Notre Dame Law Review

Volume 60 | Issue 2 Article 1

1-1-1985

Section 7 of the Clayton Act and the Pursuit of Economic Objectivity: Is There Any Role for Social and Political Values in Merger Policy

Wesley A. Cann

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr

Part of the Law Commons

Recommended Citation
Wesley A. Cann, *Section 7 of the Clayton Act and the Pursuit of Economic Objectivity: Is There Any Role for Social and Political Values in Merger Policy*, 60 Notre Dame L. Rev. 273 (1985).
Available at: http://scholarship.law.nd.edu/ndlr/vol60/iss2/1

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

Section 7 of the Clayton Act and the Pursuit of Economic "Objectivity": Is There Any Role for Social and Political Values in Merger Policy?

Wesley A. Cann, Jr. *

Congress passed the Celler-Kefauver Amendment[1] to broaden the applicability of section 7 of the Clayton Act[2] and to repress what it considered to be the "rising tide of economic concentration in the American economy."[3] Throughout the legislative history of the amendment, Congress spoke of the social and political effects that would result from an unbridled accumulation of economic and political power within our country.

Congress expressed concern for small businesses and for the local communities in which those businesses had played such an important role. It feared the consequences of absentee management, the loss of local independence, and the concentration of decision-making power in the hands of a few. The legislature recognized the dangers of allowing large corporations to "swallow up" their competitors, their suppliers, and their customers, as well as the dangers that could accompany even the acquisition of an unrelated firm.[4] Finally, in the belief that the nation would not tolerate so vast an accumulation of power in private hands,[5] Congress acted to avoid what it saw as the otherwise inevitable public re-

---

* Associate Professor in Residence—Business Law, University of Connecticut.

1 Act of Dec. 29, 1950, Pub. L. No. 81-899, 64 Stat. 1125. As originally enacted, § 7 of the Clayton Act prohibited acquisitions where the effect of the transaction might be "to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition." Pub. L. No. 63-212, 38 Stat. 730, 731-32 (1914). Because of this language, some felt that § 7 only involved competition between the *acquiring* and *acquired* firms and was thus limited to horizontal mergers. *See* H.R. REP. No. 1191, 81st Cong., 1st Sess. 11 (1949). The Celler-Kefauver Amendment deleted this language to make clear that the section deals with vertical and conglomerate mergers as well as horizontal. *Id.* The amendment also broadened the scope of § 7 to include acquisitions by way of acquiring another corporation's assets as well as by acquiring its stock. For the text of § 7 of the Clayton Act, see note 17 *infra.*

2 15 U.S.C. § 18 (1982). Broadly stated, § 7 of the Clayton Act prohibits acquisitions (coming within its auspices) that may substantially lessen competition or tend to create a monopoly in any line of commerce, or in any activity affecting commerce, in any section of the country. For the text of § 7, see note 17 *infra.*

3 Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962). For a discussion of the congressional debate surrounding the antitrust laws, see Lande, *Wealth Tranfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged,* 34 HAST. L.J. 65 (1982).

4 95 CONG. REC. 11,501 (1949) (comments of Rep. Douglas).

5 *Id.* at 11,486 (comments of Rep. Celler).

sponse—the creation of a politically-collective state.[6]

Although three decades have passed since Congress expressed this relatively clear "set of value premises,"[7] the 500 largest U.S. industrial corporations control a staggering $1.35 trillion in assets[8] and employ 14.1 million persons.[9] Under current section 7 enforcement policy—or perhaps more accurately, the lack thereof—mergers of unprecedented proportions are being undertaken. During the first quarter of 1984, the dollar value for all announced merger/acquisition/divestiture transactions totaled a record breaking $48.3 billion,[10] a 245% increase from the corresponding quarter in 1983[11] and nearly double the previous quarterly record set in 1981.[12] These first quarter announcements included Socal's $13.2 billion acquisition of Gulf Oil and Texaco's $10.1 billion takeover of Getty, the two largest acquisitions in U.S. history, as well as Mobil's $5.7 billion acquisition of Superior Oil.[13] The announcement also reflected 43 transactions of $100 million or more, a jump of 72% from the corresponding quarter of 1983.[14] As Federal Trade Commissioner Michael Pertschuk stated, present merger policy reflects an "anything goes"[15] approach. He noted that "the anticompetitive merger remains a constantly receding image on the FTC's horizon—a mirage—never to be encountered in real life."[16]

