a Lid on Associate Salaries*, *LEGAL TIMES*, Aug. 21, 1989, at 9, col. 1.

turnover rate, as attorneys join the agencies with the sole aim of gaining the experience that will launch a more elegant private sector career.

The second institutional prerequisite is to make long-term investments in the development of an analytical infrastructure that ensures good theory development, case selection, and evaluation. This infrastructure requires several ingredients. One of the agency's most valuable assets should be its institutional memory. The Antitrust Division and the FTC need to build new monopolization cases on lessons learned from past experience. For example, the government's inattentiveness to remedial issues has accounted significantly for the dissatisfying results attained in section two cases in which the government prevailed on liability questions.²⁵⁹ In the ideal development of a monopolization suit, Professor Sullivan writes, "[t]he remedy would be neither an afterthought, nor a reward allowed to the trial attorney for winning the lawsuit, but a public policy goal integral to the entire proceeding."²⁶⁰ The accumulated experience from past remedial contests must guide the agencies' development of new proposals for structural relief.

A second necessary infrastructure element consists of ongoing economic analysis of industry conditions necessary to choose candidates for monopolization challenge. The enforcement agencies' economists should perform industry studies that assess the empirical validity of recent economic literature that proposes closer antitrust scrutiny of large firm conduct,²⁶¹ suggest appropriate targets for new cases, and evaluate the effects of completed section two litigation. In the past decade, resource constraints and changes in enforcement ideology have led the agencies—most notably, the FTC's Bureau of Economics—to de-emphasize long-range industry analysis and data collection.²⁶² These developments also appear to have discouraged the agencies from investing in the preparation of ex post evaluations of the effects of completed lawsuits.²⁶³ Programs that take stock of past enforcement episodes and monitor current industry developments are crucial to the intelligent selection of section two targets.

The issue of analytical resources suggests an important paradox that helps to explain the government's weak performance in the section two area. Investments in middle and long-term analytical capabilities tend to generate returns that fall largely beyond the relatively brief tenures of high

259. See L. SULLIVAN, *supra* note 4, at 141-47 (discussing remedies for monopolization and limitations on their effectiveness).

260. *Id.* at 146.

261. See *supra* note 244 and accompanying text.

262. See REPORT OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION, *reprinted in* 58 ANTITRUST L.J. 43, 101-04 (1989). Despite the many criticisms made of the overall purpose and specific features of the FTC's discontinued line of business program, I share the view of commentators such as Professor Baxter that the Commission has an important part to play in collecting line of business or similar data as a tool for assessing appropriate policy toward dominant firms. See Baxter, *How Government Cases Get Selected—Comments from Academe*, 46 ANTITRUST L.J. 586, 590-91 (1977).

263. For two examples of this type of analysis, see P. HUBER, *supra* note 19; FEDERAL TRADE COMMISSION, IMPACT EVALUATIONS OF FEDERAL TRADE COMMISSION VERTICAL RESTRAINTS CASES (Aug. 1984).

level agency officials, who would prefer to invest in projects they can more readily appropriate. The initiation of a major section two case, on the other hand, presents the agency's leadership with an accomplishment for which credit can be claimed when the political environment rewards such action. Thus, the incentives that influence enforcement agency leadership elicit section two cases when the political climate is right, but they fail to generate investments in the institutional infrastructure necessary to ensure that these initiatives will succeed.²⁶⁴

Today, the federal enforcement agencies suffer fundamental, growing weaknesses in both their human capital and their analytical infrastructure. These conditions have several important implications for the prosecution of structural cases. They diminish one's confidence that the enforcement agencies will avoid excessive false positives in case selection. They also raise serious doubts about the government's ability to bring structural lawsuits to a timely conclusion.²⁶⁵ In short, until the necessary institutional conditions are established, the government is unlikely to improve upon the weak results of past deconcentration endeavors. Unless the institutional preconditions for success are satisfied, there is no useful social purpose to be served by greater recourse to the section two divestiture suit.

IV. CONCLUSION

Gilbert Montague was one of the first members of the private bar to gain wide renown for his mastery of antitrust law. Montague wrote extensively on antitrust topics, and in 1932 he commented on proposals to revise the Sherman Act. Antitrust enforcement at the time was moribund, but Montague focused on what he believed to be its unusual recuperative powers. He wrote that

[o]ne of the peculiarities of the Sherman Act is the frequency with which, under expanding interpretations of the Supreme Court, the Act has successively been found to be amply effective to accomplish one after another of most of the things that economists, publicists, and even several Presidents of the United States at one time or another have assumed were quite beyond the scope of the Act.²⁶⁶

He added that the statute's most remarkable attribute was perhaps that "its periods of greatest growth have always immediately followed the periods when its critics have been most firmly convinced that the Act is hopelessly inadequate."²⁶⁷

In the 1980s government enforcement of the Sherman Act's ban on monopolization fell below levels that prevailed in the early 1930s, when the

264. See Kovacic, *supra* note 227, at 186-92.

265. The long duration of most § 2 litigation (often eight to ten years) routinely exposes government cases to industry change that undercuts both the theory of liability and the underlying premises for the proposed relief. See R. POSNER, *supra* note 4, at 232-36; Baker, *supra* note 20, at 899.

266. Montague, *Proposals for the Revision of the Anti-trust Laws*, in *THE FEDERAL ANTI-TRUST LAWS* 23, 62 (M. Handler ed. 1932).

