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The Role of Attempt To Monopolize in Antitrust Regulation: An Economic and Social Justification for a New Approach

Joel R. Tew

NOTE

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TABLE OF CONTENTS

I. INTRODUCTION

Contemporary industrial structure and performance clearly demonstrate the inherent conflict within laissez-faire economics

and the free enterprise system.[1] Driven by the desire to maximize profits,[2] the entrepreneur theoretically will produce the optimal quantity of goods and services at prices that will maximize consumer welfare, thereby most efficiently allocating the scarce resources society has at its disposal.[3] The economic process therefore is a dynamic one, with competitive equilibrium achieved only after intense struggle between competitors. Because birth and death of business entities are integral parts of the competitive process,[4] the economic law of behavior is essentially that of any Darwinian society—the survival of the fittest.[5] Therein lies the inconsistency between the means and the end of the competitive process. Although unfettered competition most nearly achieves allocative efficiency, it also may produce increasing concentration of economic power.[6] The resulting market imperfections in turn produce resource misallocation and societal welfare loss.[7] Consequently, to the extent

1. In theory the conflict originated with the classical formulation of free enterprise. *See* J. MILL, PRINCIPLES OF POLITICAL ECONOMY (1848); A. SMITH, THE WEALTH OF NATIONS (1776). The conflict became a reality with the advent of the Industrial Revolution, and it has become a dominant theme in the economics of the twentieth century. For a contemporary treatment of this and related problems in industrial organization, see F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND PERFORMANCE (1970).

2. Although some economists have questioned the efficacy of the profit motive as the driving force of the competitive process, it remains the most acceptable characterization of the behavioral catalyst within the individual entrepreneur. *See generally* Gellhorn, *An Introduction to Antitrust Economics,* 1975 DUKE L.J. 1. A competing theory is the constrained sales maximization model, the latest version being developed in W. BAUMOL, BUSINESS BEHAVIOR, VALUE AND GROWTH (rev. ed. 1967).

3. Classical theorists were fascinated with the mystical process by which the "invisible hand" of capitalism harmonized the efforts of individual entrepreneurs. *See* SMITH, *supra* note 1. More elahorate price theory has since evolved to demystify the workings of the invisible hand. *See, e.g.,* A. MARSHALL, PRINCIPLES OF ECONOMICS (3d ed. 1895); G. STIGLER, THEORY OF PRICE (1952).

4. Freedom of entry and exit is essential to the maintenance of competitive market equilibrium. In order to prevent supernormal profit in the long run, firms must he able to enter an industry quickly when others in the market are earning a profit above the normal rate of return. The entry of profit-seeking firms, in turn, increases industry supply and hence drives price back down to the equilibrium level. Conversely, when price falls below the long run equilibrium point, the least efficient firms will be driven out of the industry. As firms leave, supply decreases, and prices once again rise to the competitive level. *See* Gellhorn, *supra* note 2, at 15-19.

5. *See* C. DARWIN, THE ORIGIN OF SPECIES (1848). For a discussion of Social Darwinism and its effect on the problem of monopoly, see H. THORELLI, THE FEDERAL ANTITRUST POLICY 108-63 (1955).

6. The classical view necessarily produces victors in the competitive process. Scale economies and market imperfections have combined to prevent the replenishment of competitors, and concentration ratios and profits have risen accordingly. *See* J. BAIN, BARRIERS TO NEW COMPETITION (1956); Bain, *Relation of Profit Rate to Industry Concentration: American Manufacturing, 1936-40,* 65 Q.J. ECON. 293 (1951). *But cf.* H. DEMSETZ, THE MARKET CONCENTRATION DOCTRINE (1973) (questioning the earlier industry concentration studies).

7. *See* Gellhorn, *supra* note 2; Kamerschen, *The Economic Effects of Monopoly: A*

that unfettered competition tends toward concentration of power and misallocation of resources, the competitive process is self-destructive, and when monopoly or oligopoly emerge the costs to society outweigh the benefits.[8]

Under the direction of the antitrust laws,[9] the private plaintiff[10] and the government[11] share responsibility for controlling the competitive process, but the ultimate determination rests with the court. Given broad discretion by the original legislation[12] and little guidance by subsequent enactments,[13] the federal courts have fashioned a common law of antitrust designed to preserve the otherwise inherently destructive competitive system.[14] In the development of antitrust law, no area has produced more disagreement among jurists and commentators than the attempt to monopolize proscription of section two of the Sherman Act.[15] While the traditional view

Lawyer's Guide to Antitrust Economics, 27 MERCER L. REV. 1061 (1976). *But cf.* Boulding, *In Defense of Monopoly*, 59 Q.J. ECON. 524 (1945) (presenting the positive economic effects of monopoly).

8. Some economists contend, on the other hand, that monopoly produces a net benefit. *See* J. SCHUMPETER, THE THEORY OF ECONOMIC DEVELOPMENT (1934). Schumpeter focuses on the creative benefits of monopoly and concludes that monopoly may be justified by the added incentive to innovate. The process by which individual competitors are destroyed is therefore one of "creative destruction." *See also* Markham, *Market Structure, Business Conduct, and Innovation*, 55 AM. ECON. REV. 323 (1965).

9. The principal statutes considered here are the Sherman Act, 15 U.S.C. §§ 1-7 (1970), Clayton Act, 15 U.S.C. §§ 12-27 (1970), and Federal Trade Commission Act (FTC Act), 15 U.S.C. §§ 41-58 (1970).

10. Clayton Act §§ 4, 16, 15 U.S.C. §§ 15, 26 (1970).

11. Clayton Act §§ 4A, 15, 15 U.S.C. §§ 15a, 25 (1970); Sherman Act § 4, 15 U.S.C. § 4 (1970). Only the government may bring an action to prohibit unfair competition under the FTC Act. Federal Trade Commission Act § 5, 15 U.S.C. § 45 (1970).

12. *See* Part II(A) *infra.*

13. Congress has enacted relatively few amendments to the principal antitrust statutes. The substantive offenses of both § 1 and § 2 of the Sherman Act, for example, are identical to the original version. The only significant alteration was the exception for state fair trade under § 1, which Congress since has repealed. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (repealing Miller-Tydings and Maguire Acts effective March 11, 1976).

14. A substantial body of opinion contends that economic efficiency is not the only goal of antitrust. *See* Part II *infra. See generally* THORELLI, *supra* note 5.

15. 15 U.S.C. § 2 (1976) provides in relevant 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 . . . ." *See* Blecher, *Attempt to Monopolize Under Section 2 of the Sherman Act: 'Dangerous Probability' of Monopolization Within the 'Relevant Market,'* 38 GEO. WASH. L. REV. 215 (1969); Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 MICH. L. REV. 373 (1974); Hawk, *Attempts to Monopolize—Specific Intent as Antitrust's Ghost in the Machine*, 58 CORNELL L. REV. 1121 (1973); Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281 (1956); Note, *Attempt to Monopolize Under the Sherman Act: Defendant's Market Power as a Requisite to a Prima Facie Case*, 73 COLUM. L. REV. 1451 (1973).

inextricably tying the attempt offense to the completed offense of monopolization still prevails, divergent but significant plaintiffs' theories and judicial pronouncements in the lower courts are challenging that view.[16]

The first reason for the pending controversy is the difficult conceptual problems presented by the attempt offense when analyzed from the perspective of the means-end conflict of the competitive process. Should the attempt offense relate only to the end of the competitive process—allocative efficiency—and therefore remain bound to the monopolization offense, or should the attempt offense cover the means of the competitive process—unfettered competition—and therefore constitute an offense independent from actual monopolization? Moreover, the economic basis for the attempt offense may not be the only relevant concern. The following more fundamental issues arise: what economic theory applies, and does that theory converge with the political and social values underlying antitrust regulation?[17] Finally, the concepts borrowed from the criminal law of attempt[18] make a determination of the proper role of attempted monopoly even more difficult. Do concepts of criminal attempt have a place in antitrust analysis, and if so, are they consistent with the economic goals of the competitive process?[19]

The impractical economics of antitrust litigation are the second reason for the present controversy. Because the antitrust litigant faces prohibitive costs, any new conceptualization of the attempt offense might have a significant effect on the settlement value of the case. Without proper safeguards a pro-plaintiff standard[20] encourages settlement of nonmeritorious claims. On the other hand, the courts should not ignore the common defense tactic of outspending

16. *See* Part V *infra.*

17. *See* Part III *infra.*

18. Justice Holmes, relying on a criminal case he had decided earlier in his judicial career, Commonwealth v. Peaslee, 177 Mass. 267, 272, 59 N.E. 55, 56 (1901), adapted criminal doctrine into attempts to monopolize in Swift & Co. v. United States, 196 U.S. 375 (1905):

> Intent . . . is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen . . . . But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.

Id. at 396.

19. *See* Note, *Attempt to Monopolize: The Offense Redefined,* 1969 UTAH L. REV. 704 (criticizing the application of criminal concepts to attempted monopoly).

20. *See, e.g.,* Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964); Blecher, *supra* note 15.

less resourceful plaintiffs who file meritorious claims.[21]

Despite the significant conceptual and practical problems warranting resolution, the Supreme Court has refused to answer definitively the questions posed by the lower court controvery.[22] Last term the Court once again denied certiorari in cases in which the litigants sought delineation of the required elements of the attempt offense.[23] The Court should review the attempt issue not only because lower courts cannot agree on the subject but also because judicial formulation of attempt standards suffers from a dearth of economic analysis. Moreover, review of the attempt offense should include reevaluation of the scope of antitrust policy, the reach of the present law, and the proper role of attempted monopoly within the competitive framework.[24] Successful formulation of a legal standard for attempted monopoly depends on the Court's ability to resolve the underlying economic and social policy questions.

II. ANTITRUST POLICY

Legal principles are valid only to the extent they accurately reflect the values of the society they are to govern. Inadequate formulation of normative antitrust values has contributed directly to the attempt to monopolize controversy.[25] The judiciary has developed the legal structure of the attempt offense without first ascertaining the values that give validity to the legal terms and determining the purpose that the legal principles are to serve.[26] The initial step, therefore, is to rethink the standards that should govern the competitive process, and after identifying and evaluating the relevant values, to fix a meaningful target at which the antitrust arsenal should aim.

A. Legislative and Judicial Treatment of Purpose

Although the courts have placed little reliance on the legislative

21. The problem becomes particularly acute when, as in antitrust litigation, massive pretrial discovery sharply increases the costs to both parties.

22. *See* Part V(A) *infra.*

23. Bravman v. Bassett Furniture Indus., Inc., 552 F.2d 90 (3d Cir.), *cert. denied,* 98 S. Ct. 69 (1977); Pacific Eng'r & Prod. Co. v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir.), *cert. denied,* 98 S. Ct. 234 (1977).

24. *See* Parts II(B)-(C) *infra.*

25. The courts have made no serious inquiry into the peculiar underlying values affected by various formulations of attempt doctrine. For a general discussion of antitrust policy, see Turner, *The Scope of Antitrust and Other Economic Regulatory Policies,* 82 HARV. L. REV. 1207 (1969).