Despite the social concerns about the business community which members of Congress expressed, the actual language of section 7 of the Clayton Act does not refer to any such considerations. Instead, section 7 prohibits only those mergers where the effect "may be substantially to lessen competition, or to tend to create a monopoly."[17]

6 *See* 96 CONG. REC. 16,446, 16,452, 16,504, 16,507 (1950); 95 CONG. REC. 11,486, 11,503 (1949). For a discussion of the purposes of § 7 of the Clayton Act, see Cann, *The New Merger Guidelines—Is the Department of Justice Enforcing the Law?*, 21 AM. BUS. L.J. 1, 3-11 (1983).

7 Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 305 (1960).

8 *The 500*, FORTUNE, Apr. 30, 1984, at 274, 275.

9 *Id.*

10 W.T. Grimm & Co., Press Release No. 24060-97526, at 1 (June 14, 1984) (published by Doremus and Company, Chicago, Illinois).

11 *Id.*

12 *Id.* at 2.

13 *Id.* at 1.

14 *Id.* at 2.

15 Statement of Michael Pertschuk, Hearings on GM/Toyota Venture Before the Subcomm. on Commerce, Transportation and Tourism of the House Comm. on Energy and Commerce, 98th Cong., 2d Sess. (Feb. 8, 1984) (on file with the *Notre Dame Law Review*).

16 M. Pertschuk, Economic Lessons Learned at the Knee of the Chastened National Nanny, Remarks Before the National Economists Club, Washington, D.C. 4 (Oct. 18, 1983) (on file with the *Notre Dame Law Review*).

17 15 U.S.C. § 18 (1982). Section 7 of the Clayton Act states, in pertinent part:

Because of the contrasting concerns expressed in the congressional record and the actual statutory language,[18] two diverse approaches to merger enforcement policy have developed. The first, which found substantial support in the Warren Court, stresses a multivalued analysis of mergers.[19] Although recognizing the desirability of an efficient allocation of resources, this approach applies a substantially broader meaning to the term "competition," particularly as that term relates to such factors as barriers to entry. The multivalued approach views section 7 of the Clayton Act as a mechanism both for preserving the type of economic structure Congress apparently sought to encourage and for safeguarding the social and political values which concerned Congress.

Under the second approach, mergers are judged primarily, if not exclusively, by their economic effect. This economic approach severely restricts the use of the "per se rule,"[20] defines "competition" solely in its economic context, and disregards non-competitive concerns. It seeks to deter "market power"—the ability of a firm or collusive group of firms "profitably to maintain prices above competitive levels for a significant period of time."[21] As a result, little concern is given to such non-horizontal effects as foreclosure

---

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting 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.
>
> No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

18 *See Panel Discussion: Merger Enforcement and Practice*, 50 ANTITRUST L.J. 233, 239 (1982) (comments of R.D. Joffe).

19 *See* Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 CALIF. L. REV. 1, 4 (1980).

20 Under this rule, certain activities will be found to be unreasonable as a matter of law, without a detailed inquiry into their actual market context or competitive consequences. In addressing the per se rule, the Supreme Court in Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977) (citing Northern Pac. R.R. v. United States, 356 U.S. 1, 5 (1958)), noted that "there 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."

21 U.S. DEPARTMENT OF JUSTICE, MERGER GUIDELINES § 1 (June 14, 1984) [hereinafter cited as 1984 GUIDELINES].

of equal access to potential suppliers and customers,[22] trends toward vertical integration,[23] reciprocal buying,[24] and entrenchment,[25] all of which stem from either vertical or conglomerate mergers.[26] The pursuit of efficiency is substantially encouraged, while the necessity of making any type of "value judgment" is allegedly extinguished.

