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CONGLOMERATE MERGER SYNDROME—A COMPARISON: CONGRESSIONAL POLICY WITH ENFORCEMENT POLICY

JAMES C. THOMAS*

“IT is a sad thought . . . that the present system of production and of exchange is having that tendency which is sure at some not very distant day to crush out all small men, all small capitalists, all small enterprises.” This statement, descriptive of the present day corporate merger activity, was first rendered by Senator George in 1890 when Congress was considering passage of the Sherman Act.¹ Perhaps an even more descriptive statement was made by the late Justice Harlan in the *Standard Oil* case.² Dissenting in this famous Supreme Court decision which created the so-called “rule of reason,” Justice Harlan declared:

All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The Nation had been rid of human slavery . . . but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessities of life. Such a danger was thought to be then imminent, and all felt that it must be met firmly and by such statutory regulations as would adequately protect the people against oppression and wrong.³

Prior to, and for many years after the passage of the Sherman Act, businessmen manifested a desire to be insulated from the risk of competition. The various tactics used to accomplish this included: formation of trusts; predatory pricing practices to force competitors to come into line or drop from the market; acquiring weakened competitors; etc.⁴ Today these blatant methods have been replaced by more subtle and ingenious devices.⁵ In their expansion drives, designed to reduce the risk of competition, businessmen have effectively gained control of other corporations through the respectable merger route.

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1. 21 Cong. Rec. 2598 (1890).

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

3. *Id.* at 83-84 (concurring and dissenting opinion).

4. See *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

5. Speaking before the Committee on Banking and Currency, United States Senate, on S. 510, 90th Congress, 1st Session, Manuel F. Cohen, Chairman of the Securities and Exchange Commission, stated: “It is wise not to underrate the ingenuity of those engaged in the complex game of promoting or opposing block acquisitions . . .” (Unpublished statement).

Additional respectability has in fact been given to mergers, especially conglomerate mergers, by Donald F. Turner, who presently heads the Antitrust Division of the Justice Department.⁶ Turner, it is said, has taken the aura of a crusade out of trust busting; however, he should not receive the full credit or blame for the failure of section 7 of the Clayton Act to stop or even slow down the merger movement. The number of corporate mergers taking place in this country has increased steadily since 1944, with a sharp increase in 1954. In the area of manufacturing and mining, for example, there were 295 mergers or acquisitions in 1953. This number jumped to 387 in 1954 and has been on a rapid incline since, with 854 in 1964, 1,008 in 1965, and 995 in 1966.⁷ This increase becomes even more startling when one examines the Federal Trade Commission's tabulation of all mergers. Taking the last three years, 1964, 1965 and 1966, the Commission recorded a total of 1,797, 1,893, and 1,746 respectively.⁸

Perhaps when one speaks in terms of the number of mergers occurring in this country the conclusion becomes somewhat clouded; however, the staggering consequences of the merger movement are clearly manifested in the valuation of disappearing assets. Taking 912 selected mergers that occurred during the period of 1948-1966, the valuation of acquired assets exceeded thirty-one billion dollars.⁹ During an earlier period, 1940-1947, Congress noted that 2,500 formerly independent manufacturing and mining companies disappeared as a result of mergers and acquisitions. The asset value of the acquired companies amounted to 5.2 billion dollars, which represented 5.5 per cent of the total assets of all manufacturing corporations.¹⁰

Generalizations such as the above will admittedly vary, depending on their particular source,¹¹ but they are sufficient to support the points to be raised in this paper. A more complete and accurate tabulation of the number and valuation of mergers occurring in this country would only support the already clear conclusion that section 7 of the Clayton Act has failed

6. *Business Week*, May 20, 1967, at 59.

7. See Appendix table 1, p. 566 *infra*.

8. See Appendix table 2, p. 567 *infra*.

9. See Appendix table 3, p. 568 *infra*.

10. H.R. Rep. No. 1191, 81st Cong., 1st Sess. 2-3 (1949).

11. Note the discrepancy in the number of reported mergers and acquisitions in manufacturing and mining shown by comparing Appendix 1 and Appendix 2. It will be noted that the source material in compiling Appendix 2 included the *Wall Street Journal*, *Journal of Commerce*, and *New York Times*. One might still change these figures by adding other source material in which mergers are reported.

In *Forbes*, it was reported that the brisk merger rate was causing 2,400 companies to disappear into other companies every year. *Forbes*, Feb. 15, 1967, at 38, col. 1. There were 1,416 mergers during the first six months of 1967, according to the *Associated Press*. *Tulsa Daily World*, Sept. 3, 1967, § 3, at 3, col. 3.

to thwart the ever-increasing expansion and creation of gigantic corporations which hold extreme economic power over this society. It is enough to demonstrate that the merger business in the financial world has become big business. For example, it was recently reported that Lehman Bros., investment bankers, were paid a fee of \$916,000 for services in connection with the study and negotiations leading to the merger of American Home Products with Ekco Products Company.¹² While business brokers and CPA firms have increased their role in the "merger business," the key role in most major mergers is played by Wall Street investment bankers. These bankers, who handle the underwriting of new acquisitions, participate in one of the most vital phases of a successful merger.¹³ Then, of course, there are the business executives who play a not insignificant role in producing major mergers, many of which go unchallenged.¹⁴

The merger and acquisition fever has risen to such a level that many businessmen feel that they can act with impunity as far as the federal anti-trust laws are concerned. And perhaps this attitude is not unwarranted, especially in light of the current administrative enforcement philosophy which has been created by a combination of factors. This philosophy, by giving businessmen a false sense of security, has led to several rags-to-riches success stories. One of the most interesting and successful involves the rapid growth of Gulf and Western Industries, Inc.

Charles Bluhdorn, born in Vienna, has entered into many apparently crazy (but successful) business deals and has become known on Wall Street as "the mad Austrian."¹⁵ In 1958, Bluhdorn purchased Michigan

12. Forbes, Feb. 15, 1967, at 38, col. 3. In this same article, it was reported that CPA firms are taking an active role (and generating a profitable business) in advising corporations on the acquisition of other firms. "Some big CPA firms generate their own 'companies for sale' list, which is circulated internally. Many big CPA firms are starting to set up trouble-shooting departments for merger and acquisition work." *Id.* at 39, col. 1. The merger business is so big that D.H. Blair & Co. conducts special seminars on the subject. See full page advertisement, Forbes, Sept. 15, 1967, at 335. William Colvin, who started Corporate Seminars Inc., observed that: "More and more you find company chairmen and presidents spending half their time searching out acquisitions." *Tulsa Daily World*, Sept. 3, 1967, § 3, at 3, col. 3. Even educational institutions, especially law schools, have entered the business of training company officials and lawyers in how to accomplish a corporate merger.

13. Forbes, Feb. 15, 1967, at 41-48.

14. A number of these executives are examined in Forbes, Feb. 15, 1967, at 49-59. See also *Business Week*, May 20, 1967, at 61, reporting several unchallenged mergers: Continental Oil Co. combined with Consolidation Coal Co., forming a company with aggregate assets of 2.1 billion dollars; Atlantic Refining Co. and Richfield Oil Co., with combined assets of 1.4 billion dollars; Douglas Aircraft Co. plus McDonnell Co. has assets of 1.2 billion dollars; and American Tobacco Co.'s acquisition of Sunshine Biscuits forms a company with assets of 959 million dollars.

15. Welles, Multimillion Reach of Wall Street's "Mad Austrian", *Life*, March 10, 1967, at 43.

Bumper, a manufacturing concern that was at the time losing \$50,000 each year, which was then merged into a Houston auto parts firm. The combined company, named Gulf and Western Industries, Inc., then acquired over 150 distributors and signed up hundreds more as independents through which Gulf and Western sells about \$100 million in auto parts every year.¹⁶ Since its formation in 1958, Gulf and Western has purchased 68 other companies, including Paramount Pictures, and has within this relatively short period of time become one of the top one hundred corporations in the United States.¹⁷ Chris Welles, writing about the philosophy of Bluhdorn, says: "All he wants to do, all he ever talks about, is to get bigger faster than anyone else, reaching a billion in sales in two years, then two billion."¹⁸

While most mergers or acquisitions are mutually advantageous to the acquiring and acquired corporations, the tender offer is becoming a popular way to capture control of another corporation unilaterally. Success of a tender offer requires that the affection and confidence of shareholders for the present management be alienated. This alienation is accomplished by bidding for a large block of stock at a price considerably higher than the current market price. Gulf and Western has used the tender offer to fulfill its goal of growing faster and bigger than anyone else. For example, through a full-page ad appearing in the *New York Times*, it made a tender offer to purchase 500,000 shares of common stock of Delta Steamship Lines, Inc.¹⁹

Manuel F. Cohen, Chairman of the Securities and Exchange Commission, has referred to the tender offer as a form of industrial warfare which he compares with the more familiar corporate proxy fights—both being methods of capturing or preserving control of a corporation.²⁰ To initiate a tender offer, bidders normally raise money by drawing on the general corporate lines of credit.²¹ The war-like atmosphere that prevails over many tender offers has been vividly described by William S. Rukeyser.²² There is no standard pattern with successful tender offers. They may be preceded by abortive merger negotiations, or by an attempt to acquire

16. *Id.* at 44, col. 3. Compare *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966), with *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

17. Welles, *Multimillion Reach of Wall Street's "Mad Austrian"*, *Life*, March 10, 1967, at 43, col. 1.

18. *Id.* at 43, col. 4.

19. *New York Times*, Aug. 10, 1967, at 59. Gulf & Western lost its bid for the Delta Steamship stock, having been outbid by Transcontinental. See *Forbes*, Oct. 1, 1967, at 63.

20. Hearings on S. 510, Before the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess., at 16 (1967).

21. Rukeyser, *Getting Tough with Tenders*, *Fortune*, Aug., 1967, at 108, 110.

22. *Id.* at 109-10.

the necessary control by open-market purchases, both of which would accomplish the same thing at a much cheaper price. But if this is considered strategically unsound from the start, the bidder will carefully conceal his intent in an effort to acquire the desired stock before management can marshal its defenses. In such cases, great care is taken to preserve secrecy, for by tipping off management the bidder would invite open industrial war. Determined management has many defensive and even some offensive weapons which can be used to fend off an unwanted take-over bid.

In the first place, management is in a better position to reach stockholders—assuming that it has time. If the veil of secrecy is pierced, it may launch a vigorous publicity campaign against the offer. Or, if it is capable of raising the necessary capital, it can make a counter offer to buy its own shares at a price higher than that offered by the outside bidder. These tactics failing, management may resort to more extreme measures, such as negotiating a merger with a third company. Not surprisingly, in light of the present ineffective enforcement policy under section 7 of the Clayton Act, writers have given little attention to the anti-merger legislation as an effective weapon against tender offers.

Nothing used presently or in the past has effectively deterred the growth of tender offers. Chairman Cohen has observed that the aggregate of cash tender offers has grown from less than two hundred million dollars in 1960 to almost a billion in 1965.²³ Instead of considering the legality under section 7 of the Clayton Act²⁴ of the growing number and amount of tender offers, the general response is to regulate them. Although recognizing the dangers of tender offers, Mr. Cohen, in his testimony before Congress, did not take a firm stand against them. In his response to the views of Professor Mundheim, who ardently supports corporate takeovers, Mr. Cohen observed that tender offers are being made "simply because the acquiring company wants to get bigger or more diversified."²⁵ But having said this, he concedes that there are tender offers that may be beneficial to stockholders, and he does not favor a bill that would unduly hinder the beneficial ones.²⁶

23. Hearings on S. 510, *supra* note 20, at 17.

24. Clayton Act, § 7, 15 U.S.C. § 18 (1964): "No corporation . . . shall acquire . . . the whole or any part of the stock . . . of another corporation . . . where . . ." certain conditions are present.

25. Hearings on S. 510, *supra* note 20, at 179. The statement of Professor Mundheim, as quoted by Mr. Cohen, was as follows: "Corporate take-overs by block acquisitions are a good thing, because they provide a method, perhaps the most effective presently available, of dislodging entrenched but incompetent management, and may thus improve the efficiency with which resources are allocated and businesses are managed." *Id.* See also Rukeyser, *supra* note 21. At no place in his article did Mr. Rukeyser mention the application of the antitrust laws to "tender offers."

26. Hearings on S. 510, *supra* note 20, at 21.

Professor Mundheim, in opposition to the Senate bill to regulate tender offers, testified at one point that the proposed bill was, "in my opinion, a wholly unfair and even an un-American approach."²⁷ He supported the tender offer as an effective method of eliminating corporate inefficiency. Whether tender offers may in fact improve the efficiency of management and whether they may be beneficial to stockholders is of some interest academically; legally, however, such arguments have for many years been rejected as valid defenses to an asserted violation of the antitrust laws.²⁸ Even so, the congressional committee considering S. 510 gives some credence to the economically oriented testimony of Professor Mundheim. In its report to accompany S. 510, the Committee observed:

It was strongly urged during the hearings that takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management. It was also recognized that these bids are made for many other reasons, and do not always reflect a desire to improve the management of the company.²⁹

Noting the conflicting testimony concerning the purposed regulation of tender offers, the report observed: "The committee has taken extreme care to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid."³⁰ In short, this bill³¹ is designed only to require full and fair disclosure and is not intended in any way to prohibit this method of corporate take-over.

Should Congress pass S. 510, introduced by Senator Williams of New Jersey, it would lend an unwarranted degree of respectability to tender offers. Lower federal courts, already unsympathetic to rigid enforcement of section 7 of the Clayton Act, will be provided another technical argument to support mergers and acquisitions.³² With a sophisticated, defense-oriented antitrust bar, one can expect the passage of any tender offer regulation to be used as a defense for mergers. The argument will go something like this, Since Congress, in passing the tender offer legislation must have been aware of the existence of section 7 of the Clayton Act, the logical conclusion is that Congress must have approved the use of this de-

27. *Id.* at 115.

28. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933); *United States v. Corn Prod. Ref. Co.*, 234 F. 964 (S.D.N.Y. 1916), appeal dismissed, 249 U.S. 621 (1919).

29. S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967).

30. *Id.*

31. S. 510, 90th Cong., 1st Sess. (1967), passed by Senate, Aug. 30, 1967, 113 Cong. Rec. 12,559 (daily ed. Aug. 30, 1967).

32. See *Lunkenheimer Co. v. Condec Corp.*, 268 F. Supp. 667 (S.D.N.Y. 1967), where the court refused to enjoin the defendant's "tender offer" to acquire controlling stock interest in the plaintiff.

vice to capture control of corporations.³³ This interpretative conclusion is understandable in light of the historical judicial presumption that the legislative body is fully aware of the existing state of the law.³⁴ Actually, the very consideration of a bill such as S. 510 manifests a congressional misunderstanding of the legislative process. Where this misunderstanding has resulted in inconsistent legislation, the Supreme Court has been called upon to rule that congressional action or inaction based on an erroneous understanding of existing law does not, in fact, amend the previously enacted statute.³⁵

I. THE PROBLEM DEFINED

Though one might find statements to the effect that the anti-merger statutes are being overly enforced,³⁶ an objective analysis will lead to a contrary conclusion. Looking at the anti-merger legislation in retrospect, it is obvious that the law has failed to stop the merger trend. After the Supreme Court created the so-called "rule of reason,"³⁷ it became necessary to supplement the Sherman Act with new legislation. In response to this recognized need, the Clayton Act was passed in 1914. Under this act—incorporated in section 7—certain specified business practices were prohibited, and among these was the prohibition of certain mergers.³⁸ Instead of stopping, the merger trend continued uninterrupted. Finally, after numer-

33. The initial reaction of lower federal courts toward the Bank Merger Act of 1966 was discussed in *United States v. First City Nat'l Bank*, 386 U.S. 361 (1967).

34. I am referring to more than repeal or amendment by implication, which is based on the idea that the legislature is presumed to intend to achieve a consistent body of law. See 1 J. Sutherland, *Statutory Construction*, §§ 1922, 2011, 2012, 2014 (3d ed. 1943). More pertinent is the idea that the legislative body is presumed to have knowledge of existing laws including judicial decisions. See *Enyeart v. Board of Supervisors*, — Cal. 2d —, 427 P.2d 509, 58 Cal. Rptr. 733 (1967); *McIver v. State Highway Comm'n*, 198 Kan. 678, 426 P.2d 118 (1967); *State v. Ayers*, 198 Kan. 467, 426 P.2d 21 (1967).

35. The Supreme Court has been unwilling to use repeal or amendment by implication where the federal antitrust laws are in issue. See *California v. FPC*, 369 U.S. 482 (1962); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). But more important, the Supreme Court has not allowed such an amendment to be inferred from administrative or congressional inaction. *United States v. E. I. Du Pont de Nemours & Co.*, 353 U.S. 586 (1957). Even where Congress has taken action partially on an erroneous understanding of existing law, such was not allowed to change the existing law. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

36. M.A. Wright, Chairman of Humble Oil & Refining Co. has recently charged that the antitrust enforcement policies threaten America's economic growth. He stated that: "the Supreme Court has adopted a very narrow interpretation of our anti-trust statutes." Cited in remarks of Commissioner Reilly delivered to Antitrust Section, District of Columbia Bar Ass'n, Feb. 23, 1967.

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

38. 38 Stat. 731 (1914).

ous statements concerning the failure of the law, Congress again officially expressed concern with the further increases in the concentration of economic wealth, and, in 1950, it passed a significant amendment to the existing anti-merger statute.³⁹ Yet even with this amendment, which incorporates the declaration of congressional purpose, the number of corporate acquisitions and mergers continues to climb.

That it has failed is obvious; less obvious is why it failed. This paper will explore the attitudes of parties involved in merger cases in an effort to find an answer to this most perplexing question. In my search for some plausible conclusion, I do not propose to make a detailed and comprehensive coverage of the substantive rules, as such an attempt would only tend to perpetuate error.

The problem in the past has been created by an aberrant philosophical conclusion as to the role of courts in the interpretation of statutes. Little attention and less concern has been shown for the relationship of courts and legislature involved in the statutory interpretative process. This is particularly true in the area of antitrust laws, where legal analysts start with the presupposition that the statutes are purposely phrased in general language⁴⁰ in order to elevate courts to a creative role. Having made such a presumption, which in the author's opinion demonstrates the general misunderstanding of the legislative process, the analysts conclude that courts are charged with a duty of shaping an antitrust policy that is in the best interests of society. In the shaping of this policy, the statute is looked upon as a broad general standard established by Congress, from which courts will promulgate specific principles to be applied in each individual case.

Section 7 of the Clayton Act offers one of the best examples of the application of this philosophy. The language, certainly general in nature, declares that no corporation shall acquire the stock or assets of another corporation "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition"⁴¹ Legal analysts, looking at this language, reason that only anti-competitive mergers are proscribed. The analysts then conclude that it is the courts that must decide which mergers are anticompetitive by examining each merger in light of the market conditions and other economic standards.

If courts must decide merger cases on the basis of an examination of

39. 15 U.S.C. § 18 (1964), amending 38 Stat. 731 (1914).

40. See Cohen, *Judicial "Legisputation" and the Dimensions of Legislative Meaning*, 36 *Ind. L.J.* 414 (1961); Jaffe, *An Essay on Delegation of Legislative Power*: 1, 47 *Colum. L. Rev.* 359 (1947); Miller, *Statutory Language and the Purposive Use of Ambiguity*, 42 *Va. L. Rev.* 23 (1956).

41. Clayton Act, § 7, 15 U.S.C. § 18 (1964).

economic data, the reasonable assumption is that they pass upon conflicting economic theories which make their function more legislative than judicial. Such an attitude gives Congress little credit for having the ability to formulate an economic standard that will control all future merger activity. There is no sound reason to conclude that the use of general language in a statute was meant to be a delegation of legislative authority to courts. When the legislative process is looked upon as a legal institution it becomes just as reasonable to say that general language is used in order to cover all unforeseen and new devices that might be invented by businessmen which, if not stopped, would seriously impair the desired congressional policies. Despite the many articles and books written on the subject of antitrust, and more particularly mergers, few if any writers, in their search for the real meaning of section 7, have given Congress sufficient credit for being capable of writing a statute to meet the changing needs in society. Concentrating on their individual theories as to what enforcement agencies and courts should do in the antitrust field, most writers fail to consider, at least with sufficient objectivity, the subtle problems of statutory construction.⁴²

There is no one person or group that is responsible for the general failure of section 7 to achieve the congressional desire to stop the merger trend. Nor is the defect in legal philosophy (the area to be discussed in this paper) a product of a sinister plot to block this legislation. The fact is that the failure is a product of an aberration of long existence. If any condemnation is in order, perhaps it should be leveled at the institutions of legal education, which have failed to respond to the change from common law to statutory law.⁴³ Legal education, through an over-emphasis of com-

42. The imperative nature of the study of statutory interpretation in connection with any legislative research project has been made abundantly clear by the newly formed Law Commission in England. Created by the Law Commissions Act of 1965 for the purpose of promoting the reform of the law, this agency, in its first "programme," observed: "It is evident that a programme of law reform, which must necessarily use the instrument of legislation, depends for its successful realization on the interpretation given by the courts to the enactment in which the programme is embodied. The rules of statutory interpretation, although individually reasonably clear, are often difficult to apply, particularly where they appear to conflict with one another and when their hierarchy of importance is not clearly established. The difficulty which faces the courts may be enhanced by present limitations on the means, other than reference to the actual text of the statute, for ascertaining the intention of the legislature." Law Commission Act 1965, First Programme of the Law Commission, at 15 (Her Majesty's Stationery Office 1965). Since then, the Law Commission has prepared and is circulating the first set of working papers on the subject: *The Interpretation of Statutes*.

43. Roscoe Pound saw this problem even prior to 1908 when he observed: "Not the least notable characteristics of American law today are the excessive output of legislation in all our jurisdictions and the indifference, if not contempt, with which that output is regarded by courts and lawyers. Text-writers who scrupulously gather up from every remote

mon law, has historically trained students in the art of maneuvering. With this art, lawyers squeeze and shape legislation (as they do common law principles) to fit the needs of their clients. In an antitrust bar that is manifestly defense-oriented, lawyers, with the zeal generated by the adversary system, show little interest in understanding a law that works against the desires of their corporate clients. But adversaries employed by the two principal antitrust enforcement agencies, and the judges sitting on lower federal courts,⁴⁴ have proven equally inept in the enforcement of a simple merger prohibition created by Congress. This is not too surprising, because the government attorneys and the trial court judges have, like the private attorney, been trained in the archaic but prevailing philosophies found in most of the present day law schools.

In the discussion to follow, I will seek to define the problem in more detail, as well as to connect this philosophical defect to the failings of section 7 of the Clayton Act. To accomplish this it will be necessary to review in some detail the present enforcement policy of agencies such as the Federal Trade Commission and the Antitrust Division of the Justice Department. I will then bring in and discuss to a lesser degree the philosophy of the members of the private antitrust bar. At a later date, I will seek to show that the sophistication of the lower federal courts, at least in the area of antitrust, is not on the same level with that of the United States Supreme Court. From this more or less philosophical study, I will move into a discussion of the congressional design and purpose behind its anti-merger legislation, which should clearly establish the problems that exist in this area of the law. In the final portion of this paper, I will consider the question: Where do we go from here? There are, in fact, practical solutions that are available which will stop abruptly the continuing merger incline. Furthermore, in putting these practical solutions into operation, there is no need for additional legislation.

II. TURNER'S PHILOSOPHY ON CONGLOMERATE MERGERS

Since Professor Donald F. Turner was named head of the Antitrust Division, one has an easier time in analyzing the enforcement policy of the Justice Department. It is easier because prior to his appointment, Turner, while a Professor of Law at Harvard, spent considerable time studying the legal problems of conglomerate mergers. One product of his research⁴⁵

corner the most obsolete decisions and cite all of them, seldom cite any statutes except those landmarks . . . , or if they do refer to legislation, do so through the judicial decisions which apply it." Pound, *Common Law and Legislation*, 21 *Harv. L. Rev.* 383 (1908).

44. I single out the lower federal courts because there is a distinct difference in the sophistication level between these courts and the Supreme Court, whose lead the lower courts have time after time failed or refused to follow.

45. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 *Harv. L. Rev.*

has, within the antitrust bar, been regarded as the authoritative article on the subject.⁴⁶ More significantly, the article has received important judicial attention from Justice Harlan, the principal antitrust dissenter on the present Court.⁴⁷ But regardless of the amount of attention received, the article is significant as a detailed expression of the person who presently plays a major role in shaping the antitrust enforcement policy of this country, and because it is manifest that the policy expressed therein is being carried out in practice.

A. *The Turner Position on Conglomerate Mergers Reviewed*⁴⁸

Turner wrote *Conglomerate Mergers and Section 7 of the Clayton Act* to: (1) emphasize the need for rules in the merger field; (2) describe the type of rules needed; and (3) actually formulate the rules.

1. *Need and Type of Rules*—Ideally, observes Turner, the regulatory policy on mergers would be to examine on a case-by-case basis their anti-competitive consequences. If we are to have an effective anti-merger statute, however, this policy is impossible. It is impractical because, with the limited enforcement machinery, a case-by-case approach would present insurmountable problems.⁴⁹ Instead of the case-by-case approach, Turner suggests that we direct "the law toward rationally-based general rules that are framed in terms of . . . significant factual issues. . . ."⁵⁰ Cases falling within the class identified by the factual issues could then be readily decided without any need for a detailed economic analysis. There is nothing new or novel about calling for the formulation of general rules, which have the effect of reducing the proof requirement. The Supreme Court has long followed this idea in the antitrust field, particularly with its creation and application of the so-called "per se" rule.⁵¹

Even in the merger field, the Supreme Court has formulated broad gen-

1313 (1965) [hereinafter cited as Turner]. This 82-page article was the first comprehensive study of conglomerate mergers.

46. During a two day (Dec. 2 & 3, 1966) Practising Law Institute forum on "The Anti-trust Challenge to Corporate Growth Through Conglomerate Acquisitions and Joint Ventures," the Turner article received much attention and praise.

47. *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 582 (1967) (concurring opinion).

48. In this section, I will be reviewing in some detail the Turner article on conglomerate mergers.

49. Turner 1318. For an interesting judicial discussion of the "case-by-case" approach in a regulatory field, see *FPC v. Southern Cal. Edison Co.*, 376 U.S. 205, 206-16 (1964).

50. Turner 1319.

51. The nature of the "per se" rule was well stated by Justice Black in *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958): "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."

eral rules under which particular acquisitions will be judged. It has on many occasions expressed, in its holdings, a fear of an accelerated concentration of economic power, and it has refused to allow the companies involved to come forward with proof of economies or increased efficiencies which would allegedly result from the merger.⁵² This philosophy of the Court is not shared by Turner, who says, "[T]here are strong reasons for not interpreting the law so broadly as to limit unduly the number of potential purchasers of capital assets . . ."⁵³ Not only is the Court's philosophy not shared, but Turner openly criticizes the Court for its manifestly hard line against mergers.⁵⁴

Besides opposing broad rules which might restrict the number of mergers, Turner advocates a different standard for each type of merger, saying, "[W]e must recognize that the legal standards for various classes of mergers are interdependent."⁵⁵ He further maintains, "[R]ational lawmaking requires that we endeavor to establish some idea of the relative probabilities of anticompetitive effects as among the various types of mergers, so that our hierarchy of rules will at least make internal sense."⁵⁶ In his hierarchy of rules, the standards would be hardest on horizontal, easier on vertical, and least severe on conglomerates.⁵⁷ However in the opinion of the author, Turner's reasoning on the different standards is inconsistent, not only with the congressional design,⁵⁸ but also with the

52. For a good example of this "concentration of power" general rule, see *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294, 316 (1962). In the former case, the Court, after reviewing the size factor alone, said that: "Our conclusion that these percentages raise an inference that the effect of the contemplated merger . . . may be substantially to lessen competition . . ." 374 U.S. at 365.

53. Turner 1320.

54. He criticizes the Court's reasoning on the "concentration of power" issue in the *Brown Shoe* case and the *Philadelphia Nat'l Bank* case, *supra* note 52. Turner 1324-26. He criticized the holding (not on the concentration issue) of the FTC in *Reynolds Metals Co.*, 56 F.T.C. 743 (1960), *aff'd*, 309 F.2d 223 (D.C. Cir. 1962). Turner 1343. He also criticized the FTC and approved the Circuit Court reversal in the *Consolidated Foods* case, 329 F.2d 623 (7th Cir. 1964). Turner 1393. Subsequent to the Turner article, the Supreme Court, in *Consolidated Foods*, reversed the circuit court and upheld the FTC. 380 U.S. 592 (1965).

55. Turner 1320.

56. *Id.*

57. *Id.* at 1322.

58. From the Congressional Committee Reports, it is clear that Congress meant for all forms of mergers to fall under a single standard. S. Rep. No. 1775, 81st Cong., 2d Sess. (1950); H.R. Rep. No. 1191, 81st Cong., 1st Sess. (1949). In the House Report, it was noted that: "Mergers and acquisitions have traditionally been designed as horizontal, vertical, and conglomerate." *Id.* at 11. This report also includes a comprehensive chart showing the nature and consequences of conglomerate mergers. Chart III. Consistent with the report, the statute, as passed, makes no distinction as to the various forms of merger.

Supreme Court's interpretation of section 7.⁵⁹ There is no good reason for distinguishing among the different forms of corporate mergers, except perhaps for economists engaged in an academic analysis. Granted that each forms a different factual pattern which may have different competitive consequences, there is no benefit gained from, and no legal justification for, distinguishing between competitive consequences. Such distinctions merely lead to more uncertainty, which is the very thing that we are seeking to reduce. If elimination of uncertainty is our goal, we also gain nothing by formulating general rules that are inconsistent with the statute. Clarity in understanding, and effective enforcement, can be accomplished only by recognizing and accepting the statute as being a single standard of merger prohibition. If different standards had been desirable, Congress was quite capable of providing for each. Instead it formulated the single antimerger standard that must be followed by enforcement agencies and courts.

Turner, somewhat biased economically, has formulated his own set of merger rules, which deviate from congressional standards. One statement made by Turner in the conclusion of his article demonstrates the personal nature of the rules formulated. He states, "In traversing the field of conglomerate mergers, *I* have suggested a limited number of general rules covering what *I* would like to think are rather carefully defined situations."⁶⁰ When the formulation of general rules is placed on a personal basis, the most carefully defined situations will still reflect any biases that might be present. Since Turner is an economist as well as a lawyer, it is inevitable that any general rule that he might formulate will be somewhat influenced, if not controlled, by the particular economic school with which he is associated.

The philosophy of this economic school, which ascribes economic advantages to conglomerate mergers, is reflected in the Turner article and now, more significantly, in the enforcement policy of the Antitrust Division of the Justice Department. But what if, instead of Turner, Dr. John Blair, a noted economist, had been appointed head of the Antitrust Division? This question interestingly focuses attention on the consequences of letting any economist formulate general rules under which the congressional standard in section 7 will be enforced. Since Blair sees no economic advantage in conglomerate acquisitions, the present substance

59. The Supreme Court's position was made clear by Justice Douglas in *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967) when he stated that: "All mergers are within the reach of § 7, and all must be tested by the same standard, whether they are classified as horizontal, vertical, conglomerate or other." *Id.* at 577 (footnote omitted).