26. Part of the problem is attributable to the failure to recognize that the emerging industrial and social structure has altered values. *See* Part II(C) *infra.*

history of the Sherman Act in interpreting its substantive provisions,[27] the concerns that prompted its passage obviously are relevant to a contemporary understanding of antitrust policy.[28] The original resolution introduced by Senator Sherman demonstrates the drafters' primary concern with preserving "freedom of trade and production."[29] Moreover, the economic values articulated by Senator Sherman maintained vitality throughout the ensuing debates and the ultimate passage of the Act.[30] On the other hand, social and political values apart from the drafters' faith in classical economic theory provided equal, if not stronger, impetus for the antitrust movement. The proponents objected to the trust primarily because it created a disturbance in the social order.[31] The trust also bore obvious resemblance to the political autocrat[32] since economic

27. *See* Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921) (limiting the use of congressional debates on the Sherman Act); Standard Oil Co. v. United States, 221 U.S. 1 (1911).

28. Justice Reed relied heavily on congressional purpose in United States v. Columbia Steel Co., 334 U.S. 495 (1948):

> It is not for courts to determine the course of the Nation's economic development. Economists may recommend, the legislative and executive branches may chart legal courses by which the competitive forces of business can seek to reduce costs and increase production so that a higher standard of living may be available to all. The evils and danger of monopoly and attempts to monopolize that grow out of size and efforts to eliminate others from markets, large or small, have caused Congress and the Executive to regulate commerce and trade in many respects . . . . The very broadness of terms such as restraint of trade, substantial competition and purpose to monopolize have placed upon the courts the responsibility to apply the Sherman Act so as to avoid the evils at which Congress aimed.

Id. at 526. *See also* THORELLI, *supra* note 5, at 164-214.

29. 19 CONG. REC. 6041 (1888).

30. *See* THORELLI, *supra* note 5, at 166-210. The original resolution was consistent with the classical economic views of its time. The first antitrust bill introduced by Senator Sherman likewise reflects the economic goal to advance "full and free competition." *See* BILLS AND DEBATES IN CONGRESS RELATING TO TRUSTS, S. DOC. No. 147, 57th Cong., 2d Sess. 7 (1903).

31. In his major speech in support of the proposed antitrust legislation, Senator Sherman emphasized:

> The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition. These combinations already defy or control powerful transportation corporations and reach State authorities. They reach out their Briarean arms to every part of our country. They are imported from abroad. Congress alone can deal with them, and if we are unwilling or unable there will soon be a trust for every production and a master to fix the price for every necessity of life.

21 CONG. REC. 2460 (1890).

32. Senator Sherman criticized the trust by comparing it with political tyranny:

> If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to

power provided the means for attaining political power. Senator Sherman expanded the political analogy when he labeled the proposed legislation a "bill of rights" and a "charter of liberty,"[33] clearly indicating an intent to preserve free competition not only for the sake of economic efficiency but also for the paternal benefit of the less powerful economic interests.

The judicial analysis of Sherman Act purpose and policy reflects an understanding of similar values. In *Northern Pacific Railway Co. v. United States*[34] the Court acknowledged the close relationship between the economic, political, and social goals of antitrust:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.[35]

An appreciation of social and ethical values that cannot be attributed directly to the purpose of promoting economic efficiency permeates the opinions. Values including "equality of opportunity,"[36] protection from "subversive or coercive" influences of monopoly,[37] and a fear of "collective power"[38] demonstrate that Congress in-

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prevent competition and to fix the price of any commodity.
Id. at 2457.

33. *Id.* at 2456-62. See also the remarks of Senator Pugh, citing the promotion of freedom and fairness of competition as the public policy to be furthered. *Id.* at 2558-59.

34. 356 U.S. 1 (1958).

35. *Id.* at 4. Other formulations of the economic goals of the Sherman Act use slightly different terms, but the common thread of securing competition runs throughout. *See, e.g.*, Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940) (prevent restraints to free competition in business and commercial transactions); United States v. Reading Co., 253 U.S. 26, 59 (1920) (secure competition and preclude practices that tend to defeat it); United States v. Union Pacific R.R., 226 U.S. 61, 82 (1912) (preserve free action of competition); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 337 (1897) (the law of free and unrestricted competition is the controlling element in the business world). For a judicial discussion of the political and social aspects of antitrust, see United States v. Columbia Steel Co., 334 U.S. at 535-36 (Douglas, J., dissenting).

36. *See* Charles A. Ramsey Co. v. Associated Bill Posters, 260 U.S. 501, 512 (1923): "The fundamental purpose of the Sherman Act was to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade." *See also* United States v. American Linseed Oil Co., 262 U.S. 371 (1923).

37. Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359 (1933).

38. The Court persistently has recognized the importance of individual enterprise and sagacity as an essential component of the classical competitive process. *See, e.g.*, United

tended to terminate great aggregations of capital in order to alleviate the helplessness of the individual.[39] Even the *Alcoa* decision,[40] the first sophisticated treatment of the economic issues of antitrust and the pillar of contemporary monopolization law, emphasized the noneconomic values to be considered in applying the Sherman Act:

> We have been speaking only of the economic reasons which forbid monopoly; but, as we have already implied, there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results. . . . Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.[41]

B. Competing Policy Perspectives on Antitrust

The description of the Sherman Act as a "charter of liberty"[42] has sparked a debate that emanates from the self-destructive nature of the free enterprise system.[43] The vacillation of economic policy between preservation of competition and protection of competitors[44] reflects the inherent conflict between the allocative goals of the competitive process and the political and social consequences of unrestrained competition. The attempt offense is significant because it places stark emphasis upon these competing antitrust values. In virtually every attempt case the court must endeavor to harmonize economic efficiency with conduct that is socially, politically, or ethically undesirable.[45] The extent to which attempted monopoly draws the conflicting values into opposition explains why the courts have had great difficulty in formulating attempt standards.

One side of the debate advocates the economic goal of efficiency to the exclusion of all social, political, and ethical considerations[46]

States v. Line Material Co., 333 U.S. 287 (1948); Associated Press v. United States, 326 U.S. 1 (1945).

39. 1 H. TOULMIN, ANTITRUST LAWS OF THE UNITED STATES 108 (1949).

40. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

41. *Id.* at 428-29. The legislative history of the Sherman Act supports Judge Hand's observation: "If the concerted powers of this combination are intrusted to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the State and national authorities." 21 CONG. REC. 2457 (1890).

42. *See* note 33 *supra* and accompanying text.

43. *See* notes 1-8 *supra* and accompanying text.

44. *See* Bork & Bowman, *The Crisis in Antitrust*, 65 COLUM. L. REV. 363 (1965).

45. *See, e.g.*, Union Leader Corp. v. Newspapers of New England, Inc., 180 F. Supp. 125 (D. Mass. 1959), *aff'd in part and rev'd in part*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961). *See generally* Turner, *supra* note 15.

46. *See* Bork & Bowman, *supra* note 44, at 370 (labeling Judge Hand's *Alcoa* statement as "dubious, and indeed radical, social policy").

and labels as "protectionist"[47] the acknowledgment of any noneconomic value. According to this view such values represent an anticompetitive strain that has produced a contemporary crisis in antitrust.[48] Professor Posner[49] has joined this faction and has concluded that the single goal of antitrust law should be to promote efficiency in the economic sense.[50] The other side of the debate takes the position that antitrust law cannot be defended solely on the basis of economics.[51] Instead, this side views antitrust as having a significantly broader base, including, in addition to economic efficiency, the goals of minimal political interference and the advancement of individual liberty and opportunity.[52]

C. *The Convergence of Economic and Noneconomic Values*

Both sides to the debate implicitly assume that the economic and noneconomic values of antitrust law necessarily conflict. Although the social or political values occasionally tend to contradict the goal of economic efficiency, the sociopolitical values more often support the economic values espoused by the antiprotectionists.

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47. *Id.* at 364.

48. *Id.* at 375-76. *See also* Bork, *Contrasts in Antitrust Theory: I*, 65 COLUM. L. REV. 401 (1965); Bowman, *Contrasts in Antitrust Theory: II*, 65 COLUM. L. REV. 417 (1965).

49. Richard A. Posner is a Professor of Law at the University of Chicago Law School.

50. R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 8-22 (1976). Professor Posner initially analyzes the economic basis of antitrust and then discounts three sociopolitical objections to monopoly. First, he concludes that the argument against the monopoly wealth transfer from consumers to producers loses force since consumers' losses will not remain with producers but instead will be dissipated in the activity of becoming a monopolist. *Compare* this conclusion *with* Part III *infra*. Second, he finds the evidence that amalgamation of economic power bears a direct relation to political power inconclusive. Finally, Professor Posner finds populist support of small business to be an unworkable alternative:

> The idea that there is some special virtue in small business compared to large is a persistent one. I am not prepared to argue that it has no merit whatever. I am, however, confident that antitrust enforcement is an inappropriate method of trying to promote the interests of small business as a whole. The best overall antitrust policy from the standpoint of small business is *no* antitrust policy, since monopoly, by driving a wedge between the prices and the costs of the larger firms in the market . . ., enables the smaller firms in the market to survive even if their costs are higher than those of the large firms.

POSNER, *supra*, at 19. For an analysis of Professor Posner's policy as applied to § 1 of the Sherman Act, see Note, *Conscious Parallelism and the Sherman Act: An Analysis and a Proposal*, 30 VAND. L. REV. 1227 (1977).

51. *See, e.g.*, Blake & Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377 (1965).

52. Blake & Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422 (1965). The authors emphasize that the concept of multiple objectives is hardly new to antitrust. Concern over the preservation of self-policing markets, with a view to minimizing the role of government, and over the protection of individuals from oppression and foreclosure of opportunities by economically powerful interests has been prevalent from the inception of antitrust law. *See* Part II(A) *supra*.

Individual liberty certainly plays a key role in the classical economic scheme since the initial step toward optimal resource allocation requires individual determination of output based on each firm's unique cost structure.[53] Freedom of opportunity not only is consistent with notions of allocative or technical efficiency[54] but also is essential to competitive equilibrium. Ease of entry and exit, the means of assuring that entrepreneurs earn no supernormal profit[55] in the long run, necessarily entails encouragement of opportunity for the individual. Finally, populist support for small business is consistent in many instances with the classical concept of economic atomization, for essential to the model of perfect competition is a market composed of many individual firms, each small enough with respect to total industry output that individual output changes have no visible effect on market price.[56]

Because in the abstract noneconomic values exist alongside, and interact with, the economic goals of antitrust, antitrust policy not only should take into account the economic goals of allocative and technical efficiency but also should consider the broader social, political, and ethical values. These noneconomic values include minimizing political interference with the market system, dispersing political power by limiting concentration of economic power, and preserving individual liberty and freedom of opportunity through encouragement of small business. Moreover, a code of moral behavior should operate within the competitive process to establish limits beyond which conduct becomes unacceptable. The promotion of a business ethic to encourage fairness of competition augments the policy base of antitrust. Finally, because concentration of capital leads to inequality of wealth and condition, one of the noneconomic goals should be the promotion of social stability.

No particular analytical problem arises when the efficiency goals and the sociopolitical goals converge. Questions arise instead when the activity has no effect on economic efficiency, so that only the noneconomic values support antitrust regulation;[57] the activity

53. *See* Gellhorn, *supra* note 2.

54. Allocative efficiency refers to the extent that prices accurately reflect relative costs, so that consumer preferences bring about production of the optimal variety and quantity of goods and services. Technical efficiency refers to the proximity of actual cost of production to the lowest possible cost given existing levels and types of output.

55. Supernormal profit is any return to the entrepreneurial factor of production above the normal return required before diversion of resources to an alternative use.