While the relative merits of these approaches have long been debated,[27] the conflict between the two has never been more dramatic than under current merger policy. Under earlier court decisions,[28] such doctrines as potential competition, entrenchment, reciprocity, submarkets, and foreclosure were enforced—whether correctly or incorrectly—with substantial vigor. Courts more narrowly defined relevant product and geographic markets, prohibited small increments in concentration or market share, and skeptically viewed barriers to entry. Under the guise of preventing "the substantial lessening of competition," the courts' use of these doctrines carried out the broad public policy found in the legislative history.

But in 1974, *United States v. General Dynamics Corp.*[29] ushered in a new, more economically-sophisticated approach to merger analysis which severely questioned the economic "realities" of many of those doctrines. Since that decision, courts and merger enforcement officials have continued to expand upon the theories presented in that case. Against such a background, the United States Department of Justice issued its new merger guidelines in 1982 and its revised guidelines in 1984.[30]

---

22 *See* U.S. DEPARTMENT OF JUSTICE 1968 MERGER GUIDELINES, 1 TRADE REG. REP. (CCH) ¶ 4510, § 11 [hereinafter cited as 1968 GUIDELINES].

23 *Id.* § 14.

24 *Id.* § 19.

25 *Id.* § 20.

26 A horizontal merger involves two firms producing the same or substitutable products at the same distribution level who are in competition with each other (i.e. in the same geographic market). *See* 1968 GUIDELINES, *supra* note 22, § 4. A vertical merger is one between firms at different levels of the same distribution chain and involves "acquisitions 'backward' into a supplying market or 'forward' into a purchasing market." *Id.* § 11. Conglomerate mergers are simply those that are "neither horizontal nor vertical" in nature. *Id.* § 17.

27 *See* notes 64-87 and 98-109 *infra* and accompanying text.

28 *See, e.g.*, FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); United States v. Von's Grocery Co., 384 U.S. 270 (1966); United States v. Pabst Brewing Co., 384 U.S. 546 (1966); FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965); United States v. Aluminum Co., 377 U.S. 271, *reh'g denied*, 377 U.S. 1010 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); Brown Shoe Co. v. United States, 370 U.S. 294 (1962); Allis Chalmers Mfg. Co. v. White Consol. Indus., 414 F.2d 506 (3d Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970); United States v. Atlantic Richfield Co., 297 F. Supp. 1061 (S.D.N.Y. 1969).

29 415 U.S. 486 (1974).

30 U.S. DEPARTMENT OF JUSTICE, MERGER GUIDELINES (June 14, 1982) [hereinafter cited as 1982 GUIDELINES]. Two years later, to the day, the Department of Justice issued a revised set of Guidelines. 1984 GUIDELINES, *supra* note 21, §§ 1-5.

With such an antitrust climate in mind, this article first presents an overview of the economic and multivalued approaches to merger enforcement policy, focusing on the legislative history of section 7, judicial interpretations, and the varied positions of legal scholars. The article examines the apparent discrepancy between the original congressional sentiment and present merger activity, including a discussion of the 1984 Merger Guidelines. Part II asserts that the economic approach, contrary to common belief, is not based solely upon objectivity and does *not* eliminate the necessity for subjective judgments. Part III explores the dangers inherent in this misconception, including the concentration of political and decision-making power which present policy encourages, the consequences of a broad market definition, the apparent disregard of transaction costs, and the effects of an undiscerning pursuit of efficiency. Finally, this article discusses proposals for reform and the need for congressional response.

I. Two Approaches to Merger Enforcement Policy: An Overview

A. *A Multivalued Approach*[31]

1. Legislative Purposes

In passing section 7 of the Clayton Act, and more particularly the 1950 Celler-Kefauver Amendment, Congress clearly expressed its desire to preserve a variety of social and political values and to encourage an "economic way of life"[32] that was compatible with those values. Congress recognized that great industrial consolidations were inherently undesirable for reasons that went beyond their economic effect.[33] It viewed the "rising tide of economic concentration"[34] resulting from the external expansion of business through mergers, acquisitions and consolidations[35] as potentially destructive not only to the nation's economy but also to its social

31 The term "multivalued" is taken from Sullivan, *supra* note 19, at 4.

32 Brown Shoe Co. v. United States, 370 U.S. 294, 333 (1962).

33 *See* United States v. Aluminum Co., 148 F.2d 416, 428, 429 (2d Cir. 1945). For example, Judge Hand indicated that in passing the Sherman Act Congress

> was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few.