60. Turner 1393-94 (emphasis added).

of enforcement policy would be reversed. According to Blair, there are only three classes of mergers—horizontal, vertical and conglomerate. And he states that of these classes, the “conglomerate acquisitions have the least claim to promoting efficiency in the economic sense.”⁶¹ Turner, looking at conglomerate mergers on a much broader scale,⁶² recognizes the possibility of resulting economies and efficiency. Dr. Blair, considered “one of the leading crusaders against conglomerate mergers,”⁶³ has, according to Turner, greatly overstated his case.⁶⁴

It is unfortunate that dichotomic economic views should prevail over the antimerger law since this seriously weakens the total legislative process. Application of section 7 does not require a construction based on any one of the varying economic schools of thought. In fact, to the dismay of many economists, it is not necessary for one to be even trained in the field of economics in order to understand the antimerger statute. Congress has established its own economic standard, which is based on a comprehensive, time-consuming and expensive analysis of the many conflicting economic views. If Congress has been wrong in the conclusion reached (which is the view of many), the economists, desiring to establish different principles, should go back to Congress and request the necessary changes. It is not for lawyers to question the substance of lawfully enacted standards. Refusal to accept such standards (particularly in the antimerger field), under the guise that Congress has granted the legal profession a license to formulate its own economic rules, will effectively emasculate the statute, and has done so with section 7.

2. *Conglomerates Defended*—To understand the Turner position, one must consider the factors that influence the substantive nature of his conglomerate rules. For obvious reasons, Turner limits his formulation of general rules to the conglomerates. The generally accepted construction of section 7 is that it prohibits only anticompetitive mergers.⁶⁵ From this starting point, one can readily see the anticompetitive effects of horizontal and vertical mergers. Horizontal mergers, it is said, contribute heavily to the growth of monopoly and oligopoly situations; thus there

61. Blair, *The Conglomerate Merger in Economics and Law*, 46 *Geo. L.J.* 672, 679 (1958). When this article was written, as part of a symposium, Blair was the chief economist for the Senate Sub-Committee on Anti-Trust and Monopoly. But though an economist, he gives an accurate discussion of the historical congressional fears of mergers and the associated legal issues.

62. Looking at the issue on a broader scale, Turner observes that conglomerates involving no significant economic relationship have been relatively infrequent. Turner at 1315. But even with the so-called pure conglomerate, Turner sees many economic advantages that must be considered in measuring the anticompetitive effects. Turner at 1329-37.

63. *Id.* at 1328-29.

64. *Id.* at 1329.

65. I will discuss this point in greater detail at a later point in the article.

is justification for a significant check on them.⁶⁶ Likewise, vertical mergers are likely to be anticompetitive, since they may lead to an extension of market power from one level to another.⁶⁷ Conglomerate mergers, on the other hand, do not as readily produce clear anticompetitive effects (presuming that the statute prohibits only anticompetitive mergers). According to Turner, the conglomerates range from pure conglomerate, in which there are no discernible economic relationships between the acquiring and the acquired firm, through a variety of mixed conglomerates, involving horizontal or vertical characteristics.⁶⁸

Basically, Turner defends conglomerate mergers by means of a policy argument in favor of improved economies and efficiency. Looking, perhaps, at the total antitrust policy picture, Turner states, "[T]here is the enormous social interest in progress and efficiency, which has represented one of the primary bases for the policy of promoting competition as it has in fact evolved."⁶⁹ More specifically, the economies of a conglomerate merger might include spreading of overhead;⁷⁰ spreading risk over more independent sources of income;⁷¹ use of more efficient management;⁷² and the attraction of cheap capital.⁷³ The validity of none of these advantages of the conglomerate can be questioned. The *Procter & Gamble* case illustrates how the acquiring company is allowed to spread overhead.⁷⁴ By its acquisition of Clorox, Procter & Gamble was able to achieve a more efficient deployment of some 127 million dollars spent on advertising. Being such a large network purchaser, Procter & Gamble could give each product network exposure at a fraction of the cost per product that a firm with only one product to advertise would incur.⁷⁵ The second advantage listed above (that risk is spread over more independent sources of income) has been a major motivating factor behind conglomerate mergers. For example, the precarious tobacco industry may desire to join with the less precarious liquor industry;⁷⁶ a defense-oriented company (dependent on government contracts) may wish to join with a consumer product-oriented company in order to spread the risk emanating from a peaceful solution

66. Turner 1317.

67. *Id.*

68. *Id.* at 1315.

69. *Id.* at 1326.

70. *Id.* at 1329.

71. *Id.*

72. *Id.* at 1330.

73. *Id.* at 1331.

74. *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

75. *Id.* at 573.

76. One proposed merger that failed to ripen was between P. Lorillard, Inc. and Schenley Industries, Inc.

of world problems. As far as using the conglomerate to achieve a more efficient management, this is a possibility but not a certainty.⁷⁷ In support of the last advantage (attraction of cheap capital), Turner provides some interesting statistics. He says that small firms acquired by giant firms are placed in a better position to acquire capital at a more favorable cost.⁷⁸

True, the mere presence of the larger merged entrant may affect behavior of smaller firms. This, to Turner, is an additional advantage offered by conglomerate mergers. He observes that where acquisitions yield significant economies and the acquiring firm takes full advantage of them, the heavy pressure placed on the smaller competitors will improve, rather than worsen, their competitive performance. In order to survive, these smaller competitors will be forced to improve their product, reduce manufacturing costs, and ultimately reduce the price to the public.⁷⁹ Speaking of the small businessman who might, as a result of the increased efficiency brought to the market by the conglomerate merger, fall by the wayside, Turner makes this most revealing statement: "To be sure, they may be unable to survive the pressures Large, diversified firms may tend to supplant small, single-product companies; and perhaps, though not necessarily, the *number* of sellers may eventually decline."⁸⁰ To this possibility, Turner in effect says: So what? If the smaller firms are lost because of greater efficiency then this is the force of competition.⁸¹ To support both this conclusion and his entire theory, Turner resorts to the worn out phrase that the statute protects "*competition, not competitors.*"⁸² While this in itself is not an incorrect statement, it is, however, incomplete. Competition can be protected only by protecting competitors against practices proscribed by the statute.⁸³ Turner's position, however, is necessary if one is to conclude that mergers should not be invalidated because of the increased economies. He argues that Congress never intended that

77. See Hearings on S. 510, *supra* note 20, at 179, where the "tender offer" was defended as a means of eliminating inefficient management. In "The Magazine of Wall Street and Business Analysis," May 13, 1967, the strong management of P. Lorillard was viewed as a way to improve the Schenley brands.

78. Turner 1338. Using 1957, Turner reports costs of bank loans to businesses: businesses with assets of less than: \$50,000—6.5%; \$50,000 to \$250,000—5.7%; \$1 million to \$5 million—5.1%; \$5 million to \$25 million—4.8%; and over \$100 million—4.4%. *Id.*

79. Turner 1352.

80. *Id.* at 1353 (emphasis added).

81. *Id.* at 1353.

82. *Id.* at 1324.

83. See *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Turner recognizes, however, that in some areas of the antitrust laws, individual competitors have been protected. Turner 1325.

section 7 be used as a weapon against increased efficiency, and he takes issue with the Court⁸⁴ and the Federal Trade Commission⁸⁵ for making such a suggestion. Turner notes that in the *Foremost Dairies* case, the Commission said that: "[T]he necessary proof of violation of the statute consists of types of evidence showing that the acquiring firm possesses significant power in some markets or that its overall organization gives it a decisive advantage in *efficiency* over its smaller rivals."⁸⁶ To this statement, Turner remarks: "This position is not only bad economics but bad law."⁸⁷ Others have made even stronger condemnatory statements about what appears to them to be a judicial attack on efficiency.

One of the most blistering attacks on the Court, with special mention of Justice Douglas, comes from Professor Bork of the Yale Law School. Writing in a recent issue of *Fortune*, Professor Bork, in a review of the *Procter & Gamble* case, says: "The Supreme Court has steadily and drastically re-shaped the law to protect the inefficient producer at the expense of consumers."⁸⁸ One of the most astonishing things about the *Procter & Gamble* case, according to Professor Bork, was the Court's lack of concern about the efficiencies generated by the merger. This lack of concern for efficiencies is particularly significant, he finds, in light of the position the government brief took: "In general, advantages afforded by a merger which reflect simply greater efficiency ought not to be a basis for holding the merger illegal; efficiency is, after all, a prime goal of anti-trust."⁸⁹ Focusing a direct attack on Justice Douglas, who wrote the *Procter & Gamble* opinion, Professor Bork noted these words: "'Possible economies . . . cannot be used as a defense to illegality.'"⁹⁰ These words, according to Professor Bork, were unfortunate; however, there was more concern for the reasons given by Justice Douglas in support of his assertion. His interpretation of the reasoning of Justice Douglas was that economies weigh on the side of illegality because cost savings which might be beneficial to consumers were a threat to the protection of small, locally-owned businesses.⁹¹ Justice Douglas was attacked principally for his (alleged) "tendency from time to time to assert without explanation and to treat conclusions as self-evident."⁹²

84. *United States v. Philadelphia Nat'l Bk.*, 374 U.S. 321, 362 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962); Turner 1324.

85. *Foremost Dairies, Inc.*, 60 F.T.C. 944 (1962); Turner 1324.

86. 60 F.T.C. at 1084 (emphasis added).

87. Turner 1324.

88. Bork, *The Supreme Court Versus Corporate Efficiency*, *Fortune*, Aug. 1967, at 92, col. 2.

89. *Id.* at 155, col. 1.

90. *Id.*

91. *Id.*

92. *Id.* at 93, col. 1.

Besides showing some ambivalence in his reasoning, Professor Bork, like Turner, shows a misunderstanding of the merger opinions of the Supreme Court. Without going into a detailed discussion of *Procter & Gamble*, as well as other merger cases that have reached the Supreme Court,⁹³ it is sufficient, at this point, to say that the Court is not attacking efficiency. What is being attacked is a *method* of achieving the efficiency which threatens the very existence of small locally-owned businesses. The line separating the "method of achieving" from the "efficiency" itself is, to be sure, thin and subtle, but it is discernible and must be seen and comprehended for one to understand the Supreme Court decisions in this area.

Artificial methods of achieving efficiency are nothing new to the commercial world. In fact, these methods were the very concern of the antitrust laws, starting in 1890 with the Sherman Act. The large trusts of the 1800's, it could be argued, were designed to achieve the greatest degree of efficiency. By bringing all competitors under central control, it was possible to utilize the production facilities in the most efficient manner. The problem was that the power formed by this centralization was misused. Large mergers occurring today present the identical problem. Though they may be defended in their inception because of the increased economies and efficiency, the power created might very well be misused tomorrow.

In early cases such as *Trenton Potteries* (involving price fixing)⁹⁴ and *Addyston Pipe* (involving division of markets),⁹⁵ the Court struck down efforts by parties to achieve greater efficiency because of the *method* used. In *Trenton Potteries*, it made little difference that the prices fixed were reasonable and thus beneficial to consumers. The Court, showing more concern over the power represented by the price-fixing agreement, stated that: "The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. *The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow.*"⁹⁶ Certainly no one would say that the Court was attacking efficiency in these cases. The Court was instead attacking the method of achieving efficiency, as it has in so many other cases where the method was of the type proscribed by Congress.

93. I am presently researching this area and hope in the near future to complete my study of the judicial attitude in the antitrust field, with emphasis on merger and treble damage cases.

94. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

95. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), modified, 175 U.S. 211 (1899).

96. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927) (emphasis added).

In the *Corn Products* case,⁹⁷ for example, the parties through a combination had, because of depressed market conditions, acquired and closed down several plants which were not capable of effective production. Ignoring the fact that the combination may have had a beneficial effect on industry and the public, Judge Learned Hand struck down the combination. In doing so, he stated that: "If the decisions of the Supreme Court are to be so understood, it is the mere possession of an economic power, acquired by some form of combination, and capable, by its own variation in production, of changing and controlling price, that is illegal."⁹⁸ Justice Douglas, who has written most of the Supreme Court's merger opinions since the *Columbia Steel* case,⁹⁹ has been even more adamant in rejecting the efficiency arguments as justification for illegal methods. In the *Socony-Vacuum* case,¹⁰⁰ Justice Douglas stated that: "Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing."¹⁰¹ While these cases have not involved merger problems, they do represent creditable support for the assertion that the Court is attacking the method of achieving efficiency and not the efficiency itself. Looking at a recent merger case, one finds the argument in the *Philadelphia National Bank* case that the merger will improve the bank's efficiency and will have pro-competitive effects since the Philadelphia bank will be in a better position to compete with the large New York banks.¹⁰² Rejecting this argument, the Court, in an opinion written by Justice Brennan stated: "If anti-competitive effects in one market could be justified by pro-competitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader."¹⁰³ Justice Brennan then went further and, in effect, stated that even if the Court was receptive to the pro-competitive and efficiency arguments it could do nothing. "A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7."¹⁰⁴

Regardless of the opposing mandate from the highest Court, the legal profession, the lower court judges, and antitrust scholars persist in

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

98. *Id.* at 1012.

99. *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948).

100. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

101. *Id.* at 221.

102. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370-71 (1963).

103. *Id.* at 370.

104. *Id.* at 371.

defending conglomerate mergers as a vehicle for the achievement of greater economies and efficiency. Turner, classed high among the anti-trust scholars, strongly defends this position even after expressly recognizing that this efficiency might force out of business the smaller, less efficient competitors. This, he continues, cannot be avoided because such an effect is a natural consequence of efficiency. Furthermore, if it does not happen through a merger, it will inevitably happen through internal expansion of a corporation into new markets.¹⁰⁵ What Turner seems to be saying is that: Since we cannot block the efficiency then we should go ahead and promote it. Whether efficiency is brought to a market through a merger or internal expansion, the small, inefficient operator will either be lost or he will be forced to improve his competitive performance.¹⁰⁶ Turner is too quick to accept what he considers to be the inevitable.

There is a thin line separating the methods of bringing greater efficiency to a market. Though the line is thin, the resulting separation of mergers and internal expansion is more noticeable. Consideration of this separation will illustrate why Congress felt justified in limiting its proscription to mergers. And if Turner had considered the inherent differences, I do not believe that he would have been so quick in his conclusion that the smaller firms will be affected in the same way in either case.

Small firms in a particular market are affected more materially by a merger than by internal expansion by a large firm. In the first place, internal expansion is a slower process, and the smaller firms already established in a market will be given some time to improve their competitive performance. With the merger, on the other hand, the expansion can come much more quickly, thereby cutting into the time needed to improve. Besides this time advantage, there is also a cost factor that must be considered. Obviously a corporation cannot go into a new market and construct facilities at the same cost that a small competitor faced twenty to fifty years earlier. With higher construction costs, the large corporation considering internal expansion into a new market immediately faces a higher unit cost for the produced product. This then, in a sense, insulates the smaller firms from the economic power of the giant corporations. Turner himself admits that expansion through mergers is cheaper than expansion through internal growth.¹⁰⁷ The *Columbia Steel Company* case¹⁰⁸ presents some interesting figures which illustrate the significance of the time and cost factors. When United States Steel became interested in acquiring the assets of Consolidated Steel Corporation, the committee

105. Turner 1331-32.

106. *Id.* at 1352-53.

107. *Id.* at 1318.

108. *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948).

established to study these facilities found that it would cost United States Steel 14 million dollars and three years of time to construct plants equivalent to those owned by Consolidated.¹⁰⁹ Since the depreciated value of the Consolidated facilities was approximately \$9,800,000, its cost base would have been \$4,000,000 less than what it would take for U.S. Steel to construct equivalent facilities. Faced with the increased cost factor plus the risk associated with the three years needed to construct the plants, the committee established by U.S. Steel might well have recommended no entry into the Consolidated market through internal expansion. Instead it might have considered internal expansion in some other market area, thereby contributing to a decentralization of production facilities. This probability,¹¹⁰ however, will never be tested since U.S. Steel successfully negotiated an acquisition price of \$8,250,000 for the Consolidated assets.¹¹¹

A final Turner justification for conglomerate mergers to be discussed in this section involves the "capital asset" market which is created by a liberal merger policy. Turner says that a strict merger policy would drastically weaken the market for capital assets and seriously depreciate the price that persons could get for their businesses when they wished to liquidate.¹¹² "Such a policy," remarks Turner, "would seriously interfere with maximum exploitation of productive resources . . . clearly against the interests of small businesses already in being."¹¹³ As laudable as this policy argument might be, its acceptance would mean the complete destruction of the anti-merger statute. Congress in formulating its anti-merger standard was in effect weighing the interests of those who desired to stay in business and those who desired to liquidate. It is impossible to protect both interests by a general proscription, and with section 7 Congress chose to protect those businessmen desiring to stay in business. Furthermore,

109. *Id.* at 506.

110. There was such a probability in this case since U.S. Steel had earlier acquired its Geneva facilities from the Government. U.S. Steel needed new fabricating facilities to insure a market for its increased production of rolled steel products created by Geneva.

111. *United States v. Columbia Steel Co.*, 334 U.S. 495, 506 (1948).

112. *Turner* 1326.

113. *Id.* Speaking of the Columbia Steel case, *supra* note 108, it should be noted that Consolidated, the acquired firm, approached U.S. Steel and encouraged the acquisition. From what Turner states about the benefits to small businesses, it would be of interest to see what size the business must be to be considered "small." The editors of *Fortune*, August, 1967, at 94, reported on a survey of "What 'Little Business' Thinks About Mergers." This survey, however, included only executives of companies with annual sales ranging from \$40 million to \$60 million. The conclusion of the survey should be obvious. In this conclusion, the editors noted: "Clearly, the federal trustbusters and men of the bench who have been shaping increasingly restrictive policies on corporate mergers, partly for the purpose of protecting smaller companies, get surprisingly little support from this group of supposed beneficiaries." *Id.* at 94, col. 3.

it is possible, if not probable, that if the threat of corporate invasion was eliminated, fewer businessmen would desire to liquidate.

3. *Conglomerates—Attacked*—Answers given by Turner to certain obvious attacks on conglomerate mergers will firmly establish his support for this form of corporate acquisition. It was first noted that a common belief is that a large company selling in several product or geographical markets is likely to indulge in predatory pricing.¹¹⁴ While this is a possibility, Turner reports that research and analysis show that this is unlikely.¹¹⁵ His entire discussion on this point is weakened by the narrow and technical definition given to "predatory pricing." He says that merely because a firm sells below cost or operates at a loss for a substantial period of time, predatory pricing is not necessarily indicated.¹¹⁶ Such practices, says Turner, may be supported by justifiable reasons such as: meeting distress market conditions, breaking into a new market, efficiency, etc.¹¹⁷ While the possibility exists, Turner thinks that predatory practices are so improbable that they deserve little weight "in formulating antimerger rules based on prospective effects."¹¹⁸ Finally, he goes to the extreme of saying that even should predatory practices occur subsequent to the acquisition, this should not be grounds for invalidating the merger.¹¹⁹

Similar conclusions are reached by Turner in his discussion of the problems of reciprocity. Though he makes it clear that there can be no justification for the serious anticompetitive device of reciprocity which might be a product of mergers, he is equally clear on the point that mergers should not be automatically outlawed merely because the possibility of reciprocity exists. He states, "It would be preposterous to outlaw a merger simply on the ground that the merged firm would have a greater ability to employ requirements contracts or tying agreements, because such restrictions can generally be readily detected and reached by law whenever they materialize."¹²⁰ Little concern is shown by Turner for the power created by a merger which makes it possible for a corporation to engage in a more favorable pricing policy or even reciprocity.¹²¹

114. Turner 1339.

115. *Id.* at 1340.

116. *Id.*

117. *Id.* at 1341.

118. *Id.* at 1346.

119. *Id.* at 1347. In light of what is said here, see *United States v. E. I. Du Pont de Nemours & Co.*, 353 U.S. 586 (1957).

120. Turner 1389.

121. His lack of concern for the "power" is the very antithesis of the Court's position. For recent cases showing the Court's growing concern for power, see *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966); *Atlantic Refining Co. v. FTC*, 381 U.S. 357 (1964).

For Turner, it is enough that these practices can be easily spotted and brought under control by other existing provisions under the antitrust laws. Beyond doubt, then, Turner is one of the stoutest advocates of conglomerate mergers, and it is only natural in light of his present position that the enforcement policy should reflect these views.

III. CRITICAL ANALYSIS OF TURNER'S MERGER PHILOSOPHY

Perhaps, to an extent, it is unfair to make reference to "Turner's merger philosophy," since what Turner has said in the article discussed above is reflective of the views of many other leading scholars. But Turner is unique in the sense that he has provided us with one of the most exhaustive studies of conglomerates. Furthermore, he has formulated a set of rules that in his opinion should control the determination of the legality of conglomerate mergers. This by itself might not be too significant; however, this set of rules (or guiding principles) has received wide attention and acclaim from members of the legal profession and business leaders.¹²² And though this public attention is not conclusive, its significance was increased by his appointment to the position of Assistant Attorney General in charge of the Antitrust Division.

In view of his present position, Turner's previously published views on conglomerate mergers have become "quasi-public statements." They became "quasi-public" in the sense that they have manifestly become the official enforcement policy. One commentator has observed that in the more than two years since Turner took office he has challenged few conglomerate-type mergers.¹²³ This, to me, represents a failure of the antimerger statute. But the failure cannot be attributed solely to Turner. From its inception, the failure of section 7 of the Clayton Act has been closely related to the enforcement policy. By charting this relationship, the wide gap separating the number of mergers and the number of mergers challenged becomes obvious. Graphs I and II, prepared from statistics reported by the Federal Trade Commission, illustrate the long-existing timidity in enforcement policy. Consequently, in order to find a clue to explain the obvious failure, one must comprehensively examine the antitrust enforcement philosophy.

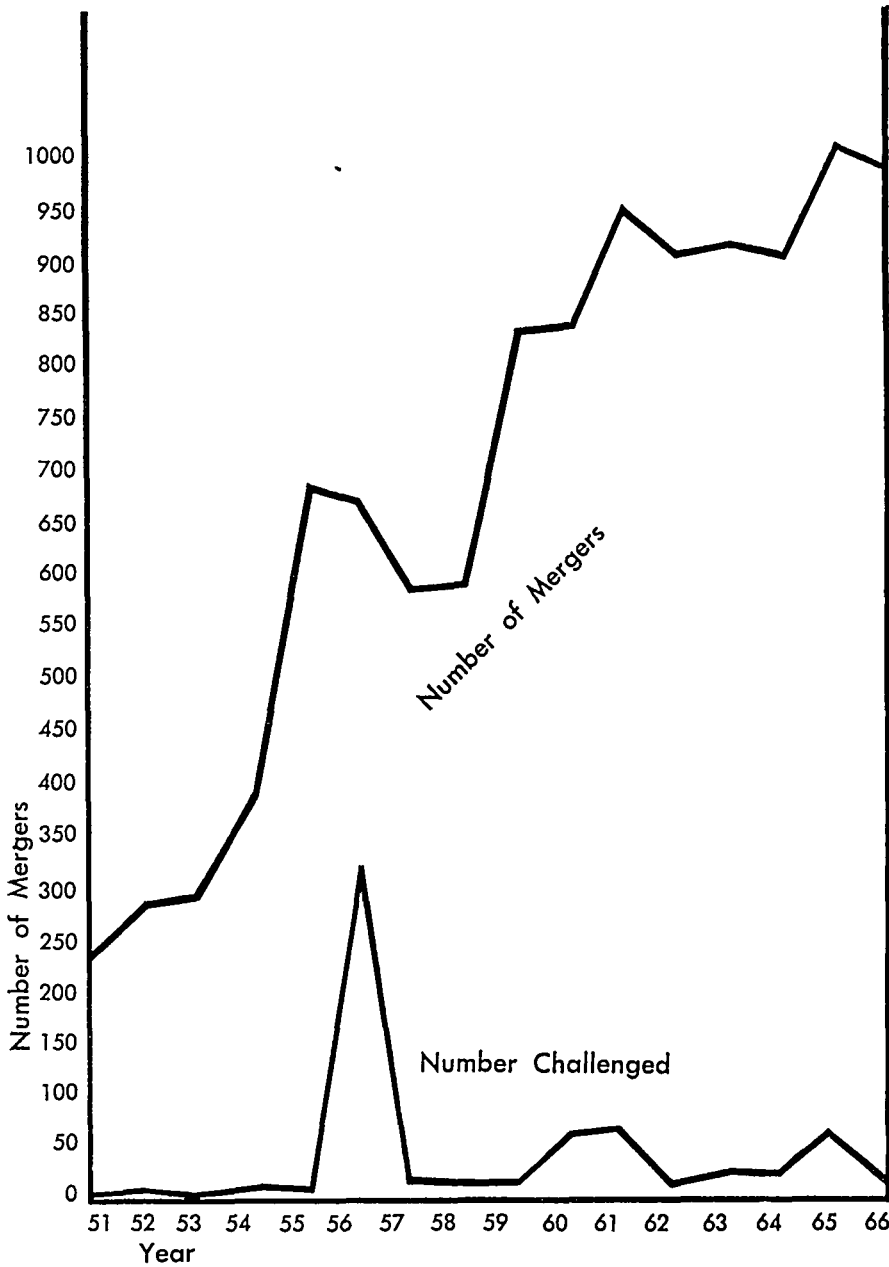
In focusing attention on Turner, there is certainly no intent to be vindictive. He, like others, is merely reacting to a long established judicial supremacy philosophy.

1. *Judicial Supremacy Philosophy*—Though a historical and philosophical aberration, judicial supremacy is, in practice, a reality. I have

122. *Business Week*, May 20, 1967, at 60; *Time*, Sept. 8, 1967, at 93; Wright, *Antitrust Today: A Curb on Competition 8* (Pamphlet distributed by U.S. Chamber of Commerce).

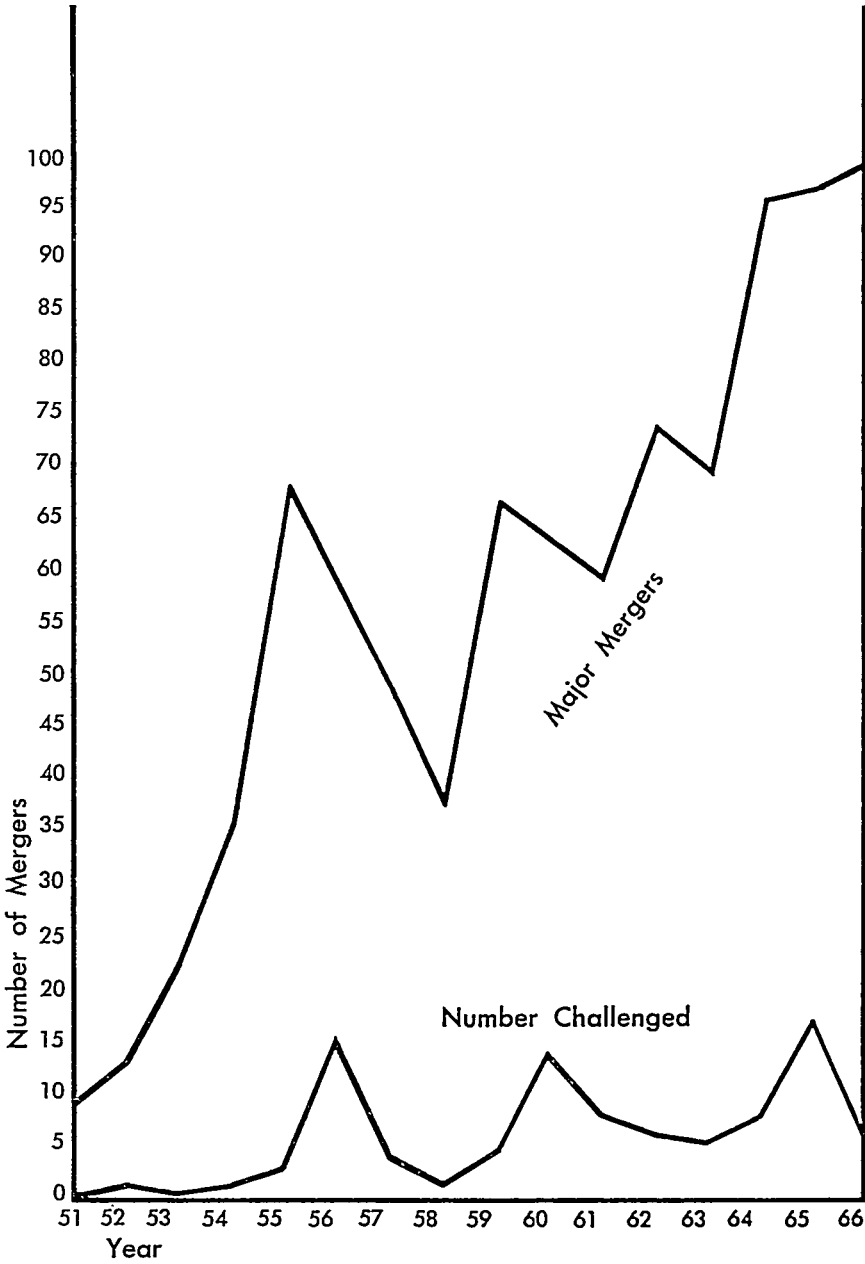
123. *Time*, Sept. 8, 1967, at 93.

GRAPH I
 Manufacturing & Mining
 Total Number of Mergers Compared With
 Total Challenged—1951-1966



Source: Staff of House Comm. on the Judiciary, 90th Cong., 1st Sess., *The Celler-Kefauver Act: Sixteen Years of Enforcement 37-39* (Comm. Print Oct. 16, 1967) [hereinafter cited as *Staff Report*].

GRAPH II
Total Number of Major Mergers Compared With Total
Major Mergers Challenged—1951-1966



Source: Staff Report 5, table 2.

seen no satisfactory discussion as to the origin of this policy; however, most writers seem to trace it to the common law.¹²⁴ Speaking of the court's power over statutes, Professor Radin once observed that there was no early common law doctrine that held statutes unassailable.¹²⁵ This form of judicial supremacy, according to most legal historians, was rooted in the idea that statutes in derogation of the common law must be strictly construed.¹²⁶ Likewise, they all seem to agree that Sir Edward Coke was the creator of this concept. For example, Professor Radin says that Coke illustrates better than any one else the ordinary common law lawyer's opposition to statutes which interfered with the normal course of legal development.¹²⁷

Coke, in whom the common law came to be personified,¹²⁸ did in fact express words in the *Dr. Bonham* case that could logically lead to the historian's conclusion of judicial supremacy.¹²⁹ In this case, Coke, in clear, unequivocal language, declared that courts were superior to Parliament. He stated, "And it appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void."¹³⁰ There can be no question that this language, considered in isolation, stands for the proposition of judicial supremacy. And since its declaration in 1610, this statement, though the weakest sort of dictum, has been cited on numerous occasions by American courts.¹³¹ The only real problem with the legal historians and the courts is that none really questioned the validity of the *Dr. Bonham* statement.

James Kent in his *Commentaries* did, to an extent, raise doubts about

124. J. Honnold, *The Life of the Law* (1964); W. Hurst, *The Growth of American Law—The Law Makers* (1950); M. Radin, *Handbook of Anglo-American Legal History* (1936).