56. *See* Gellhorn, *supra* note 2.

57. This is the case in the typical attempt claim when the defendant's market share is so small that no traditional economic effect is discernible, but conduct is abusive. In the

promotes economic efficiency at the expense of social, political, or ethical values; or the activity promotes sociopolitical values at the expense of economic efficiency.[58] While this Note contends that the courts have overstated the number of cases in which these values diverge,[59] a sound basis exists for acknowledging the noneconomic goals and for occasionally giving them preference over classical notions of economic efficiency when conflicts arise.

One reason for preserving social, political, and ethical values in antitrust analysis is the decreasing credibility of the economic theory upon which efficiency values rest. The structure of the American economy hardly resembles that envisaged by the classical theorists.[60] Economists have contended for over forty years that the efficiency model of perfect competition has no practical application.[61] The divergence between the actual and the theoretical has become so acute that the classical model also has questionable validity as a competitive norm. Similarly, the modern breakthrough in macroeconomic theory already approaches obsolescence. The familiar Keynesian function[62] governing fiscal management has questionable application in an economy whose public sector has overtaken private enterprise.[63] Therefore, although economic efficiency remains a fundamental goal of antitrust, economic theory inadequately explains to the courts how best to achieve that goal. Because the theory lags behind, the courts should pursue more actively the sociopolitical goals that jurists are more competent to achieve.

The structural evolution of American business also justifies the stronger emphasis of noneconomic concerns. The socioeconomic structure of the late nineteenth century, in which entrepreneurs faced each other as discrete and wholly individual units, closely

aggregate, however, there is a social cost attached to this type of behavior. *See* Part III(A) *infra.*

58. *See* Pacific Eng'r & Prod. Co. v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir.), *cert. denied,* 98 S. Ct. 234 (1977).

59. *See* Part III *infra.*

60. *Compare* SMITH and MILL, *supra* note 1, *with* J. GALBREATH, THE NEW INDUSTRIAL STATE (1967) and R. HEILBRONER, BETWEEN CAPITALISM AND SOCIALISM (1970). For an excellent treatment of the entire transition from Adam Smith to the present, see R. HEILBRONER, THE WORLDLY PHILOSOPHERS (4th ed. 1972).

61. E. CHAMBERLAIN, THE THEORY OF MONOPOLISTIC COMPETITION (1932); J. ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION (1934).

62. J. KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY (1936). *See* P. SAMUELSON, ECONOMICS, ch. 11-14 (9th ed. 1973).

63. *See* note 60 *supra.* The proposed federal budget, for example, exceeds $500 billion. N.Y. Times, Jan. 24, 1978, at 13, col. 1. Together with state and local government spending, the public sector clearly dominates the content of gross national product.

resembled "free competition." When Congress adopted the Sherman Act in 1890, the relationship among business entities was one of atomistic opposition.[64] On the other hand, the regulative principle that most accurately characterizes the socioeconomic movement of advanced capitalism is not "free competition" but "stabilizing cooperation."[65] Increasing economic interdependence and the abrupt emergence of public enterprise have transformed the modern economy into an economy predicated on "pluralism."[66] Unlike the individualism brought about by atomization under free competition, pluralism rests on mutual cooperation or moral behavior between potential litigants.[67]

The changing socioeconomic structure, in increasing the mutual interdependence among participants in the competitive process, consequently has altered normative values.[68] To some extent the classical paradox[69] of laissez-faire economics has been resolved by the natural evolution of the competitive process. Radical individualism no longer governs the competitive system. The emerging economic order[70] of cooperation instead is fashioned upon a new moral concept of fairness, a value commensurate with the flexible, interdependent transactions of advanced capitalism.[71]

Antitrust policy makers should not ignore the extent to which political enactments determine economic activity and performance.[72] Reliance upon economic efficiency as the sole purpose of antitrust regulation demonstrates a faulty perception of the American social, economic, and political structure. The broadly based

64. Gabel, Book Review, 91 HARV. L. REV. 302, 309 (1977) (R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977)). *See also* note 5 *supra* and accompanying text.

65. Gabel, *supra* note 64, at 309. For an elaborate treatment of the multiple trends converging on the concept of group interaction, see K. BOULDING, THE ORGANIZATIONAL REVOLUTION (1953).

66. Gabel, *supra* note 64, at 310. Horizontal and vertical integration, diversification, and concentration in industry and labor cause increased interdependence.

67. *Id.* The Uniform Commercial Code, with its fundamental reliance on trade standards of fairness and good faith, provides a prime example of the new emphasis on cooperative or moral behavior. Other examples cited by Gabel include the expansion of strict liability in tort, collective bargaining in labor, administrative arbitration, and equal protection clause litigation. The utilization of risk allocation theory in the vicarious liability field provides another example. *See* Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

68. *See generally* J. RAWLS, A THEORY OF JUSTICE (1967).

69. *See* notes 1-8 *supra* and accompanying text.

70. *See* GALBREATH, *supra* note 60; HEILBRONER, *supra* note 60.

71. Gabel, *supra* note 64.

72. *See* note 63 *supra* and accompanying text. The intrusion of the public sector into the private through tax policy, welfare programs, and direct regulation of trade, health, and safety must be added to tbe public intrusion arising from spending alone.

view of antitrust policy thus more accurately reflects the actualities and the demands of the existing competitive process. Within this framework, the courts should establish two goals. First, they should re-evaluate the contemporary values that society desires antitrust policy to address, taking into account both the new economic structure of society and the shortcomings of economic theory in dealing with that structure. Second, the courts should adopt antitrust standards that conform to contemporary antitrust policy.

III. Conduct and Performance Aspects of Attempt to Monopolize

A. *Anticompetitive Effect of Attempted Monopolization*

The traditional conceptualization of attempt to monopolize gives that offense meaning only as an appendage to, or precursor of, completed monopolization.[73] The only evil arising from an attempt to monopolize when so analyzed is the possibility that monopolization will result.[74] The traditionalists are concerned only with the potential welfare loss associated with monopoly.[75] Attempt to monopolize therefore generates legal concern only if there is a "dangerous probability"[76] that monopolization—and hence welfare loss—will result.

The attempt cases fall into two groups.[77] First are those cases that explicitly acknowledge the dangerous probability requirement and therefore view the attempt provision as no more than a stopgap means of avoiding actual monopolization. Under this view attempted monopoly causes legal concern because it increases the likelihood of monopoly welfare loss.[78] The other group of cases[79] commonly view the prohibition of attempt to monopolize as an end

73. Cooper, *supra* note 15 (discussing attempted monopoly in its "natural role of analogy to completed monopolization"); *see* Part V(B) *infra.*

74. This analysis is due to the borrowed conceptualization from the criminal law. *See* notes 18-19 *supra* and accompanying text. The Court subsequently has applied notions of criminal law to the substantive offenses of § 2. For example, while attempt crimes are generally merged into the completed criminal offense, the Court has held that a defendant may be convicted of both conspiracy to monopolize and actual monopoly for a single transaction. American Tobacco Co. v. United States, 328 U.S. 781 (1946).

75. *See* Gellhorn, *supra* note 2; Kamerschen, *supra* note 7; Siegfried & Tiemann, *The Welfare Cost of Monopoly: An Inter-Industry Analysis,* 12 Econ. Inquiry 190 (1974); Posner, *The Social Costs of Monopoly and Regulation,* 83 J. Pol. Econ. 807 (1975).

76. *See* note 18 *supra. See also* notes 46-50 *supra* and accompanying text.

77. Part V(B)-(C) *infra.*

78. The majority view among the lower courts, discussed in Part V(B) *infra,* rests on this policy basis.

79. *E.g.,* Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964); *see* Part V(C) *infra* (discussing *Lessig* and its progeny).

in itself, independent from any practical or conceptual link with monopolization.[80] None of the cases has justified this departure from the traditional view on economic grounds. A basis exists, nonetheless, to support the developing body of opinion[81] and to give the attempt offense an independent existence in terms of economic efficiency and welfare maximization.

Economists have identified three adverse economic effects of monopolistic resource misallocation. First is the transfer payment from consumers to producers that results from supracompetitive pricing.[82] This transfer, the familiar profit rectangle of the monopolist, results in the loss of part of the surplus consumers would enjoy in a perfectly competitive market.[83] Second, monopoly produces a dead-weight welfare loss,[84] a portion of consumer surplus that is neither captured by consumers nor the monopolist.[85] More recently Posner has identified a third effect[86] that accounts for the opportunity cost of alternatives foregone and resources expended by the would-be monopolist in its effort to establish a monopoly.[87] Quantification of the magnitude of total welfare loss has proved difficult,[88] but the existence of some loss is undisputed.

Attempted monopoly produces economic loss indistingnishable from that of monopoly. Market power is not a discrete, unique characteristic of the monopolistic market, but is instead a continuum that begins the instant market structure diverges from the perfectly competitive model.[89] Attempted monopolization by any individual firm causes a transfer payment from consumers to producers at least

80. The minority views therefore rest on the policy ground that regulation of the means of the competitive process is an appropriate goal in itself. *See* text accompanying notes 16-17 *supra*.

81. *See, e.g.*, Baker, *Section 2 Enforcement: The View From the Trench*, 41 ANTITRUST L.J. 613 (1972).

82. Since the monopolist faces a downward sloping demand curve, the result of its profit-maximizing output and price level (where marginal cost equals marginal revenue) is less output and higher prices than in the competitive market. The extent to which the monopoly price exceeds marginal cost at the monopoly output is therefore one measure of the economic inefficiency caused by monopoly. This loss is approximated by the monopoly profits. Under perfect competition, this portion of the competitive surplus would pass instead to consumers. *See* Gellhorn, *supra* note 2, at 33-35.

83. *Id. See also* SAMUELSON, *supra* note 62, chs. 22-26.

84. Resource misallocation explains why the dead-weight loss results. Given society's preferences, it could increase total utility by shifting resources elsewhere. Consequently, Gellhorn labels this loss the "sinister force" of monopoly. *See* Gellhorn, *supra* note 2, at 35.

85. *See* note 75 *supra*.

86. Posner, *supra* note 75.

87. *Id.*

88. *See* Kamerschen, *supra* note 7; Siegfried & Tiemann, *supra* note 75.

89. *See* P. AREEDA, ANTITRUST ANALYSIS 195, 259 (2d ed. 1974).

in the short run even if the firm does not achieve actual monopolization in the legal sense.[90] At the same time, a dead-weight loss is created when supernormal profits are earned; consequently, attempted monopoly produces a short-run welfare loss. In the aggregate, a series of attempted monopolizations transforms the short-run loss into a long-run dead-weight loss similar to that of actual monopolization. The aggregative loss occurs even if the attempts are undertaken by separate firms or if they occur in unrelated industries. Under dynamic analysis, a series of discrete losses produces a fixed, concrete welfare loss in the long run. While the dead-weight loss from any single attempt that proves unsuccessful may be negligible, the total loss of such attempts in the long run may prove substantial. Therefore, in view of the economics of market power, attempted monopoly and actual monopolization logically are identical under long-run analysis.[91]

Application of the opportunity cost concept[92] to the attempted monopoly setting is even more striking. The resources utilized by potential monopolists in attempting to achieve monopoly constitute a welfare loss whether or not the would-be monopolist is ultimately successful. As a result of these expenditures, the opportunity cost of foregone alternatives is a welfare loss attributable to attempted monopoly as well as to achieved monopoly, and the extent of the loss is analytically independent from the completed offense itself. Consequently, prohibition of attempted monopolization is logically defensible from the economic perspective. Moreover, the economic inefficiency produced is not dependent upon the loss traditionally associated with actual monopolization. The minority conceptualization of attempted monopolization as a self-contained phenomenon independent from the monopoly offense is therefore justifiable in economic terms.