267. *Id.*

future vitality of the Sherman Act seemed doubtful. Fresh memories of the deconcentration experiences of the 1970s have convinced many that the divestiture suit is a hopelessly flawed instrument of antitrust policy. In many respects it is harder today than it was in the early 1930s to imagine a revival of the section two divestiture action as an important antitrust weapon.

Yet Montague knew some history, and his assessment in 1932 has meaning a half-century later. Three basic features of the country's past deconcentration experiences explain the resilience Montague identified. First, deconcentration constitutes antitrust's cyclical response to eras of permissiveness in the treatment of market power, whether gained through single-firm conduct or through consolidation. Federal antitrust enforcement policy and judicial decisionmaking today confer substantial discretion on dominant firms in their choice of business strategies. Since 1981, the federal enforcement agencies have given firms significantly greater freedom to acquire horizontal rivals. These are the types of policies in which the targets of future deconcentration initiatives have taken root.

Second, deconcentration ebbs and flows with the tides of politics. Ronald Reagan's ideological predecessor in the White House was Calvin Coolidge, whose administration disdained attacks on corporate size and viewed mergers tolerantly.²⁶⁸ "The Coolidge era is usually viewed as a period of extreme conservatism," writes historian William Leuchtenburg, "but it was thought of at the time as representing a great stride forward in social policy, a New Era in American life."²⁶⁹ Less than a year after Coolidge left office, the Depression engulfed this country and destroyed the aura of respect and deference large corporations had enjoyed in the 1920s. The unpredictable, recurring forces of crisis and scandal at any time can unleash the political floods that press public officials to harness large firms. Deconcentration has proven a favored device toward this end.

Third, deconcentration periodically surfaces in an upswelling of ideas that justify policies to redress private monopoly and disperse economic power. Conservative trends in antitrust analysis over the past decade have weakened, but not destroyed, the intellectual base for deconcentration. When the political environment changes, there will be an inventory of theories that policymakers can use to pursue new monopolization initiatives.

The persuasive impact of these intellectual tools likely will be enhanced, because many advocates of the existing conservative orthodoxy reduce them to caricatures and thus fail to address their underlying logic seriously. In 1985 the Deputy Assistant Attorney General for Antitrust told a conference that antitrust analysis "need not be very sophisticated, of course, to determine that such antitrust notions as 'no fault monopolization' have little economic merit and can be explained as merely a knee-jerk reaction to economic success and a suspicion of capitalism."²⁷⁰ Whatever

268. Coolidge, who saw probusiness ideals as a secular creed that inspired the nation's greatest achievements, stated that "[t]he man who builds a factory builds a temple. The man who works there worships there." A. SCHLESINGER, *supra* note 69, at 57.

269. W. LEUCHTENBURG, *supra* note 67, at 201.

270. C. Rule, *Deregulating Antitrust: The Quiet Revolution*, Speech before the 19th New

comfort or appeal one finds in this assessment, it is hardly a satisfying or accurate critique of the no-fault proposals of commentators such as Phillip Areeda, Donald Turner, and Oliver Williamson—scholars not ordinarily associated with a knee-jerk reaction to economic success or a suspicion of capitalism. If the existing orthodoxy eventually gives way to a more activist vision of antitrust policy, complacency and self-congratulation will deserve much credit for the change.

These formative influences yielded three major periods of deconcentration activity and they are likely to converge again in the future to produce a fourth. Past experience supplies scant basis for predicting that the next round of initiatives will improve upon the disappointing results of former deconcentration eras. Why, then, will a new collection of enforcement officials set off to climb a mountain that routinely has conquered its challengers? The answer may be that the durability of the deconcentration impulse ultimately has little to do with realistic expectations that a broad-based program of Sherman Act divestiture suits will dissolve existing aggregations of market power. Its recurring hold on public policy instead derives from its attractiveness as a symbolic outlet for public antipathy toward large corporate size.

One year before he assumed the position that made him history's most famous antitrust enforcer, Thurman Arnold acidly called the antitrust laws a charade that let the country harmlessly express its indignation at the discomfiting but necessary process of economic concentration.²⁷¹ Arnold noted the apparent futility of the dissolution of the Standard Oil Trust in 1911 and observed that "a crusade against the Aluminum Company of America is in the first stages of its long struggle through the courts."²⁷² He explained that "[t]he reason why these attacks always ended up with a ceremony of atonement, but few practical results, lay in the fact that there were no new organizations growing up to take over the functions of those under attack."²⁷³ Arnold added that "the antitrust laws, instead of breaking up great organizations, served only to make them respectable and well thought of by providing them with the clothes of rugged individualism."²⁷⁴

In sum, Arnold concluded that the antitrust laws were "a great moral gesture" and "a most important symbol."²⁷⁵ Their symbolic value inhered in their power to deflect calls for more comprehensive regulatory schemes of lesser utility. Arnold said that some had "founded political careers on the continuance of such crusades, which were entirely futile but enormously picturesque . . ."²⁷⁶ One year later, Arnold launched a grand crusade of his own. Future crusades may prove largely futile, as well, but the powerful symbolic value inherent in the deconcentration vision ensures that other antitrust policymakers will embrace it in the Sherman Act's second century.

England Antitrust Conference 10 (Nov. 8, 1985).

271. T. ARNOLD, *THE FOLKLORE OF CAPITALISM* 207-29 (1937).

272. *Id.* at 220.

273. *Id.*

274. *Id.* at 227.

275. *Id.* at 217.

276. *Id.*