Id. at 427. "[A]mong the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them." *Id.* at 428. "Throughout the history of these statutes, it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units . . . ." *Id.* at 429.

34 *See Brown Shoe*, 370 U.S. at 315.

35 H.R. Rep. No. 1191, *supra* note 1, at 2.

and political institutions.[36]

One purpose of the Celler-Kefauver Act was to protect the independence of small businesses and to perpetuate their existence as important competitive factors in the American economy.[37] Congress recognized that small, locally-controlled businesses "of the kind that built up our country, of the kind that made our country great," were quickly disappearing.[38] It also recognized that the merger movement consisted primarily of large corporations swallowing up smaller firms, rather than smaller firms combining in order to compete more effectively.[39]

In carrying out this purpose, courts have held that the basic underlying premise of section 7 is that "competition will be most vital 'when there are many sellers, none of which has any significant market share.' "[40] The courts have noted that section 7 promotes competition "through the protection of viable, small, locally owned businesses"[41] despite the higher costs and higher prices that might occasionally result[42] and that trends toward concentration[43] are to be arrested in their "incipiency."[44]

Congress sought to preserve a market structure composed of many independent units and to protect the opportunity for the "average man" to enter that market and start a business of his own.[45] It also wanted to prevent the loss of local economic independence and the steady transfer of control from local communities to large absentee corporations.[46] The legislative history spoke of the millions of people who were losing power over their own economic welfare and "depending helplessly" on the discretion of distant managers.[47] Congress also expressed concern for the loss of acquaintanceship between workers and owners, the "siphoning" of

36 *See Brown Shoe*, 370 U.S. at 316. The Court observed that, "throughout the recorded discussion may be found examples of Congress' fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose." *Id.*

37 *See* 96 CONG. REC. 16,433, 16,507 (1950); S. REP. No. 1775, 81st Cong., 2d Sess. 3 (1950).

38 95 CONG. REC. 11,486 (1949) (comments of Rep. Celler).

39 H.R. REP. No. 1191, *supra* note 1, at 3.

40 United States v. Aluminum Co., 377 U.S. 271, 280, *reh'g denied*, 377 U.S. 1010 (1964) (quoting United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963)).

41 Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962); *see also* United States v. Von's Grocery Co., 384 U.S. 270, 275 (1966).

42 *Brown Shoe*, 274 U.S. at 344; *see also* United States v. Aluminum Co., 148 F.2d 416, 429 (2d Cir. 1945).

43 *Von's Grocery Co.*, 384 U.S. at 277.

44 *Brown Shoe*, 370 U.S. at 317; *see also* United States v. Pabst Brewing Co., 384 U.S. 546, 552 (1966); United States v. Von's Grocery Co., 384 U.S. 270, 277 (1966).

45 *See* 95 CONG. REC. 11,506 (1949); *see also* 96 CONG. REC. 16,503, 16,507 (1950).

46 *See* 96 CONG. REC. at 16,444, 16,450, 16,452.

47 *Id.* at 16,452 (comments of Sen. Kefauver).

income to distant areas, and the disappearance of the social and civic ties that had served to bind communities together.[48]

Congress also considered the potential political consequences of economic concentration. If industry were allowed to continuously expand, Congress feared there would be a growing demand for government intervention to prevent that expansion. It reasoned that the people would not allow the power that large business combinations would develop over all aspects of the market to rest in private hands[49] and that the creation of a politically-collective state would ultimately result.[50]

It can also be argued that the legislature was concerned not only with concentration within particular markets, market power, but with the overall concentration of wealth within the country. Throughout the legislative debate of the Celler-Kefauver Act, Congress consistently expressed its concern over what it liberally termed "economic concentration," noting that, as "measured by practically any method and compared to practically any standard, the level of economic concentration in the American economy is high."[51] Congress repeatedly reported that one-tenth of one percent of American corporations owned forty-nine percent of all corporate assets, and that two percent of these firms owned seventy-eight percent.[52] Tables were introduced to indicate that corporations were gaining greater economic power than some cities and states.[53] Legislators noted the "extraodinary accumulation of liquid assets in corporate treasuries"[54] and that the possession of power had the "tendency to corrupt."[55]