125. M. Radin, *supra* note 124, at 335.

126. *Id.* at 335-37; J. Honnold, *supra* note 124, at 64; W. Hurst, *supra* note 124, at 34; Pound, *Common Law and Legislation*, 21 *Harv. L. Rev.* 383, 386 (1908).

127. M. Radin, *supra* note 124, at 336.

128. MacKay, *Coke—Parliamentary Sovereignty or the Supremacy of the Law?*, 22 *Mich. L. Rev.* 215, 222 (1924).

129. 8 *Rep.* 107a, 113b, 77 *Eng. Rep.* 638, 646. The *Dr. Bonham* case has received an enormous amount of attention. See MacKay, *Coke—Parliamentary Sovereignty or the Supremacy of the Law?*, 22 *Mich. L. Rev.* 215 (1924); Plucknett, *Bonham's Case and Judicial Review*, 40 *Harv. L. Rev.* 30 (1926); Thorne, *Dr. Bonham's Case*, 54 *L.Q. Rev.* 543 (1938).

130. 8 *Rep.* at 118a, 77 *Eng. Rep.* at 652 (footnote omitted).

131. Statutes in derogation of the common right shall be strictly construed. *Lock v. Miller*, 3 *Stew. & P.* 13 (Ala. 1832); *Young v. McKenzie*, 3 *Ga.* 31 (3 Kelly 1847); *Sprague v. Birdsall*, 2 *Cow.* 419 (N.Y. 1823).

the validity of the statement. Speaking of the power of the statute in England, Kent stated, "The will of the legislature is the supreme law of the land, and demands perfect obedience."¹³² But then he continued, "while we admit this conclusion of the English law, we cannot but admire the intrepidity and powerful sense of justice which led Lord Coke . . . to declare, as he did in *Dr. Bonham's* case, that the common law does control acts of Parliament, and adjudges them void, when against common right and reason."¹³³ While Kent recognized the supremacy of the statute in England, he did not defend the concept. He stated that: "The judicial power in every government must be co-extensive with the power of legislation."¹³⁴ In exercising their judicial power in the interpretative process, courts, according to Kent, were required to consider two things—the common law and the constitution. His view was that statutes are to be construed with reference to the principles of the common law, since it must be presumed that the legislature did not intend to create more of an innovation in the common law than the case absolutely required.¹³⁵ More important than this, however, was Kent's discussion of the constitutional role of the court. Citing *Marbury v. Madison*,¹³⁶ Kent stated that: "It is the province and the duty of the judicial department to say what the law is; and if two laws conflict with each other, to decide on the operation of each."¹³⁷

Even with his recognition of the strong constitutional power of courts to declare statutes null and void, Kent still did not carry the issue as far as later writers. He stated that: "If there be no constitutional objection to a statute, it is with us as absolute and uncontrollable as laws flowing from the sovereign power, under any other form of government."¹³⁸ Contemporary writers like Hurst and Honnold look more upon the constitution as the source of power for courts to rule over legislative bodies, both federal and state.¹³⁹ Although Kent did express some limitation to his views concerning the power of courts over legislative bodies, I think it fair to say that he, more than any other person in this country, was instrumental in institutionalizing the judicial supremacy concept. The irony is that the judicial supremacy concept is based on an erroneous interpretation of historical events.

Upon a closer examination of the *Dr. Bonham* dictum that courts are

132. 1 Kent, Commentaries* 448 (5th ed. 1844).

133. Id. (footnote omitted).

134. Id. at *296.

135. Id. at *463.

136. 5 U.S. (1 Cranch) 137, 177 (1803).

137. 1 Kent, Commentaries* 453 (5th ed. 1844).

138. Id. at 448.

139. J. Honnold, supra note 124, at 64; W. Hurst, supra note 124, at 27-33.

supreme, it becomes clear that the statement was not characteristic of Coke.¹⁴⁰ Coke was a great believer in the supremacy of Parliament for which, as a member of the Commons, he fought so hard. At the same time, however, Coke believed in a strong and independent judicial system. The conflict arising in the quest for judicial independence was always with the king, never with Parliament.

There are several incidents in history that might be considered as conflicts between common law courts and Parliament.¹⁴¹ One of the most interesting, involving Coke, arose when the 1628 Parliament was called. With the people in control of the Commons, an effort was made to force crown officers into a sense of responsibility toward Parliament.¹⁴² One of the first problems to be considered involved the power of the king to arrest and hold free Englishmen without first charging them. This had been the issue in the *Five Knights* case, and the judges who ruled in that case were called in to defend their position, which was in favor of the crown.¹⁴³ Coke, taking hold of the issue, began to cite judicial precedent to support his position that the knights must first be charged before they could be held, but he suffered a startling setback when the Solicitor General cited Coke himself in support of holding the prisoners without a charge.¹⁴⁴ Two other members of the Commons, Phelips and Selden, assigned the duty of investigating the Commons' records and precedents in light of the Solicitor General's statement, concluded and reported that: "*Judicial opinions . . . were but servants of the law; where anything was done against the statutes, it ought not to hold.*"¹⁴⁵ And with this conclusion, Coke had to agree. When he went before the Upper House to defend the resolution passed by the Commons, Coke cited both judicial and statutory precedent and stated that: "If these acts of Parliament cannot persuade you, my lords, nothing can."¹⁴⁶ To sum up the power of Parliament, one writer says that:

[T]here is now no doubt as to the force and effect of a statute. An act of Parliament can do anything. It can alter the Prayer Book, define the creed of the Church of England, annul royal marriages, and even settle the succession to the Throne. Any citizen

140. For general reading on Coke, see 1 L. Campbell, *Lives of the Chief Justices* 239-347 (1849); C. Bowen, *The Lion and the Throne* (1957).

141. Because of the major theme of the article, I will refrain from going into a detailed discussion of these incidents. It should, however, be noted that this should be the type of research conducted in order to define more accurately the responsibilities of government officials charged with the function of carrying out the policy of Congress.

142. C. Bowen, *supra* note 140, at 482.

143. *Id.* at 485.

144. *Id.* at 486.

145. *Id.* at 486-87.

146. *Id.* at 487.

who deems a statute unjust or immoral may agitate in every constitutional manner for its repeal. But so long as it remains unrepealed he must obey it.¹⁴⁷

Going back to the *Dr. Bonham* case for a moment, I should say that writers construing the dictum in that case to mean that Coke supported judicial supremacy over Parliament do a disservice to the man. There are too many consistent acts which reveal his strong support for sovereign power for us now to use an inconsistent statement to destroy this belief.

In this country, there has been a battle for power waged between courts and legislatures.¹⁴⁸ Professor Hurst has observed that the years 1750-1820 offered legislators a chance to become the principal lawmakers in this country. Not only did the early constitutions give the legislatures broad powers, but there were, during this period, no significant judicial decisions regarding the scope of legislative authority.¹⁴⁹ But then the legislature lost, or perhaps failed to gain, the confidence of the general public.¹⁵⁰ In any event, courts captured the popular imagination about 1820 and took the initiative in making the law.¹⁵¹ When revived legislatures began to challenge this judicial leadership, courts reinforced their hold on their supremacy by a revolution in legal education.¹⁵² When in the 1870s, Dean Christopher Langdell installed the case method of legal instruction at the Harvard Law School, the concept of judicial supremacy was perpetuated.¹⁵³ During Langdell's time, when legislation was relatively insignificant, the case method of instruction was no doubt appropriate. Since then statutes have been rapidly increasing to the point that all phases of our life and business are controlled by statute instead of the common law.

Despite the tremendous shift in the balance between common law and statutes, legal education continues to teach by the now outdated case method. This is true even in the so-called statutory courses where the explanation of legislative meaning is based on cases. This defect in legal education was first mentioned by Roscoe Pound in 1908.¹⁵⁴ And while text book writers are now providing "cases and materials" instead of a mere collection of "cases," the emphasis in instruction is still placed on

147. 1 W. Odgers, *The Common Law of England* 57-58 (1911).

148. W. Hurst, *supra* note 124, at 23.

149. *Id.* at 25.

150. J. Honnold, *supra* note 124, at 61.

151. W. Hurst, *supra* note 124, at 85.

152. *Id.* at 85-86.

153. *Id.* at 86, 258-68. At about the same time the Field-Carter-Pomeroy controversy was being waged with the enactment of the Field Code in California in 1874. See Thomas, *Statutory Construction When Legislation is Viewed as a Legal Institution*, 3 *Harv. J. Legis.* 191, 205-07 (1966).

154. Pound, *Common Law and Legislation*, 21 *Harv. L. Rev.* 383 (1908).

case analysis. Overemphasis of case analysis, the basis of common law development, is today the most significant interference with the legislative process. Legal education, thus the legal profession, has rejected the legislative process as a legal institution.¹⁵⁵ We have likewise refused to accept the fact that there now exists a science of legislation.¹⁵⁶

Students of the law have historically been taught that certain types of statutes, and all statutes under certain conditions, should be strictly construed. They have been told that the interpretation of statutes offers a truly creative role for judges.¹⁵⁷ Courts acting as lawmakers have found authority for their creative role in the canons of statutory construction and in the "due process clause" of the constitution.¹⁵⁸ There is abundant authority, even at common law, supporting the proposition that statutes must be strictly construed.¹⁵⁹ There are indeed interesting consequences that flow from how one defines the word "strictly." Most writers look upon this common law founded statement as justification for a creative judicial role. When judges say that a certain statute must be strictly construed because it abrogates the common law or because it is a penal statute, they are giving a reason, or attempting to find support, for what might amount to a law-making decision.¹⁶⁰ At one time, I found myself within this group of writers who construed the word "strictly" to mean that judges were to play a law-making role.¹⁶¹ Considerable research, however, has revealed that this proposition is unsound. To say that "a statute must be strictly construed" does not necessarily lead one to the conclusion that courts must play a creative role.¹⁶² It is just as logical, and more consistent with history, to say that the word "strictly" limits the authority of courts. Once the word is seen as a word of limitation instead of a creative word, the consequences flowing therefrom become

155. Thomas, *Statutory Construction When Legislation is Viewed as a Legal Institution*, 3 *Harv. J. Legis.* 191 (1966).

156. Pound, *supra* note 154, at 186.

157. W. Hurst, *supra* note 124, at 186.

158. I again find it necessary to restrict my discussion because of time and space. One point about "due process" must, however, be raised. At one point in history courts freely reviewed the substance of a statute to decide if it met the substantive standard of due process. Today the substantive due process attack has all but been eliminated. See *Nebbia v. New York*, 291 U.S. 502 (1934). But even so, the attack has influenced the construction process and must be considered as a factor in the present study.

159. T. Plucknett, *A Concise History of The Common Law* 158 (5th ed. 1956).

160. See Horack, *The Disintegration of Statutory Construction*, 24 *Ind. L.J.* 335 (1949).

161. Thomas, *supra* note 155, at 207.

162. Professor Dickerson once said that: "A court that was interested only in ascertaining the meaning of a statute would have little occasion to construe it either 'strictly' or 'liberally.'" Dickerson, *Symposium On Judicial Law Making in Relation to Statutes—Introduction*, 36 *Ind. L.J.* 411, 414 (1961).

quite different. For example, when one says that "statutes must be strictly construed," the meaning is that courts have no authority either to add or subtract anything from the words of the legislative body. This removes all judicial authority to hand down policy-making decisions, which to some degree deviate from the enacted words.¹⁶³

Not only have we ignored the possibilities that this distinction offers, we have followed the lead of James Kent and John Chipman Gray by devoting our full energy and facilities to support the proposition that courts should be creative in the sense that they actually rewrite existing statutory law.¹⁶⁴ The effects of our lack of concern can only be appreciated by an examination of the more contemporary consequences.

2. *Modern Battle and Consequences*—Judicial interpretation of statutes always involves a confrontation of courts and legislative bodies. The basic conflict lies in the concepts of the authority of each. On the one side, courts have consistently and jealously guarded their exclusive authority from legislative encroachment.¹⁶⁵ But the converse has not generally held true. Besides the more subtle incidents, an overreaction to the institutionalized judicial supremacy concept has led to some amazing examples of judicial usurpation of legislative authority. The most blatant incident in recent times occurred when Judge Corcoran of the District Court of the District of Columbia (at the urging of the American Civil Liberties Union) issued a temporary order restraining the House Un-American Activities Committee from conducting hearings into demonstrations against the Viet Nam war. Never has there been such a direct attack on the legislative process, and, noting the ensuing reactions on the part of Congress, one suspects we will never witness such an attack again. Representative Pool, Chairman of the Committee, was reported to have said: "The judge has no constitutional right to issue such an order"

163. If this distinction is valid then the very foundation of judicial supremacy is destroyed. At the present time I am engaged in research to support this position; however, much more time is needed before a more definite stand can be taken. I suggest this possible distinction here in an effort to encourage others to devote time to the issue.

164. J. Gray, *The Nature and Sources of the Law* (2d ed. 1927). Gray has been given much credit for formulating a theory of jurisprudence in which statutes were considered to be only a "source of Law," with the actual "Law" coming from judicial decisions. *Id.* at 84. Actually a broad view of history reveals that Gray formulated no new theory. Rather, he merely restated what he actually saw going on in the legal system. Instead of accepting these views as a great contribution (to be followed) to jurisprudence, they should have aroused concern for what was in reality taking place. With the wide acceptance of his views, Gray furthered the institutionalization of the judicial supremacy concept.

165. See T. Cooley, *Constitutional Limitations* 114 (7th ed. 1903). *Smith v. United Construction Workers*, 251 Ala. 250, 122 So. 2d 153 (1960); *People ex rel. Mutual Life Ins. Co. v. Board of Supervisors*, 16 N.Y. 424 (1857); *Greenough v. Greenough*, 11 Pa. 489 (1849).

I will go to jail . . . until hell freezes over to prove my point."¹⁶⁶ Equally incensed by this flagrant judicial attack, Representative Buchanan of Alabama declared: "I think the time has come at last . . . for Congress to take a long, sober look at the powers of the Congress and their relation to some of the things the judicial and executive branches of government have been doing."¹⁶⁷ Accepting the court's action as a direct judicial attack on the legislative process, it must be realized that this was merely a natural consequence of the judicial supremacy concept.¹⁶⁸ The difference between this blatant attack and the more subtle encroachments accomplished through the interpretative process is only a matter of degree. There has been so much written and said (particularly in the arena of legal education) on this subject, that the common belief is that courts operate as a supervisory arm over the law-making institution.

There are other incidents of possible judicial encroachment which, while less obvious, are equally direct. Following the reapportionment cases,¹⁶⁹ the Supreme Court finally took jurisdiction of a case involving an individual's right to take his legislative seat.¹⁷⁰ Though the Georgia legislature was not ordered to seat Julian Bond,¹⁷¹ the same issue might well be presented to the Court again in the Adam Clayton Powell case.¹⁷²

Early labor cases also offer a good example of the battle for authority waged between courts and legislative bodies.¹⁷³ At first, the courts were in command. By applying a double standard, the courts, freely granting labor injunctions, effectively thwarted the rights of workers to organize and to take concerted action necessary to gain any demanded economic benefits.¹⁷⁴ By the use of common law devices¹⁷⁵ and later the Sherman

166. N.Y. Times, Aug. 16, 1966, at 1, col. 1.

167. Birmingham News, Aug. 16, 1966, at 1, col. 7.

168. The decision was reversed about as fast as it was rendered. N.Y. Times, Aug. 17, 1966, at 1, col. 1.

169. Since *Baker v. Carr*, 369 U.S. 186 (1962), reapportionment has presented no real issue to the courts.

170. *Bond v. Floyd*, 385 U.S. 116 (1966).

171. The Court merely ruled that Bond's constitutional rights had been violated. But upon this decision, the legislature, without waiting for further judicial action, seated Bond.

172. *Powell v. McCormack*, 266 F. Supp. 354 (D.D.C. 1967). [The Supreme Court later denied certiorari. 387 U.S. 933 (1967).]

173. The same experience is found in the evolution from the old fellow-servant rule to the workman's compensation laws. See generally, C. Auerbach, L. Garrison, W. Hurst & S. Mermin, *The Legal Process* (1961).

174. For a discussion of this double standard, see L. Wolf, *Lockout 4-5* (1965). Compare *Plant v. Woods*, 176 Mass. 492, 57 N.E. 1011 (1900), with *Mogul S.S. Co. v. McGregor, Gow, & Co.*, 23 Q. B. Div. 598 (1889).

175. E.g., *Vegeahn v. Guntner*, 167 Mass. 92, 44 N.E. 1077 (1896).

Act,¹⁷⁶ workers were judicially suppressed, causing at times outbreaks of violence.¹⁷⁷ Congress, in an effort to protect the rights of workers to organize, then passed the Clayton Act, which exempted the "labor of a human being" from the provisions of the Sherman Act.¹⁷⁸ But courts, influenced by their generally unsympathetic feeling toward labor, refused to give up the battle so easily. The Clayton Act, which had been hailed as labor's "charter of freedom," was rendered impotent by the strict construction device which has been effectively used by courts to perpetuate the judicial supremacy concept.¹⁷⁹ Finally Congress, making a counter-attack to preserve its law-making authority, effectively removed the federal courts from the scene of labor disputes. With the passage of the Norris-LaGuardia Act, courts were prohibited from issuing any labor injunction "except in a strict conformity with the provisions of this act."¹⁸⁰ Then, in another giant step, Congress established in the National Labor Relations Board, a more sympathetic agency that would honor rather than usurp its legislative authority.¹⁸¹

Of all the incidents where judicial supremacy has clashed with the legislative process, none can compare (at least for effectiveness) with incidents arising under antitrust laws. In the field of antitrust, the success of courts in their law making role must be attributed to the fact that no one has really questioned this judicial authority. Even those writers who call for the elevation of legislation to a science seem to concede that the antitrust laws are in a special category.¹⁸² It is special in the sense that writers generally take the position that Congress has purposely used general language to transfer to the courts a general license to supply the meaning.¹⁸³ Professor Jaffe, speaking on the court's role in the field of antitrust, has stated that:

176. Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); United States v. Debs; 64 F. 724 (N.D. Ill. 1894).

177. Roscoe Pound observed that there were those who "express the opinion that 'belated and anti-social' decisions have been a fruitful cause of strikes, industrial discord, and consequent lawlessness." Pound, *supra* note 154, at 384. See also Reid, *Violence in American Law: A Review of Five Books*, 40 N.Y.U.L. Rev. 1208 (1965).

178. Clayton Act, 15 U.S.C. §§ 12-27 (1964).

179. See Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).

180. Norris-LaGuardia Act § 1, 29 U.S.C. §§ 101-115 (1964) (emphasis added). It is interesting to note how Congress was using the word "strict" in this statute. With the use of this word, there was a clear attempt to restrict the authority of courts. This is the same way the word should be accepted in the historical common law approach to statutes in general.

181. Wagner Act § 3, 29 U.S.C. §§ 151-66 (1964).

182. Pound, *supra* note 154, at 383: "[L]awyers in the legislature often conceive it more expedient to make of a statute the barest outline, leaving details of the most vital importance to be filled in by judicial law-making."

183. J. Cohen, *Materials and Problems on Legislation* 64-67 (2d ed. 1967); J. Honnold,

Even the most traditional lawyer will admit that under the Sherman Act a court has no choice but to formulate its standards as to what is a restraint of trade or a monopoly and that the formulation must express the court's notions of policy. The Sherman Act is an extreme case but all great statutes force the judge at some point or other, be he ever so reluctant, to devise a "common-law" of the statute. We have it from good authority that the legislative draftsman on occasion . . . deliberately fails to make explicit provision for a foreseen case.¹⁸⁴

This license has been freely exercised by most of the lower federal courts which render antitrust decisions on the basis of some conceived policy, though it might be totally inconsistent with the legislative purpose. For example, a federal district court, in upholding the Philadelphia National Bank merger, stated that the merger would be "good for Philadelphia."¹⁸⁵ The most notable incidents of judicial supremacy in the antitrust field have, however, occurred in the treble damage cases. Lower federal courts, without any support from the Supreme Court, have generated a natural reluctance toward private suits because of the severity of the compulsory treble damages.¹⁸⁶ Professor Areeda, on this point, observed that we are not willing to frame broad or rigorous liability rules because private plaintiffs will not invoke them with responsible restraint.¹⁸⁷ Lower federal courts have gone so far as to ignore the practical effects of the personal efforts of an injured plaintiff who successfully litigated his case all the way through the Supreme Court. After receiving a favorable verdict from the Court in *Simpson v. Union Oil Co.*,¹⁸⁸ the plaintiff returned to the federal district court to prove his damages. To his surprise, the lower court denied the damages on the ground of unfairness to defendant who it said had acted in good faith in relying on previously existing judicial precedent.¹⁸⁹

Turner, like the courts, has felt free to formulate a set of conglomerate merger rules with which to supply meaning to the presumed skeleton anti-merger statute. In his comprehensive conglomerate merger article,

supra note 124, at 61; Cohen, Judicial "Legisputation" and the Dimensions of Legislative Meaning, 36 Ind. L.J. 414, 415-16 (1961); Miller, Statutory Language and the Purposive Use of Ambiguity, 42 Va. L. Rev. 23, 30 (1956).

184. Jaffe, An Essay on Delegation of Legislative Power, 47 Colum. L. Rev. 359, 360-61 (1947) (footnotes omitted).

185. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 371 (1963). The Supreme Court rejected this policy decision and stated: "A value choice of such magnitude is beyond the ordinary limits of judicial competence . . ." *Id.*

186. Clark, The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits, 52 Mich. L. Rev. 363 (1954), citing *Straus v. Victor Talking Mach. Co.*, 297 F. 791, 812 (2d Cir. 1924).

187. P. Areeda, Antitrust Analysis 36 (1967).

188. 377 U.S. 13 (1964).

189. CCH 1967 Trade Cases 72,142 (N.D. Calif. 1967). For a discussion of the plaintiff's chances before district court decision was rendered see P. Areeda, supra note 187, at 36.

Turner in effect denied the exclusive authority of Congress on three occasions. He first stated, "While Congress obviously wanted to limit mergers significantly, it also wished to leave at least some room for those that promised beneficial or neutral effects and no serious threat to competition."¹⁹⁰ He then observed that it is undeniable that the legislative history of the 1950 amendment "indicated extensive, if not primary, pre-occupation with alleged evils of concentration and alleged virtues of small entrepreneurship."¹⁹¹ Finally Turner stated that "even though Congress may have thought otherwise, and even though it may not be appropriate for a court to 'overrule' a major premise of Congress by appeal to . . . [economics statistics], it is certainly in order for the courts to take into account the facts as they are in rejecting a policy choice that is contrary to the main thrust of antitrust law and that Congress never really made."¹⁹²

There is little doubt that Turner recognized and understood the statutory purpose behind the 1950 Clayton Act Amendment; however, it is equally clear that he seeks to bury this policy under his own economic philosophy. His formulation of economic rules under which the great majority of conglomerate mergers can be approved is nothing more than an overreaction to the aberrant judicial supremacy concept. After creating a set of general guiding principles based on certain economic views, Turner says that if "Congress had focused on the issue, it would have wished such a result."¹⁹³ It seems strange indeed that anyone would suggest that Congress had not focused on the issue. There are probably few, if any, topics considered by Congress that have received the attention focused on corporate mergers. Furthermore, a closer examination of this material will bring clarity to the statutory words.

Congress is quite capable of establishing its own economic standard under which corporate mergers are to be judged. When this is done (as it has been in section 7 of the Clayton Act), there is no room, in the application of the statute, for lawyers, courts or enforcement officers to formulate their own economic policy. Instead of expending energy in this direction (which will naturally result in inconsistent conclusions and thus confusion) our efforts must be directed toward gaining an understanding of the single congressional standard. This, however, will be accomplished only by developing a "legislative science" which demands recognition of the legislative process as a "legal institution." Only then will clarity in making business decisions replace the present state of confusion.

190. Turner 1316-17.

191. *Id.* at 1326.

192. *Id.* at 1327-28 (footnote omitted).

193. *Id.* at 1326.

While the final results of the enforced statute might not make businessmen who desire to merge happy, any necessary changes must come from Congress.

Refusal to abandon the judicial supremacy concept has effectively retarded the consistency and thus the effectiveness of the antitrust laws,¹⁹⁴ and members of the legal profession who face antitrust problems daily have contributed heavily to this retardation. In fact, the judicial supremacy concept reaches its pinnacle through positions taken by certain leading members of the Bar. For example, Jerrold Van Cise, a nationally known antitrust lawyer, considered it necessary (in his discussion of the *per se* rule) to determine whether congressional objectives should be used to support judicial decisions.¹⁹⁵ When taken out of context, a reasonable conclusion would be that one should go to the statute only when the judicial decisions are not clear. Placed in its proper context, Van Cise's conclusion is that the *per se* rule is not absolute, and that to determine the limitations one should go to the congressional objectives. But even here (where a case is clear), the judicial decision is elevated above the statute—leaving the impression that there is a wide range of judicial discretion. Remaining consistent with most other writers, Van Cise admits and supports the wide range of judicial discretion. He states, "In the antitrust field the courts have been accorded, by common consent, an authority they have in no other branch of enacted law."¹⁹⁶ But Van Cise does not go nearly as far as some other lawyers who specialize in antitrust laws. Ira Millstein, who was formerly with the Antitrust Division, took a rather interesting position at a recent Practising Law Institute workshop on conglomerate mergers.¹⁹⁷ He voiced objections to congressional hearings on this subject because such hearings were nothing more than a list of economic views rather than an examination of proven judicial decisions. He continued by saying that Congress should have looked to the courts to see what legislation should be passed in the merger field. In view of its obvious fallacy, nothing need be said about this position except that it is one more example of overemphasis of the judicial supremacy concept.

3. *Why The Insistence That Courts Make Law?*—For the general purposes of this article, I will not seek to provide a comprehensive and conclusive discussion of this question. Rather, I will seek merely to

194. This is not limited to the antitrust laws; the same holds true for most social legislation statutes. Through their interpretative powers, courts can effectively impede or thwart social legislation. See Pound, *supra* note 154, at 385.

195. J. Van Cise, *Understanding the Antitrust Laws* 116 (1966).

196. *Id.* at 117.

197. Practising Law Institute, *The Antitrust Challenge to Corporate Growth Through Conglomerate Acquisitions and Joint Venture*, Dec. 2-3, 1966.

identify the stumbling blocks to effective legislation. My discussion will be divided into two parts: first, the general misunderstanding of the legislative process which prevails in this country; second, the natural fear of change.

a) *Misunderstanding*: It has been suggested that since judges were common law trained, they felt somewhat awkward in deciding cases based on statutes. They would look at statutes but then analogize from cases.¹⁹⁸ Since legal education was common law oriented, it was only natural that lawyers would feel more comfortable and reassured with an analysis of cases. And what lawyers do, so do the judges. "It is not the judge's duty to understand, but it is the lawyer's duty to make himself understood. The judge remains seated awaiting a communication; the lawyer is on his feet; he should be the aggressor and approach the judge in both the physical and intellectual sense."¹⁹⁹ This is especially true under our adversary system where the opposing lawyers are charged with the duty of developing the case.

By reasoning that the legislative body must predict detailed applications of any proposed legislation while courts draw their principles from detailed applications after the event, one might reasonably conclude that courts must make law. In other words, statutes passed yesterday must be molded by courts to meet modern technological changes. This is a commonly heard statement; however, I suggest that it manifests a clear misunderstanding of the legislative process. The misunderstanding is based on the outworn and discarded concept that courts, in applying statutes, must ascertain the legislative *intent*.²⁰⁰ There is no reason to assume a limitation on the authority of Congress to pass a law which will cover both foreseen and unforeseen situations. Under the Sherman Act, Congress could have just as well said that every contract and every other device that might be invented in the future by lawyers or businessmen, in restraint of trade, is hereby declared to be illegal. Merely because every conceivable device was not listed does not mean that any law-making authority was delegated to courts in classifying the type of device which would be illegal. Congress was *itself* taking care of the unforeseen situation. Likewise, Congress could have said that every contract involving price fixing, division of markets, group boycotts, and any other form of restraint that might be invented in the future, is hereby declared to be illegal. Again, merely because Congress did not conceive of all forms

198. J. Honnold, *supra* note 124, at 60.

199. These philosophical words come from P. Calamandrei, *Eulogy of Judges* 22 (2d ed. 1956 tr. by Adams and Phillips).

200. Justice Frankfurter admonished us against using this word "intent." Frankfurter, *Some Reflections On the Reading of Statutes*, 47 *Colum. L. Rev.* 527 (1947).

of restraint, one cannot conclude that any law-making authority was delegated to the courts. The use of general language in a statute is not a delegating device; it is a legislative device used to insure that the prohibition provided will cover the unknown as well as the known evils.

The general misunderstanding of the legislative process is rather evidenced by the belief that the courts' creative role lends greater certainty to the law. It is argued that by refining the general congressional standard into more precise principles (as is done at the common law) greater certainty is achieved.²⁰¹ No one would argue about the desire for greater certainty; the question, however, is: how much certainty is possible? Since few words possess the precision of mathematical symbols, and since most statutes deal with many unforeseen problems, "no more than a reasonable degree of certainty can be demanded."²⁰² Because of the unavoidable lack of precision in a statute, "one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."²⁰³ The risk involved is certainly not mitigated by encouraging courts to create more precise principles. Courts cannot be granted such creative power without, at the same time, being allowed to consider policy arguments which, in the antitrust field, will be based on a variety of economic theories. Furthermore, there will be many inconsistent decisions coming from the several districts, thereby creating greater uncertainty rather than achieving the desired clarity. Though certainty can never be absolute, the greatest degree will be achieved by expending all energies toward gaining an understanding of the single congressional standard.

There has been much written on the subject; however, I do not believe that the research in the antitrust field has proven any more effective than in other areas of legislation. As to these areas, the late Justice Frankfurter once observed, "I confess unashamedly that I do not get much nourishment from books on statutory construction, and I say this after freshly reexamining them all, scores of them."²⁰⁴ The general weakness of writers in this area is that they are either seeking to explain the law

201. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 *Harv. L. Rev.* 863 (1962); Sullivan, *Federal Power Commission Jurisdiction Over Commingled Sales of Natural Gas: a Problem in Judicial and Administrative Legislation*, 30 *Geo. Wash. L. Rev.* 638, 642 (1962). In the antitrust area this position is shared by most writers. This is the position advocated by Turner in his article. See also *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967) (concurring opinion of Mr. Justice Harlan); Bork, *supra* note 88.

202. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952); see Frankfurter, *supra* note 200, at 543.

203. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 393 (1965).

204. Frankfurter, *supra* note 200, at 530.

on the basis of judicially created principles or they are seeking to play the part of a politician by rewriting the law. In either case the main object of the legal research is lost. It is impossible to understand the substantive matter of a statute without, at the same time, giving sufficient consideration to the relationship of courts and the legislature as it is involved in the interpretative process.²⁰⁵

b) Fear of change: Fused with the general misunderstanding of the legislative process is a fear of change. While one might say that fear is based on misunderstanding, it goes much deeper than this. Fear of change might actually be based on a desire to preserve the existing power structure.