Economic analysis of attempted monopolization thus isolates the same three anticompetitive effects produced by actual monopoly—the transfer payment, the dead-weight loss, and the opportunity cost. Each variable, however, operates independently in the attempted monopoly setting, and most cases will require separate

90. There is no logical reason why the judicially imposed brand of monopoly power has to fall at 70% market share. Supracompetitive pricing certainly can occur below that level. While the *Alcoa* rule of thumb may be an expedient policy tool, it cannot serve to disprove the anticompetitive pricing that may occur with lower market share. *See* text accompanying notes 202-03 *infra*.

91. Professor Scherer emphasized the importance of long-run analysis in the antitrust field in *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869 (1976).

92. *See* notes 86-87 *supra* and accompanying text.

evaluation of each variable before the overall competitive effect appears. For example, the transfer payment and dead-weight loss components tend to vary directly with the proximity to actual monopoly. The larger the market share—and hence the closer to "monopoly power" in the legal sense—the larger the quantitative effect of the transfer payment and the dead-weight loss. On the other hand, in most cases the opportunity cost variable will increase in magnitude the farther the would-be monopolist is from attaining monopoly status, since the defendant must expend more resources in order to transverse a longer portion of the market power continuum.

In practice the opportunity cost component of attempted monopoly welfare loss appears to be the largest in magnitude. For instance, when the nonmonopolist engages in predatory pricing, no transfer payment or dead-weight loss arises in the short run since the price actually is set *below* the competitive level. While the predatory price cutter anticipates sufficient long-run gain to overcome the short-run loss, that anticipated gain will not arise until the price cutter acquires sufficient market power to charge a supracompetitive price. Often the price cutter will reach legal monopoly status first, so that the transfer payment and dead-weight loss are monopoly consequences; the attempted monopoly itself produces no comparable loss. Even in this setting, however, the opportunity cost component acts to detect a significant attempted monopoly welfare loss. The resources consumed by the price cutter and the opportunities foregone during the predatory pricing campaign are therefore independent social welfare losses that justify proscription of predatory pricing by the nonmonopolist.

A similar example demonstrates that attempted monopoly welfare loss may even exceed the welfare loss of actual monopoly. The monopolist in fact may not charge the full monopoly price in order to avoid the attention of antitrust enforcers or potential competitors. Consequently, the transfer payment and dead-weight loss might be negligible despite high market share. Similarly, an established monopolist employing limit-pricing tactics generates no appreciable opportunity cost. As a result, the welfare loss created by the nonmonopolist in its predatory bid for monopoly status could substantially outweigh the welfare loss produced by the conservative actual monopolist.

B. Noneconomic Values and Attempted Monopolization

An increasing number of courts have recognized noneconomic

values in attempt analysis.[93] Because attempt to monopolize is an independent threat to allocative efficiency and to the preservation of pluralistic values, conduct that is inconsistent with those values, whether economic, social, or political, should be proscribed.[94] Given the long-run anticompetitive effect of attempted monopolization and the new judicial emphasis upon the noneconomic values underlying cooperative stabilization, attempted monopolization should be expanded to cover the means of the competitive process, and monopolization should be reserved for preservation of the competitive end alone.[95]

Lorain Journal Co. v. United States[96] illustrates the means-end dichotomy and its relation to attempted and actual monopolization. *Lorain Journal* stands for the general proposition that misuse of monopoly power to limit threatened competition constitutes an attempt to monopolize.[97] Despite the fact that the Journal enjoyed a substantial monopoly in news and advertising dissemination, the Court concentrated on the means employed to limit competition—a forced secondary boycott of the sole competitor.[98] The likely explan-

93. Professor Turner seems to have originated the de-emphasis of market analysis in attempt and conspiracy cases under § 2. Turner, *supra* note 15. The Ninth Circuit has led the judicial battle toward establishing a conduct offense under § 2. *See* Part V(C)(1) *infra*.

94. The reasons for treating the element of monopoly differently must stem from differences in the element of conduct involved in each offense. In examining these differences, I think the attenuation of the monopoly concept in attempt and conspiracy cases can easily be justified, and so can the transition to a more careful consideration of monopoly in instances of combination.

> The kind of conduct that typically establishes the requisite "specific intent" in attempt and conspiracy cases is clearly conduct which has no social or economic justification. No benefits can be expected, at least in the long run, from predatory price-cutting, coercive refusal to sell, and similar abuses of economic power. If defendants are attempting to drive someone out of the market by foul means rather than fair, there is ample warrant for not resorting to any refined analysis as to whether the intent is to drive everyone out or whether, having taken over all of the production of a particular commodity, the defendants would still face effective competition from substitutes. Coercive conduct is analogous to price fixing, attempts at which are illegal "though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity."

Turner, *supra* note 15, at 305.

95. *See* text accompanying notes 16-19 *supra*.

96. 342 U.S. 143 (1951).

97. *Id. See also* Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); United States v. Griffith, 334 U.S. 100 (1948); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927); Cooper, *supra* note 15.

98. Two explanations have been offered. The Court possibly was concerned that the competitor had not yet been completely destroyed. *See* Cooper, *supra* note 15, at 404. On the other hand, the Court suggests that the Journal enjoyed a natural monopoly. *See* Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

ation for the Court's reluctance to employ the monopolization clause is that the relevant market could support only one firm.[99]

The *Lorain* Court acknowledged that certain conduct should be proscribed in the course of attaining the competitive or noncompetitive goal, even when monopoly can be economically justified. Consequently, the means employed by a participant in the competitive process should be subjected to antitrust scrutiny regardless of the economic effects of the ultimate product of those means,[100] and the attempt offense should be the tool employed to control conduct whenever the economic justification for application of the monopolization provision is lacking.[101] The attempt and monopolization concepts should be directed at two independent phenomena. Monopoly analysis should be concerned primarily with the structural effects of a competitor's victory in the competitive struggle;[102] attempt analysis should be concerned with conduct of competitors and the means by which they participate in the competitive process.[103]

IV. Alternative Means of Controlling Conduct

The preceding discussion suggests both economic and noneconomic reasons for prohibiting attempted monopoly apart from the traditional justification that attempt to monopolize should be prohibited because it increases the likelihood of actual monopoly. Moreover, given the independent relationship between the attempt offense and the completed offense of monopolization, the two offenses are properly directed at separate and distinct aspects of the competitive process. The next step is to extend the inquiry beyond section two of the Sherman Act and to consider its companion provisions and the alternative means of controlling conduct under the

99. *See* Union Leader Corp. v. Newspapers of New England, Inc., 180 F. Supp. 125 (D. Mass. 1959), *aff'd in part and rev'd in part,* 284 F.2d 582 (1st Cir. 1960), *cert. denied,* 365 U.S. 833 (1961).

100. In *Union Leader* Judge Wyzanski pointed out the proximity between exclusionary practices and the use of unfair means: "In a situation where it is inevitable that only one competitor can survive, the evidence which shows the use, or contemplated use, of unfair means is the very same evidence which shows the existence of an exclusionary intent." 180 F. Supp. at 140.

101. Closer scrutiny of the means employed in Pacific Eng'r & Prod. Co. v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir.), *cert. denied,* 98 S. Ct. 234 (1977), for example, may have produced a contrary result despite the obvious justification for the natural monopoly.

102. The de-emphasis of the conduct aspect of monopoly (often called the transitive verb requirement) since *Alcoa* demonstrates the Court's structural emphasis in monopoly cases. *See* United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954); text accompanying notes 202-03 *infra.*

103. *See* Areeda, *supra* note 89, at 244-45, 259. The offensiveness of the conduct therefore is relevant and, contrary to monopoly, the structural effect should not be the sole concern.

antitrust laws. The complementary relationship between section two and other antitrust provisions elucidates the difficulties encountered in attempt analysis and suggests an appropriate attempted monopoly standard.

A. The Relationship Between Section One and Section Two

The most significant feature of section one of the Sherman Act is the requirement of concerted action.[104] In contrast, the attempted monopoly and monopoly offenses of section two noticeably lack this requirement.[105] Consequently, under the Sherman Act the only means of controlling single-firm conduct and performance that does not rise to the gravamen of an *Alcoa* monopoly is to use the attempt to monopolize clause. The traditional relegation of attempted monopoly to a mere appendage of monopoly has created a gap in antitrust enforcement under the Sherman Act.[106] According to the prevailing rule, an individual firm can engage in any practice, no matter how abusive or economically inefficient, without incurring liability provided that the practice is not on the verge of producing actual monopolization.[107]

The judiciary has responded intuitively to close the gap created by the misconception of the attempt offense. The majority result, however, has not been to re-evaluate and redefine the attempt offense, but to manipulate other Sherman Act provisions in an effort to cover the single-firm void. In this endeavor the courts have resorted primarily to a questionable attenuation of the conspiracy concept under section one; as a result both section two and section one have been misconstrued in the process.

One example of the infectious nature of the attempted monopoly misconception is the Supreme Court's treatment of restricted distribution and refusals to deal under section one.[108] The supplier

104. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1976).

105. Conspiracy to monopolize under § 2 is also a concerted conduct offense. While concerted action is not a requisite to an attempt to monopolize, some courts have held that two or more persons concertedly may attempt to monopolize. *See, e.g.*, United States v. Dunham Concrete Prods., Inc., 501 F.2d 80 (5th Cir.), *rehearing denied*, 504 F.2d 760, *cert. denied*, 421 U.S. 930 (1974).

106. Cooper, *supra* note 15. The author acknowledges the wide range of single firm behavior presently outside the Sherman Act, but concludes that the monopoly offense and not attempted monopoly is the appropriate means of expanding coverage of single firm conduct.

107. *See* Part V(B) *infra*.

108. For a discussion of the vertical agreement problem under § 1, see AREEDA, *supra* note 89, at 553.

in a vertical relationship may, under the *Colgate* doctrine,[109] individually refuse to deal with a buyer or distributor without incurring liability. In order to avoid the per se sanction of resale price maintenance,[110] the supplier therefore may "suggest" retail prices to distributors at the outset and then unilaterally refuse to deal with those who do not maintain the suggested price. The Court has become increasingly willing to strain the concept of contract, combination, or conspiracy in order to find concerted action in this and related situations. As a result the exception to the *Colgate* doctrine has swallowed the rule.[111]

Albrecht v. Herald Co.[112] demonstrates the degree to which the "agreement" requirement under section one has become attenuated. The defendant newspaper terminated the holder of a newspaper route for refusing to sell newspapers at the required retail price and subsequently replaced the plaintiff with a new seller. Although the evidence did not establish any dealings between the defendant and the new seller beyond the mere assumption of plaintiff's route, the Court found sufficient concerted action to warrant the finding of an agreement.

A related problem arises when the distributor refuses to accede to the supplier's initial demands for adherence to a territorial allocation scheme or to retail price maintenance. In such cases the plaintiff has no cause of action under section one because of the absence of an agreement, even if it is driven out of business for refusing to accede to the seller's demands.[113] On the other hand, the plaintiff who consents to the supplier's unlawful demands and is thereby a party to an illegal agreement may thereafter renege and seek redress

109. United States v. Colgate & Co., 250 U.S. 300, 307 (1919):

> In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.