In attempting to alleviate these problems, Congress made it clear that section 7 of the Clayton Act would apply to vertical and conglomerate mergers. As originally enacted, section 7 prohibited acquisitions where the effect of the transaction might substantially lessen competition "between the corporation whose stock is so acquired and the corporation making the acquisition."[56] As a result, it was believed that this section only involved competition between the acquiring and acquired firms and was thus limited to horizontal

48 95 CONG. REC. at 11,495 (comments of Rep. Bryson).

49 *Id.* at 11,486 (comments of Rep. Celler).

50 *See* 96 CONG. REC. at 16,446, 16,452, 16,503-04, 16,507; 95 CONG. REC. at 11,486, 11,503.

51 H.R. REP. No. 1191, *supra* note 1, at 2.

52 *See, e.g.*, 96 CONG. REC. at 16,437.

53 *Id.* at 16,448.

54 *Id.* at 16,449 (comments of Sen. O'Mahoney).

55 *Id.* at 16,447 (comments of Sen. Wiley).

56 Clayton Act, Pub. L. No. 63-212, ch. 323, § 7, 38 Stat. 730, 731-32 (1914) (codified as amended at 15 U.S.C. § 18 (1982)).

mergers.[57] But by deleting this language, the Celler-Kefauver Amendment clarified that the law would apply "to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal"[58] and that all mergers would be "tested by the same standard."[59]

While these legislative goals will continue to be debated, their relevancy to merger analysis should not be dismissed merely because they may not pass scrutiny under "modern economic theory."[60] However tempting, the legislative history cannot be invoked when convenient and disavowed when problematic, for our antitrust laws represent the "Magna Carta of free enterprise,"[61] guaranteeing to "each and every business, no matter how small,"[62] the freedom to compete.

Including social and political considerations in merger analysis may indeed reduce the predictability of section 7 enforcement, complicate judicial inquiry and decision-making, cause uncertainty among corporate strategists, and deter non-objectionable merger activity.[63] Nevertheless, if legislative history is to play a role in statutory construction, such factors must be considered when developing or enforcing merger policy.

2. The Scholarly Argument

Based on this legislative history, many scholars feel that a merger policy that fails to reflect social and political considerations would contravene the congressional mandate. While proponents of the multivalued approach recognize that section 7 of the Clayton Act only prohibits mergers that may tend to substantially lessen competition, they do not view "competition" as merely "prices, costs, and product innovations,"[64] but as a term possessing "a strong socio-political connotation."[65]

For example, Steve Axinn has argued that it would be incorrect to assume that section 7 "is translatable only into economic terms

---

57 *See* H.R. REP. No. 1191, *supra* note 1, at 11.

58 *Id.*

59 FTC v. Procter & Gamble Co., 386 U.S. 568, 577 (1967); *see* Copperweld Corp. v. Imetal, 403 F. Supp. 579, 589 (W.D. Pa. 1975).

60 *See* Bork, *Emerging Substantive Standards—Developments and Need for Change*, 50 ANTITRUST L.J. 179, 180 (1982).

61 United States v. Topco Assoc., Inc., 405 U.S. 596, 610 (1972).

62 *Id.*

63 *See* Statement by Attorney General William French Smith Releasing the New Department of Justice Merger Guidelines 1 (June 14, 1982); Statement by Attorney General William French Smith Releasing the New Department of Justice Merger Guidelines 4-5 (June 14, 1984); 1984 GUIDELINES, *supra* note 21, § 1; *Panel Discussion*, *supra* note 18, at 238 (comments of R.H. Bork).