Lawyers have historically shown a fear of change, particularly if the change is to occur within the legal profession. No better evidence of this can be shown than the early Field-Carter-Pomeroy codification controversy.²⁰⁶ James Carter, the great New York opponent to a change from common law to codification, declared: "We all know that when the courts of common law in the infancy of legislation came to be called upon to interpret statutes, they soon displayed their wisdom by hitting upon the now familiar rule that statutes in derogation of the common law are to be *strictly construed*."²⁰⁷ Professor Pomeroy argued the issue even more strongly since he was fighting to save the common law after the Field code was adopted in California. He argued that the code was incomplete, imperfect and partial since the familiar common law terminology had been replaced by unfamiliar expressions which had no definitely settled legal meaning.²⁰⁸ He then successfully proposed that

except in the comparatively few instances where the language is so clear and unequivocal as to leave no doubt of an intention to depart from, alter or abrogate the common-law rule concerning the subject-matter, the courts should avowedly adopt and follow without deviation the uniform principle of interpreting all the definitions, statements of doctrines and rules contained in the code in complete conformity with the common-law definitions, doctrines and rules, and as to all the subordinate effects resulting from this interpretation.²⁰⁹

Closely akin to this fear of change, and even more important, is the desire to preserve the existing power structure.²¹⁰ Many incidents in the law show the existence of this desire. For example, in *Munn v. Illinois*,²¹¹

205. See note 42 supra.

206. Thomas, supra note 155, at 205-07. See also J. Honnold, supra note 124, at 123.

207. J. Carter, *Law: Its Origin, Growth and Function* 308 (1907).

208. Harrison, *The First Half-Century of The California Civil Code*, 10 *Calif. L. Rev.* 185, 189 (1922).

209. Quoted in Harrison, supra note 203, at 189-90.

210. See H. Laski, *The State In Theory and Practice* (1935).

211. 94 U.S. 113 (1876).

where the Supreme Court affirmed the states' power to regulate railroads, Mr. Justice Field, in a vigorous dissent, stated that: "The principle upon which the opinion of the majority proceeds is, in my judgment, subversive of the rights of private property, heretofore believed to be protected by constitutional guarantees against legislative interference."²¹² It has been stated that courts captured the popular imagination about 1820;²¹³ however, there is just as much evidence to support the notion that courts, rather than being popular with the people, were actually controlled by the railroad interests and their own political philosophy.²¹⁴ This conclusion cannot be ignored in light of the vast amount of evidence concerning the unsympathetic feeling of courts toward individuals in fellow-servant cases and in the many cases involving the workers' efforts to organize in order that they might be more effective in making demands on employers. And there is no reason to believe that the same feeling does not exist in the field of antitrust. In fact, this feeling becomes quite obvious in the many harsh attacks leveled at the Supreme Court because of adverse decisions in the relatively few cases that ever reach the Court. It becomes particularly unfortunate when this criticism is leveled at the Court by men who are supposed to be trained in the law.²¹⁵ Many of these critics are good examples of the "politician disguised as a lawyer."

IV. SHOULD COURTS MAKE LAW IN THE FIELD OF ANTITRUST?

Based on the previous discussion, no one can question the fact that courts have definitely assumed law-making power in the antitrust field. In fact, instead of questioning this power, most people and courts devote their energies to a defense of it. The judicial position on this question was greatly clarified in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*²¹⁶ Recovery of treble damages was there denied on the ground that the defendant should not be penalized for action occurring before the

212. *Id.* at 136.

213. W. Hurst, *supra* note 124, at 85.

214. Thomas, *An Answer to Regulation Critics—Control of Administrative Agencies*, 1 *Tulsa L.J.* 109, 112 (1964); Reid, Henry Brannon and Marmaduke Dent: The Shapers of West Virginia Law, Part I, 65 *W. Va. L. Rev.* 19 (1962). It has been said of Chief Justice Marshall that he personally (he being a Federalist, it is understandable) favored a strong national economy and a strong central government, which he achieved through decision after decision "until they became imbedded in our law." Jones, Chief Justice John Marshall xv (1956). James Kent was another judge who obtained greatness, but what he was not capable of achieving in his unsuccessful career as a politician, he sought to achieve during his more successful tenure as a judge. See W. Hurst, *supra* note 124, at 44.

215. For an example of unfair criticism, see Bork, *The Supreme Court Versus Corporate Efficiency*, *Fortune*, Aug. 1967, at 92. (Bork is a Professor at Yale Law School.)

216. 377 F.2d 776 (3d Cir. 1967).

"change occurred in the law."²¹⁷ It was concluded that the change (created by judicial decision) could not be retroactively applied.²¹⁸ This retroactivity question offers the clearest example of judicial lawmaking, and presents the most obvious judicial encroachment into the legislative process.²¹⁹ In such cases, courts interpret and apply statutes under a double standard. Persons relying on prior judicial decision are given immunity from liability. Consequently judicial decisions are elevated above statutes, and the concept of judicial supremacy is effectively perpetuated. If a defendant has neatly fitted his action under a judicial decision (which is not difficult under the adversary system which incorporates the art of manipulation), it might be very profitable for one to violate the antitrust laws. Since a judicial change will only be prospectively applied, the defendant is able to retain the profit of his illegal act. The consequences of this are particularly great in the antitrust field where restraining agreements and illegal mergers reap substantial benefits for the wrongdoer. Furthermore, injured persons, bound by prior judicial principles, have been given no voice in the creative process.

1. *Certainty*: That certainty is acquired through the role of judicial law-making is at best questionable. It has been reasoned that this certainty results from a judicial refinement of statutory standards into more precise principles. Such an optimistic view manifests a clear misunderstanding of our entire legal system. In the first place, the accuracy of this position is based on an ideal that all decisions are skillfully reasoned and written. But, as Kent pointed out, "It is probable that the records of many of the courts in this country are replete with hasty and crude decisions."²²⁰ Secondly, such a position is based on a fatalistic view that the legislative body is incapable of conveying a meaning which will be a clear enough standard. When the legislative process is looked upon as a legal institution and is understood, the statute represents a single standard. On the other hand, judicial decisions represent multiple standards varying in conclusion and reasoning dependent on the ability and philosophy of the judges. Question: Where is clarity gained? At the present time, this question will be left open, but an answer will be sought in the remaining portion of this article.

2. *Who is best able to handle social problems?* Whether one seeks to answer this question constitutionally or purely academically, the conclusion is the same. "It is the province of the Statesman, not of the

217. Id. at 789.

218. Id. at 787-90.

219. See *Hare v. General Contract Purchase Corp.*, 220 Ark. 601, 249 S.W.2d 973 (1952). See also *Great N. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932).

220. 1 Kent, Commentaries *477 (5th ed. 1844).

lawyer, to discuss, and of the Legislature to determine what is best for the public good, and to provide for it by proper enactments."²²¹ Only a statesman can objectively assess the needs of the nation. Lawyers, on the other hand, chained to the adversary system, are dedicated to converting others to preconceived and unscientific conclusions. Acceptable weapons in the lawyer's arsenal include the use of schemes, devices, tactics and the art of rhetoric.²²² Furthermore, lawyers are without the necessary resources or facilities for making adequate sociological, political and economic studies. Within the legislative body, however, massive machinery and funds are available to measure the voice of the governed. Thus, value judgments reached and enacted by legislative bodies must not be disposed of lightly as offhand products. They "represent long and patient study by experts, careful consideration by conferences or congresses or associations, press discussion in which public opinion is focused upon all important details, and hearings before legislative committees."²²³

This bit of political philosophy was clearly structured into our constitutional system of government to insure that society would be regulated by "law" and not by the value judgments of men, whether they be men of good or bad will, whether they be judges, lawyers or enforcement officers. The United States Constitution represents more than the isolated ideals over which the American Revolution was fought. It was written from the early experiences of the internal political struggle that had previously taken place in England over the respective power of the king, Parliament and courts. It was during the reign of James II that that controversy was climaxed with the claim that the king by his prerogative could dispense individual cases from the operation of a statute. Upon this clear issue of authority, the conflict was fought in what has been described as "the great and glorious revolution" of 1688.²²⁴ From this revolution came the Bill of Rights which provided that the pretended power of suspending laws, or the execution of laws by regal authority, without the consent of Parliament, was illegal.²²⁵ But even before this date Parliament was gaining in power. Maitland, describing the early English Parliaments, observed that the House of Lords gave the king advice and counsel, and from the House of Commons the king sought *consent*.²²⁶ This consent proved to be a useful tool to the king, especially when he sought to

221. W. B. Odgers, *The Common Law of England*, vol. I, at 59 (1911).

222. J. Frank, *Courts on Trial* 80-102 (1949).

223. Pound, *Common Law and Legislation*, 21 *Harv. L. Rev.* 383, 384 (1908).

224. T. Plucknett, *supra* note 159, at 59.

225. *Id.*

226. F. W. Maitland, *The Constitutional History of England* 388 (1908).

impose a tax on the people. When such a tax was imposed on the people *by consent* of the House of Commons, greater general acceptance was assured, and there was greater ease in collections.²²⁷ According to all jurisprudential writers, consent (or obedience) of the people is vital to the stability of any legal system. The legal order can stand only so long as there is sufficient general acceptance by the people or, in the absence of this acceptance, sufficient physical force to insure obedience. In a representative form of government greater reliance is placed on this general acceptance with a minimum amount of physical force; however, this reliance is assured only if the representatives respond to the wishes of the people.

One finds this historical background reflected in the constitution. To insure the consent of the people, all legislative power is vested in the Congress.²²⁸ And to insure a fair enforcement of the laws, the judicial power is vested in the courts.²²⁹ According to Chief Justice Marshall, in *Marbury v. Madison*,²³⁰ it was the "duty of the judicial department to say what the law is." When one looks at Marshall's words in light of the Constitution, there is a significant difference between what they mean and what those adhering to the judicial supremacy concept construe them to mean. According to the words of the Constitution, courts (in certain prescribed jurisdictional areas) decide *controversies*.²³¹ Viewed in light of Marshall's words, "courts say what the law is" to the extent necessary to resolve the *controversy*.

This is the only consistent interpretation that can be given to the constitutional words. Moreover, since courts are not representative of the people, in a political sense, it is only natural that judicial power be limited. When the courts interpret the formulation of general statutory principles²³² as casting courts in a law-making role, people most affected by this judicially-created law find themselves bound without having been given any standing to be heard on the merits. This political conflict is avoided only by adjudicating cases on the basis of the statute as it is written. Turner offers the best example of why (at least in the area of antitrust) this political division must be preserved. In formulating his general principles under which conglomerate mergers will be judged, Turner

227. This historical practice perhaps explains why in the Constitution, revenue measures must originate in the House. U.S. Const. art. I, § 7.

228. U.S. Const. art. I, § 1.

229. U.S. Const. art. III, § 1.

230. 5 U.S. (1 Cranch) 137, 177 (1803).

231. U.S. Const. art. III, § 2.

232. This is what Turner is calling for in his conglomerate merger article, a view that is shared by the dissenting member of the Court, Mr. Justice Harlan. See *FTC v. Proctor & Gamble Co.*, 386 U.S. 568, 581 (1967) (concurring opinion of Mr. Justice Harlan).

shows little concern for the small businessmen.²³³ These small companies, says Turner, are not lost because of the merger; they are lost because they fail or are unwilling to improve their competitive position. If mergers were prohibited, companies would merely expand internally, and the small companies which remained uncompetitive would, in any event, be lost.²³⁴ In formulating his merger rules, Turner is making, at the most, a value judgment which is based on a personal economic philosophy that adheres to the position that no law should retard corporate efficiency, even at the cost of eliminating small businessmen from our economy.

It is doubtful that Turner, in formulating his rules, held any public hearing in which the voice of the small businessman was heard. Congress, on the other hand, in formulating its standard as found in section 7 of the Clayton Act, did hold hearings and did provide an opportunity for the small businessman to speak for himself or through his elected representative. Based on this complex legislative machinery, Congress likewise reached a value judgment that might very well be the antithesis of the position taken by Turner. Perhaps it was decided that the small companies, with all their inefficiency, should be preserved. Such was, in fact, suggested by the Supreme Court in the *Brown Shoe Company* case.²³⁵ The court stated that: "[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher cost and prices might result from the maintenance of fragmented industries and markets. *It resolved these competing considerations in favor of decentralization.* We must give effect to that decision."²³⁶

With this value judgment Turner takes issue and charges that the Court in making the statement was ambivalent.²³⁷ The difference in the two value judgments is that Congress is the constitutional institution created to make such judgments. Whatever value judgment is finally reached through the legislative process, it carries with it the weight of law, and all public officials are charged with the duty of executing this law on the basis of the official value judgment. Public officials, including enforcement officers and courts, have no constitutional power to dispense

233. It has been reported that: "Turner makes few friends in Congress with the outspoken candor he developed in Academe. Turner upsets members of the congressional small business committees when he tells them that the anti-trust laws aren't meant to assist small companies overcome their competitive problems." *Business Week*, May 20, 1967, at 61, col. 2.

234. Turner 1353.

235. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

236. *Id.* at 344 (emphasis added).

237. Turner 1323-24.

with a constitutional statute for any reason.²³⁸ It is the author's intent, in writing this paper, to clarify this legislative value judgment.

3. *False Sense of Security*: With the merger rules formulated by lower federal courts and institutionalized by Turner, lawyers and businessmen are presently enjoying a sense of security. One periodical has reported that business lawyers are saying that "the antitrust rules have never been clearer than they are today."²³⁹ For this greater degree of certainty, credit is given to Turner, who, it is said, has been spelling out *his* interpretation of the law.²⁴⁰ This security results from Turner's refusal to prosecute the great majority of conglomerate mergers.²⁴¹ And, to be sure, businessmen are taking advantage of this security, with major corporate mergers during this year moving at a record clip of 150 each month.²⁴² *The Wall Street Journal* reports that the present merger surge has been spurred partly by fear that the government may soon blow the whistle.²⁴³

That there is a fear of a possible government crackdown on mergers should be evidence that the security gained by judicial or Turner rules is a "false security." Even assuming constitutional authority for the non-legislative formulation of rules, the fact remains that the rules are subject to change at any time and without notice. This alone should cause every merged company to operate in constant fear, and it might even be wise for them to set up a contingency reserve fund which might be needed to defend the merger or to finance the possible divestiture or dissolution.

But there are other factors that should cause even more concern. It is obvious that Turner's merger philosophy is not consistent with that of the Supreme Court. As Professor Bork recently observed: "Defendants are simply not winning cases they should win in the Supreme Court. No defendant has won a merger case there since Congress amended Section 7 of the Clayton Act 17 years ago."²⁴⁴

It should be noted that, though there are dissenters on the Court, there have been no serious splits in antitrust opinions. It has even been said that the Court seems to be urging Turner to be more aggressive in

238. Such attempts are no different than the early regal efforts to dispense with statutes enacted by Parliament. See note 224, *supra*, and accompanying text.

239. *Business Week*, May 20, 1967, 59, at 60, col. 1.

240. *Id.*

241. *Time*, Sept. 8, 1967, at 93, col. 1.

242. *Id.* at 87, col. 1.

243. *The Wall Street J.*, Sept. 19, 1967, at 1, col. 6. Attorney General Clark has already announced a tougher stand on conglomerates. See *Conglomerates, Beware!*, *Forbes*, Nov. 1, 1967, at 27.

244. Bork, *The Supreme Court Versus Corporate Efficiency*, *Fortune*, Aug. 1967, 92, at 158.

the merger field.²⁴⁵ Every merger that has occurred since Congress created its merger standard is subject to prosecution even though the companies carefully follow the rules formulated by Turner. If Turner should reverse his philosophy, or if the next enforcement officer does not agree with the Turner philosophy, these companies could well find themselves defending a merger that occurred 30 years previously. One should not forget that this is exactly what happened in the *DuPont* case.²⁴⁶

The sense of security gained from the Turner rules is further weakened by the presence of the Federal Trade Commission, which also holds authority to enforce section 7 of the Clayton Act. Whether this agency is more adept in carrying out the congressional merger policy must at this point remain in question; however, at a later point in this article the FTC authority will be discussed in greater detail. Right now it is sufficient to observe that this dual authority does exist and represents a threat to whatever security a company might presently be gaining from the Turner rules.

Another threat that merging companies must consider is the private treble damage suit. Even though lower federal courts have been unsympathetic to private antitrust plaintiffs, they will be unable to follow the *Hanover*²⁴⁷ philosophy, under which damages are denied on the ground that the defendant acted in good faith in following what he thought was the law as evidenced by Supreme Court decisions. The Supreme Court has shown little interest in formulating more precise standards under which mergers will be controlled. Instead it has followed a general approach with an express desire to effectuate the policies of Congress. Since the official enforcement agencies have shown initiative in attacking corporate mergers, private plaintiffs, under the present Supreme Court attitude, might find it much easier to prosecute merger cases. But even with the private suits, there are hurdles to cross, and because of the different level of sophistication within the judicial system, plaintiffs might find it necessary to prosecute a case all the way to the Supreme Court.

V. CONGRESSIONAL STANDARDS VS. TURNER'S RULES

1. *General*: Besides the philosophical weaknesses in the Turner rules, the so-called guiding principles are contrary to congressional standards. To support this conclusion one must make a comprehensive study of the legislative material. And to make this study meaningful, it is necessary

245. *Business Week*, May 20, 1967, 59, at 61, col. 2.

246. *United States v. E. I. Du Pont De Nemours & Co.*, 353 U.S. 586 (1957).

247. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 377 F.2d 776, 787-90 (3d Cir. 1967).

to take a look at the total antitrust congressional policy. From this broad view, we can then proceed to focus on more precise questions. My intent is not to formulate any new or novel economic theories that might be consistent with the general antitrust philosophy. Instead, it is to define and understand the economic theory adopted by Congress in section 7 of the Clayton Act.

2. *Background:* There is a long history behind the present anti-merger statute, dating back to the inception of the antitrust laws. Starting in 1890 when the Sherman Act was passed, one finds, spilled over the pages of the Congressional Record, economic evidence that manifested a serious fear of the domination by what has been generously referred to as free enterprise. To repeat the words of the late Justice Harlan:

All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. . . . [T]he conviction was universal that the country was in real danger from another kind of slavery . . . that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessaries of life.²⁴⁸

During this earlier period of time, merger, just as much as restraining agreements, represented a serious threat to free competition. Actually, the great merger movement began at the very end of the 19th century and extended through the year 1907, and it was during this period that the country witnessed the birth of such huge consolidations as the United Steel Corporation.²⁴⁹ The steel trust, under the leadership of Judge Gary, reaped immense profits from its actual capital of 650 million dollars. With this concentrated economic power, Judge Gary operated under the philosophy that workers should be suppressed into industrial slavery, and that enormous profits should be distributed to the relatively small number of shareholders.²⁵⁰ Describing the conditions of workers under the steel trust, Brandeis stated:

It is a life so inhuman as to make our former Negro slavery infinitely preferable, for the master owned the slave, and tried to keep his property in working order for his own interest. The Steel Trust, on the other hand, looks on its slaves as something to be worked out and thrown aside. The result is physical and moral degeneracy—work, work, work, without recreation or any possibility of relief save that which dissipation brings. The men coming out of these steel mills move on payday straight to the bar-room. Think what such men transmit as a physical and moral heritage to their children and think of our American citizenship for men who live under such conditions.²⁵¹

248. *Standard Oil Co. of N.J., Inc. v. United States*, 221 U.S. 1, 83 (1911).

249. H.R. Rep. No. 1191, 81st Cong., 1st Sess. 4 (1949). *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904).

250. L. Brandeis, *The Curse of Bigness* 38 (1935).

251. *Id.*

The steel trust, which exemplified the power of economic concentration, exerted great effort to prevent combination among its employees when they sought to procure decent working and living conditions. "It stamped out, through its immense powers of endurance, one strike after another. It developed a secret service, a system of espionage among its workmen, singling out individuals who favor unionism; and anyone fomenting dissatisfaction with existing conditions, as it was called, was quietly discharged."²⁵² The social unrest of our people in this struggle with the concentrated economic powers represented a serious threat to our entire legal system and has been compared with the unrest leading to the American Revolution and the Civil War.²⁵³

With this economic history, representative of the total picture, as a background, Congress passed the Sherman Act.²⁵⁴ After all constitutional attacks had failed,²⁵⁵ lawyers began resorting to the Carter-Pomeroy codification philosophy that statutes should be construed in light of their common law background. Although this philosophy was first rejected,²⁵⁶ the Supreme Court, with later strategic changes in its personnel, created the "rule of reason."²⁵⁷

This judicially created "rule of reason" was a great victory for the antagonists of the Sherman Act in the sense that it created a serious question as to the respective authority of the Court and Congress. Standing alone (without future elucidation) it stood for the proposition that the Court had the power to decide what "contracts in restraint of trade" ought to be held illegal.²⁵⁸ This meant that the courts could examine

252. *Id.* at 39.

253. *Id.*

254. 15 U.S.C. §§ 1-7 (1964).

255. Commerce clause: *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899). Delegation of legislative authority: *Standard Oil Co. of N.J., Inc. v. United States*, 221 U.S. 1 (1911). Liberty of contract: *United States v. Joint-Traffic Ass'n*, 171 U.S. 505 (1898). Vagueness: *Nash v. United States*, 229 U.S. 373 (1913).

256. *United States v. Trans-Mo. Freight Ass'n.*, 166 U.S. 290 (1897); *United States v. Joint-Traffic Ass'n*, 171 U.S. 505 (1898).

257. *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904), set the stage for the judicial shift which finally culminated in 1911 with *Standard Oil Co. of N.J., Inc. v. United States*, 221 U.S. 1 (1911). From the time that *Trans-Mo. Freight Ass'n.* was decided in 1897 until *Standard Oil* in 1911, only two of the Justices were the same—Justices White and Harlan. Mr. Justice White, who dissented in *Trans-Mo.*, wrote the majority opinion in *Standard Oil*. Mr. Justice Harlan, who was included in the majority in *Trans-Mo.*, wrote the concurring (dissenting as to common law) opinion in *Standard Oil*.

258. The effects of the "rule of reason" have been greatly reduced by the judicially created concept of "per se" illegality. When these are taken together, the same conclusion could have been reached by a non-creative sophisticated and scientific approach to statutory

mergers under this "rule of reason" to decide if there was an unreasonable restraint.²⁵⁹ Under this philosophical and political aberration, lawyers could approach an antitrust case on the theory of offering economic evidence in justification for a particular merger. Courts were then left with the duty of deciding the issue on the basis of opposing economic views. Whether a merger would survive an attack depended upon the prevailing economic view and the present judicial attitude. A shift in judicial personnel or time meant a shift in the law.²⁶⁰

Creation of the "rule of reason" merely contributed to the then obvious fact that the Sherman Act had failed in accomplishing its designed purpose. Various forms of restraint, including mergers, continued at a full gallop, causing great public concern and indignation. Turning the problem into a major political issue, the finger of blame, recorded in the Congressional Record, pointed first at the attorney general and then at the Court, with special mention given to the "rule of reason" case.²⁶¹ After reviewing the *Standard Oil*²⁶² decision, the Court was criticized by Congress for its reluctance to issue strong decrees against monopolies. It was observed that while the Court used harsh language against the trust and had even issued a decree ordering the dissolution of Standard Oil, the effect was to place greater economic power in fewer hands.²⁶³ One is left with little doubt that by 1914 Congress was determined to pass a bill that was powerful enough to eradicate the country of the dreaded trust and monopolies.

From the long and heated debates came two significant laws, both designed to supplement the Sherman Act. These two laws were of course the Federal Trade Commission Act, approved on October 14, 1914, and the Clayton Act, approved one day later. Congress, in the Clayton Act,²⁶⁴ listed certain proscribed activity, the legality of which had been left questionable by the judicially created "rule of reason." To Congress, the "rule of reason" left the antitrust laws indefinite, requiring courts to apply definitions to all new forms of combination which businessmen could and would invent.²⁶⁵ With this act, Congress desired to remove any

interpretation. See Thomas, *Statutory Construction When Legislation Is Viewed As A Legal Institution*, 3 *Harv. J. Legis.* 191, 201-02 (1966).

259. *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948); *United States v. Winslow*, 227 U.S. 202 (1913). But with change of times and change of attitudes, see *United States v. First Nat'l Bank and Trust Co.*, 376 U.S. 665 (1964).

260. *Id.*

261. For early debates expressing the charges and counter charges for failure of Sherman Act, see 51 *Cong. Rec.* 1866, 8840, 8973 (1914) (House debates); 51 *Cong. Rec.* 11031, 11237 (1914) (House debates).

262. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

263. 51 *Cong. Rec.* 8973, 8976 (1914) (remarks of Mr. Murdock).

264. 38 *Stat.* 730 (1914).

265. 51 *Cong. Rec.* 8973, 8976 (1914) (remarks of Mr. Murdock).

possibility of judicial emasculation by removing the effect of the "rule of reason" from certain proscribed practices, including: price fixing,²⁶⁶ exclusive dealing arrangements,²⁶⁷ acquisition of capital stock,²⁶⁸ etc. With the Federal Trade Commission Act,²⁶⁹ Congress sought to move further away from the judicially created "rule of reason." It was argued that the laws proposed should be written in such a fashion that they could stop a monopoly before it grows so powerful that even when the courts condemn it, they shrink from destroying it. Thus, the creation of a strong interstate trade commission (later to be named the Federal Trade Commission) was proposed. This Commission²⁷⁰ was empowered and directed to prevent persons from using *unfair methods of competition* in commerce.²⁷¹

By its decision to use the general words, "unfair methods of competition," Congress again showed its desire to avoid loopholes created by the inventiveness of businessmen and the consequences of the creative attitude of courts. An interesting and revealing congressional debate took place over the use of this general phrase. Many senators desired that a definite meaning be placed on the term "unfair method"; however, this was not to limit the power of the Commission. The fear was that such an obscure term might be used to argue that the act was unconstitutional. Other members, including Senator Cummins, insisted that the term had a definite meaning, but when called upon to give an actual definition to the words, Senator Cummins refused.²⁷² The desire to have unfair methods of competition enumerated in the bill was further to direct the Commission and to avoid the mild interpretation being placed thereon. This observation manifested a congressional misunderstanding of the many mechanical rules of statutory construction under which specific words act more as words of limitation. With the inventiveness of businessmen and lawyers, operating under the adversary system, new restraining devices could be created which, under a strict judicial interpretation, would satisfy the statutory specifications. In fact, other senators expressed the belief that such an enumeration might act as a limitation on the authority of the Commission's discretion to decide what was or was not an unfair method

266. Clayton Act, § 2, 15 U.S.C. § 13 (1964).

267. Clayton Act, § 3, 15 U.S.C. § 14 (1964).

268. Clayton Act, § 7, 15 U.S.C. § 19 (1964).

269. 15 U.S.C. §§ 41-46, 47-58 (1964).

270. "That a commission is hereby created and established, to be known as the Federal Trade Commission . . . which shall be composed of five commissioners." 15 U.S.C. § 41 (1964).

271. Federal Trade Comm'n Act, § 5, 15 U.S.C. § 45 (1964).

272. 51 Cong. Rec. 11081, 11105 (1914) (remarks of Senator Cummins).

of competition.²⁷³ As to this discretion, Senator Cummins would have given the Commission absolute power to rule what was an unfair method of competition without any review or appeal.²⁷⁴ Use of general words in a statute is like Congress saying: Everything that we now know and everything that might be invented in the future is, if it falls within this general category, illegal.

I think it fair to say that Congress, in passing the Clayton and the Federal Trade Commission Acts, was attacking the judicial system in what might be considered a battle for supremacy. When viewed in retrospect, the congressional concern over possible restrictive judicial interpretation was not unfounded. In its period of infancy, it is clear, the Federal Trade Commission was not looked upon with favor by the courts as vividly demonstrated in *FTC v. Gratz*.²⁷⁵ The Commission had, in that case, held it to be an "unfair method of competition" for the respondent to refuse to sell cotton ties unless the customer purchased a corresponding amount of jutebagging. As a tying arrangement, which is today considered illegal *per se* because it is anticompetitive by its very nature,²⁷⁶ there would be no question about it being illegal; however, the Court in reversing the Commission's ruling, stated that it is for the courts, not the Commission, ultimately to determine, as a matter of law, what is included under the phrase "unfair method of competition." The Supreme Court has now rejected this view, and it is now recognized, in line with the dissent of Justice Brandeis in the *Gratz*²⁷⁷ case, that the Commission has broad powers to declare trade practices unfair. The present significance of the *Gratz* case is in the Court's historical expression in support of the judicial supremacy concept, the very thing that Congress, in passing the Federal Trade Commission Act, was seeking to avoid. In another judicial attack against the authority of the Federal Trade Commission Act, the Court took the statutory words, "unfair methods of competition," literally and held that injury to *competition* was a jurisdictional prerequisite to proceedings under the act.²⁷⁸ Congress responded to this judicial assault in 1938 by passing the Wheeler-Lea Amendment to the Federal Trade

273. For a complete discussion of the meaning of the term "unfair method of competition," see 51 Cong. Rec. 11105-09, 11113 (1914) (debates of Senators Cummins, Robinson, Words and Reed).

274. 51 Cong. Rec. 11081, 11105 (1914) (remarks of Senator Cummins).

275. 253 U.S. 421 (1920).

276. *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958).

277. *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966), citing prior rejections: *FTC v. R. F. Koppel & Bro., Inc.*, 291 U.S. 304, 310 (1934); *FTC v. Cement Institute*, 333 U.S. 683, 693 (1948); *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 369 (1965).

278. *FTC v. Raladam Co.*, 283 U.S. 643 (1931).

Commission Act which added a prohibition against "unfair or deceptive acts or practices."²⁷⁹

3. *Mergers through the Year 1914*: That an anti-merger section was included in the original Clayton Act indicates definite congressional concern, even in 1914, about the merger problem. In fact, as stated before, one of the economic factors behind the passage of the Clayton Act was the great merger movement which began at the very end of the 19th century and extended through 1907.²⁸⁰ And Congress, as early as 1890, when the Sherman Act was passed, expressed the desire to protect small businessmen against the large aggregation of economic power which was brought on through various devices—one being mergers. Senator George, expressing concern over the economic conditions of the time (1890), observed that the "present system of production and of exchange is having that tendency which is sure at some not very distant date to crush out all small men, all small capitalists, all small enterprises. This is being done now. We find everywhere over our land the wrecks of small independent enterprises thrown in our pathway."²⁸¹ Most writers cling to the view, with strong judicial support,²⁸² that Congress never, in the antitrust statutes, attacked bigness.²⁸³

With the Sherman Act, there is some logic with which to justify this conclusion. Section 2 of that act does not make "monopoly" illegal; it makes illegal the act of "monopolization," which denotes some form of action (either to gain, retain or use monopoly power).²⁸⁴ This same logic, however, does not stand in any legislative study of the Clayton Act. In the congressional debates there are repeated references made to "bigness." As mentioned earlier, one of the charges was that the reluctance of the courts to issue strong decrees had the effect of placing greater economic power in fewer hands, thus making the big get bigger.²⁸⁵ Certain members of Congress would have actually placed big companies under governmental control. Speaking on this subject, Mr. Morgan stated that: "If necessary for the public welfare we should authorize the commission to regulate the prices at which large industrial corporations shall dispose

279. The Act now reads: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." 15 U.S.C. § 45 (1964).

280. H.R. Rep. No. 1191, 81st Cong., 1st Sess. 4 (1949).

281. 21 Cong. Rec. 2598 (1890) (remarks of Senator George).