110. *See, e.g.,* Albrecht v. Herald Co., 390 U.S. 145 (1968); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951).

111. *See* note 109 *supra.* In practice, virtually any step taken by the wholesaler or manufacturer may qualify as an agreement so that the *Colgate* requirement of purely unilateral conduct cannot be met. Any offer to reinstate, affirmance of suggested price, or request for voluntary compliance is generally sufficient.

112. 390 U.S. 145 (1968).

113. *See* AREEDA, *supra* note 89, at 563. *Compare* Alles Corp. v. Senco Prods., Inc., 329 F.2d 567 (6th Cir. 1964), *with* Amplex v. Outboard Marine Corp., 380 F.2d 112 (4th Cir. 1967), *cert. denied,* 389 U.S. 1036 (1968). *See also* Cornwell Quality Tools Co. v. C.T.S. Co., 446 F.2d 825 (9th Cir.), *cert. denied,* 404 U.S. 1049 (1971); Quinn v. Mobil Oil Co., 375 F.2d 273 (1st Cir.), *petition for cert. dismissed,* 389 U.S. 801 (1967).

under section one.[114] The unjust result of denying a remedy to an injured party who performs its legal duty while rewarding the competitor who violates its duty follows from undue reliance on section one to prohibit conduct that is in fact unilateral. This misplaced conception of "concerted conduct" under section one is, in turn, the by-product of an ineffective section two device for controlling abusive individual conduct.

The intraenterprise conspiracy doctrine provides a second example of the fiction created under section one in an effort to close the single-firm void. In many instances the defendants to a section one claim are affiliated under a common legal entity. Affiliated corporations therefore will argue that they are operated as a single business enterprise and that a single entity is incapable of conspiring with itself.[115] In response the Supreme Court has developed the intraenterprise conspiracy concept, which states, in essence, that affiliated corporations may conspire in violation of the Sherman Act notwithstanding the fact of common ownership.[116] In the process, however, the courts have constructed the fiction that a corporation cannot conspire with its unincorporated division, but that it can conspire with its subsidiary or other affiliated corporation.[117] This nonfunctional distinction has produced inconsistency in cases in which the courts make no serious inquiry into the manner of operation of the units.[118] Again, the inadequate development of attempted

114. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951).

115. Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952).

116. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) (parent corporation and subsidiary liable for conspiracy since they had availed themselves of the privilege of doing business in the corporate form); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951) (two subsidiaries of parent corporation capable of conspiring with each other); Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948) (parent corporation and wholly owned subsidiaries capable of conspiring); United States v. Yellow Cab Co., 332 U.S. 218 (1947) (corporate affiliation actually facilitates conspiracy).

117. *See* Woods Exploration & Prod. Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir.), *cert. denied*, 404 U.S. 1047 (1971); Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203 (5th Cir. 1969); Syracuse Broadcasting Corp. v. Newhouse, 319 F.2d 683 (2d Cir. 1963); Rea v. Ford Motor Co., 355 F. Supp. 842 (W.D. Pa. 1972).

118. Some lower courts have concluded that when one person not only is the sole or principal owner of the affiliated corporations but also is the only person involved in the corporations' decision-making process, the person and the affiliated corporations should be treated as a single entity. *See, e.g.*, Windsor Theatre Co. v. Walbrook Amusement Co., 94 F. Supp. 388 (D. Md.), *aff'd*, 189 F.2d 797 (4th Cir. 1950). Other courts have retreated from the hard line drawn by the Supreme Court and have held affiliated corporations incapable of conspiring when the corporate structure is subservient to the integrated production process of the business. *See, e.g.*, Haas Trucking Corp. v. New York Fruit Auction Corp., 364 F. Supp. 868 (S.D.N.Y. 1973).

monopoly as an effective means for controlling single-firm conduct and performance is primarily responsible for the conspiracy attenuation. A broader view of attempt would provide a more logical basis for controlling conduct in cases clearly involving a unified functional operation.[119]

B. Expanding the Federal Trade Commission Act

Section five of the Federal Trade Commission Act also offers a potential alternative to expansion of the attempt to monopolize offense under section two of the Sherman Act. The Federal Trade Commission has the power to enforce the substantive provisions of the Sherman and Clayton Acts and, in addition, to prevent unfair methods of competition.[120] The Commission, therefore, is not bound by the present infirmities of the Sherman Act in controlling single-firm conduct, but may go farther than the courts in prohibiting "unfair" conduct, including conduct that demonstrates no inherent economic evil.

Several serious limitations detract from the superficial appeal of the section five alternative. The Act limits the Commission's authority to the issuance of cease and desist orders,[121] and consequently the Commission cannot award compensatory damages to the victim of the unfair practice. Moreover, the Commission's resources are far too limited to accomplish widespread enforcement—only an insignificant portion of the practices that would be classified as unfair are disclosed by FTC proceedings. The absence of any penalty, financial or otherwise, likewise negates the potential benefit of selective enforcement, for until the Commission detects and prosecutes the particular practice of the particular defendant, the defendant is without incentive to cease the unfair practice. Finally, because private plaintiffs have no cause of action under section five, no threat of treble damage recovery is present. Thus, deterrence is lacking in an area in which economic reprisal has proved the most effective enforcement tool.

Section five must be modified if it is to serve as a viable alternative to attempted monopoly in controlling single-firm behavior. A provision for a private cause of action is one possibility. Such an

119. Affiliated corporations clearly may perform separate and distinct functions, and therefore they should be treated as separate entities for Sherman Act purposes. On the other hand, a division is no less capable of generating anticompetitive effects than a subsidiary, and the two should be treated the same when they serve the same productive function.

120. 15 U.S.C. § 45 (1970).

121. *Id.*

amendment would augment enforcement without sacrificing the present advantage of the Commission's expertise. The prospect of awarding damages, however, appears less attractive. The damage issue in an unfair competition claim might require trial by jury,[122] in which event the expertise of the Commission would be lost. Consequently, a private damage action would have little advantage over the Clayton and Sherman Act procedures.[123]

Alternatively, the Federal Trade Commission could promulgate regulations prohibiting certain individual firm practices.[124] Identifying specific practices that are unfair under section five would partially offset the disadvantage of selected enforcement, and promulgations would avoid the obstacles of a private cause of action. Drafting meaningful regulations in this elusive area of single-firm conduct would prove difficult, however, since the context in which the alleged unfair practice occurs often determines the economic and social effect of the conduct. Regulations precise enough to allow more complete enforcement might produce a sufficient number of undesirable results to outweigh the desired benefit.[125] In addition, FTC promulgations could destroy the flexibility of the Sherman Act. A principle virtue of the antitrust laws is their constitutional-like character; the phraseology of the Sherman Act is analogous to the due process clause both in the abstract and in application.[126] The free hand given the Court by Congress to fashion a common law of antitrust[127] should be retained to the greatest extent possible in order to harmonize antitrust policy with the dynamic structural

122. U.S. CONST. amend. VII. Although the FTC authority is statutory, the unfair competition claim existed at common law as well. Consequently, a money damage provision under the FTC Act might be distinguishable from those under federal statutes such as the National Labor Relations Act, under which the jury trial argument has been rejected in claims for back pay. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). The expansion of the right to jury trial since *Jones & Laughlin* also bears on this point. *See* Ross v. Bernhard, 396 U.S. 531 (1970); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); *cf.* Katchen v. Landy, 382 U.S. 323 (1966) (bankruptcy setting is an exception to the *Westover* principle that claims for money damages require trial by jury).

123. Since the federal courts review FTC decisions, the only difference in procedure would be at the trial level. If both Clayton Act § 4 claims and FTC § 5 claims would require trial by jury, the advantage of the Commission's expertise is lost.

124. 4 TRADE REG. REP. (CCH) ¶ 38,005 (1972).

125. Consider, for example, the dispute that has arisen over the formulation of a conclusive standard for assessing predatory pricing. *Compare* Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975), *with* Scherer, *supra* note 91.

126. U.S. CONST. amends. V, XIV.

127. *See* Part II(A) *supra*.

movement of the economy.[128] Judicial expansion of section two attempt doctrine, unlike the promulgation of regulations under section five of the FTC Act, can achieve the desired results without sacrificing the common-law approach to antitrust regulation.

C. *State Regulation of Business Practices*

Recently the states have assumed more active roles in antitrust and trade regulation through the enactment of antitrust, fair trade, price discrimination, and sales-below-cost laws. While many of the state laws apply only to one or two specific industries or products,[129] virtually every state also has a general antitrust provision.[130] These provisions of general application vary considerably from state to state,[131] however, and adoption of the Uniform State Antitrust Act[132] by a significant number of states seems unlikely.[133]

Lack of uniformity presents problems in antitrust enforcement whenever the subject of regulation, regardless of its local nature, qualifies as interstate commerce under Sherman Act jurisdictional standards.[134] Disparate state antitrust provisions therefore create

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128. *See* Part II(C) *supra*. *See generally* Turner, *supra* note 25.

129. See, for example, New Jersey's statutory prohibition of price discrimination only in alcoholic beverages, insurance, and motor fuel, and below cost sales only in cigarettes and gasoline. 4 TRADE REG. REP. (CCH) ¶¶ 33,331, 33,385-86 (1972).

130. *E.g.*, COLO. REV. STAT. §§ 6-4-101 to 109 (1973); CONN. GEN. STAT. §§ 35-24 to 45 (1975).

131. Some state constitutions contain an antitrust provision, and in many instances these provisions attack divergent conduct. *Compare* GA. CONST. art. IV, § 4, para. 1, *with* ALA. CONST. art. 4, § 103. Other state antitrust provisions omit any reference to attempted monopoly. *E.g.*, FLA. STAT. § 542 (1975); GA. CODE § 20-504 (1975); TENN. CODE ANN. § 69-1 (1955). A significant number incorporate the basic language of section two of the Sherman Act, including the general proscription of attempts to monopolize. *E.g.*, ALASKA STAT. § 45.52.020 (1962); CONN. GEN. STAT. § 35-27 (1975). The statutes also differ in mode of enforcement, with some states providing for a private treble damage action, *e.g.*, CONN. GEN. STAT. § 35-35 (1975), while others limit the cause of action to the state Attorney General, *e.g.*, ARK. STAT. ANN. § 70-102 (1957 Replacement) (limiting penalty for violation to $200-$500 fine to be paid into the state treasury for the benefit of the common school fund). The Uniform Act, on the other hand, retains the private cause of action, but limits treble damage recovery to "flagrant" violations. ARIZ. REV. STAT. § 44-1408B (1974).

132. 4 TRADE REG. REP. (CCH) ¶ 30,101 (1972). The National Conference on Uniform State Laws approved the proposal on August 2, 1973. In February 1974 the American Bar Association House of Delegates voted approval.