64 Bok, *supra* note 7, at 248.

65 *Id.* at 236.

because it uses words like competition."[66] Instead, he argues that such a term "refers to an entire process which has preserved a system of entry and exit" and thereby contains a series of social and political ramifications.[67] He places very little credence in the argument that the members of Congress in 1950 "were more impressed by the then-current views of economic thinkers than they were by the views of their political constituents, many of whom were small businessmen and voters" concerned about the rising tide of concentration.[68]

Other writers are also skeptical of a purely economic approach to merger enforcement. Professor Sullivan has indicated that economic theory can make for "an attractively tidy antitrust world," where markets work well if simply left alone and where "antitrust policemen" are not overworked.[69] Sullivan notes, however, that such an approach fails to recognize that the antitrust laws aim at values other than economic efficiency and that "courtrooms are not laboratories for empirical investigation of issues framed by economists."[70] Two decades earlier, Derek Bok had expressed similar sentiment when he warned that society should not "succumb to the economists who bid us enter a jungle of 'all relevant factors,' telling us very little of the flora and fauna that abound in its depth."[71]

In denying that efficiency was the primary concern of Congress in enacting and amending section 7 of the Clayton Act,[72] such scholars stress that any application of economic doctrine must take into account "the broader range of interests which Congress had in mind."[73] Professor Brodley has emphasized that although Congress sought to prevent mergers that inhibit free competition, it also wished to "avoid the undesirable social losses from mergers." Such social losses include the "centralization" of political and economic power, the denial to small business of the opportunity to compete, the loss of "regional centers of business autonomy," and the erosion of "public support for the free market system."[74] Rob-

66 *Panel Discussion*, *supra* note 18, at 237 (comments of Steve Axinn).

67 *Id.* at 237-38.

68 *Id.* at 238.

69 Sullivan, *Economics and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214, 1216 (1977).

70 *Id.* at 1232.

71 Bok, *supra* note 7, at 227.

72 *See, e.g.*, Statement of Joseph Brodley, Statement on Possible Legislation Relating to Mergers by Large Corporations: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 98th Cong., 1st Sess. (July 14, 1983) (on file with the *Notre Dame Law Review*); M. Pertschuk, *supra* note 16, at 6; *see also* Lande, *supra* note 3, at 131-35.

73 Bok, *supra* note 7, at 248.

74 Statement of Joseph Brodley, *supra* note 72.

ert Lande, although taking a more conservative approach,[75] similarly noted that Congress was concerned with the social and political power in the hands of large corporations and that Congress feared "that the mere existence of [such] power had the potential to cause social disruption."[76]

In specifically addressing the political dangers of economic concentration, Robert Pitofsky stated that it would be "bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws."[77] These "political values" would include the fear of antidemocratic pressures resulting from the accumulation of power, the desire to reduce the "range within which private discretion by a few . . . controls the welfare of all," and the avoidance of an economy "so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs."[78] As a result, Pitofsky believes that "despite the inconvenience, lack of predictability, and general mess introduced into the economists' allegedly cohesive and tidy world of exclusively micro-economic analysis,"[79] any antitrust policy that fails to consider such values "would be unresponsive to the will of Congress."[80]

Similarly, Michael Pertschuk and Kenneth Davidson, in examining the political impact of conglomerate mergers, view such mergers as a "direct challenge to the balance of institutional power because there is almost no limit to the size a firm can achieve."[81] Because evidence suggests that political influence grows as a function of firm size, thereby creating political economies of scale,[82] these mergers not only reduce the number and diversity of political decision-makers,[83] but also have the effect of greatly increasing the "absolute political power"[84] of a firm.

Proponents of the multivalued approach thus call for a stricter enforcement policy that would, in Scherer's words, err on the side

---

75 Lande's basic proposition is that "Congress passed the antitrust laws to further economic objectives, but primarily objectives of a distributive rather than an efficiency nature. In other words, Congress was concerned principally with preventing 'unfair' transfers of wealth from consumers to firms with market power." Lande, *supra* note 3, at 68.

76 *Id.* at 129.

77 Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979).

78 *Id.*

79 *Id.* at 1052.

80 *Id.*

81 Pertschuk & Davidson, *What's Wrong with Conglomerate Mergers?*, 48 FORDHAM L. REV. 1, 2 (1979).

82 *Id.* at 6, 10 (citing Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555, 591-92 (1973)).