282. *United States v. United States Steel Corp.*, 251 U.S. 417 (1920); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

283. Turner throughout his article takes this position. See also Handler & Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 Colum. L. Rev. 629, 667 (1961) ("concentration [or bigness] does not in itself spell illegality"); J. Van Cise, *Understanding The Antitrust Laws* 26 (1966).

284. J. Van Cise, *supra* note 283, at 26.

285. 51 Cong. Rec. 8973, 8976 (1914) (remarks of Mr. Murdock).

of their products.”²⁸⁶ He continued by saying that: “Many of our industrial corporations have become impressed with public use. They are public agencies. They are in every legitimate sense of the word quasi-public corporations, and we should by law declare them to be such.”²⁸⁷

Although this strong view was held by only a very small minority of Congress, there can be no question that it influenced the tone of the final Federal Trade Commission and Clayton Acts. Clearly, there was a congressional policy forming against bigness. While policy did not go so far as to create a law to break up any existing company, it did go so far as to hold that any increase in bigness could not be accomplished by the conduct proscribed by the statute—price fixing, exclusive dealing and, of course, mergers.

The only problem with the proscribed merger conduct was that Congress did a poor drafting job, and courts were correct in not applying the statute beyond a reasonable interpretation of the words, regardless of the clarity in purpose and policy. In the original section 7 of the Clayton Act, it was provided: “That no corporation . . . shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation . . . where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.”²⁸⁸ Why Congress elected to use this very limited wording can only be a matter of speculation today. Being very generous to this legislative body it has been suggested that this was the generally accepted way of accomplishing a merger.²⁸⁹ Though Congress had considered this very problem in wording the Federal Trade Commission Act, in this instance it failed to consider the ingenuity of the lawyer who immediately seeks to devise methods of pushing mergers through possible loopholes. Under the circumstances, courts could do nothing but apply this proscription to stock acquisitions, even though, in other parts of the act, the Court did stretch its interpretative powers to expand the statutory words to cover the questionable vertical acquisitions.²⁹⁰ The Court also found it possible to bend the legislative command that could, if literally construed, reach acquisitions of even the smallest companies. To get around this poor drafting job, the Court applied the Sherman Act “rule of reason” test. Of course, this shift destroyed one of the major reasons

286. 51 Cong. Rec. 1866, 1870 (1914) (remarks of Mr. Morgan).

287. 51 Cong. Rec. 1866, 1871 (1914) (remarks of Mr. Morgan).

288. 38 Stat. 731, as amended, 15 U.S.C. § 19 (1964).

289. H.R. Rep. No. 1191, 81st Cong., 1st Sess. 4 (1949); Handler & Robinson, *supra* note 283, at 652.

290. *United States v. E. I. DuPont De Nemours & Co.*, 353 U.S. 586 (1957).

for passing the Clayton Act—that is, to remove the merger practice from this judicially created rule.

While statutory words must be examined in light of the legislative purpose, one should not conclude that courts are free to supply missing words.²⁹¹ Regardless of the clarity with which Congress declares the purpose of the antitrust merger proscription, judicial power is limited by the words.²⁹² Courts that are willing to supply or amend statutory words in order that the legislative policy not be defeated are, to the highest degree, engaged in judicial law making. It matters not what the legislative “intent” is; courts can only declare the meaning of statutory words.²⁹³ The clarity lacking in the words themselves is supplied through an examination of such words in light of the legislative purpose.²⁹⁴ If the legislative process is ever to be elevated to an institutional level, Congress must accept full responsibility for drafting laws and should never look to the courts to correct its own drafting errors. Likewise, courts must not accept a responsibility that constitutionally and necessarily belongs to Congress. The Supreme Court (even though lower federal courts have not yet reached this level) has shown a willingness to recognize the supremacy of congressional authority in the antitrust field, particularly where mergers are involved. With this present judicial attitude, the congressional merger activity becomes even more significant.

4. *TNEC—A Study of Bigness*: With the failure of the original section 7, the merger movement continued unabated. While during 1914 (the year the Clayton Act was passed) there were only 39 reported mergers in manufacturing and mining, 1,058 mergers took place in 1928 and 1,245 were reported in 1929.²⁹⁵ Capital assets held by independent companies were swiftly disappearing into larger holdings. The increase in the concentration of economic power, already reaching a serious level, again caused concern in Congress. To publicize this concern, Congress

291. The clearest example of this is where the Court ruled that the original section 7 covered both vertical and horizontal mergers. While the legislative purpose clearly supports the conclusion, the words of the statute were inadequate to cover vertical mergers. *United States v. E. I. Du Pont De Nemours & Co.*, 353 U.S. 586 (1957).

292. For a debate on this issue, see, Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593 (1958); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv. L. Rev. 630 (1958).

293. Frankfurter, *Some Reflections On the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947).

294. See note 292 *supra*. The “purpose theory” is not a rule of statutory construction; it is a rule of language. Since statutes are words, it is obvious that the circumstances under which the words are uttered would be significant in determining meaning. See Thomas, *Statutory Construction When Legislation is Viewed As A Legal Institution*, 3 Harv. J. Legis. 191 (1966).

295. See Appendix table 1.

launched one of the most massive research projects that has ever been witnessed.

On April 29, 1938, President Roosevelt called attention to the need for a thorough study of the concentration of economic power and its injurious effects on the American system of free enterprise.²⁹⁶ Echoing this call, Congress, by joint resolution, approved June 16, 1938, created the Temporary National Economic Committee.²⁹⁷ Granted the same investigating power held by the Securities and Exchange Commission,²⁹⁸ the TNEC was charged with the duty of making a complete study of, and defining the problems concerning monopoly and the concentration of economic power in the production and distribution of goods.²⁹⁹ Specifically, the committee was charged with determining the causes of such concentration and control and their effect upon competition.³⁰⁰ From this study, the committee was to make recommendations to Congress toward the "improvement of antitrust policy and procedure and the establishment of *national standards* for corporations engaged in commerce."³⁰¹

This last statement, drawn from the congressional resolution, clearly defines the principal function of the TNEC. Congress was calling for a study from which could be developed a *national standard*. Recognition of the need for such a *national standard* was a recognition of the need for uniformity—without which the law would be unworkable. If the anti-merger statute is to be effective, the several federal district courts cannot freely formulate general merger principles. Furthermore, the effectiveness of the law (however subsequently formulated by Congress) requires serious enforcement. Such was the observation of the committee as it cited the efforts of an earlier congressional study.³⁰² To achieve such

296. Temporary National Economic Committee, Investigation of Concentration of Economic Power, S. Doc. No. 35, 77th Cong., 1st Sess. 691 (1941) [hereinafter referred to as TNEC Report].

297. 52 Stat. 705 (1938).

298. 52 Stat. 706 (1938).

299. 52 Stat. 705 (1938).

300. *Id.* The word "competition," as used here concerns the general system of free enterprise and not to the specific effects of a specific restraining device. The significance of this observation will be seen later.

301. 52 Stat. 705 (1938) (emphasis added).

302. TNEC Report 770-773. In 1898, The Industrial Commission was formed to conduct a similar economic study. One recommendation of this Commission was: "That combinations and conspiracies, in the form of trust or otherwise in restraint of trade or production, which by the consensus of judicial opinion are unlawful, should be so declared by legislation uniform in all jurisdictions, and as to all persons, and such statutes should be thoroughly enforced. *Id.* at 772 (emphasis added). The need for uniformity in the interpretation of national statutes was also discussed by the Supreme Court in *NLRB v. Hearst Publications Inc.*, 322 U.S. 111 (1944).

uniformity, the committee recognized the necessity of exploring all viewpoints on the subject, particularly those of economists.

In order to obtain the widest range of views, several federal agencies³⁰³ were assigned the task of conducting special studies, for which \$858,000 of budgeted funds were allocated.³⁰⁴ In order to obtain a well-rounded analysis and treatment of the broad subject of the concentration of economic power and its effects, it was considered necessary, not only to obtain direct testimony but to have economists, expert in particular fields, study the problems raised in the hearings and make separate reports upon them. From these special studies, 43 separate monographs were published by leading economists.³⁰⁵ Lawyers have been heard to criticize such congressional studies as being "just a bunch of economic views." Instead of looking at the conflicting economic views, it is said, Congress should examine proven judicial decisions that have been generated by our adversary system.³⁰⁶ Such a suggestion would, if accepted, cause utter confusion, for under the adversary system the interest of the general public is not in issue. Economic standards that are formulated to control business activity can be objectively and comprehensively studied and decided upon only within the framework of the legislative process. Our failure to accept this conclusion has resulted in the creation of serious credibility gaps among legislative bodies, the people and the courts. With many writers in the field and the several district courts making anti-trust policy decisions on the basis of a jurisprudential aberration, there can be no uniformity in the application of the law, and no person affected thereby can be sure of his rights or remedies. Clarity in the law can come only from a general acceptance of the single standard created by the official lawmaking body.

Turner, in creating his rules for conglomerate mergers, completely ignores the economic standard formulated by Congress in the TNEC studies, even though the standards were in 1950 distilled into a new anti-merger statute. By ignoring this policy, he is forced to give a literal interpretation to the key words of the statute. Though he does cite the general policy of the antitrust laws, Turner takes the words "substantially to lessen competition" as being a congressional caveat authorizing

303. These agencies included: the Department of Commerce, the Federal Trade Commission, the Department of Justice, the Department of Labor, the Securities Exchange Commission, the Department of the Treasury and the Department of Agriculture.

304. TNEC Report 694-95.

305. TNEC Report 694.

306. Remarks of Ira M. Millstein, attorney, delivered at Practising Law Institute Forum on the Antitrust Challenge to Corporate Growth Through Conglomerate Acquisitions and Joint Ventures, Dec. 2-3, 1966, New York. See also Bork, *The Supreme Court Versus Corporate Efficiency*, *Fortune*, Aug., 1967, 92, at 156.

him to supply rules consistent with his own economic views.³⁰⁷ Since this position goes against a most basic and elementary axiom of statutory construction—that words of a statute must be examined in light of congressional policy—it must be rejected. In fact, the Turner rules for conglomerate mergers are the very antithesis of the congressional policy concerning the anticompetitive effects of the concentration of economic power.

a) *What the TNEC study reveals:* So that readers of this rather long dissertation will not think that the revelations of the TNEC million dollar study are of only historical significance, I should point out that the present words of section 7 of the Clayton Act express a national merger policy that evolved from this study. The words of that statute, if they are to be understood, must be read in light of this background since they are, in fact, a reaction to our economic history.³⁰⁸

Results of the TNEC investigation are staggering, and most revealing of the congressional merger policy. This economic investigation coincided with our national efforts to mobilize industry for war. Thus, due to the enormous war contracts let by the government, there was an accurate method of measuring the extent of economic concentration.

During the period of June 1, 1940 to March 1, 1941, government defense contracts were awarded in an amount in excess of 12 billion dollars—"a sum which is more than half of all the value added by manufacture in all the industrial plants of America for all industrial commodities during the year, 1939."³⁰⁹ At the time, this 12 billion dollars exceeded the total assessed valuation of all the real and personal property within the boundaries of 21 states. When one examines the allocation of this sum among the states, the concentration of economic power and wealth is dramatically revealed. For example, less than 13 per cent of the 12 billion dollars was received by a total of 35 states. By the end of February, 1941, 2 states, Montana and North Dakota, had received no primary defense contract of more than \$10,000.³¹⁰ On the other hand, 4 states—California, Pennsylvania, New Jersey, and New York—had received nearly 40 per cent of the total defense spending. Six states, including the four previously mentioned, received nearly 54 per cent. In fact, more than 82 per cent of the total went to only 15 states.³¹¹

Similar results were found in the distribution of industrial facilities

307. Turner 1316, 1326-28.

308. Note the similarity in reasoning in Congressional reports that supports the present wording of section 7 of the Clayton Act. H.R. Rep. No. 1191, 81st Cong., 1st Sess. (1949); S. Rep. No. 1775, 81st Cong., 2d Sess. (1950).

309. TNEC Report 3.

310. *Id.* at 3, 53.

311. *Id.* at 4, 54.

which were financed by the federal government. Sixty-nine per cent of these facilities were constructed in only ten states while less than 12 per cent went to thirty-three states.³¹² The Committee, in citing these statistics, was not being critical of the War and Navy Departments since the primary objective of the defense organization was to produce essential war materials. It was only logical that these government expenditures go to the states in which the American industrial plant had already been concentrated. The statistics do, however, illustrate the intensity of the economic concentration during this period of time. An even more startling observation, drawn from the analysis of the contracts, shows that 45 per cent of the total 12 billion dollars went to six closely interrelated corporate groups. Taking this analysis one step further, one finds that 80 per cent of the total defense spending for this period went to 62 companies. During this time of crisis, the government was not free to make an equitable distribution of these funds; it was forced to follow the pattern and contribute to an increase in economic concentration.

With this general geographical concentration of economic power, it is not surprising to find a similar pattern in asset and income holdings. The Committee reported that in the year 1932, 78 per cent of all business wealth in this country was owned by corporations.³¹³ Breaking down this wealth into assets and income, the results become staggering. Citing statistics published by the United States Treasury Department for 1937, it was revealed "that 228,721 corporations, each with total assets of less than \$50,000, reported less than 1½ per cent of total assets of all reporting corporations although they constituted 55 per cent of the total number. At the other end of the scale, the 394 largest corporations, although they constituted less than 1/10 of 1 per cent of the total number of reporting corporations, owned almost 45 per cent of all corporate assets."³¹⁴ The income analysis is no different. From the same statistics reported above, one finds that 65 per cent of the corporations received considerably less than 2 per cent of the total reported income while the 1/10 of 1 per cent of the corporations received 40 per cent. Though already at an alarming level, it was observed that the concentration of wealth within the corporate structure was progressing.³¹⁵

No one can question the fact that this economic concentration is progressing. It has been reported that the 200 largest U.S. corporations increased their control over total assets from 30 per cent in 1947 to 55 per cent in 1967. And it is predicted that, if the trend continues, these

312. *Id.* at 4, 55-56.

313. *Id.* at 679.

314. *Id.*

315. *Id.*

200 corporations will control 67 per cent of the assets by 1975.³¹⁶ Expressed in dollars, this increase becomes even more evident. Total assets of the top 100 corporations, as reported in *Forbes*, amounted to 15 billion dollars in 1917; 28 billion dollars in 1929; 36 billion dollars in 1945 and 200 billion dollars in 1967.³¹⁷

b) Consequences of bigness or concentration: Having established the existence of a high degree of economic concentration, which indicates a failure in the antitrust laws, particularly the original antimerger statute, we must now consider the consequences of bigness or, if you prefer, concentration. In the introductory paragraph of its final report, the TNEC states that: "It is quite conceivable that the democracies might attain a military victory [World War II] over the aggressors only to find themselves under the domination of economic authority far more concentrated and influential than that which existed prior to the war."³¹⁸ These words demonstrate the seriousness of the present level and expected growth in the concentration of economic power. Facing destruction from an unsuccessful war effort, the concepts of democracy and free enterprise were equally endangered by this economic concentration. Reaffirming their belief in democracy, at a time when that political system was facing its fiercest attack, the committee stated:

The form of political and social organization which we call democracy is at bay throughout the world. Powerful forces have arisen on every continent which reject the principles upon which our system of free government and free enterprise has been established. Americans are committed to an enthusiastic defense of the ideals of democracy, but if that defense is to be successfully waged and its institutions made secure for the future, it is clear that our people must re-examine the elementary factors of our faith in democracy.³¹⁹

The most basic tenet of democracy, the Committee wrote, is that "all power originates in all of the people and not in any part of them . . ."³²⁰ Drawing still further from the historical principles of democracy, the Committee stated: "Governments are instituted among men to serve men; men were not created to serve government."³²¹ It is not the function of government to direct and command the activities and lives of men. Rather the limited function of government is to produce and preserve that order which will insure the rights of all men to enjoy their free will. Just as the

316. *Ling the Merger King*, *Newsweek*, Oct. 9, 1967, 71, at 76, col. 3. See also, Hearings pursuant to S. Res. 191 before the Subcomm. on Anti-trust and Monopoly of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess., pt. 5, at 1891 (1966).

317. *Forbes*, Sept. 15, 1967, at 76.

318. TNEC Report 3.

319. *Id.* at 5.

320. *Id.*

321. *Id.*

government is called into existence by men for the benefit of the entire community, it is equally true that the economic organizations, called into existence by men to meet their material needs, are likewise justified only to the degree in which they serve the entire community. "If the political structure is designed to preserve the freedom of the individual, the economic structure must not be permitted to destroy it."³²² To prevent the economic structure from destroying the political structure, a steady concentration of political power in Washington has been necessary.

Though people have not wanted to surrender local self-government, and though Congress was reluctant to accept additional political power,³²³ the concentration of political power in a centralized government became inevitable because economic life had broken down all geographical boundaries.³²⁴ Political power must increase in proportion to the increase in economic concentration—and in the same proportion, the free will of men will decrease. On the other hand, a decrease in economic concentration will be accompanied by a decrease in political centralization, though the least amount of government regulation that business can ever expect is the "enforcement of free competition"³²⁵ which makes other forms of regulation unnecessary. It was observed in the TNEC report that the concentration of government appeared because local communities and states, no longer economically self-sufficient, became economically dependent upon the acts and decisions of persons and organizations beyond their jurisdiction. "Local communities and local sovereignties . . . found themselves dependent upon centralized political organization . . ."³²⁶

As industrial facilities become more centralized through concentration, the economic dependency of local government will continue to increase. Many states and local communities, bidding for the entry of new industrial facilities, have given up a degree of sovereignty. Besides subsidizing these private economic organizations in the form of tax concessions, construction of plants, grants of land, etc., these states have been economically bound to retain archaic workmen's compensation laws and have been restrained from passing necessary legislation called for by the danger level of water and air pollution. In each case, the central government, which has no boundaries, has been forced to impose the necessary restrictions on business, thereby adding to the centralized political influence.³²⁷

322. *Id.*

323. Thomas, *An Answer to Regulation Critics—Control of Administrative Agencies*, 1 *Tulsa L. J.* 109, 117 (1964).

324. TNEC Report 5.

325. *Id.* at 16.

326. *Id.* at 6.

327. See generally, TNEC report 5-6.

c) *Big companies v. little companies*: The principal and elementary premise upon which most legal scholars in this area rely is that the anti-trust laws do not make bigness illegal. And it is in light of this premise (in support of which there has been no deliberation) that the present version of section 7 of the Clayton Act has been interpreted. Turner, throughout his analysis of problems of conglomerate mergers, clearly adheres to this position. He concedes that the appearance of a large firm in a market of small competitors will put these small competitors under pressure. However, Turner goes on to explain that this pressure goes toward improving rather than decreasing their competitive performance.³²⁸ He even goes so far as to admit that some of these small competitors may be unable to survive the pressures and that the number of sellers may eventually decline. But this eventuality is explained by saying that if the smaller firms are lost because of greater efficiency, this is the force of competition.³²⁹ The foundation of Professor Turner's *value judgment* as expressed here, along with his total theory and enforcement philosophy, crumbles under the policy expressed in the TNEC report, as well as all other subsequent congressional reports on the subject.³³⁰

*"Men will dare to compete against men but not against giants."*³³¹ These words, spoken by President Roosevelt, greatly influenced the substance of the economic standard of competition which was eventually to be formulated by this special congressional committee. The TNEC report, having been carried forward to the section 7 amendment, must be considered as the official voice formulating the official economic standard and policy under which the congressional words must be examined. Here lies the weakness of the antimerger statute. Congress, though clearly adopting the policy, did not, as it so wisely did in the labor statutes, include a formal expression of policy within the body of the written law. Consequently, lawyers, lower federal courts and writers, starting with a literal construction of words, have felt free to work with varying economic theories.

The TNEC could not have been clearer in declaring itself in favor of small independent businessmen as well as a stop to further increases in the concentration of economic power. Free enterprise, to the Committee, meant that there was an economic freedom which allowed individuals to engage in any business or trade. "Every State in the Federal Union,"

328. Turner 1353.

329. *Id.*

330. In order to avoid any possible objection to this observation, I should say that I recognize that there is a difference between an expression of policy and the law as it is written. I must still show, if possible, that the policy as expressed in the TNEC Report, was actually distilled in the words of the statute.

331. TNEC Report 13 (words of President Roosevelt).

observed the Committee, "has tried by law to protect economic freedom by exempting from execution or attachment the tools and implements of trade" ³³² In its strongest policy statement, the Committee declared: "America must find the way to bring about a permanent decentralization if the ideals of a democratic social and economic structure for all our people are to be achieved." ³³³

Further declaring its faith in small businessmen, the Committee called for the government to encourage actively the development of new private enterprises, and to initiate positive programs designed to foster and protect them. ³³⁴ "If the opportunity for the employment of idle men and idle money is to be found in a free, private enterprise system then, obviously, we must find the way to stimulate that enterprise by encouraging the investment of private savings in *new private enterprise*." ³³⁵ While there are laws designed to stimulate the activity of small businessmen, the total economic environment presently works against their interest. In the first place, the cost of loans is higher for the small business. In fact, Turner uses the fact that large firms can obtain capital on a more favorable basis as justification for allowing certain mergers. ³³⁶ Secondly, it is obvious that the availability of capital is greater for the giant firms. It is even more obvious that this availability increases when the funds are to be used in a corporate take-over scheme as opposed to the support for a *new private enterprise*. Just recently, for example, during the tight money market, James Ling, one of the self-styled merger kings, was able to borrow 80 million dollars to finance a corporate takeover of Wilson & Co. Then, with more financial manipulation, he generated another 250 million dollars to finance future takeovers of companies, which may or may not cooperate. ³³⁷ If the money is available, it is immaterial whether the company destined to be captured cooperates.

Turner does not object to any technique that will encourage new enterprises or which will preserve or add to the opportunities of small business entrepreneurship. He supports the aids provided by Congress in the form of loans and loan guarantees and favorable income tax treatment for small business, and he says that these can do more to promote opportunities for small business "than the ephemeral protection afforded by sweeping antimerger prohibitions—a 'protection' that will often harm rather than help the small businessman." ³³⁸ Arguing strongly for con-

332. *Id.* at 6.

333. *Id.* at 4.

334. *Id.* at 9.

335. *Id.* at 9-10 (emphasis added).

336. Turner 1338.

337. Ling the Merger King, *Newsweek*, Oct. 9, 1967, at 71.

338. Turner 1327.

glomerates, Turner says that large firms should not be penalized for acquiring small firms merely because of the cost savings. He continues by saying that there is an enormous social interest in the progress and efficiency that such conglomerates generate. Any strict or sweeping enforcement of the antimerger statute would do violence to this social interest, in his opinion.

By relying on this personally conceived value judgment, Turner reveals the fallacy in his entire conglomerate theory. In formulating his conglomerate rules, he cannot be said to have lacked understanding of the congressional policy on the issue. As he so accurately observed: "It is undeniable that the legislative history of the 1950 amendment to section 7 indicated extensive, if not primary, preoccupation with the alleged evils of concentration and the alleged virtues of small entrepreneurship."³³⁹ But while not denying the existence of an official congressional policy against concentration, Turner in effect says that Congress was wrong. He says that had this lawmaking body given adequate consideration to the social interest of conglomerates (as conceived under his personal economic views) it is doubtful that there would have even been any strong policy against concentration. With this unsupported explanation Turner seeks to justify the application of his own economic standards to the anti-merger statute. Actually the congressional committee, in its study of the problems of economic concentration, did consider conflicting economic views. Spending in excess of one million dollars on this study, the TNEC specifically called for economists, expert in particular fields, to study the problems raised in the hearings and to make separate reports upon them.³⁴⁰

No matter what one's qualifications be, particularly if he is a public officer, he cannot ignore the policy adopted by the official law-making body. If, as Turner does in this instance, an enforcement officer disagrees with this official pronouncement, he should present his views to Congress and seek a change through the machinery of the legislative process. Instead Turner merely ignores the congressional policy with which he disagrees, and tells the antitrust enthusiast on Capitol Hill that he isn't alarmed at the increase in the percentage of industrial assets controlled by the top firms.³⁴¹

With this open and bold rejection of the "will of Congress," Turner is overreacting to the more subtle concept of judicial supremacy. It might be argued that if this is true then Congress should retaliate by changing the law. Of course there is nothing original about this argument. This is

339. *Id.* at 1326.

340. TNEC Report 694.

341. *Business Week*, May 20, 1967, at 61, col. 2.

the theory followed by many courts which hold that if the legislative body fails to respond to a particular judicial construction of a statute, it then acquiesces in it. Such convoluted reasoning, which has contributed to the failure of many statutes, fails to consider the complexity of the law-making machinery. With all the conflicting views and political pressures, the obstacles to merely initiating change are staggering.

d) Bigness: There is no doubt that the TNEC, after long and serious deliberation of all opposing views, came up with an official economic standard in favor of blocking any further extension of economic concentration. It did not say that the future increase of concentration should be controlled by government regulation. Instead it said, in unequivocal terms, that legal action must "stop the processes of concentration . . ." ³⁴² Nor was the Committee satisfied with preserving the status quo; it insisted that the trend be reversed.³⁴³ But before there can be a reversal in the trend, action to stop the trend must be accomplished. Once the trend was stopped, the reversal would be a natural consequence of an increased confidence of small investors. This confidence would be further enhanced by the recommended government action to encourage actively the development of private enterprise.³⁴⁴

The Committee did concede that bigness already present was here to stay, but along with this it recognized the need for the presence of sufficient government controls "to eliminate all danger of arbitrary power."³⁴⁵ Being realistic in its approach, the Committee observed that its recommendations were not "designed to turn the economic clock back."³⁴⁶ In outlining the function of the Committee to study economic concentration, President Roosevelt had earlier declared: "No one suggests that we return to the hand loom or hand forge."³⁴⁷ The President observed that modern efficiency might require one or more huge mass production plants to turn out a given manufactured product. However, he continued by saying, "[M]odern efficient mass production is not furthered by a central control which destroys competition between industrial plants each capable of efficient mass production while operating as separate units."³⁴⁸ At first glance, one might draw the conclusion from these words that the President was concerned only with competition in the production and sale of a particular product between two merging plants. I suggest, however, that this would be a narrow construction of the word competition. Read con-

342. TNEC Report 9.

343. *Id.*

344. *Id.*

345. *Id.* at 7.

346. *Id.* at 10.

347. *Id.* at 13.

348. *Id.*

sistently with the general theme of his message and the subsequent findings and conclusions of the TNEC, this word "competition" must be considered as an economic concept standing for the broader term "free enterprise." Under this broader interpretation of the word, it is obvious that all forms of mergers were considered—horizontal, vertical and conglomerate. The President and the Committee rejected any attempt to justify any further concentration of economic power on the argument that mergers would encourage efficiency. This, of course, is the central theme under which Turner formulates his conglomerate rules. However, as President Roosevelt declared: "Industrial efficiency does not have to mean industrial empire building."³⁴⁹

e) *What is wrong with bigness*: A continuing inquiry into economic concentration has established that this concentration is intimately related to higher consumer prices.³⁵⁰ Inflation and rising prices, the correction of which brings on suggested tax hikes, have today become a major concern to this nation. Market power breeds more economic power through promotional and advertising techniques, as was noted by the Supreme Court in the recent *Procter & Gamble* case.³⁵¹ That company, in 1957, spent more than 80 million dollars on advertising and an additional 47 million dollars on sales promotion.³⁵² During this same year, the Clorox Company, which was acquired by P & G, spent almost \$3,700,000 on advertising and \$1,700,000 for other promotional activities.³⁵³ In this latter situation, it was observed that the advertising was used to imprint the value of the name "Clorox" in the mind of consumers, even though all liquid bleach is chemically identical.³⁵⁴ Such mass promotional campaigns (which, it could be argued, are anticompetitive in themselves) are so costly that they necessitate a high concentration of economic power. This high cost, however, is obviously passed on to consumers in the form of higher prices.³⁵⁵

Not only is rising cost associated with economic concentration, but it has been suggested that "bigness" and "corporate morality" are closely re-

349. *Id.*

350. Hearings pursuant to S. Res. 191 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess., pt. 5, at 1863 (1966).

351. *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

352. *Id.* at 573.

353. *Id.*

354. *Id.*

355. It is not my purpose here to take any position on the anticompetitive effects of advertising. I can see the educational virtues of advertising. But I can also see the anticompetitive effect of creating demands on the basis of "brand names" rather than the more traditional competitive merits such as price, quality, services, etc. But, not being an economist, I am not qualified to reach even this conclusion.

lated. It might be argued that any danger of the centralization of economic power in a handful of huge corporations is diluted by a wide public distribution of securities. President Roosevelt, in his message to Congress prior to the TNEC study, rejected this idea and declared that, in 1929, the concentration of stock ownership was equal to the concentration of corporate assets.³⁵⁶ "Corporate morality" takes on many different forms, depending upon the source being considered. The TNEC report, for example, in formulating a congressional policy, declared that economic organizations can be justified only to the degree in which they serve the entire community.³⁵⁷ Other sources might measure this "morality" by the financial return received by the shareholders.³⁵⁸ Today, even the historical position of complete allegiance to shareholders is being questioned. It has been suggested that those firms which merge tend to be more oriented to management's interest than to the shareholders'.³⁵⁹

Whatever the conclusion reached on the question of "corporate morality," it is obvious that the standard envisioned in the TNEC report has not yet come about. Efficiency of the corporation is not presently measured in terms of the good it can do for the general public. Instead of decentralization, which would allow all economic geographic segments of the country to develop, there has been a rapid increase in consolidations. Such deviation from the congressional standards has been geared to increase profits and generate additional capital which can be used to capture control of other companies. The consequences of this efficiency were considered by Congress as being too great to allow the continuation of concentration to go unchecked. To repeat the words of President Roosevelt: "Industrial efficiency does not have to mean industrial empire building."³⁶⁰

From these general remarks concerning the consequences of bigness, I will now consider some of the more serious points raised in the TNEC studies. My purpose in discussing these points is to clarify further the official congressional policy upon which section 7 of the Clayton Act was amended. At times, I will seek to compare the current economic problems to these standards to demonstrate the obvious failure of the merger proscription. In doing this, however, I may at times drift too far and insert my own economic biases. If this should occur, I beg the reader to disregard it, for my principal purpose remains that of isolating the con-

356. TNEC Report 11.

357. *Id.* at 5.

358. Rupert Thompson of Textron, Inc. remarked about shareholders: "No stockholder of any company that we have acquired has ever done worse than double his money." *Newsweek*, Oct. 9, 1967, at 72, col. 1.