133. Only one state has adopted the Uniform Act. *See* ARIZ. REV. STAT. §§ 44-1401 to 1413 (1974).

134. The jurisdictional reach of the Sherman Act is coextensive with the commerce power. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 558 (1944). Moreover, virtually any business transaction has an "effect on interstate commerce" under modern commerce clause standards. *See* Katzenbach v. McClung, 379 U.S. 294 (1964); Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941).

potential conflict with the commerce clause,[135] since businesses engaged in interstate commerce may face conflicting and irreconcilable local antitrust laws. Even if the federal laws do not occupy the antitrust field, the conflicting state laws nonetheless may impose an unconstitutional burden on interstate commerce.[136] Consequently, state antitrust regulation does not offer a viable alternative to section two of the Sherman Act as the logical vehicle for expanding single firm control.

Although the Uniform Act moves in the proper direction to the extent that it resolves the inconsistency among the states, the Act provides no additional means for controlling single-firm performance. Additionally, the Act differs significantly from the Sherman Act, thereby generating potential for direct conflict with federal antitrust provisions. The Uniform Act, for example, limits the prohibition against restraints and monopolies to those that have a purpose of excluding competition or controlling, fixing, or maintaining prices.[137] Unlike the Sherman Act, the Uniform Act interjects directly into the statutory proscription the requirement that the attempt to establish a monopoly be in a "relevant market."[138] The Act defines relevant market, however, as "the *geographical* area of actual or potential competition in a *line of commerce.*"[139] On its face the Uniform Act therefore omits the product component of the Sherman Act relevant market requirement for monopoly[140] and employs instead the line of commerce approach of the Clayton Act.[141] Apparently this proposal would reduce the degree of scrutiny the court presently gives to relevant-market aspects of attempted monopoly under the majority view.[142]

The disparity between state antitrust provisions heightens the existing controversy among the lower federal courts, and the Uniform Act aggravates rather than alleviates the problem. Together with inactive state enforcement, this incongruity makes a unified nonfederal solution to the attempt problem virtually impossible.

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135. U.S. CONST. art. I, § 8, cl. 3.

136. *See* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945).

137. ARIZ. REV. STAT. § 44-1403 (1974).

138. UNIFORM STATE ANTITRUST ACT § 3.

139. *Id.* § 1(2) (emphasis added).

140. *See* United States v. Grinnell Corp., 236 F. Supp. 244 (D.R.I. 1964), *aff'd except as to decree*, 384 U.S. 563 (1966).

141. 15 U.S.C. §§ 12-27 (1976). Arizona did not incorporate either the term relevant market or the term line of commerce, but instead used the language "any part of which is within this state." ARIZ. REV. STAT. § 44-1403 (1974).

142. *See* Part V(B) *infra.*

Although Congress recently has expressed discontent with state regulation of fair trade and has repealed enabling legislation that formerly limited federal antitrust regulation under section one,[143] more active state enforcement will generate substantial conflict with existing federal standards. When conflict occurs the court simply may disregard the state statute, a customary practice whenever the commission of business torts is alleged defensively.[144] Consequently, control of abusive single-firm conduct through more comprehensive business tort statutes likewise provides an unattractive alternative.[145]

While expansion of attempted monopoly under section two poses its own problems, the other alternatives are neither more practically nor conceptually appealing. The section two approach additionally offers the opportunity to resolve the overextension of section one conspiracy doctrine, a problem that state laws treat ineffectively. The ultimate question, therefore, is which legal approach to section two best facilitates an expansion of attempted monopoly that is consistent with, and accurately reflects, the conceptual and practical underpinnings of contemporary antitrust policy.

V. Formulating a Legal Standard

A. *Attempt to Monopolize in the Supreme Court*

The Supreme Court has reviewed the attempt-to-monopolize offense sparingly. In most instances the Court has treated the attempt claim as a peripheral issue, and therefore much of its language dealing with attempted monopoly is dictum.[146] Even those cases that confront the attempt offense directly have unsuccessfully articulated the requisite elements.[147] The Court has not resolved the ambiguity of *Swift*[148] in subsequent decisions—while in some cases the Court has stated that proof of specific intent to monopolize is

143. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801.

144. *See* Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941).

145. The use of business tort law creates conceptual problems because the legal means do not comport with the goal. Antitrust is related to tort law, but its concerns are sufficiently different to warrant separate treatment. As a result, the law has not followed tort development although it has borrowed some major tort concepts.

146. *See, e.g.*, Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965); American Tobacco Co. v. United States, 328 U.S. 781 (1946).

147. *E.g.*, Swift & Co. v. United States, 196 U.S. 375 (1905). For Justice Holmes' classic formulation of the attempt standard in criminal law terms, see note 18 *supra*. *See generally* Note, *supra* note 15.

148. 196 U.S. 375 (1905).

sufficient since dangerous probability of success is simply the consequence of specific intent,[149] on other occasions it has suggested that dangerous probability is a separate element that must be proved in addition to specific intent to monopolize.[150]

The Court most recently discussed attempt in a passing reference in *Walker Process Equipment, Inc., v. Food Machinery & Chemical Corp.*[151] Although the Court spoke of the need to appraise the exclusionary power of the defendant in a relevant market, the decision does not mention "dangerous probability."[152] In no decision has the Court dealt meaningfully with the conceptual dichotomy between attempted monopoly and the completed offense of monopolization, nor has it scrutinized the role of attempted monopoly in the framework of antitrust policy. Since the movement to expand attempted monopoly began, the Court consistently has rejected the opportunity to clarify the confusion among lower courts.[153]

B. The Dangerous Probability Requirement

The majority of lower courts has adhered to the dangerous probability requirement.[154] In these courts the plaintiff must prove,

149. *See* United States v. Columbia Steel Co., 334 U.S. 495 (1948) (no mention of proof of market power or dangerous probability of actual monopoly in holding conduct that was not unreasonable under § 1 to constitute an attempt to monopolize under § 2). *See also* United States v. Yellow Cab Co., 332 U.S. 218 (1947) (conspiracy to monopolize proved so long as an appreciable amount of commerce is affected, regardless of market share). Because the § 2 term "any part of interstate commerce" seems equally applicable to attempt, courts frequently cite *Yellow Cab* to support the view that a dangerous probability of success need not be proved in an attempt case.

150. " 'The phrase "attempt to monopolize" means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it . . . .' " American Tobacco Co. v. United States, 328 U.S. at 785. The Court's language is suspect since only the monopoly charge was being reviewed. *See also* Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (dangerous probability of monopolization found without explicitly stating that such a determination was a separate requirement along with specific intent to monopolize); *see generally* note 96-99 *supra* and accompanying text.

151. 382 U.S. 172 (1965).

152. In fact the case involved an alleged fraudulent patent procurement, the type of attempt claim that raises more ethical than economic concerns. The Court refused to dismiss the claim at the motion for summary judgment stage of the proceeding.

153. *E.g.*, Bravman v. Bassett Furniture Indus., Inc., 552 F.2d 90 (3d Cir.), *cert. denied*, 98 S. Ct. 69 (1977); Pacific Eng'r and Prod. Co. v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir.), *cert. denied*, 98 S. Ct. 234 (1977); Panotex Pipe Line Co. v. Phillips Petroleum Co., 457 F.2d 1279 (5th Cir.), *cert. denied*, 409 U.S. 854 (1972); Cornwell Quality Tools Co. v. C.T.S. Co., 446 F.2d 825 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972).

154. *See* Cooper, *supra* note 15, at 384-88; Note, *supra* note 15, at 1459-64; *see, e.g.*, Agrashell, Inc. v. Hammons Prods. Co., 479 F.2d 269 (8th Cir.), *cert. denied*, 414 U.S. 1022 (1973); Panotex Pipe Line Co. v. Phillips Petroleum Co., 457 F.2d 1279 (5th Cir.), *cert. denied*, 409 U.S. 845 (1972); Cornwell Quality Tools Co. v. C.T.S. Co., 446 F.2d 825 (9th Cir.

in addition to a specific intent to monopolize, that the defendant's conduct has brought or will bring it dangerously close to monopoly power in the relevant market. Therefore, the plaintiff must identify the relevant product,[155] define the relevant geographic market,[156] and determine the defendant's share of that market. Generally, the plaintiff must demonstrate that the defendant's market share would have been close to seventy percent had the attempted monopoly been successful.[157] Under the majority view the plaintiff thus faces the same procedural and substantive burden in an attempt claim as in a monopoly case. In practice attempt may prove even more difficult, since the plaintiff must show specific rather than general intent.[158]

The principle virtue of the dangerous probability test is its deterrence of spurious claims. Because the test places such an extreme burden on plaintiffs at the initial stage of the proceeding, only the most meritorious claim stands any chance of surviving a preliminary motion.[159] The dangerous probability requirement also offers the court an alternative to resolving the difficult question of intent since a finding of insufficient market power dismisses the claim.[160] In practice the majority view shifts the balance unduly in favor of the defendant. The plaintiff bears an insuperable burden whenever the defendant possesses anything less than near absolute market control.[161]

The dangerous probability criterion also is subject to conceptual criticism. The term "dangerous probability" has no independent economic or legal content. Like "monopoly power," it provides no definitive standard until the court assigns an arbitrary market share.[162] Further, when the market share required for a finding of

1971), *cert. denied*, 404 U.S. 1049 (1972); Hiland Dairy, Inc. v. Kroger Co., 402 F.2d 968 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969); Lektro-Vend Corp. v. Vendo Corp., 403 F. Supp. 527 (N.D. Ill. 1975).

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

156. *See* United States v. Grinnell Corp., 236 F. Supp. 244 (D.R.I. 1964), *aff'd except as to decree*, 384 U.S. 563 (1966).

157. *See* United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

158. *Id.*

159. Consequently, most plaintiffs also raise conspiracy allegations to avoid this result, since issues of fact cannot be resolved on the pleadings. The minority's view of attempt, in relying on specific intent alone, eliminates this check on spurious claims as a matter of law since intent, like conspiracy, is a question of fact.

160. *See* Hawk, *supra* note 15.

161. *See* Blecher, *supra* note 15. The difficulty of proving sufficient market power becomes particularly acute if the market relationship between the plaintiff and the defendant is vertical. *See* Cooper, *supra* note 15.

162. *See* Part II(A) *supra*. Since market power is a continuum, the assignment of the

dangerous probability and for actual monopoly are the same, the offenses merge at a single point on the market-power continuum.[163] In addition, the dangerous probability requirement brings criminal attempt doctrine into the antitrust arena.[164] Assuming, *arguendo,* that criminal concepts apply, the majority view suffers from the erroneous contention that factual impossibility is a defense to attempt.[165]

Despite the potential criminal sanction provided by the Sherman Act, notions of criminal attempt are not suited to antitrust analysis.[166] First, the Sherman Act, unlike other criminal statutes, has never been construed strictly. The broad range of judicial discretion and the constitutional-like provisions mandate flexibility, and the judiciary has not felt constrained in its ever-changing interpretation of the substantive violations.[167] Second, the courts impose criminal sanctions only in circumstances of repeated violations that clearly have been defined in prior decisions.[168] Finally, no criminal sanction applies in most instances, because the private litigant brings the vast majority of antitrust actions. Criminal standards not only are inconsistent with the policy underpinnings of antitrust, but also are unnecessary for effective enforcement.

C. *Development of the Expansionary View*

A number of minority positions question the validity of the structural approach to attempted monopolization. While the emerging views range from total abrogation of the dangerous probability requirement[169] to a mere reduction in the share of the market deemed sufficient to produce the dangerous probability,[170] all advo-

term "monopoly power" to one segment of that spectrum is somewhat arbitrary. The Court's reliance on market share as the sole indication of market power poses a related problem. *See also* text accompanying notes 202-03 *infra.*

163. *Id.*

164. *See* note 18 *supra* and accompanying text.

165. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW 438, 440-42 (1972). Assuming the defendant possesses the requisite intent and has taken actual steps toward monopolization, its absence of monopoly power should not be a defense to a charge of attempt to monopolize. This situation is analogous to that in which a defendant attempts to commit murder with an unloaded gun, and the courts consistently bave imposed liability in those cases.

166. *See* Note, *supra* note 19.

167. *See, e.g.,* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), *overruling* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

168. The court imposes most criminal sanctions in the price-fixing arena, where the per se rule is firmly entrenched. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

169. Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964).

170. Lektro-Vend Corp. v. Vendo Corp., 403 F. Supp. 527 (N.D. Ill. 1975).

cate an increasing reliance on conduct and a decreasing concern with market structure. The Antitrust Division of the Justice Department advocates a shift in attempt analysis that roughly corresponds to the more expansionary version of the minority views.[171] Taken together, the divergent positions represent a significant exception to traditional attempt doctrine.

(1) Specific Intent to Monopolize

The clamor for reform began with Professor Turner's commentary on the *Cellophane Case.*[172] The abuse theory[173] of attempted monopoly first appeared in *Lessig v. Tidewater Oil Co.,*[174] in which the Ninth Circuit established specific intent to monopolize as the sole requisite to an attempt violation. In *Lessig* the plaintiff neither established a relevant market that was the subject of the attempt nor proved a dangerous probability of success in that market. Although *Lessig* has undergone a stormy history in the Ninth Circuit itself,[175] a recent decision reaffirmed the result,[176] and other courts occasionally have followed its reasoning.[177]

In its most expansionary form, the *Lessig* approach virtually established a per se violation. Once the plaintiff proves the requisite specific intent,[178] even the complete absence of market power by the defendant would not constitute a defense. Subsequent decisions have tempered the *Lessig* view, however, so that market power still is a relevant factor when it serves to disprove specific intent.[179] Thus, some courts have created a de minimis exception wherein a defendant with negligible market power presumably cannot possess a specific intent to monopolize. The burden, however, is upon the defendant to establish that it falls within the de minimis exception; therefore, the plaintiff's prima facie case does not include proof of

171. Baker, *supra* note 81.

172. Turner, *supra* note 15; *see* note 94 *supra.*

173. *See* Cooper, *supra* note 15. The abuse theory concentrates on conduct rather than structure in assessing performance.

174. 327 F.2d 459 (9tb Cir.), *cert. denied,* 377 U.S. 993 (1964).

175. *See* Annot., 27 A.L.R. Fed. 762 (1976).

176. Greyhound Computer Corp. v. IBM Corp., 5 TRADE REG. REP. (CCH) ¶ 61,603 (9th Cir. 1977).

177. Rea v. Ford Motor Co., 355 F. Supp. 842 (W.D. Pa. 1973); Mt. Lebanon Motors v. Chrysler Corp., 283 F. Supp. 453 (W.D. Pa. 1968), *aff'd,* 417 F.2d 622 (3d Cir. 1969).

178. The plaintiff may rely, and usually must rely, on inferential evidence to prove specific intent. Under the *Lessig* approach, abusive conduct generally is sufficient to substantiate a finding of specific intent to monopolize. *See also* note 100 *supra.*

179. *See* Moore v. Jas. H. Matthews Co., 473 F.2d 328 (9th Cir. 1973); Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336 (9th Cir. 1970).

market share sufficient to create a dangerous probability of actual monopolization.[180]

(2) Specific Intent in a Relevant Market

In search of a middle ground between the *Lessig* and dangerous probability positions, a third approach has discarded the dangerous probability criterion, but has retained relevant market definition.[181] Under this approach the plaintiff proves attempted monopoly when the defendant has a specific intent to monopolize a defined relevant market, regardless of the defendant's power in that market. As with *Lessig,* the plaintiff can show intent in a defendant who does not possess monopoly power, provided the plaintiff can demonstrate a predominant motive to acquire monopoly control.[182]

Retention of relevant-market concepts without requiring proof of market power achieves two desirable results. First, dangerous probability is no longer an element of the plaintiff's prima facie case, giving attempted monopoly an identity independent from the completed offense of monopolization.[183] Consequently, the plaintiff's burden is relaxed significantly, and structural criteria are not automatically given precedence over competing values. Second, by requiring the plaintiff to establish a relevant market that is the object of the alleged attempt, the approach moves toward objectification of the otherwise highly subjective *Lessig* standard.[184] The most spurious claims fail because plaintiffs cannot connect the alleged intent with an appropriate market.

(3) Structure and Conduct on a Sliding Scale

Recognition that both economic and noneconomic values have a place in antitrust analysis has produced yet another proposal that accommodates structure and conduct in attempt to monopolize. Employing a sliding scale test, the plaintiff must demonstrate less market power as the egregiousness of the defendant's conduct and the strength of evidence of monopolistic intent increase.[185] In prac-

180. *Id.*

181. *See* Bowl America Inc. v. Fair Lanes, Inc., 299 F. Supp. 1080 (D. Md. 1969); American Football League v. National Fooball League, 205 F. Supp. 60 (D. Md. 1962), *aff'd,* 323 F.2d 124 (4th Cir. 1963); *cf.* White Bag Co. v. International Paper Co., 1974-2 Trade Cas. ¶ 75,188 (4th Cir.); Diamond Int'l Corp. v. Walterhoefer, 289 F. Supp. 550 (D. Md. 1968).

182. *See* cases cited in note 181 *supra.*

183. *See* Part III *supra.*

184. *See* Hawk, *supra* note 15.

185. AREEDA, *supra* note 89, at 258; *see* Telex Corp. v. IBM Corp., 367 F. Supp. 258 (N.D. Okla.), *rev'd on other grounds,* 510 F.2d 894 (10th Cir. 1973) (explicitly noting the

tice the sliding scale relaxes the need to delineate precise boundaries of the relevant market when the defendant's intent and conduct clearly are predatory.[186]

Some courts have applied the sliding scale concept directly to the dangerous probability requirement. As a result, the plaintiff may prove dangerous probability through evidence of market power, but it also may prove dangerous probability through evidence of specific intent or conduct.[187] Specific intent might not be enough to establish a sufficient likelihood of success, but neither is market share the sole means for establishing a dangerous probability of monopolization.[188] This approach is problematic since the dangerous probability concept is inextricably related to market share. Less confusion would arise if formalistic notions of dangerous probability were abandoned whenever the court weighs both conduct and structure.

(4) Manipulation of the Relevant Market

In those circuits in which the dangerous probability and consequent relevant-market requirements have prevailed, some courts have expanded attempt coverage by manipulating both the confines of the relevant market and the requisite share of the market necessary to establish the dangerous probability of success. Courts have acknowledged that proof of elaborate integration reduces the necessary market share, thereby giving vitality to attempted monopoly as an enforcement tool apart from actual monopoly.[189] Shortage situations provide a second basis for altering traditional market analysis. Absent direct government controls, the relevant market generally shrinks during a shortage.[190] In the short run, unavailability of

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Lessig view, balancing it against the dangerous probability view, and endorsing a sliding scale approach).

186. *See* materials cited in note 185 *supra.*

187. *See* Hallmark Indus. v. Reynolds Metals Co., 489 F.2d 8 (9th Cir. 1973).

188. Koratron Corp. v. Jack Winter, Inc., 375 F. Supp. 1 (N.D. Cal. 1974).

189. *E.g.,* Gutor Int'l AG v. Raymond Packer Co., 493 F.2d 938 (1st Cir. 1974). In *Lektro-Vend Corp.* the court held defendant liable for attempted monopoly when its share of the national market was approximately 20% and increasing:

> The "attempt to monopolize" prohibition in section 2 was intended to "nip incipient monopolies in the bud;" with this congressional policy in mind, considering the structure of the vending machine industry, the Court believes that, unchecked, Vendo's alleged practices raise a dangerous propensity for creation of an actual monopoly.

403 F. Supp. at 534.

190. The relevant market must be defined from the buyer's viewpoint in these circumstances. *See* George R. Whitten Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547 (1st Cir. 1974). Consequently, the market is limited to the extent the buyer cannot turn elsewhere for an alternative source of supply. *See* United States v. Empire Gas Corp., 393 F. Supp. 903

alternative supply sources creates tremendous leverage for the supplier in a vertical relationship, and any abuse of that power can be devastating to buyers.[191] Traditional market definition will not reveal the actual degree of control exerted by the supplier, and absent a redefinition of the market, the plaintiff is without a remedy no matter how abusive the conduct or inefficient the performance.[192]

D. A Proposal for a Rule of Reason Approach

Neither the dangerous probability view nor the *Lessig* approach achieves the desired balance between economic and noneconomic objectives. The two positions are the extremes in attempt analysis—dangerous probability connotes an economic inquiry limited to market share analysis, while *Lessig* focuses on behavior and conduct to the exclusion of economic performance. The difficult problem is fashioning a legal standard that simultaneously satisfies the conceptual quest for balancing values and the practical need for an expedient rule of law that produces a clearly discernible result for each factual circumstance.

Fortunately, the courts already are familiar with a Sherman Act standard that has proven itself in both respects. The rule of reason[193] is the logical candidate as the legal mechanism by which the courts can expand attempt to monopolize in order to achieve control over single-firm conduct and performance. Although historically the courts have applied the rule of reason only to contracts, combinations, or conspiracies under section one, a similar analysis logically would apply to attempted monopoly under section two.[194] The rule of reason offers breadth and flexibility; the court could consider all relevant factors, economic and noneconomic, and could

(W.D. Mo. 1975), *aff'd*, 537 F.2d 296 (8th Cir. 1976).

191. The seller's demand curve may become perfectly inelastic in the shortage situation, thereby enabling the seller to increase price drastically with no corresponding decrease in quantity demanded. *See* Mullis v. Atlantic Richfield Co., 502 F.2d 290 (5th Cir. 1974). *See also* Byrnes, Lowry, & Bondurant, *Product Shortages, Allocation and the Antitrust Laws*, 20 ANTITRUST BULL. 713 (1975); 53 TEX. L. REV. 551 (1975).

192. For example, a supplier who also competes directly with its buyer through a subsidiary in the retail market may exert enough leverage during a shortage period to drive the buyer out of the retail market, or alternatively, to force a more favorable acquisition price. In either event, the abuse of power in the vertical relationship because of the market shortage enables the supplier to expand its position in the retail market through its subsidiary. This result is aggravated when the buyer and seller are signatories to a long term requirements contract.

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

194. The similarity between the traditional § 1 rule of reason approach and the broad inquiry suggested here under § 2 attempt cases justifies treating the two types of cases accordingly.

assess the relative merits of each. Because courts have substantial experience in working with the rule of reason, it offers an additional advantage over the newly created middle-ground attempt formulations.[195] Moreover, unlike either extreme view of attempt, the rule of reason easily could accommodate the concept of market power as a single continuum along which competitive performance must be measured.[196]

The rule of reason proposal will provoke two major criticisms. First, practitioners will consider the rule indefinite and vague. Both defendants and the courts prefer to know in advance which specific practices are prohibited; the nature of antitrust analysis, however, defies concrete resolution. Virtually any practice may take on a significantly different antitrust posture depending on its peculiar setting. Predatory pricing offers a prime example. Analysts have made more progress toward articulating a conclusive and easily applicable test for this particular phenomenon than for any other claim under the Sherman Act.[197] Others have thoughtfully criticized the across-the-board standard,[198] and the courts have been reluctant to employ it as the sole basis for their decisions.[199] Unfortunately, a case-by-case approach is the only method by which the courts can meaningfully achieve the broad policy goals of antitrust.