83 *Id.* at 7.

84 *Id.*

of a "hard line against mergers"[85] and they are willing to assume "the risk that occasionally mergers offering substantial efficiency benefits will be barred."[86] They believe that section 7 of the Clayton Act was amended with the purpose of preserving the values expressed throughout its legislative history and that any rule that would resolve uncertainties "in a manner contrary to those desires threatens to give section 7 a significance and an impact on the economy which differs from what was envisaged by the Congress."[87]

But Congress has unsuccessfully attempted to amend the Clayton Act to more specifically incorporate some of these values. For example, the Small and Independent Business Protection Act of 1979[88] would have flatly prohibited mergers where each of the parties had assets or sales exceeding two billion dollars.[89] It would also have prohibited other sizable mergers unless they would specifically enhance competition, result in substantial efficiencies, or involve a corresponding divestiture.[90]

An earlier Federal Trade Commission proposed a pure "cap and spin off" approach under which no merger would be flatly forbidden, thus allowing for investment flexibility and efficiency, but which would require divestiture of one or more entities of comparable aggregate size.[91] Other bills, such as the Domestic Petroleum Company Acquisition Act of 1984,[92] have been directed specifically at the oil industry. These bills have recognized that continued merger activity within that industry could result "in the elimination of important competitive checks on . . . economic and political power."[93]

A final example is the bill introduced by Representative Rodino[94] which would have prohibited mergers that create a firm controlling over five billion dollars in assets and employing over 25,000 workers, unless the merger was deemed to be in the "public interest."[95] The comments on the bill regarding absentee owner-

85 F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 546 (1980).

86 *Id.*

87 Bok, *supra* note 7, at 305.

88 S. 600, 96th Cong., 1st Sess. (1979), *reprinted in Mergers and Economic Concentration, 1979: Hearings on S. 600 Before the Subcomm. on Antitrust, Monopoly, and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 641 (1979).

89 *Id.* § 2(a).

90 *Id.* § 3(a).

91 *See* Pertschuk & Davidson, *supra* note 81, at 17-18, 21.

92 S. 2277, 98th Cong., 2nd Sess. (1984).

93 *Id.* § 2(4).

94 H.R. 3561, 98th Cong., 1st Sess. (1983).

95 *Id.* In determining if such a public standard was met, the appropriate enforcement agency would focus on whether the merger would promote existing or potential competition, whether it would result in the effective management of corporate assets, the offering of new goods or services, the enhancement of the quality of goods and services, or a reduc-

ship, community pride and commitment, the dangers of excessive economic and political power,[96] the reduction in the number of decision-making centers, and the social and political costs of "bigness"[97] were tellingly reminiscent of the debate over the Celler-Kefauver Act three decades earlier.

B. *An Economic Approach*

1. Development of the Counter Argument

Despite the guidance in the legislative history regarding the need to preserve social and political values, the actual language of section 7 only prohibits mergers that may substantially lessen competition or tend to create a monopoly. As a result, many commentators, as well as the Justice Department, believe that non-competitive concerns have no place in merger enforcement policy.[98]

Proponents of the economic approach[99] believe that most mergers are either neutral or beneficial in effect. Thus, rather than stressing the potential dangers of mergers, such proponents tend to emphasize the potential benefits that accompany merger activity. These benefits include the ability to liquidate holdings, improve management and, of course, improve efficiencies.[100] They also argue that "most merger activity does not threaten competition, but actually improves our economy's efficiency and thus benefits all consumers."[101] Any merger policy, they believe, should seek to encourage efficiencies resulting from economies of scale, technological and product-related synergy, superior management, coordinated research and development, lower transportation and transaction costs, and the reduction of excess capacity.[102] In order to avoid frustrating these purposes, they urge a policy that would be based on objective and predictable criteria.

---

tion in price, and whether it would unduly disrupt management or employees or cause excessive transaction costs. *Id.*

96 129 CONG. REC. H5128-30 (daily ed. July 13, 1983) (comments of Rep. Rodino and Rep. Seiberling).