359. Hearings pursuant to S. Res. 191, *supra* note 350, at 1915-20.

360. TNEC Report 13.

gressional policy. Far from my mind is any notion to persuade any person to accept a given economic view. Such persuasion, in my opinion, rightly belongs to the political or social scientist and I confess to be neither. Furthermore, there are already too many unofficial economic theories being advocated to courts in the application of the antimerger statute. And these unofficial views have been the major cause of the present ineffective enforcement policy. There is no room for judicial consideration of varying economic theories; the choice has already been made by Congress. Lawyers, as opposed to political and social scientists, have the limited and, I might add, the less taxing duty of understanding the single standard adopted by the law-making body. Should we, as lawyers, consider the law to be unworkable or unfair to the interest of our clients, we must, if the political system is to be preserved, restrict ourselves to the same legislative machinery that is available to all the people. Lawyers who seek changes through the judicial tribunal, and judges who respond by way of either a restrictive or an expansive statutory interpretation, interfere with the constitutional and orderly method of accomplishing a change in the law. It is with this limited purpose that I continue the discussion of the consequences of bigness.

f) *Distribution of wealth*: It was no empty slogan when the TNEC expressed its general standard that economic organizations can be justified only as they serve the *entire* community.³⁶¹ With this expression, the Committee was avowing its faith in the concept of "free enterprise,"³⁶² which, according to the Committee, can be preserved only by decentralization of economic interests. Nor was the avowed faith in this concept based on any mere philosophical bias. It was believed that the force of "free enterprise," through decentralization, could more equitably distribute the wealth of the nation. Congressman Celler recently observed that utilization of corporate funds for mergers and consolidations diverted corporate resources from the building of new plants and the development of new technical resources.³⁶³ Decentralization, if accomplished, would cause facilities of production to be dispersed into the undeveloped market areas, thereby reducing the problems of unemployment and failing businesses. States have become economically dependent on persons and organizations that, through mergers and consolidations, have removed economic activity from within the borders of their respective communities.³⁶⁴

Although there may be greater efficiency in consolidated facilities, it comes at the expense of those economically depressed areas that today

361. Id. at 5.

362. Id. at 7.

363. Cong. Rec. A1493 (daily ed. Mar. 23, 1964) (remarks of Mr. Celler).

364. TNEC Report 5-6.

have captured the attention of all Americans.³⁶⁵ If the cost of gaining efficiency is an increase in economic concentration, the expense is too high. The unending trend toward super concentration has already all but destroyed "free enterprise." Consequently, a large mass of people, deprived of any economic opportunity, have inflicted the conscience of this nation with a cancerous sore. To be more exact, 35,000,000 people, or one sixth of the nation's population, have "not shared in the abundance which has been granted to most of us, and on . . . [them] the gates of opportunity have been closed."³⁶⁶ Responding to President Johnson's message of March 16, 1964, Congress launched a major attack on the total problems of poverty.³⁶⁷ With special emphasis on the economically depressed areas (urban slums, the Ozarks and Appalachia), Congress has authorized expenditures of billions of dollars to relieve the starving conditions (economic and mental) of millions of American citizens.

It is unfortunate that the centralized government was compelled to enter this war on poverty. For so long, the system of "free enterprise," with all its economic force, was assigned the task of distributing the nation's wealth. Because reliance was placed on this economic force, the government, even with all its bureaucracy, found itself inadequate to the challenge of making any meaningful economic distribution.³⁶⁸ Emphasis, under the poverty program, has been placed on education, job training, etc., with little, if any, attention being directed toward a move to enhance an effective antitrust enforcement policy. This is not to suggest that economic decentralization is a panacea for all the ills of poverty. It merely points to the fact that the TNEC adopted this system of economic organization as *its* standard for insuring the greatest number of jobs and the greatest number of opportunities for small private enterprise.

It is reasonable to think that the forces of competition, if unrestricted, would naturally develop the economic segments of the country. If there are people then there are markets, and the forces of "free enterprise"

365. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963). The Court ruled that procompetitive effects in one market will not justify anticompetitive effects in another market area. *Id.* at 370.

366. Message from The President of the United States, H.R. Doc. No. 243, 88th Cong., 2d Sess. 1 (1964).

367. Economic Opportunity Act, 78 Stat. 508 (1964) (codified in scattered sections of 42 U.S.C.).

368. It was noted in the House Report that for parts of the program there was no prototype or model upon which to build or improve, making the administration of this new concept difficult. H.R. Rep. No. 428, 89th Cong., 1st Sess. 2 (1965). See also, S. Rep. No. 599, 89th Cong., 1st Sess. (1965). This Senate Report reveals that the Economic Opportunity Act of 1964 carried an authorization for an appropriation for only one year. This was a control technique developed by the Congress in order to require a close check and reevaluation of this new program. *Id.* at 1.

will cause the entry of that business necessary to satisfy the demands of the market. If the people are untrained, the economic forces, in order to satisfy their demand for labor, will train them. All people have the right to that level of dignity which is associated with the ability to earn a living. Deprivation of this dignity due to the forces of either political or economic centralization threatens the very existence of the legal system. Yet millions have been deprived of this dignity because the economic organizations were allowed to grow so powerful that even Congress, with its lawmaking powers, has been unable to stop the tide.³⁶⁹

The timidity of antitrust enforcement and adjudicating policy is the principal cause of the general failure of the antitrust laws to achieve decentralization. First and foremost, of course, is the emasculating interpretation applied to the antimerger statute both by the Justice Department and the Federal Trade Commission. Long before Turner was named to head the Antitrust Division, there had been ineffective enforcement. The only difference between Turner and the previous enforcement officers is that he spells out and explains his reluctance to act.³⁷⁰ Almost as important is the long standing attitude of the Federal Trade Commission on delivered pricing. While the Supreme Court has upheld the Federal Trade Commission's determination that delivered pricing amounts to price discrimination, the Commission announced a policy that it would attack only those pricing systems devised by concerted effort.³⁷¹ Acceptance of this delivered pricing system causes companies located near a market to lose their competitive advantage of location. Large firms with centralized facilities can compete effectively in faraway markets by absorbing the freight costs. Without this ability, the larger firms would be forced to decentralize by building new plants in juxtaposition with local markets and thereby develop economically deprived areas. Until this occurs, individual states and local communities will continue to be dependent upon centralized economic organizations which are presently resisting any efforts toward gaining local economic self-sufficiency.

The TNEC, in its recommendations for bringing about decentralization, took a strong stand against delivered pricing systems. It said that "such systems have resulted in uneconomic and often wasteful location of plant

369. Congressman Murdock spoke in favor of creating a strong commission (the FTC) which could prevent a monopoly before it grew so powerful that even if the courts condemned it, they would shrink from destroying it. 51 Cong. Rec. 8973, 8975 (1914) (remarks of Mr. Murdock).

370. The enforcement role of the FTC will be discussed in greater detail at a later point.

371. See *FTC v. Cement Institute*, 333 U.S. 683 (1948); *Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726 (1945); *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945). For a discussion of the development of FTC policy, see S. Oppenheim, *Federal Antitrust Laws* 262-63 (2d ed. 1959).

equipment . . ."³⁷² Addressing itself to the objections raised to the recommendation that Congress enact legislation declaring delivered pricing illegal, the Committee stated:

The committee is not impressed with the argument that a legislative outlawing of basing point systems will cause disturbances in the rearrangement of business through a restoration of competitive conditions in industries now employing basing point systems. Such disturbances may be costly to those who have been practicing monopoly. But the long-run gain to the public interest by a restoration of competition in many important industries is clearly more advantageous.³⁷³

No such legislative action was taken. However, after the Supreme Court rulings in 1945 and 1948,³⁷⁴ there was no further need for it. But after these decisions, Congress, somewhat inconsistently with its decentralization policy, passed legislation which legalized freight absorption.³⁷⁵ Whether this was due to the economic pressure placed on the lawmaking body or on a general misunderstanding of the competitive system as described in previous and subsequent antimerger legislative history is not clear. In any event, President Truman vetoed the measure, indicating that the bill, intended to clarify the law, would instead obscure it and create new confusion.³⁷⁶

g) *Preservation of the concept of free enterprise*: As already mentioned, the term "free enterprise" is being used conceptually to stand for the standard or ideal of "individual opportunity"—an ideal rooted in the very foundation of our political system. Congressman Celler noted, in his stand for passage of an effective antimerger statute, that the greatness of this country was first built on the foundation of small, independent, decentralized business.³⁷⁷ Even Thomas Jefferson, who favored states rights and local control, looked upon the great concentration of industrial power as a threat to the constitutional right of individual liberty.³⁷⁸ This relationship between economic power and political power was the issue before Congress in 1890, in 1914, on numerous occasions between 1940 and 1949, and finally in 1950. In passing the 1950 antimerger amendment, this lawmaking body took its stand in favor of the preservation of

372. TNEC Report at 33.

373. Id.

374. Cases cited note 371 supra.

375. S. Oppenheim, supra note 371, at 263. S. 1008, after long debate, was passed by the House on March 14, 1950, and the Senate on June 4, 1950. With the passage of the amendment to § 7 of the Clayton Act occurring in the same year (Dec. 29, 1950), it might well be argued that the expressions in favor of delivered pricing dilute any argument in favor of a strict policy in favor of decentralization. Since I have no present time to follow through on this point, this must be considered a limitation to my views.

376. S. Oppenheim, supra note 371, at 264.

377. 95 Cong. Rec. 11486 (1949) (remarks of Mr. Celler).

378. Id. at 11485.

"free enterprise," a term synonymous with decentralization. Some theorists (including politicians), however, mistakenly interpret this freedom to mean that men with such capabilities should be allowed to either acquire or sell corporate stock or assets unrestrained.³⁷⁹ People with such views, in the name of free enterprise, claim an uncontrolled right to merge. As noted in the TNEC report: "Private enterprise is ceasing to be free enterprise and is becoming a cluster of private collectivisms; masking itself as a system of free enterprise after the American model, it is in fact becoming a concealed cartel system after the European model."³⁸⁰

With all the clarity in the policy of the law, it is indeed a sad commentary that those holding the minority view in favor of unrestrained acquisitions have consistently been winning the final battle. What they were unable to accomplish through the legislative process, they are doing quite successfully by means of the enforcement agencies and the lower federal courts. And this failure to enforce the antitrust laws, particularly the antimerger statute, vigorously, is at the expense of the next generation. As the TNEC report warned:

So great a proportion of all national savings and all national wealth have fallen under the control of a few organized enterprises that the opportunity of those individuals who will constitute the next generation will be completely foreclosed unless, by common consent of leadership in business and government, we undertake to reverse the trends responsible for the present crises.³⁸¹

Since these words of warning were delivered in 1941, the merger trend has continued unabated despite the passage of the 1950 antimerger amendment. Perhaps this ever increasing trend has already been allowed to go too far.

At other points in this paper, I have already illustrated the extent of mergers; however, let me cite a few more statistical observations. As of 1949, there were over 3 million business units in this country. Of these, 445 corporations, $\frac{1}{8}$ of one percent of all corporations, owned 51 per cent of the nation's business assets.³⁸² This, according to Congressman Celler, was allowed to happen because of loopholes in the 1914 antimerger statute. Under these loopholes, 2,500 formerly independent companies disappeared as a result of mergers. While this number may not be too impressive, the assets of the 2,500 disappearing corporations were valued at \$5.2 billion, 5.5 per cent of the total corporate assets.³⁸³ We have al-

379. 95 Cong. Rec. 11488 (remarks of Mr. Goodwin); 95 Cong. Rec. 11492 (remarks of Mr. Jennings); Turner 1326.

380. TNEC Report 12.

381. *Id.* at 9.

382. 95 Cong. Rec. 11485 (1949) (remarks of Mr. Celler).

383. *Id.*

readily seen that the number of major business mergers during the year 1967 moved at the record rate of 150 a month.³⁸⁴

More recently, it has been observed that during the period of 1955 through 1965, only 14 of the 500 largest firms have not engaged in mergers.³⁸⁵ Partially as a result of mergers, the top 100 corporations increased their asset ownership from \$36 billion in 1945 to \$200 billion in 1967.³⁸⁶ In a review of the top 100 corporations, it was reported in *Forbes*: "Not only companies, but whole industries rise and fall in our economy."³⁸⁷ For example, from 1945 to 1967, only 71 of the top 100 corporations survived outside attacks.³⁸⁸ And of the 29 newcomers, several jumped to a point near the top.³⁸⁹

The merger trend merely reflects the general big business belief that the historical idea of "free enterprise" is an outdated market concept. Frank Peterson, president of Brown Company, taking this position, explains that the "middling sized company is doomed."³⁹⁰ He says that we are now in an era of industrial socialism where middle sized companies are being picked on by the little fellow and crushed by the giant.³⁹¹ When businessmen freely express approval of the merger trend, they show an open disregard for congressional standards. Voicing his approval of this trend, Frank Peterson declares that while the whole country might not be made up of conglomerate giants, we will see over 80 per cent of the gross national product produced by 15 per cent of the companies.³⁹² This prediction is fast coming true, with the merger upstarts, such as James Ling of Ling-Temco-Vought, Inc., Harold Geneen of International Telephone and Telegraph, Charles G. Bluhdorn of Gulf and Western Industries, Charles Thornton of Litton Industries, and Rupert Thompson of Textron, Inc. acting as pacesetters.

Established companies that once were conservative in seeking out mergers have gained a sense of security from the "hands off" enforcement policy for conglomerates. Feeling secure, they have followed the pacesetters by forcefully entering into the merger arena in a bid to obtain profit stabilization and to form shelters from market fluctuations. Be-

384. *Time*, Sept. 8, 1967, at 87, col. 1.

385. Hearings pursuant to S. Res. 191, *supra* note 350, at 1924 n.24.

386. *Forbes*, Sept. 15, 1967, at 76.

387. *Id.*

388. *Id.* at 64.

389. *Id.* at 76. Companies listed were not part of the top 100 in 1945, yet they gained the following positions: General Telephone & Electronics 11; International Telephone & Telegraph 22; Tenneco 17; Reynolds Metals 46. *Id.* at 58-60.

390. *Id.* at 336.

391. *Id.* at 336-37.

392. *Id.* at 337.

sides these economic reasons for mergers, it has been suggested that the moving trend is being influenced by additional psychological forces. In a desire to keep up with the corporate Joneses, it is reasoned: " 'Everybody's doing it—why not us?' " ³⁹³ The Wall Street Journal has facetiously (but with some accuracy) predicted that the merger trend would end only after the merger of General Motors Corporation into American International Consolidated Everything, Inc. "The GM purchase completes AICE's acquisition program—it has now bought every company in the U.S." ³⁹⁴

The destructive power of economic concentration cannot be measured by the effects of a single merger. Any one particular merger may have no apparent anticompetitive consequences. On the other hand, a series of these seemingly procompetitive mergers would most definitely contribute to a further general concentration of economic power, and thus would be contrary to the congressional standard. Consequently, one must, in each case, consider the anticompetitive effects on a broad conceptual basis.

h) Foreign influence and control: Speaking of the size of American corporations and the power generated thereby, the TNEC report indicated that what states cannot constitutionally do, corporations with their economic power have been able to do. ³⁹⁵ On the international scene, large corporations have entered cartel arrangements with foreign governments. ³⁹⁶ Besides the competitive advantages gained by these big corporations (capable of involvement in cartel arrangements) over smaller American competitors, another effect is that foreign influence is gaining a foothold in American industry. It is interesting to note, for example, that James Ling sought and obtained \$50,000,000 from banks in Europe to finance his take-over of Wilson & Co. ³⁹⁷

i) Bank control: Lending institutions—foreign or domestic; bank, trust or other institution ³⁹⁸—that furnish the necessary capital for corporate take-overs are being placed in a strategic position to exercise control and influence over American industry and thus the American economy. With what appears to be reckless financial manipulation to accomplish corporate take-overs, even proponents of the merger trend

393. Wall Street J., Sept. 19, 1967, at 1, col. 6.

394. Id. "This is pretty much what Wall Street wags predict would happen if the present merger rush roared on unchecked." Id.

395. TNEC Report 7. See U.S. Const., art. I, § 10.

396. TNEC Report 8.

397. Ling the Merger King, Newsweek, Oct. 9, 1967, at 72, col. 2.

398. Id. For the Wilson & Co. takeover, Ling needed \$80 million, of which he obtained \$50 million from European banks and \$30 million from American non-banking institutions such as insurance companies and the Harvard and Stanford University trust funds.

have raised the storm flag. John Beckett, president of Transamerica Corporation, a great supporter of the merger trend, warns that: " 'There's a great danger . . . of people coming in, trying to do what we're doing, and getting themselves completely overextended. They're using too much of debt securities and dividend securities, paying too high a price to acquire something and pyramiding.' " ³⁹⁹ Some of these merging companies, warns Mr. Beckett, could eventually get into difficulties equivalent to what happened to the old utility holding companies in the depression. ⁴⁰⁰ Overextension of credit is easy to understand when one realizes that corporate take-overs are not inexpensive. This is especially true when there are two raiding parties seeking to capture the same corporation. ⁴⁰¹

Closely related to the problems created by an overextension of credit is the financial manipulation that gives big corporations strong economic power over local communities. Local communities, with power to issue municipal tax-free bonds, have engaged in the practice of pirating plants from other communities. The fact that this practice creates an economically depressed area in the pirated community is enough to condemn it. But yet more significant is the corporate power created over the political subdivision as a consequence of an overextension of public debt. The tax exempt status of municipal bonds is being transferred to private economic organizations. ⁴⁰²

Besides being an abuse of a tax benefit, the practice has serious economic consequences, as the following examples will illustrate. In order to transfer the public tax benefit to a private group, a municipality will issue bonds which are sold to the corporation willing to move into the area. The money received is then used to build the plant facilities, which in turn will be rented to the corporation for thirty years at a rate to cover cost, and then renewed for an additional thirty years at \$1 per year. A specific example cited by Congressman Reuss showed that the city council of Bowling Green, Kentucky authorized the issuance of \$6,500,000 tax-free bonds to finance the construction of a plant for Cutler-Hammer Group. This company, then operating a plant in Milwaukee employing

399. *Forbes*, Sept. 15, 1967, at 312.

400. *Id.* It seems curious that a person favoring the merger trend would even liken it to the old utility holding company problems, since, following a FTC investigation of the problems, Congress passed the Federal Power Act, Natural Gas Act, Securities Act, Securities and Exchange Act, and Public Utility Holding Co. Act. See Davis, *The Influence of the Federal Trade Commission's Investigations on Federal Regulation of Interstate Electric and Gas Utilities*, 14 *Geo. Wash. L. Rev.* 21 (1945).

401. Consider the fight between Gulf & Western and Transcontinental Bus System over New Orleans' Delta Steamship. With its better offer to the Delta shareholders, Transcontinental won the battle. *Forbes*, Oct. 1, 1967, at 63.

402. For a full discussion of this problem, see 110 *Cong. Rec.* 5918-19 (1964) (remarks of Mr. Reuss).

800 workers, announced that it would leave Milwaukee and move to Bowling Green, the reason being the more favorable tax benefits that were available in the Kentucky community. The consequences of this pirating practice was that the 800 workers in the Milwaukee plant lost their jobs.⁴⁰³

An even more startling incident involved the small community of Lewisport, Kentucky, which had a total population of 780 persons. In order to bring in the Harvey Aluminum Company (the fifth largest aluminum producer in the United States), this small community announced the issuance of \$50 million in revenue bonds, the proceeds of which would be used to finance the construction of a rolling mill for the company. It is obvious that such a small community could not market revenue bonds in this amount. The company's soundness of business was the indispensable ingredient for making the bonds attractive to investors. And as Congressman Reuss observed: "One of the company's bankers, the Bank of America, took up an \$8 million share."⁴⁰⁴ Not only were the tax exemption benefits transferred over to the large Harvey Aluminum Company, but the company was able effectively to distribute securities to the general public free from the scrutiny of the Securities Exchange Commission. As for the anticompetitive consequences, I will merely raise the question: What power did this bond issuance give Harvey Aluminum Company over the small community of Lewisport?

5. *TNEC Recommendations and Subsequent Congressional Proposals:* There is, to my knowledge, no evidence in the TNEC report that would indicate a desire to change the previously existing congressional policy. On the contrary, the TNEC expression of policy, crystallized in the recommendations, merely reinforced the 1890 (Sherman Act) and the 1914 (Clayton Act and Federal Trade Commission Act) congressional standards in opposition to concentration of economic power. During these earlier periods, Congress was just as clearly seeking to preserve a belief in small private enterprise as the TNEC was in the early 1940's.

a) *Enforcement policy:* The TNEC first recommended "the vigorous and vigilant enforcement of the antitrust laws."⁴⁰⁵ There was certainly nothing different in this suggestion from what Congress did in 1914. When the Clayton Act was passed, Congress was not seeking to add new substance to the then existing Sherman Antitrust Act. To Congress, everything specifically proscribed in the Clayton Act was thought to have been incorporated in the earlier Sherman Act. With the two principal 1914 statutes, Congress was merely seeking a more vigorous and vigilant en-

403. Id. at 5918.

404. Id. at 5919.

405. TNEC Report 9.

forcement policy which had become necessary due to the judicially created "rule of reason." Mergers falling under this "rule of reason" were in such an uncertain state that Congress made this one of the specifically proscribed acts, thereby removing mergers from the effects of this rule. With the general recommendations of the TNEC, an effort was again exerted to insure a more effective enforcement policy. The effectiveness of this policy would be established (at least with the proposed section 7 amendments) only when the trend toward the concentration of economic power was *stopped*.

b) *Merger recommendations*: While the TNEC studies and recommendations covered the entire antitrust field, this article will be limited to those things dealing with mergers. The report concerning the merger recommendations first notes that: "The committee has given serious consideration to the problem of corporate mergers and consolidations, this process being recognized as one which has for years hastened the growth of the concentration of economic power and has contributed in major part toward the elimination of competition."⁴⁰⁶ Thus we can conclude that the general purpose behind the recommendations was to *stop* the growth of concentration through mergers. To accomplish this purpose, three principal proposals were offered.

First, the TNEC recommended a change in the statutory language so that section 7 of the Clayton Act would apply both to capital stock and assets.⁴⁰⁷ As will be seen later, this was the recommendation that was subsequently incorporated into the 1950 amendment. But, as the committee urged, this single change would not be sufficient to stop the merger trend.⁴⁰⁸ With this observation, the committee appears to have been concerned about the judicial attitude that had become apparent in anti-trust cases. It urged that, instead of attempting to stop the merger trend through "case by case litigation," the lawmakers should devise a procedure that would *halt* the merger in its inception.⁴⁰⁹

Thus the TNEC's second recommendation was that Congress give the Federal Trade Commission sufficient authority "to forbid the acquisition of the assets and property of competing corporations of over a certain size unless it be made to appear that the purpose and apparent effect of such consolidation would be desirable."⁴¹⁰ In drafting a congressional standard for the Federal Trade Commission to follow in its merger re-

406. *Id.* at 38.

407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.*

view, the TNEC suggested that no merger be permitted unless its proponents demonstrate:

- (a) That the acquisition is in the public interest and will be promotive of greater efficiency and economy of production, distribution, and management;
- (b) That it will not substantially lessen competition, restrain trade, or tend to create a monopoly (either in a single section of the country or in the country as a whole) in the trade, industry, or line of commerce in which such corporations are engaged;
- (c) That the corporations involved in such acquisition do not control more than such proportion of the trade, industry, or line of commerce in which they are engaged as Congress may determine;
- (d) That the size of the acquiring company after the acquisition will not be incompatible with the existence and maintenance of vigorous and effective competition in the trade, industry, or line of commerce in which it is engaged;
- (e) That the acquisition will not so reduce the number of competing companies in the trade, industry, or line of commerce as materially to lessen the effectiveness and vigor of competition in such trade, industry, or line of commerce;
- (f) That the acquiring company has not, to induce the acquisition, indulged in any unlawful methods of competition or has not otherwise violated the provisions of the Federal Trade Commission Act, as amended.⁴¹¹

In addition to this pre-merger clearance procedure, the TNEC recommended "an outright prohibition on the acquisition of stock in or holding company control of competing companies"⁴¹² With all three of the above recommendations, the TNEC was seeking to infuse a degree of certainty into the congressional standard to avoid any serious interpretation problem.

c) Subsequent congressional proposals: Beginning in 1943, new efforts (sparked by the TNEC 1941 final report) were made in Congress to amend the antimerger statute,⁴¹³ the main thrust coming from Senator O'Mahoney, who had been chairman of the TNEC. In that year, Senator O'Mahoney introduced a bill in which he inserted the TNEC recommendation for pre-merger approval.⁴¹⁴ Administered by the Federal Trade Commission, the bill required prior approval of mergers where corporate property was valued at a dollar amount to be determined by Congress.⁴¹⁵ Having failed in getting this bill before Congress, O'Mahoney reintro-

411. *Id.* at 39.

412. *Id.*

413. There had been many earlier attempts to amend § 7 of the Clayton Act. See Handler & Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 *Colum. L. Rev.* 629, 652-54 (1961).

414. S. 577, 78th Cong., 1st Sess. (1943), as cited in Handler & Robinson, *supra* note 413, at 655.

415. Handler & Robinson, *supra* note 413, at 655.

duced the bill in 1945.⁴¹⁶ After congressional hearings, the dollar amount specified in the bill was replaced by a percentage of market rule. But this prior notification bill failed again, and was reintroduced in the next session.⁴¹⁷

In 1947, proponents of the antimerger statutory amendment shifted their attention to a bill designed merely to plug the loopholes in section 7.⁴¹⁸ One objection to this change was that the amended language "would override the prior interpretation of section 7 and 'prevent any such rule of reason at all as to competition.'"⁴¹⁹ This objection, being consistent with subsequent objections to be raised, clearly made manifest the real issue (which went unnoticed by Congress) involved in this political entanglement. This "rule of reason" was one of the principal reasons why Congress, in 1914, passed the Clayton and Federal Trade Commission Acts. At that time this rule was considered as an open disregard for congressional standards.

d) *General words v. specific words*: Proponents of the consistent congressional policy against economic concentration do a disservice to that policy by insisting on a specifically worded antimerger statute. If a statute is passed prohibiting mergers of companies with \$10,000,000 in assets, then there is an inference that all mergers under this figure are permissible. If Congress were to pass a bill that required pre-merger clearance, this same inference would arise. When the TNEC first made the suggestion in favor of pre-merger clearance, it demonstrated an inconsistency with its more basic economic standard. A standard calling for pre-merger clearance is incompatible with the standard in favor of *stopping* the growth of economic concentration.

As discussed earlier, this issue was considered by Congress in 1914 when it was debating the use of general words in the Federal Trade Commission Act. In deciding upon the general words, "unfair methods of competition," it avoided many loopholes which would result from a judicial strict construction. Use of general language is preferable because Congress itself is applying the statutory proscription to future practices devised by lawyers and businessmen.

Whether this philosophy had any influence on the rejection of efforts to use more precise prohibition standards is no longer material. The fact

416. S. 615, 79th Cong., 1st Sess. (1945); H.R. 2357, 79th Cong., 1st Sess. (1945), as cited in Handler & Robinson, *supra* note 413, at 655.

417. H.R. 4810, 79th Cong., 2d Sess. (1945), as cited in Handler & Robinson, *supra* note 413, at 656.

418. Handler & Robinson, *supra* note 413, at 656-59. There were, however, subsequent pre-merger bills introduced—S. 72, 80th Cong., 1st Sess. (1947); S. 104, 80th Cong., 1st Sess. (1947); H.R. 1240, 81st Cong., 1st Sess. (1949).

419. Handler & Robinson, *supra* note 413, at 657.

is that the proposal finally adopted in 1950 was phrased in general language, thus giving it a much wider application. And in construing this general language, one attempting to restrict its meaning receives little help from the previously introduced, highly articulate and restrictive bills. There is no question that Senator O'Mahoney, Senator Kefauver and other proponents of the measures were seeking to standardize the established policy which favored decentralization. Their insistence on the more precise standards merely reflected the generally prevailing misunderstanding of the power of Congress and its relationship to judicial power. It is remarkable, however, that even with the congressional rejection of pre-merger clearance, the enforcement agencies have informally incorporated this practice on a voluntary basis. Furthermore, there is an insistence that courts develop more precise standards in order to regulate merger cases, which, in my opinion, is equally contrary to this congressional rejection.

6. *The policy behind the 1950 Celler-Kefauver Amendment:* In this section of the article, I will discuss the congressional policy that was incorporated in the present words of the antimerger statute.⁴²⁰ This discussion will, at times, sound somewhat redundant; however, this should not be considered an error in writing style. At the expense of being redundant, I will show that the congressional policy behind the 1950 Amendment is no different than the policy expressed by Congress and its committees in previous years. Recognition of this means recognition of the fact that the present statutory words, in order to achieve clarity, can be examined in light of this long standing policy. When so read, the statutory words themselves become an expression of this congressional policy.

The Committee Reports, favorably endorsing the bill⁴²¹ that would eventually pass, reflect the long history of congressional efforts to *stop* the continuing trend toward concentration of economic power.⁴²² A brief examination of the conclusion reached in the House Report clearly indicates the extent to which Congress was reaffirming the historical anti-trust principles.⁴²³ It was there observed that Congress, in adopting the Sherman Act and the Clayton Act, "gave expression to a virtually unanimous demand that our *competitive economic system* be protected against those forces of monopoly which would destroy it."⁴²⁴ Similarly,

420. Clayton Act § 7, 15 U.S.C. § 18 (1964).

421. H.R. 2734, 81st Cong., 1st Sess. (1949) (introduced by Congressman Celler).

422. H.R. Rep. No. 1191, 81st Cong., 1st Sess. (1949) [hereinafter referred to as House Report]. S. Rep. No. 1775, 81st Cong., 2d Sess. (1950) [hereinafter referred to as Senate Report].

423. House Report 12-13.

424. *Id.*

the TNEC, in its 1941 report, declared that it "avows its faith in free enterprise."⁴²⁵ It was next observed that the proposal to amend section 7 "is in no sense antagonistic to so-called big business."⁴²⁶ In the earlier TNEC report, the permanent existence of big business was also recognized. However, unlike the present congressional report, where big business is recognized for its contribution to the national welfare, the TNEC report merely conceded that no one could turn the economic clock back.⁴²⁷ As a final note in the House conclusion, it was noted that the concentration of great economic power in a few corporations will necessarily lead to the formation of large national labor unions, which will of necessity lead to the growth of centralized political power.⁴²⁸ With this proposed anti-merger amendment, Congress was only seeking to effectuate a policy that had been formulated by it in 1914.⁴²⁹

a) *Opposition to bigness*: Obviously, Congress did not expressly attack the existence of bigness, which is something that proponents of the present conglomerate merger trend eagerly point out. But recognition of this is little or no defense for the continuation of mergers. The clear expression of purpose in the Senate report indicates that the proposed anti-merger bill "is to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions."⁴³⁰ Thus it is the method of gaining bigness that is being attacked. In the ensuing debates on the proposed bill, Congressman Boggs observed that the 78 largest corporations emerged from the war with 10 billion dollars in working capital, an amount sufficient to buy the assets of 90 per cent of all the existing corporations.⁴³¹ The dramatic increase in the concentration of economic power led Congressman Patman to say, "Mergers must be stopped now, or else the big corporations will become so big that there will be nothing left to do except for the government to take them over."⁴³²

Congress was well aware of the various types of corporate acquisitions, yet, in formulating a single economic standard, it made no distinction between horizontal, vertical and conglomerate mergers. As specifically stated in the House report: "The bill applies to all types of mergers and

425. TNEC Report 7.

426. House Report 13.

427. Compare House Report 13 with TNEC Report 10. President Roosevelt did, in his message to Congress, concede that one or more huge mass-production plants might be needed. TNEC Report 13.

428. Compare House Report 13 with TNEC Report 10.

429. "Congress thought that it had put a halt to mergers way back in 1914 when it passed the Clayton Act." 95 Cong. Rec. 11497 (1949) (remarks of Mr. Boggs).

430. Senate Report 3.

431. 95 Cong. Rec. 11496 (1949) (remarks of Mr. Boggs).