Second, critics will claim that the rule of reason standard will create administrative and litigatory inconvenience. Because the rule of reason would require inquiry into both economic and noneconomic aspects of the case, it potentially would consume more time than the present economic analysis. To the extent that the expensive and equally time-consuming procedure of precise market definition decreases in importance, however, the adverse administrative effect of a rule of reason diminishes.[200] In addition, the strike suit nightmare of the antitrust defendant[201] is not likely to become a reality so long as the movement away from complete reliance on market definition succeeds in reducing the costs of attempt litigation.

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195. *See* Part V(C)(2)-(3) *supra.*

196. *See* Part III *supra.*

197. *See* note 125 *supra.*

198. *Id.*

199. Bravman v. Bassett Furniture Indus., Inc., 552 F.2d 90 (3d Cir.), *cert. denied,* 98 S. Ct. 69 (1977); Blecher & Stegman, Hanson v. Shell Oil Co.: *A Straw in the Wind?,* 38 OHIO ST. L.J. 269 (1977).

200. The consuming process of market definition in monopoly cases and attempted monopoly cases in which dangerous probability is a requisite element is primarily responsible for the prohibitive costs of antitrust litigation.

201. *See* text accompanying notes 20-21 *supra.*

On balance the rule of reason affords the court an opportunity to engage in a more thorough and more accurate investigation of single-firm conduct than has heretofore been possible under the Sherman Act. Most importantly, the new legal formulation would facilitate treatment of attempt to monopolize as an independent antitrust violation directed at conduct that is undesirable apart from its historic connection with actual monopoly. Because existing legal attempt standards are connected inextricably to an erroneous conception of attempted monopoly, the new legal standard should be divorced completely from those principles.

E. The Control of Oligopoly

Application of the proposed expansion of attempted monopoly to the oligopoly problem demonstrates that the rule of reason can be an effective standard for controlling undesirable single-firm conduct. The control of oligopoly logically can be approached under either section one or section two of the Sherman Act.[202] The critical issue in oligopoly analysis is whether the concern is structure or conduct, or both. Economic performance is the ultimate concern, and structure is just one indicium of performance. The *Alcoa* monopoly result, for example, is justifiable only because when market share reaches seventy percent, poor performance is almost certain regardless of the conduct or behavior of the monopolist. Poor performance, therefore, is the underlying premise of Judge Hand's virtual per se rule in *Alcoa*. This certainty does not arise in oligopoly, however, since no individual firm has a sufficient market share to invoke the *Alcoa* premise. Thus in the oligopoly setting both conduct and structure must be analyzed before making a final determination as to performance.[203] Both economic and noneconomic considerations therefore play a role in the analysis. Once again, the problem with the former is the inadequacy of the economic theory in explaining oligopolistic efficiency.[204]

Proponents of the structural approach to oligopoly control rely on section two as the appropriate enforcement mechanism.[205] Legis-

202. *Compare* Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969), *with* Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

203. For a discussion of the inconclusiveness of oligopoly theory and performance, see *President's Task Force Report on Productivity and Competition, reprinted in* 5 TRADE REG. REP. (CCH) ¶ 50,108, at 55,134 (1972).

204. *See* Part II(C) *supra*. *See also* AREEDA, *supra* note 89, at 224-41; SCHERER, *supra* note 1.

205. *See* AREEDA, *supra* note 89, at 240-41. The Federal Trade Commission has chal-

lative efforts to curb the expansion of economic power in the oligopolistic market also have taken a structural approach.[206] An alternative approach focuses instead on the conduct of the oligopolist, relying on section one as the primary enforcement weapon.[207] Adherents to this approach contend that concerted action is the real threat of oligopoly; therefore, the proper enforcement tactics should be those traditionally utilized to restrain group conduct.[208]

Controlling oligopoly under section one necessitates additional attenuation of the conspiracy concept and for that reason is the less attractive alternative.[209] Controlling oligopoly under section one would require a revival and significant expansion of "conscious parallelism" as an inferential means of proving an agreement between the oligopolists.[210] The conscious parallelism approach is particularly suspect in the oligopolistic market setting where the recognition of mutual interdependence is an essential ingredient to the normal oligopolist's pricing mechanism.[211] Pushed to its logical conclusion, the section one theory of oligopolistic control would ban all interdependent oligopoly behavior irrespective of the economic and noneconomic advantages of oligopolistic structure in certain situations.[212]

The socioeconomic movement away from individualism and the structural evolution of industry provide a related basis for rejecting the concerted action approach to oligopoly.[213] If the characterization of the contemporary business relationship as one of "stabilizing cooperation" and "pluralism"[214] among individual entrepreneurs is accurate, no ground for expansion of concerted action remedies is available under the Sherman Act. To the contrary, any section one expansion might prove counterproductive to the extent that it

lenged the leaders in the cereal market with the collective possession of monopoly power. Kellogg Co., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,898 (1972).

206. Concentrated Industries Act, S. 1167, 93d Cong., 1st Sess., 119 CONG. REC. 7320 (1973); *see White House Task Force Report on Antitrust Policy* (1968) (the Neal Report), *reprinted in* 2 ANTITRUST L. & ECON. REV. pt. 2, at 11 (1968).

207. Posner, *supra* note 202.

208. *See* note 104 *supra* and accompanying text.

209. *See* Part IV(A) *supra.*

210. Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954); Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939); *see* note 202 *supra.*

211. For a discussion of the role of interdependence in oligopoly pricing theory, see SCHERER, *supra* note 1.

212. The application of a per se rule once the agreement has been proved by conscious parallelism accentuates this problem. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

213. *See* Part II(C) *supra.*

214. *Id.*

would not reflect current economic and social values. Therefore, consideration of the individual conduct and performance of oligopolists under section two is more consistent with the competitive process of advanced capitalism.

Reliance on structure alone, however, is equally suspect. Since the key to oligopolistic efficiency is the interaction of structure and conduct, the courts properly can assess performance only after consideration of each. Because existing legal theory treats monopoly primarily as a structural concept, the attempt to monopolize provision of section two is a more logical tool for regulating oligopoly. Moreover, the rule of reason best facilitates the balancing approach required by the expanded view of attempted monopoly.

In the oligopoly setting, the court should utilize the rule of reason to analyze both structure and conduct. Market concentration still would be a relevant factor in attempt analysis, but it would no longer be the sole or decisive factor. The plaintiff who initially could not establish the defendant's control of more than fifty percent of the relevant market would not be summarily dismissed. Instead, the court would proceed with the structural analysis. It should consider, for example, the trend of concentration ratios in the industry, giving particular attention to fringe competition and its effect on the defendant's practices.

The court also should determine the degree of vertical integration in the industry and in this particular defendant's operation, the extent of diversification in products and services, and the extent to which barriers to entry, including significant start-up costs, deter potential competition. The court should note any supernormal profits in the industry, and it should evaluate the defendant's pricing power by estimating the price elasticity of demand for the relevant product. Additionally, the court should take notice of any significant externality, including shortages generated from other levels of the production chain, and it should acknowledge the practical impact of these externalities on performance in the oligopolistic market.

Once the plaintiff demonstrates to the court a substantial adverse impact upon competition, the burden should shift to the defendant to justify its performance, guided by the criteria set forth above. In most cases the defendant has better access to the information needed to conduct an exhaustive economic analysis since its pricing policy helps determine the scope of the market and its cost data help determine the quality of performance. The rule of reason also would preserve a de minimis exception to the attempted mo-

nopoly violation, thereby shielding the clearly innocent defendant from the threat of strike suits. For example, when the plaintiff cannot demonstrate appreciable economic inefficiency through the structural criteria, and the defendant's particular conduct does not diverge significantly from the accepted trade norm, the court should dismiss the suit. Moreover, when the plaintiff carries its initial burden but the defendant justifies its structural position, the court also should dismiss the claim absent a clear showing of particularly abusive practices.

The conduct criteria are more difficult to articulate. While relatively sound guidelines exist for evaluating predatory pricing, other types of conduct are not susceptible to quantification. Litigation delay, fraudulent patent procurement, dealer terminations, refusals to deal, and disparate product allocation all may constitute abusive or unfair conduct in one setting and not in another. Consequently, the court should utilize the flexibility of the rule of reason, taking into account such factors as the history of antitrust violations, the vertical relationship between the parties, if any, and any other circumstances that, although unique to the case, help establish the defendant's performance. The court should bear in mind as it evaluates conduct the extent to which the defendant's practices conflict with the noneconomic goals of antitrust, particularly in cases of marginal structural impact.

VI. Conclusion

Attempt to monopolize is an elusive concept. The number of divergent views demonstrates the complexity the courts face in resolving the controversy. The first step toward resolution requires a rethinking of antitrust values. The many legal tangents have not produced a satisfactory result primarily because they are formulated on a value base that is incompatible with the functional requirements of the competitive process. While economic efficiency is a relevant goal of antitrust, it should not be and has not been the only goal. The evolving socioeconomic structure requires broadly based antitrust policy that acknowledges economic and noneconomic values and facilitates the transition from competitive individualism to a competitive process characterized by stabilization and cooperation.

Within the broader policy framework, both economic and noneconomic grounds exist for establishing attempt to monopolize as an offense independent from the completed offense of monopolization. Expansion of attempted monopoly would enable the courts to repair

the presently overworked conspiracy doctrine of section one and to develop a workable tool for controlling oligopoly. Because criminal attempt doctrine plays no meaningful role in antitrust analysis, the courts should discard the traditional formulation of attempted monopoly in favor of a rule of reason analogous to that employed under section one. Under the new standard, single-firm conduct and performance would be subject to control under section two, analogous to the section one prohibition of concerted activity. In keeping with desirable antitrust policy, the rule of reason should incorporate economic analysis, but should not adhere to overly stringent standards in proof of market power and nearness to actual monopoly. On the practical level the courts should strike an appropriate balance between the litigants to encourage hearty litigation of meritorious claims.

Notwithstanding the inherent conceptual and practical hurdle of attempt analysis, the foremost obstacle is the consistent refusal by the Supreme Court to come forth with definitive guidance. The Court historically has taken a leading role in antitrust development, and its recent hands-off attitude toward attempted monopoly is inexplicable. Furthermore, virtually no precedential impediments exist in the Court's decisions to bar a thorough re-evaluation and reformulation of attempt standards. The proposed movement to a rule of reason is in fact consistent with recent antitrust developments in the Burger Court.[215] The Court consistently has moved away from a per se approach to antitrust enforcement, and the extreme positions presently advocated by attempt litigants are polar versions of a per se rule of attempted monopoly.[216] The attempted monopoly question offers a prime opportunity for the Court to engage in a much-needed reassessment of contemporary values, to review the demands those values place upon antitrust policy, and to expand control of single-firm conduct under the Sherman Act.

JOEL RANDALL TEW

215. *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977).

216. While *Lessig* can be characterized as a per se rule in favor of plaintiffs, *see* Part V(C)(1) *supra*, the dangerous probability approach likewise provides a per se rule in favor of defendants in attempt claims. *See* Part V(B) *supra*.