432. 95 Cong. Rec. 11498 (1949) (remarks of Mr. Patman).

acquisitions, vertical and conglomerate as well as horizontal, which have the specified effects of substantially lessening competition . . . or tending to create a monopoly.⁴³³ Turner, along with other lawyers, writers and lower federal courts, seeks to isolate conglomerate mergers and place them under a special set of rules. This, I suggest, amounts to an open repudiation of the congressional standard against any increase in economic concentration through mergers. Even in 1914, Congress established only a single standard that was to be applied to all forms of stock acquisitions.⁴³⁴ Congressman Boggs, in the congressional debates, argued (consistently with the committee report and the statute) that the conglomerate merger "is one of the most detrimental movements to a free enterprise economy."⁴³⁵ He stated: "By this process they build up huge business enterprises which enable them to play one type of business against another in order to drive out competition."⁴³⁶ Until the *Procter & Gamble*⁴³⁷ case, even the Supreme Court was applying different standards to the various kinds of mergers; however, with that case, the Court finally came around to accepting the single congressional standard concept.⁴³⁸ Even before this Supreme Court decision, the issue was too clear for any serious doubt; yet Turner had previously advocated the opposite view. He declared that it would seem reasonable to apply different standards to horizontal, vertical and conglomerate mergers, with the least severe standard for conglomerates.⁴³⁹

The defect in this reasoning stems from the fact that there has been a tendency to tie the problems of concentration to specific industries. This then limits the application of the congressional standard against economic concentration to only horizontal and vertical mergers.⁴⁴⁰ Thereby, one

433. House Report 11. Charts appended to the House Report clearly show that Congress considered and understood the conglomerate-type merger.

434. 38 Stat. 731 (1914). The wording of this statute ("may be to substantially lessen competition [between the acquiring and the acquired corporation]") was for a long time construed to mean that the prohibition was only against horizontal mergers. See House Report 11. But see *United States v. E. I. Du Pont De Nemours & Co.*, 353 U.S. 586 (1957).

435. 95 Cong. Rec. 11496 (1949) (remarks of Mr. Boggs).

436. *Id.* In the area of price discrimination, the danger of the anticompetitive practice of geographic or area pricing has been recognized. Under such practice, a company will support the low prices in one area (the location of a competitive battle) by higher prices in another area where the competition is not as harsh. See *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954); *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835 (7th Cir. 1961).

437. *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

438. *Id.* at 577. "All mergers are within the reach of § 7, and all must be tested by the same standard, whether they are classified as horizontal, vertical, conglomerate or other."

439. Turner 1320-22.

440. The Supreme Court has spoken of the concentration of economic power only in horizontal and vertical merger cases. In *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), the Court spoke of the concentration within the shoe industry. In *United States v.*

is allowed to apply a totally different theory to conglomerates. Though Congress spoke of economic concentration in specific industries,⁴⁴¹ primary concern was fastened to the evils associated with general conditions of economic concentration. When viewed in light of the total historical legislative background, this is the only permissible conclusion. Because Congress looked upon economic concentration as a threat to the total competitive and political system, the various types of mergers cannot be distinguished. Each must stand or fall on the basis of the single economic standard formulated by Congress.⁴⁴²

b) *Desire to preserve small business*: The strong congressional opposition to those mergers that unduly contributed to an increase in economic concentration was based on the desire to preserve intact a system of free enterprise made up of small independent businesses. As noted in the Senate report: "The enactment of the bill will limit further growth of monopoly and thereby aid in preserving small business as an important competitive factor in the American economy."⁴⁴³ Similarly, concern was manifested in the House report over the fact that "recent merger activity has been of outstanding importance in several of the traditionally 'small business' industries."⁴⁴⁴ It was further noted that "the outstanding characteristic of the merger movement has been that of large corporations buying out small companies rather than smaller companies combining together in order to compete more effectively with their larger rivals."⁴⁴⁵ Speaking in favor of the bill that would manifest congressional faith in the traditional concept of "free enterprise," Congressman Celler observed that it was the small, independent, decentralized businesses that made this country strong.⁴⁴⁶ When referring to "free enterprise," in a conceptual sense, it is impossible to dissociate it from the political concept of democracy or the constitutional form of government as we know it.

Established under our Constitution, democracy is justified only to the degree that the system protects the individual rights and liberty of its people. The vehicle through which the people exercise these constitutionally preserved rights is "free enterprise," an integral part of the accepted

Philadelphia Nat'l Bank, 374 U.S. 321 (1963), the Court spoke of concentration of banking facilities. But in the classified conglomerate cases—*FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965), and *Reynolds Metals Co. v. FTC*, 309 F.2d 223 (D.C. Cir. 1962) (not a true conglomerate)—little if anything has been said of economic concentration.

441. House Report 2.

442. This distinction between specific and general concentration will become more significant when we examine the statutory words.

443. Senate Report 3.

444. House Report 3.

445. *Id.*

446. 95 Cong. Rec. 11486 (1949) (remarks of Mr. Celler).

political system. And there is no separating the two. Destruction of the economic system means destruction of the political system. Destruction of the political system means destruction of the economic system. If economic concentration threatens the survival of "free enterprise," it likewise threatens the political system. Thus, if the trend toward economic concentration is allowed to continue, *Capitalism will be replaced by Statism*.

That economic concentration does threaten the preservation of a capitalistic or "free enterprise" system can no longer be objectively debated;⁴⁴⁷ there is too much supporting data. One cannot help but note the great concern of the TNEC on this point. "This committee recites the facts [the extent of economic concentration] only for the purpose of demonstrating that concentration does exist and that America must find a way to bring about a permanent decentralization if the ideals of a democratic social and economic structure for all our people are to be achieved."⁴⁴⁸ Since the TNEC study, every subsequent Congress has experienced this same concern, and has manifested this concern by the many attempts to pass a law that would effectively stop the merger trend. As Congressman Boggs observed: "Congress thought that it had put a *halt* to mergers way back in 1914 when it passed the Clayton Act."⁴⁴⁹ Congressman Celler, desiring to make the point even more strongly, declared: "I want to point out the dangers of this trend toward more and better combines."⁴⁵⁰ Then, citing from a report that had been filed with former Secretary of War Royall, Congressman Celler stated: "Germany under the Nazi set-up built a great series of industrial monopolies in steel, rubber, coal and other materials. The monopolies soon got control of Germany, brought Hitler to power and forced virtually the whole world into war."⁴⁵¹

Congressman Celler then observed that the lack of any antitrust laws in England resulted in constant merger, constant concentration, and more

447. Antagonists and proponents of the antimerger statute use the same line of argument—preservation of "free enterprise" and democracy. To the antagonists, the threat comes from the concentrated political power. They object to any form of government control being imposed on the people (including the big corporations). Congressman Jennings of Tennessee argued that the right to buy property and to earn a living is too precious for Congress to take away. Continuing, Congressman Jennings argued that the proposed anti-merger amendment places too much power in the hands of the federal bureaucracy (the FTC) which is leading us down the same socialistic path as England. 95 Cong. Rec. 11488-91 (1949) (remarks of Mr. Jennings). This type argument refuses to recognize that centralized political power results from a centralized economic power.

448. TNEC Report 4.

449. 95 Cong. Rec. 11497 (1949) (remarks of Mr. Boggs).

450. 95 Cong. Rec. 11486 (1949) (remarks of Mr. Celler).

451. *Id.*

and more power in the hands of the few. "The end result in England was socialism. I want no socialism here," remarked Congressman Celler. "I want no manner or kind of collectivism or totalitarianism. These mergers are usually the forerunners of collectivism and socialism and therein lies the danger."⁴⁵² Echoing these same sentiments, Congressman Patman of Texas declared: "Mergers must be stopped now, or else the big corporations will become so big that there will be nothing left to do except for the Government to take them over—socialism in the United States, as in Great Britain, where they never have had our antimonopoly laws. This is the very thing we all are trying to avoid."⁴⁵³

Since I have freely cited from debates on the proposed bill to amend the antimerger statute, their relevancy must be considered. It is true that the Supreme Court has ruled that legislative debates are not entitled to the same weight as carefully considered committee reports.⁴⁵⁴ The general inadmissibility of debates as an aid to statutory construction is based on the theory that such are "expressive of the views and motives of individual members [, and] are not a safe guide."⁴⁵⁵ Refusal to accept legislative debates at all,⁴⁵⁶ or reluctance to place much weight on them,⁴⁵⁷ is understandable where the admission is sought for the purpose of placing a precise meaning on a specific word. In other words, there is good reason to limit the use of legislative debates under a theory of statutory construction that calls for an identification of "legislative intent." There is no reason, however, to restrict their use when legislative debates are used to verify the legislative policy and purpose, as opposed to assigning meaning to words.⁴⁵⁸ The limited function of legislative purpose, once it is defined, is to clarify statutory words.

c) *Limitations on Congressional Policy*: Up to now I have, perhaps, left the impression that Congress, in amending section 7 of the Clayton Act, was passing an absolute prohibition of all mergers. This is not true, although there was fear expressed in the debates that the words as proposed could be construed as an absolute prohibition.⁴⁵⁹ Had Congress

452. *Id.*

453. 95 Cong. Rec. 11498 (1949) (remarks of Mr. Patman).

454. *United States v. UAW-CIO*, 352 U.S. 567 (1957); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).

455. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474 (1921).

456. *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845).

457. 2 J. Sutherland, *Statutory Construction* § 5011, at 499-502 (3d ed. 1943).

458. For a more detailed discussion of this point, see Thomas, *Statutory Construction When Legislation is Viewed as a Legal Institution*, 3 *Harv. J. Legis.* 191, 204 (1966).

459. See, 95 Cong. Rec. 11487-88 (1949) (remarks of Mr. Goodwin); 96 Cong. Rec. 16436 (1949) (remarks of Senator Donnell). See also the minority views of Mr. Donnell. Senate Report at 11-23.

desired an absolute prohibition, "it would have been a simple matter to outlaw all acquisitions."⁴⁶⁰ Having made this statement, Professor Handler declared: "In short, Congress did not prohibit concentration as such."⁴⁶¹ Going still further, he said that since increased concentration is not itself illegal, there is no escape from the necessity of showing the requisite impact on competition.⁴⁶² With these words, Professor Handler placed himself in the company of those preoccupied with the statutory word "competition." He suggested that the competitive impact of the specific merger must be measured in each case. This then led him into the aberration that Congress provided no standards under which the statutory words are to be construed. This just isn't so.

Congress, in the amended version of section 7, declared that acquisitions that "may be substantially to lessen competition" are prohibited.⁴⁶³ Obviously, these words cannot be construed to be an absolute prohibition against all mergers. Furthermore, the House report expressly declared: "One reason for this action was to make it clear that this bill is not intended to prohibit all acquisitions among competitors."⁴⁶⁴ This statement, however, can be misleading when taken out of context. It was meant to clarify the correction of one defect in the original section 7 wording, which if literally construed would have prohibited all horizontal mergers, no matter what the size of the company. Even so, there is sufficient evidence in the committee reports, and of course in the statutory words, to show that the prohibition was never meant to be absolute.

From this point most writers proceed to the next step by saying that Congress delegated authority to the courts to make a determination on a case by case basis. They reason that courts, by applying economic evidence, are to decide if a merger is good or bad. I suggest that this erroneous conclusion is reached as a result of an incomplete analysis of the congressional purpose. A further analysis calls for answers to certain pertinent questions.

(1) Why didn't Congress prohibit all mergers? Congress recognized the evil of mergers for the threat they represented to the constitutional political and economic organizations. But, while recognizing the threat, it did agree that there would be economic mergers that might be beneficial to the economic system. Though it is obvious that Congress did not prohibit all mergers, it is equally obvious that there was no general congressional approval for "mergers in the public interest."

460. Handler & Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 *Colum. L. Rev.* 629, 667 (1961).

461. *Id.*

462. *Id.*

463. Clayton Act § 7, 15 U.S.C. § 18 (1963).

464. House Report 11.

(2) What mergers would Congress allow? If the conceptual policy of Congress was to preserve "free enterprise," one must consider the fact that such a system demands protection of the freedom of individuals to enter a business. For purely economic and practical reasons, such freedom can exist only in a highly decentralized economy where all geographical markets are developed. Referring back to the historical legislative temper on this subject, one cannot help but sense the apparent congressional desire to promote the interests and opportunities of "small businessmen."

(3) What is a small company? Congress has consistently rejected any attempt to establish a quantitative test to measure the size of a company. We are not, however, left without any standard. Interestingly, Senator O'Mahoney, in his final statement to the TNEC, made several useful observations that help to distinguish between the "big" and "small" companies.⁴⁶⁵ He first observed that local and state boundaries began to disappear as corporations began to engage in interstate business.⁴⁶⁶ From this same observation, carried forward to the final TNEC report to Congress, it was concluded that the very foundation of state and local government was undermined because of the breakdown of geographical markets.⁴⁶⁷ Principally, this economic breakdown was allowed to occur when corporations gained the right (or power) to engage in interstate business.⁴⁶⁸ As the trend toward a centralized economy continued, states lost the power to control effectively corporations engaged in interstate business.⁴⁶⁹ Eventually this concentration of economic power held by interstate corporations even exceeded the size of most states.⁴⁷⁰

Observing that corporate power was exceeding that of states, Senator O'Mahoney suggested that: "We must be able to differentiate between that business which is naturally and properly national in scope and that business which is naturally and properly local in scope."⁴⁷¹ National companies, operating in several geographical markets, can crush, almost at will, small local competitors.⁴⁷²

This fact makes it even more probable that many, if not most, states will eventually become subservient to the so-called national company.

465. TNEC Report 671-87.

466. *Id.* at 674.

467. *Id.* at 5.

468. See *International Textbook Co. v. Pigg*, 217 U.S. 91 (1910); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 517 (1839). See also *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

469. *Ohio v. Standard Oil Co.*, 49 Ohio St. 137, 30 N.E. 279 (1892). This was a prelude to the now famous *Standard Oil Co. of N.J., Inc. v. United States*, 221 U.S. 1 (1911).

470. TNEC Report 675-77.

471. *Id.* at 681.

472. *Id.* at 682-83..

Instead of contributing to the economic development of certain states, these national companies withdraw wealth from the local areas. With the use of its centralized power, aided by the delivered pricing system, a national company can make sales in a particular state without the need of building local production facilities. This practice, multiplied manifold, has left in its pathway many economically depressed areas. Local companies, on the other hand, produce and sell in the same area. Thus, profits made are then plowed back into further economic development, thereby contributing to the economic self-sufficiency of the state.

Another relevant distinction made by Senator O'Mahoney was one between corporations and individuals.⁴⁷³ He noted that, by 1932, the shift in business from individuals to corporations resulted in corporations holding 78 per cent of all business wealth in this country.⁴⁷⁴ The term "perpetuity" fairly distinguishes corporations from individuals. Corporations are allowed to accumulate wealth without the fear of dispersal that can occur with the death of an individual.

Congress was not as clear in its distinction between "big" and "little" companies. However, it did, through examples given, supply us with the same insight expressly revealed by Senator O'Mahoney. First, the anti-merger statute applies only to corporations,⁴⁷⁵ not partnerships or individuals. With both individual proprietorships and partnerships, no antimerger law was necessary; death, in both of these situations, is a natural guard against any dangerous degree of economic concentration. Besides, the descent and distribution laws, the estate and gift taxes to some extent control the accumulation of wealth. Any resulting vacuum caused in the local business community will be filled through the forces of free enterprise.

Congress, when it voted, had also been assured that the new antimerger statute would not apply to companies in a failing or bankrupt condition. Both the House and Senate reports reviewed the Supreme Court's opinion in *International Shoe Co. v. FTC*⁴⁷⁶ and adopted the judicial reasoning as part of the congressional policy.⁴⁷⁷ Interestingly, one finds in both reports the following judicial language:

[Where there was] a corporation with resources so depleted and the prospect of reha-

473. *Id.* at 678-79.

474. *Id.* at 678. One exception to this trend was with the agriculture business which was, to the extent of 93%, done by individuals. This is understandable in light of state statutes that limit the right of corporations to acquire land outside boundaries of incorporated cities. See, e.g., Okla. Const. art. 22, § 2; Okla. Stat. tit. 18, § 1.20 (1961).

475. Clayton Act § 7, 15 U.S.C. § 18 (1963): "No corporation . . . shall acquire . . ." etc.

476. 280 U.S. 291 (1930).

477. Senate Report 7; House Report 6.

bilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (*there being no other prospective purchaser*), not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public and does not substantially lessen competition or restrain commerce within the intent of the Clayton Act.⁴⁷⁸

Adoption of this policy statement does not give companies the right to sell to anybody of their choice. If there are several prospective purchasers, the sale should be to the one whose purchase least interferes with the competitive system. After reviewing the failing company doctrine, Congress reemphasized its stand on this position. In the Senate report, it was stated: "It is expected that, in the administration of the act, full consideration will be given to all matters bearing upon the maintenance of competition, including the circumstances giving rise to the acquisition."⁴⁷⁹

Another limitation expressed by Congress in its approval of the anti-merger bill concerned the right of two small companies to merge in order to afford better competition to large companies. To understand this limitation, one must go back to the original wording of section 7. In its original form, section 7 of the Clayton Act prohibited corporate stock acquisition where the effect "may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain *such commerce* in any section or *community* or tend to create a monopoly of any line of commerce."⁴⁸⁰ A literal interpretation of these words would have the effect of prohibiting the merger of even the smallest companies. Since *all* competition is eliminated between the acquiring and acquired corporations, the statutory term, "substantial lessening," is clearly established. Then by taking the words "such commerce" as referring to that which existed between the acquiring and acquired corporation, and adding to it the word "community," one can reasonably arrive at the conclusion that small *local* competitors are prohibited from merging. Such an unrealistic conclusion was possible except for the limiting interpretation by the courts.⁴⁸¹

It was observed in the House report that the proposed antimerger bill would modify the "present law so as to remove any possibility of an interpretation that would prohibit *inconsequential* acquisitions of stock or assets."⁴⁸² Congress was not attempting to block corporate mergers

478. *Id.*; *International Shoe Co. v. FTC*, 280 U.S. 291, 302-3 (1930) (emphasis added).

479. Senate Report 7.

480. 38 Stat. 731-32 (1914) (emphasis added).

481. House Report 7.

482. *Id.* (emphasis added).

where the "corporations were so small and their other competitors so numerous that the acquisition would have made no *perceptible* change in the intensity of competition in any line of commerce in which such corporations were engaged."⁴⁸³ It would appear that the limitation placed on the merger prohibition was meant to apply only to horizontal and perhaps vertical mergers. After reviewing the various forms of mergers and the change in statutory language just discussed, it was observed in the House report: "One reason for this action was to make it clear that this bill is not intended to prohibit all acquisitions among *competitors*."⁴⁸⁴

I see nothing inconsistent with the limitation of the broader congressional policy against increased economic concentration. By allowing small companies to join together, the competitive system is better preserved. An absolute prohibition against all mergers could only benefit those companies that had already gained a high degree of economic concentration. Small local companies (the heart of a system of free enterprise) could not long survive the entry of the large corporations into their market. Survival depends on the right to merge facilities.

It is thus understandable that certain horizontal (and perhaps some vertical) mergers must be allowed; however, the same is not true with conglomerates. While there are many economic arguments in favor of conglomerate mergers, none can be said to have been adopted by Congress in the passage of the new antimerger statute. The most obvious economic benefit of the conglomerates is the created buffer against bad weather within a single industry.⁴⁸⁵ As favorably viewed by Professor Turner, "acquisition of diversified lines of business, *by stabilizing profits*, may minimize the risk of business failure and bankruptcy."⁴⁸⁶ No one can question the validity of this economic observation. Diversification does spread, and thereby minimize, the risks taken by companies; however, it must be remembered that this *risk* is a natural ingredient of, and cannot be separated from, the concept of free competition. Risk can also be reduced and profits stabilized by an industry-wide agreement to buy up the surplus caused by an overproduction within a depressed market. Such was, in fact, the practice involved in *United States v. Socony-Vacuum Oil Company*.⁴⁸⁷ Facts in that case revealed that large oil companies had entered into an agreement whereby they would acquire, in an effort to stabilize market conditions, a certain amount of surplus gasoline that

483. *Id.* at 8. (emphasis added).

484. *Id.* at 11.

485. This is the benefit cited by the so-called merger kings themselves. *Time*, Sept. 8, 1967, at 88, col. 1.

486. Turner 1317.

487. 310 U.S. 150 (1940).

was being dumped on the market. Holding that this practice amounted to price fixing (and was thereby illegal per se), Mr. Justice Douglas, for the Court, declared:

The elimination of so-called competitive evils is no legal justification for such buying programs. The elimination of such conditions was sought primarily for its effect on the price structures. Fairer competitive prices, it is claimed, resulted when distressed gasoline was removed from the market. But such defense is typical of the protestations usually made in price-fixing cases. Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event, the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended.⁴⁸⁸

Because market stabilization achieved through conglomerates is artificial and with no permanency, Professor Turner's economic value judgment must be rejected. In any event, we are not free to make such value judgments; Congress, on the basis of its comprehensive economic investigation, has made this value judgment for us. And there is certainly no evidence in the legislative history of the Celler-Kefauver amendment that will support the conclusion reached by Professor Turner. In fact, the opposite is true. Looking at the legislative purpose in its broadest perspective, one is led to the conclusion that conglomerates are more anti-competitive (in the sense of contributing to economic concentration) than either horizontal or vertical mergers. Perhaps, it was such an over-view that led Congressman Boggs to observe that: "A third avenue of expansion—and this is one of the most detrimental movements to a free enterprise economy—is the conglomerate acquisition."⁴⁸⁹

There is one common factor connecting each of the limitations previously discussed—individuals, partnerships, failing or bankrupt companies, and small competing companies. In each of these situations, there is only a minimal effect on any further concentration of economic power. Viewed in light of this policy, section 7 is given its broadest application—a necessity if the trend toward economic concentration is to stop. And as was declared so many times in the TNEC report, this concentration must be stopped, if free enterprise is to survive. Regardless of any personal view as to the importance of free enterprise, we are bound to accept it, for Congress has decided in favor of its preservation.

7. *Conclusion:* From this fairly comprehensive examination of the congressional policy behind the antimerger statute, I conclude that there is no need to make any serious economic investigation in each merger

488. *Id.* at 220-21.

489. 95 Cong. Rec. 11496 (1949) (remarks of Mr. Boggs).

case. Viewed in their proper perspective, the statutory words are clear enough to apply in most cases that would ordinarily attract public attention. In oversimplified terms, one could decide merger cases on a balance sheet examination. It would not matter whether the acquiring company would have, except for the merger, entered the market. In fact, it would not matter whether the acquiring company had ever even considered the market. It would not matter whether there was in fact reciprocity. It would not matter that the company brought efficiency to a market heretofore occupied by small businesses. It would not matter what percentage of the market was involved, except perhaps at the lowest level. It would, however, matter if both companies were small local companies that passed nothing into interstate commerce—the true sign of being “small.”

I do not suggest that all the problems of interpretation have hereby been resolved. Between the poles of the largest corporate acquisitions and the merger of small local companies, there will be some difficulty. However, this could be the reason why Congress used the words “may be.”⁴⁹⁰ As one moves from the lowest levels to the higher degree of concentration, a value judgment will obviously have to be made. This represents the inevitable area of uncertainty that surrounds the interpretation of any legal rule. Doubts, however, must be resolved against the merger and in favor of preserving “free competition.”

At this point in the article, it seems clear that Turner has expressed many policy views that are the very antithesis of the congressional anti-merger policy. The principal problem with Turner's approach is that he starts and ends with the statutory words. Without giving sufficient attention to defining the boundaries of the legislative purpose, Turner starts with the conclusion that the words of the antimerger statute do not create an absolute prohibition. He then feels free to examine the statutory words in light of his own economic philosophy surrounding the term “competition.”

Before Professor Turner⁵ can be said to be wrong, we must first examine the statutory words. Though the congressional purpose and policy behind the antimerger statute are clear and beyond question, they are not, of themselves, the *law*. Only that part of the policy which is expressed in the statutory words can be given any legal efficacy. This legislative purpose, to the determination of which I have devoted considerable space, is used for the limited function of clarifying the statutory words. It is just as erroneous to become preoccupied with legislative purpose as it is to emphasize a literal and sterile interpretation of the words. The legislative words and purpose must be examined together if there is ever to be any rational application of statutes.

490. More will be said about this term in the review of the statutory words.

VI. STATUTORY WORDS REVIEWED

Read in light of the congressional policy, the words of the antimerger statute are not too complex. As amended in 1950 by the Celler-Kefauver Act,⁴⁹¹ it provides that no corporation shall acquire the stock or assets of another corporation "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."⁴⁹² This is not a radical change from the 1914 wording, the principal difference being the inclusion of "assets" in the prohibition. The main purpose behind the amendment was to close all loopholes that had permitted many corporate mergers to escape the earlier proscription. Though it is the "acquisition" of corporate stock or assets that is prohibited, since its passage the statute has been construed to cover all forms of mergers, from pure asset to pure stock and everything in between.⁴⁹³ It has even been construed to cover corporate ventures.⁴⁹⁴ Congress sought to make it clear that it desired a coverage so broad that no further loopholes would be possible.⁴⁹⁵ While lower federal courts have not freely applied this broad coverage,⁴⁹⁶ the Supreme Court has sought to implement the full scope of the congressional command.⁴⁹⁷

Today there is little trouble as to the coverage of the statute; the principal interpretation problem falls on the statutory terms "may be" and "substantially to lessen competition." Both of these phrases, brought forward from the 1914 act,⁴⁹⁸ are identical to the original terms used in section 2 (price discrimination)⁴⁹⁹ and section 3 (exclusive dealing arrangements)⁵⁰⁰ of the Clayton Act. Thus, for added clarity, this statutory language should be considered in light of the total legislative and economic history from 1914 until the 1950 Celler-Kefauver amendment.

491. Celler-Kefauver Act, 15 U.S.C. §§ 18, 21 (1964).

492. 15 U.S.C. § 18 (1964).

493. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 342 (1963).

494. *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964).

495. House Report 11. As Congressman Boggs stated: "Congress thought it had put a halt to mergers way back in 1914 when it passed the Clayton Act." 95 Cong. Rec. 11497 (1949) (remarks of Mr. Boggs).

496. See *United States v. Philadelphia Nat'l Bank*, 201 F. Supp. 348, 359-60 (E.D. Pa. 1962), rev'd, 374 U.S. 321 (1963).

497. The clearest example of judicial adherence to the congressional command is found in *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967) (all mergers must be tested by the same standard).

498. Clayton Act § 7, 15 U.S.C. § 19 (1964). There is one minor change that has made no difference. In the 1914 Act, the statute read "to substantially lessen competition;" as brought forward in 1950 amendment, the statute reads "substantially to lessen competition." The difference is in the position of the word "to."

499. Clayton Act § 2, 15 U.S.C. § 13 (1964).

500. Clayton Act § 3, 15 U.S.C. § 14 (1964).

1. *Substantially to lessen competition*: To understand this phrase, we must separate and discuss individually the term "substantially" and the term "lessen competition." This has not generally been done by writers in the antitrust field, and as a result, their analysis have been incomplete. The generally accepted interpretation of this total phrase is that Congress merely provided a general standard, the application of which required an economic examination of the "impact on competition" of each merger.⁵⁰¹ From this statutory phrase, one develops an antimerger principle to the effect that: *A merger is illegal if it is substantially anticompetitive in nature.*

With this standard, lawyers are left to determine and courts are left to decide whether economic policy arguments support the legality of the merger. In other words, the pertinent question would be: What are the competitive effects of the specific merger? For example: If the acquiring firm had previously considered going into the market through internal growth, a subsequent acquisition might be considered anticompetitive.⁵⁰² Likewise, if the merger is executed with the designed purpose of effectuating reciprocity agreements—and if the reciprocity agreements are successful—then the acquisition is anticompetitive.⁵⁰³ Even the transfer of market power of the acquiring corporation over to a market made up of small competitors has been declared to have an anticompetitive impact.⁵⁰⁴

Evidence of the legal significance placed on this idea of "impact on competition" is gleaned from the different standards of proof required for the different types of mergers, horizontal, vertical and conglomerate. Under this concept, enforcement officers and courts are obviously more strict with horizontal mergers. The fact that all competition existing between the two corporations is eliminated clearly manifests the "com-

501. See Handler & Robinson, *supra* note 460, at 667. This "impact on competition" concept is also the official enforcement policy of the Federal Trade Commission. See Mueller, *The Celler-Kefauver Act: Sixteen Years of Enforcement* 23 (Unpublished speech delivered at the Seminar in Economics and Business, University of North Carolina, Chapel Hill, N.C., Mar. 8, 1967).

502. *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964). At the Practising Law Institute forum on conglomerate mergers (Dec. 2-3, 1966), lawyers were advised that they should make sure that corporate files are stripped clean of any memoranda from aggressive young corporate personnel as to the feasibility of entering a new market internally. In fact, the advice was that these corporate officials should be told of the danger of giving any outward indication that could be used as evidence of consideration of the possibility of internal expansion.

503. *Consolidated Foods Corp. v. FTC*, 329 F.2d 623, 626 (7th Cir. 1964), *rev'd*, 380 U.S. 592 (1965). Concurring in the *Consolidated Foods* reversal, Justice Harlan declared that if there was evidence to establish that the reciprocity was beyond success then the merger was not anticompetitive. 380 U.S. at 602.

504. *Reynolds Metals Co. v. FTC*, 309 F.2d 223, 229 (D.C. Cir. 1962). This reasoning came to be called the "deep pocket" or "rich parent" theory.

petitive impact" of a horizontal merger. Thus, the only remaining question is whether this competition was substantial. With the vertical merger, proof of the anticompetitive effects comes from the market leverage that is created. Finally, with the conglomerate merger, the diversity of businesses involved makes it difficult to measure with any accuracy the resulting anticompetitive effects. As indicated by Professor Turner, rules developed for horizontal and vertical mergers are generally insufficient for conglomerate acquisitions.⁵⁰⁵ The relative hierarchy of these rules would be: hardest on horizontal, easier on vertical, and least severe on conglomerate mergers.⁵⁰⁶

Following through with this professional logic, one must, after showing the anticompetitive impact of each merger, show that the impact was *substantial*. Considered as a relative term, the word "substantial" is generally related to the size of the companies, relationship of the companies, and the effect on competition. It is generally understood or advocated that a corporate merger is not automatically to be condemned merely because it involves a "substantial volume of business."⁵⁰⁷ With this term "substantial," as well as the term "lessening competition," left in a state of vagueness by erroneous or incomplete statutory analysis, lawyers have rightfully demanded the formulation of more precise rules. Such a formulation can, however, create only more uncertainty. Where statutes are involved, clarity is achieved only through a more enlightened and sophisticated process of interpretation. This sophistication of which I speak calls for an examination of the statutory words in light of the legislative purpose. Recognizing that statutes are nothing more than a group of words of an official body that can be understood only in light of the circumstances under which they were rendered, I will again review the pertinent statutory terms.

2. *Lessening competition*: Since the term "competition" is not expressly defined in the statute, we must presume that Congress used it in its generally accepted meaning. Many courts have held that words in a statute must be given their common meaning in the absence of a legislative intent to the contrary.⁵⁰⁸ On the other hand, technical terms or terms of art are presumed to be used within their technical meaning.⁵⁰⁹ Thus, with the term "competition" one must first decide if it has a common or a technical meaning. If it has both, the term is presumed in the absence of a contrary legislative intent to be used with its common meaning.⁵¹⁰

505. Turner 1315.

506. *Id.* at 1322.

507. J. Van Cise, *Understanding the Antitrust Laws* 41 (1966).

508. 2 J. Sutherland, *Statutory Construction* § 4919, at 433-34 (3rd ed. 1943).

509. *Id.* at 438.

510. *Id.* at 441.

Unfortunately, such rules of statutory construction do not always provide sufficient certainty, especially since each is conditioned on the proviso that the rule applies unless contrary to legislative intent.⁵¹¹

By applying these rules of construction to the statutory word "competition," one quickly finds that the term can stand for two different things. First, it can refer to the precise "competitive impact" that the corporate acquisition has on the immediate market—which is the meaning that most writers and courts follow. Second, the term, literally examined, stands for the "system of free competition." Consequences flowing from this seemingly insignificant difference are startling, and directly affect the type and amount of proof required. If the statutory term "competition," refers to the precise competitive impact of each merger, the element of proof demands some economic measuring standard—balance of competitive and anticompetitive traits; presence of reciprocity; transfer of economic power (deep pocket); market leverage created; entry by internal growth; etc. Assimilation and comprehension of such proof requires the expert testimony of economists, who may or may not agree on the competitive or anticompetitive consequences of any given merger. Obviously the testimony will be influenced by the school of economic philosophy with which the witness is associated.

Conversely, if the statutory term "competition" refers conceptually to the "system of free competition," we are not concerned with the immediate competitive impact of the merger. Without regard to the relationship of the acquiring corporation to other corporations in the market, our inquiry would concern the competitive effects of the merger on the concept of "free competition" or "free enterprise." Under this view, the varying economic philosophy is of no legal significance; we are concerned only with the philosophy or economic standard formulated by Congress.

Faced with the two different interpretations of the term "competition," we must now decide which to accept. Under the out-dated rules of statutory construction, the conflict would be resolved on the basis of *legislative intent*. Under a more sophisticated method of reading statutes, however, one would examine the statutory word in light of the legislative purpose. Such an examination makes it obvious that the term "competition" was used in the conceptual sense to stand for the system of free enterprise.

Starting with the 1914 antimerger statute and leading up to the 1950 Celler-Kefauver amendment, the most basic legislative purpose incorporates the congressional desire to preserve free competition or free enterprise. Too much has already been said about this legislative purpose for

511. Rules of statutory construction have been a major obstacle to our achieving a sophisticated understanding of statutes. See Thomas, *Statutory Construction When Legislation is Viewed as a Legal Institution*, 3 Harv. J. Legis. 191, 208-11 (1966).

me to repeat it. Besides this basic purpose, it has also been made equally clear that Congress believed that free competition is reduced by each additional step toward economic concentration. In fact, the TNEC report (consistent with the Celler-Kefauver Committee reports) went so far as to declare that this free competition would be eventually destroyed unless the merger trend was *stopped and reversed*.⁵¹²

From the mere mention of the subject of economic concentration most writers recoil and release a smoke screen to cloud the real issue. One of the most noted antitrust authorities, Professor Milton Handler, declares that the antimerger statute does not make economic concentration illegal.⁵¹³ While his observation is quite correct, it is totally immaterial and irrelevant to the principal issue. The statute is too obvious for anyone to suggest that economic concentration is illegal. Congress, speaking harshly against the concentration of economic power that had been accomplished through corporate mergers, accepted the present level of concentration and showed no desire to turn the clock back.⁵¹⁴ The statute itself expressly provides that the prohibition against corporate acquisitions is not to affect or impair any right heretofore legally acquired.⁵¹⁵

Once the smoke screen is lifted, it becomes clear that Congress was in fact making *further* economic concentration illegal *only if* accomplished by corporate acquisition. Thus it is an acquisition that contributes to economic concentration that is illegal. Expressed in statutory terms, it is this increased concentration that "lessens competition" (when the term "competition" is conceptually viewed).

A similar congressional use of the word competition in the 1914 Federal Trade Commission Act indicates how an erroneous interpretation can effectively emasculate a statute. When Congress promulgated the rule that "unfair methods of competition" were illegal,⁵¹⁶ it was using the term "competition" in a conceptual sense. Congress was seeking to give the Federal Trade Commission sufficient power to remove anything that unfairly interfered with the forces of free competition. The courts, however, chose to fasten a literal interpretation on the word, thereby restricting the jurisdiction of the Commission.⁵¹⁷ Congress, in order to correct this aberration, subsequently amended the Federal Trade Commission Act by adding the words "unfair or deceptive acts."⁵¹⁸

512. TNEC Report 9.

513. Handler & Robinson, *supra* note 460, at 667.

514. TNEC Report 10; House Report 13.

515. 15 U.S.C. § 18 (1964). But a proviso to this clause provides that it shall not be construed to make lawful anything heretofore prohibited by the antitrust laws.

516. FTC Act § 5, 15 U.S.C. § 45 (1964).

517. *FTC v. Raladam Co.*, 283 U.S. 643 (1931).

518. Wheeler-Lea Amendment § 5(a), 15 U.S.C. § 45(a) (1964).

Now writers and courts are about to do the same thing with the word "competition" as it is used in section 7 of the Clayton Act. Under the erroneous "impact" notion, a merger of two corporations with combined assets of a billion dollars or more could conceivably be allowed. Such has already occurred too many times to make this a mere supposition. Consequently, the concentration of economic power continues to increase at a fast pace.

Only by viewing the word "competition" conceptually, as standing for the system of free competition, can we make sense of the statute. If we do so, economic concentration becomes the congressional standard in light of which we determine if a merger has resulted in a lessening of competition. With this general standard, the type of merger involved becomes an immaterial factor. Already, one should see and appreciate the clarity that this simple verbal shift permits. The only problem about this shift, however, is that under it nearly every major merger that has gone unprosecuted since 1950 would be adjudged illegal. Regardless of the consequences flowing therefrom, one is not allowed to question the feasibility of an interpretation that is consistent with the statutory words, especially when such construction is reinforced by legislative purpose. The conceptual interpretation of competition is not supported by legislative analysis alone; the Supreme Court has, with the *Procter & Gamble* case,⁵¹⁹ firmly and effectively rejected the erroneous "competitive impact" notion. If the law as written is too restrictive, it is not for the courts to soften the blow. Business interests, desiring to merge their facilities, must look to the constitutional lawmaking body, Congress, for any desired changes.

3. *Substantial*: As with the word "competition," Congress did not provide an explicit definition of the term "substantial." Responding to this apparent deficiency⁵²⁰ in the statute, lawyers have hastened to fasten a quantitative test to this word. In order to measure substantiality, lawyers have insisted on the measurement of the relevant geographical and product market.⁵²¹ From the formulation of market boundaries, the next legal step was to find or measure a substantial lessening of competition within that market. In each case, courts were called upon to measure abstract statutory terms. I might say, however, that this abstractness comes from a general misunderstanding of the correct way to read a

519. *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

520. This outward deficiency comes from the strict judicial construction that has prevailed in the field of antitrust. Think of the consequences of Congress providing a definition to the word "substantial." Any definition can act in a restrictive manner. The fact that no definition was provided is indicative of the desire to formulate a broad, unrestricted prohibition.

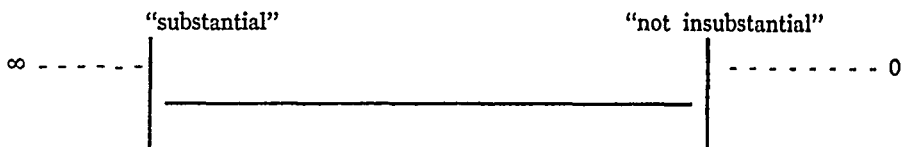
521. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

statute. Though Congress used these general and abstract terms for the purpose of avoiding a restrictive interpretation, courts have effectively narrowed the application of the prohibition.

Recognition of the abstractness in terms means only that the words must be examined in light of legislative purpose. By eliminating the "competitive impact" notion through an examination of this legislative purpose, the problem of defining the boundaries of a relevant market is rendered insignificant.⁵²² When viewed in light of the legislative purpose, the question is: At what point will there be a *substantial* increase in economic concentration? No matter how the word "substantial" is defined, there is no defense to most of the mergers being announced today. Just as the giant mergers (whether they be horizontal, vertical or conglomerate) present no trouble as to the word "substantial," there will likewise be small, local business mergers that will present no problem. The interpretation trouble arises as we move from the two poles.

Resolution of the interpretation problem requires one to examine the similar language found in section 3 of the Clayton Act. As noted in the House report, the "tests of illegality are intended to be similar to those applied in interpreting the same language in other sections of the Clayton Act."⁵²³ Looking at the section 3 language, we find the Supreme Court saying that an exclusive dealing arrangement (tying agreement) involving a "not insubstantial amount of commerce" is illegal.⁵²⁴ In other words, it appears that the statutory term "substantial" is construed to mean "not insubstantial." The effect of this interpretation becomes readily apparent to those who are familiar with linguistic analysis. With this analytical shift, a clearer line of prohibition is drawn—as is illustrated by a simple demonstration.

First draw a straight line—then at one end put the word "substantial"—at the other end put the words "not insubstantial."



You will note from this line that the term "substantial" will be measured by moving in both directions. To the right, it moves toward the point of

522. Congress did not use the market terms ("where in any line of commerce in any section of the country") to restrict the coverage of the act. This language was used to gain the broadest application of the statute without bringing in the small local community business.

523. House Report 8.

524. *Standard Oil of Calif., Inc. v. United States*, 337 U.S. 293 (1949); *International Salt Co. v. United States*, 332 U.S. 392 (1947). See also *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958) (Sherman Act case).

“not insubstantial”; to the left, it moves to infinity. Now take the term “not insubstantial.” With this term you move only in one direction with a definite terminal point—that being “nothing” or “no mergers.” The area of movement is greatly restricted, thereby offering a much higher degree of certainty.

It remains to be seen if this interpretation of the word “substantial” is consistent with the legislative purpose. Under section 3, the term “not insubstantial” includes those things that are not *de minimis* in nature.⁵²⁵ The term “substantial” used in the antimerger section must likewise be so construed. As mentioned earlier, the limitations to the antimerger statute found in the legislative history involved only those things that would have a *de minimis* effect on any increase in the concentration of economic power. Individuals and partnerships (with their limited life) were expressly excluded by Congress’ use of the term “corporation.” And then there was approval expressed in the committee reports concerning the exclusion of small competitors and, of course, the failing and bankrupt companies. None of these situations effectively contribute to the evils of economic concentration against which the statute was directed. As the House report expressed it, the bill would not prohibit *inconsequential* acquisitions of stock or assets.⁵²⁶ In the language of the House report, such acquisitions “would have made no *perceptible* change in the intensity of competition in any line of commerce in which such corporations were engaged.”⁵²⁷

Proper construction of the phrase “substantially to lessen competition” eliminates most of the problems attached to the statutory term “may be.” However, judicial interpretation of this term has contributed to the complexity already created by the erroneous construction of “substantial lessening of competition.”

4. *May be*: Three measurements come to mind when the term “may be” is used—possibility, probability and certainty. The Supreme Court has construed the term to require only a showing of probability, not certainty—which amounts only to recognition that there is a difference between the Sherman Act and the Clayton Act. With some support from the committee reports, the legal profession has raised, and the courts have accepted, the distinction between possibility and probability. Beyond this, little more need be said except for the fact that the legal profession has transformed this term into an element of proof.⁵²⁸

525. In the *International Salt* case, the amount of commerce foreclosed was only \$500,000. 332 U.S. at 395. And in *Oxford Varnish Corp. v. Ault & Wiborg Corp.*, 83 F.2d 764 (6th Cir. 1936), the foreclosed competition amounted to only \$325,000 out of a total market of \$66 million. In neither case was the amount considered *de minimis*.

526. House Report 7.

527. *Id.* at 8.

528. Senate Report 6.

Remaining consistent with the legislative purpose (to *stop* further increases in the concentration of economic power), the words "may be" merely manifest that there can be no absolute certainty in the application of the law. To understand fully the significance of this term, one must consider the anticipated role of the Federal Trade Commission in administering the statute. By increasing the power of the Commission over mergers, Congress charged it with the duty of making the determination in questionable cases.⁵²⁹ Even though the power of the Federal Trade Commission was increased, one should not forget that Congress created the economic standard under which mergers were to be examined. Throughout the years when antimerger legislation was being considered, Congress consistently found that corporate mergers increased the economic concentration and that this economic concentration lessened the effectiveness of free competition. Beyond this no proof is needed. As long as the concentration is "not insubstantial," we must conclude that the effect of the merger "may be substantially to lessen competition."

VII. CONGRESSIONAL ENFORCEMENT POLICY

The previous discussion makes it quite evident that the law has failed to stop corporate mergers, particularly those of the conglomerate type. Thus the concentration of economic power continues unchecked. One reason for this is that the Antitrust Division of the Justice Department has failed to enforce the law with the vigor intended by Congress. Congress, not unaware of the possibility of such a timid enforcement policy, created the Federal Trade Commission, an action which, in part, manifested a lack of confidence in the office of the Attorney General—at least in the field of antitrust. Conceding that the weak enforcement of the Sherman Act was due partially to inadequate investigatory power, Congress in 1914 refused to place such power in the office of the Attorney General.⁵³⁰ Instead it created a strong Commission that would be independent and free from control of the President and the Secretary of Commerce.⁵³¹ Expressing support for the creation of the Federal Trade Commission, Congressman Willis commented:

I am frank to say that, in my judgment, that is one of the reasons why this bill is to be commended—because it contemplates the creation of a commission that shall not be subject to anybody in the Government, but shall be subject only to the people of the

529. *Id.* See also, Celler-Kefauver Amendment of Clayton Act § 11, 15 U.S.C. § 20 (1964). In the debates on Celler-Kefauver Act, one dissenter argued that the power of the FTC was increased excessively. See 95 Cong. Rec. 11487 (remarks of Mr. Goodwin).

530. See 51 Cong. Rec. 8845 (1914) (remarks of Mr. Covington). This was, however, changed on Sept. 19, 1962, when the President signed into law the Anti-trust Civil Process Act, 76 Stat. 548 (1962).

531. 51 Cong. Rec. 8840-43 (1914) (remarks of Mr. Covington).

United States. I hope and believe that if this bill shall be enacted into law it will not be possible to have such a situation as to corporate control and political management as we find at present.⁵³²

Congressman Willis further declared that Congress desired to "create a body, a commission, an organization that shall not be under political domination or control, and that there shall not be the probability or possibility of such a thing."⁵³³ To insure as far as possible that the Federal Trade Commission would remain independent of any political influence, it was provided that the Commission was to have five members, of which only three could belong to the same political party.⁵³⁴ This desired administrative independence was to serve as a check on the Attorney General in the area of antitrust enforcement. It was to play an integral part in the broad enforcement scheme envisioned by Congress in the Clayton and Federal Trade Commission Acts.

This congressional design has not yet reached the desired effectiveness. Though perhaps more strict than the Justice Department, the Federal Trade Commission has been equally inept in stopping the merger trend. One reason for this has been that the Commission has come to acquiesce in the erroneous notion that only anticompetitive mergers are illegal.⁵³⁵ While on the surface nothing is wrong with this position, the Commission has, like all others, failed to accept the conclusion that Congress also determined which mergers were anticompetitive. It is thus left free to apply its own economic philosophy rather than the single economic standard formulated by Congress. Furthermore, the Commission may be moving from its somewhat independent, or antagonistic, position. Commissioner Elman has suggested a partnership with the Justice Department in the merger field. He says that the Commission was not created by Congress to duplicate those functions of the Department of Justice.⁵³⁶ I don't suggest that the Federal Trade Commission was created to be totally antagonistic to the Justice Department; however, it is clear that they were not intended to be partners that would divide cases up for enforcement. The Commission must serve as a check on the more politically motivated office of the Attorney General, and where that office refuses to enforce the law to its fullest extent against mergers, the Commission must take the lead.

Congress, showing a strong desire to *stop* mergers, did not place ex-

532. 51 Cong. Rec. 8981 (1914) (remarks of Mr. Willis).

533. *Id.* at 8982.

534. 15 U.S.C. § 41 (1964).

535. Mueller, *The Celler-Kefauver Act: Sixteen Years of Enforcement*, *supra* note 501, at 23.

536. Elman, *Antitrust Enforcement: Retrospect and Prospect*, 53 A.B.A.J. 609, 611 (1967).

clusive enforcement discretion in the hands of the two official enforcement agencies. Besides the authority granted to the Justice Department and the Federal Trade Commission, Congress provided "that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of the suit including a reasonable attorney's fee."⁵³⁷ And to simplify this treble damage action, Congress provided that a final judgment in any suit brought by or on behalf of the United States under the antitrust laws shall be prima facie evidence against such defendant in a private suit.⁵³⁸ Furthermore, Congress provided that any person shall be entitled to sue for, and have injunctive relief against threatened loss or damage by violation of antitrust laws.⁵³⁹

Though private suits (damages or injunction) have as yet proven ineffective (principally because of an unsympathetic judicial attitude), they represent the most potent weapon that can be used against corporate mergers. In the first place, private individuals, motivated by the treble damage device, are immune from any ideological, philosophical or political pressures. Increased activity in the treble damage arena would quickly stop the merger movement because such suits would make corporate mergers unprofitable. With the only check being the official enforcement machinery, which involves no threat of monetary penalty unless a criminal action is filed, many corporations are willing to take the risk because of the tremendous profits that can be reaped from a merger that might continue for many years while the suit is pending. A number of effective treble damage suits would, however, remove this profit incentive.

The weakness of the treble damage suit lies in the restricted interpretation that has been applied to the statute. Because competing corporations who might be considering mergers themselves would be reluctant to file a suit, courts must relax their strict interpretation on the issue of standing. If the treble damage action was created to supplement the enforcement policy, we should, in order to remain consistent with the purpose of the statute, find that person who is most likely to bring the suit.⁵⁴⁰

537. Clayton Act § 4, 15 U.S.C. § 15 (1964).

538. Clayton Act § 5, 15 U.S.C. § 16 (1964).

539. Clayton Act § 16, 15 U.S.C. § 37 (1964).

540. Courts have construed the statutory terms "business or property" strictly, thereby limiting the number of persons who would have standing. Only those directly harmed can bring suit. *Productive Inventions, Inc. v. Trico Products Corp.*, 224 F.2d 678 (2d Cir. 1955), cert. denied, 350 U.S. 936 (1956); *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955). Trade associations, whose members have been damaged, have been held not to have standing. *Northern Cal. Monument Dealers Ass'n v. Interment Ass'n*, 120 F. Supp. 93 (S.D. Cal. 1954). Creditors of person injured were denied standing in *Gerli v. Silk Ass'n*,

Perhaps with the case of *Dailey v. Quality School Plan, Inc.*,⁵⁴¹ we are moving into an era of relaxation for treble damage suits in the merger field. In that case, the court held that a salesman who was dismissed as a consequence of a corporate merger did have standing to bring the action. If this is upheld, then every employee, every supplier of the acquired firm, every service organization of the acquired company will have standing to attack corporate mergers. With these various persons given standing to sue, one can expect that future mergers will be stopped, and mergers that have already taken place will come under attack.

But even if the standing issue is resolved, there remains the question of damages. Reluctance of courts to develop a realistic doctrine of damages has helped eliminate the deterrent factor of treble damage suits. Even though the Supreme Court has stated that the wrongdoer must bear the risk of the uncertainty which his own wrong has created,⁵⁴² lower federal courts still show some reluctance to expand the treble damage action. Professor Areeda explains that we are not willing to frame broad or rigorous liability rules because private plaintiffs will not invoke them with reasonable restraint.⁵⁴³ While this statement might be accurate as applied to lower federal courts, the Supreme Court has shown a willingness to frame broad and rigorous liability rules.⁵⁴⁴ And this is as it should be, for Congress in creating the private treble damage action was seeking to establish a strong and effective enforcement policy.⁵⁴⁵

36 F.2d 959 (S.D.N.Y. 1929). A trustee in bankruptcy was held to have no standing in *Bonvillain v. American Sugar Ref. Co.*, 250 F. 641 (D.C. La. 1918); *Caillouet v. American Sugar Ref. Co.*, 250 F. 639 (E.D. La. 1917). But it has been suggested that a person not yet in business might file suit if his entry is blocked. P. Areeda, *Antitrust Analysis* 31 (1967). It has been suggested that consumers can file an action. M. Forkosch, *Antitrust and the Consumer*, 300 (1956).

541. 380 F.2d 484 (5th Cir. 1967). Congress has recently considered the private treble damage suit. See Hearings on S. 2512 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. (1966). The hearings involved the effect of pleas of *nolo contendere* on the private treble damage suit.

542. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946).

543. P. Areeda, *supra* note 540, at 36. There is much support for this policy argument. See Barber, *Private Enforcement of the Anti-trust Laws: The Robinson-Patman Experience*, 30 *Geo. Wash. L. Rev.* 181 (1961); Clark, *The Treble Damage Bonanza: New Doctrines of Damages in Private Anti-trust Suits*, 52 *Mich. L. Rev.* 363 (1954); Timberlake, *The Legal Injury Requirements and Proof of Damages in Treble Damage Actions Under the Antitrust Laws*, 30 *Geo. Wash. L. Rev.* 231 (1961).

544. *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927).

545. I have merely touched upon the treble damage suit for the sake of time and space. Following the same philosophy set out in this article, I will at a later date cover this subject in detail.

In this article, I have concluded that most, if not all, of the current mergers are illegal and thus subject to attack from the Justice Department, Federal Trade Commission or private parties. And with all the clarity of section 7 (when the words are viewed in light of legislative purpose), there is little doubt that a strong enforcement policy could effectively stop the merger trend and could dissolve many of the corporate marriages that have already taken place.

Though there is clarity present in an analytical sense, I am not unmindful of the several congressional inconsistencies to which one might point. First, it is inconsistent for Congress to stop all mergers when at the same time it enacts securities laws to regulate corporate mergers.⁵⁴⁶ It is likewise inconsistent when we observe the special tax laws that to some extent regulate corporate mergers.⁵⁴⁷ Other inconsistent acts passed by Congress include the basing point law, which was mentioned earlier, and the 1966 Bank Merger Act.⁵⁴⁸ Now Congress is considering another act which is inconsistent with the congressional policy of stopping mergers. Already passed by the Senate, the "tender offer" bill is presently before the House Interstate and Foreign Commerce Committee. From each of these acts, one can infer that Congress did not desire to stop mergers that were in the public interest; however, such an inference is incompatible with the clearly expressed policy against further increases in the concentration of economic power.

Instead of showing a congressional desire to relax the antimerger statute, I suggest these inconsistent statutes indicate a congressional misunderstanding of the legislative process. With its membership including many lawyers, Congress has also been the victim of the misconceived concept of judicial supremacy. Whatever courts say about a statute, Congress, is, today, apt to accept it as the correct construction. Instead of objectively assessing the accuracy of the judicial opinion, Congress is too quick to conclude that the law has failed. To correct the supposed gaps in the law, Congress then passes many inconsistent acts which further weaken the antimerger statute. If Congress passes the "tender offer" bill, it will emasculate the antimerger statute without the issue ever coming before the official body. The logical inference that can be drawn from such a bill will lead to more mergers until the day when

546. Somner, *Mergers, Consolidations, Sales of Assets*—Rule 133, 16 W. Res. L. Rev. 11 (1964).

547. Sapienza, *Tax Considerations In Corporate Reorganizations and Mergers*, 60 Nw. U. L. Rev. 765 (1966).

548. Bank Merger Act, 80 Stat. 7 (1966). With this act, Congress undid what the Court had done, thereby allowing certain banks to keep the profits of their mergers.

there is only one company remaining. At that time, Congress will be forced into the inevitable choice of either breaking up large companies or imposing stringent controls over the remaining private segment of the economy.⁵⁵⁰

VIII. RECOMMENDATIONS

If mergers are to be stopped, if we are to decentralize our economic facilities, Congress must face up to the real issue. No new legislation is needed. What is needed is a shift in attitudes that can come only through the educational process. Congress would do well to spend time and money on hearings and studies concerning the respective authority of the legislative body and courts. The necessary machinery for this has already been established by the Senate with the creation of the Sub-committee on Separation of Powers; however, it remains to be seen whether this committee will be interested in isolating the factors that interfere with an effective antitrust enforcement policy.⁵⁵¹

Likewise, Congress and legal educators must awaken to the times by giving greater support to private research efforts dedicated to the finding of causes for failure in statutory areas. Law schools are clinging to the Langdell tradition at the expense of the effective implementation of the law. In statutory areas, Langdell must be buried and we must focus the minds of students on statutory words and the sophisticated process of construction. It was most encouraging to note that Congressman Celler has introduced a bill to create a National Law Foundation.⁵⁵² The several incidents of congressional inconsistencies are sufficient proof of a need for private legal research which will be encouraged by the National Law Foundation. Perhaps with corporate mergers we have allowed them to go too far to ever hope that they can be stopped.⁵⁵³ If so, Congress must face up to the issue and find an alternative to the disappearing system of "free enterprise." To close this article, I again repeat the words of Senator (now President) Johnson: "Reluctant, apologetic administration does not inspire public confidence; and it does not get the job done."⁵⁵⁴

550. See TNEC Report 15-16.

551. The Subcommittee of the Senate Judiciary was established by S. Res. 40, 90th Cong., 1st Sess. (1967).

552. H.R. 13584, 90th Cong., 1st Sess. (1967). For the importance of research in applying law, see a discussion of systems used in other countries in W. Gellhorn, *Ombudsmen and Others: Citizens' Protectors In Nine Countries* 42-43 (1966).

553. It has been suggested that since the antitrust laws have failed to curb the merger wave, Congress should impose a "disincentive investment tax" on acquisitions. See, *Hearings on S. 2512 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess.* (1966).

554. 96 Cong. Rec. 16460 (1950) (remarks of Mr. Johnson).

APPENDIX TABLE 1
 MERGERS AND ACQUISITIONS IN MANUFACTURING AND MINING 1895-1964

Nelson Series ¹ 1895-1919		Thorp Series ² 1919-1939		FTC Series ³ 1940-1966	
Year	Annual Total	Year	Annual Total	Year	Annual Total
1895	43	1919	438	1940	140
1896	26	1920	760	1941	111
1897	69	1921	487	1942	118
1898	303	1922	309	1943	213
1899	1,208	1923	311	1944	324
1900	340	1924	368	1945	333
1901	423	1925	554	1946	419
1902	379	1926	856	1947	404
1903	142	1927	870	1948	223
1904	79	1928	1,058	1949	126
1905	226	1929	1,245	1950	219
1906	128	1930	799	1951	235
1907	87	1931	464	1952	288
1908	50	1932	203	1953	295
1909	49	1933	120	1954	387
1910	142	1934	101	1955	683
1911	103	1935	130	1956	673
1912	82	1936	126	1957	585
1913	85	1937	124	1958	589
1914	39	1938	110	1959	835
1915	71	1939	87	1960	844
1916	117			1961	954
1917	195			1962	853
1918	71			1963	861
1919	171			1964	854
1920	206			1965	1,008
				1966	995
				1st qtr.	268
				2nd qtr.	292
				3rd qtr.	209
				4th qtr.	226

1. R. L. Nelson, *Merger Movements in American Industry, 1895-1956*, Princeton University Press, 1959, p. 37.

2. W. Thorp & W. Crowder, *The Structure of American Industry*, Temporary National Economic Committee Monograph 27, at 231-34 (1941).

3. Federal Trade Commission. Based on *Moody's Industrial Manual and Standard Corporation Records*.

Source: Staff Report 37, table 1.

APPENDIX TABLE 2
NUMBER OF MERGERS AND ACQUISITIONS RECORDED, BY INDUSTRY OF ACQUIRING COMPANY, 1955 TO 1966

Industry ¹ of acquiring company	1955-1959										
	Total	Annual Average	1960	1961	1962	1963	1964	1965	1966		
Total recorded	5,811	1,162	1,345	1,724	1,667	1,479	1,797	1,893	1,746		
Full acquisitions ²	4,984	997	1,216	1,592	1,504	1,329	1,519	1,628	1,517		
Mining	318	64	48	74	48	79	59	62	55		
Manufacturing	3,691	738	918	1,043	985	906	1,006	1,063	1,051		
Trade ³	480	96	127	255	235	186	207	191	188		
Services and others ⁴	495	99	123	220	236	158	247	312	223		
Partial acquisitions ⁵	827	165	129	132	163	150	278	265	229		

1. Broad industrial classification of acquiring company in full acquisitions only.

2. Acquisitions of other independent companies, subsidiaries of other independent companies, and whole divisions of other independent companies.

3. Wholesale and retail trade combined.

4. "Other" consists mainly of companies engaged in insurance, warehousing and storage, commercial farming, contract construction, and extending credit to businesses and individuals (other than banks).

5. Acquisitions involving less than half of the assets or stock of a company.

Sources: Moody's Industrials (semi-weekly), Standard Corporation Records (daily), Wall Street Journal, Journal of Commerce, and New York Times.

Bureau of Economics
Federal Trade Commission

APPENDIX TABLE 3
 DISTRIBUTION OF LARGE CORPORATIONS ACQUIRED DURING 1948-66 By
 INDUSTRY OF ACQUIRED FIRM AND AS A PERCENT OF 1959 INDUSTRY ASSETS

Industry Group	Number of Acquisitions	Percent of Total	Value of Acquired Assets (millions)	Percent of Total	Total Value of Assets 1959 (millions)	Acquired Assets As A Percent of 1959 Total Assets
Food and Kindred Products	86	9.4	\$ 2,474	7.9	\$ 21,837	11.3
Tobacco Manufacturers	2	.2	45	.1	3,312	1.4
Textile Mill Products	59	6.5	1,922	6.1	8,319	23.1
Apparel	13	1.4	214	.7	3,792	5.6
Lumber and Wood Products	29	3.2	756	2.4	4,548	16.6
Furniture and Fixtures	5	.5	88	.3	2,092	4.2
Paper and Allied Products	75	8.2	2,792	8.9	9,721	28.7
Printing and Publishing	21	2.3	420	1.3	4,684	9.0
Chemicals and Allied Products	83	9.1	2,703	8.6	23,298	11.6
Petroleum and Oil Products	46	5.0	4,066	13.0	37,473	10.8
Rubber and Plastics Products, N.E.C.	18	2.0	289	.9	5,193	5.6
Leather and Leather Products	8	.9	111	.4	1,828	6.1
Stone, Clay and Glass Products	43	4.7	1,056	3.4	7,687	13.7
Primary Metal Industries	60	6.6	1,846	5.9	29,064	6.4
Fabricated Metal Products	52	5.7	1,191	3.8	10,556	11.3
Machinery, Except Electrical	101	11.1	3,305	10.6	20,763	15.9
Electrical Machinery	60	6.6	2,077	6.6	16,618	12.5
Transportation Equipment	51	5.6	2,258	7.2	26,578	8.5
Instruments and Related Products	21	2.3	475	1.5	3,728	12.7
Miscellaneous Manufacturing	11	1.2	152	.5	3,084	4.9
Mining	68	7.5	3,025	9.7	16,000	18.9
Total	912	100.0	\$31,265	99.8	\$260,175	12.0

Source: Staff Report 38, table 2.