97 *Id.*

98 *See* 1982 GUIDELINES, *supra* note 30, § V (B) n.54.

99 *See, e.g.*, *Panel Discussion*, *supra* note 18 (comments of R.H. Bork); Statement of Attorney General William French Smith Releasing the Department of Justice Merger Guidelines (June 14, 1984); 1984 GUIDELINES, *supra* note 21; Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979); Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981).

100 Axinn, *A Practical Approach to the New Merger Practice*, 50 ANTITRUST L.J. 205, 206 (1982).

101 Statement of Attorney General William French Smith Releasing the Department of Justice Merger Guidelines 1 (June 14, 1984).

102 *See* Fisher & Lande, *Efficiency Considerations in Merger Enforcement*, 71 CALIF. L. REV. 1582, 1599-1601 (1983).

The "driving force" behind this approach has been the Chicago School of economic theory and its "fervent belief in the ability of a free market to regulate itself."[103] Not surprisingly, under this approach, the primary (if not exclusive) evil to be avoided is the creation or exercise of market power—namely, the ability of a firm or a collusive group of firms to profitably maintain prices above competitive levels for a significant period of time.[104] As a result of this focus, other practices previously believed to be anticompetitive are no longer viewed with great concern.

Several effective advocates propose the use of the economic approach to merger analysis over the multivalued approach. In addressing the multivalued approach, Robert Bork referred to arguments regarding political power and rising tides of concentration as "pure intellectual mush."[105] He noted that the legislative history contained discussion of almost every social ill, including the higher level of infant mortality in cities with concentrated industries. He believed that if society is going to place such evidence before a judge in an antitrust case, then "we are moving toward insanity."[106]

Similarly, Donald Turner finds no support for the position that Congress "consciously appreciated" the efficiency cost of preserving small business or "consciously resolved the competing considerations in favor of decentralization."[107] Even Robert Pitofsky, who does recognize the relevance of certain "political values" to merger policy, has noted that protecting small business against rigorous competition is a non-economic concern that "can play no useful role in antitrust enforcement."[108] He also believes that any discriminatory policy "in pursuit of mythic virtues of smallness" would itself be inconsistent with other political values.[109]

This economic, or efficiency, approach to merger enforcement policy has gained increasing recognition in the lower courts and, perhaps somewhat more moderately, in the United States Supreme

103 Wines, *Reagan's Antitrust Line—Common Sense or an Invitation to Corporate Abuse?*, NAT'L J., July 10, 1982, at 1204; *see* Posner, *supra* note 99; Gerhart, *The Supreme Court and Antitrust Analysis: The (Near) Triumph of the Chicago School*, 1982 SUP. CT. REV. 319 (1982).

104 For a discussion of the market power concept, see 1984 GUIDELINES, *supra* note 21, § 1; note 146 *infra* and accompanying text. In discussing the changes in merger enforcement policy, Brodley observed that under the "new enforcement view . . . the only possible detriment from a merger [is] the risk of market collusion, and that merger enforcement should be directed against that evil alone." Statement of Joseph Brodley, *supra* note 72.

105 *Panel Discussion*, *supra* note 18, at 238 (comments of R.H. Bork).

106 *Id.*

107 Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1326 (1965). He also argues that Congress has not mandated any sort of "campaign against 'superconcentration' " in the absence of harm to competition. He says that the courts should demand that future congressional directives be "more formidable than sonorous phrases in the pages of the Congressional Record." *Id.* at 1395.

108 Pitofsky, *supra* note 77, at 1058.

109 *Id.* at 1059.

Court.[110] Economic theory has always played an important role in antitrust analysis, even when courts were more willing to consider the social and political aspects of merger activity.

In *Brown Shoe Co. v. United States*,[111] a landmark decision for the more liberal approach, the Court indicated that the purpose of section 7 was to protect "competition, not competitors."[112] As a result, according to the Court, a merger must be "functionally viewed, in the context of its particular industry"[113] since "only a further examination of the particular market—its structure, history, and probable future—can provide the appropriate setting for judging the probable anti-competitive effect of the merger."[114] Further, as Justice Harlan reminded us in *FTC v. Procter & Gamble Co.*,[115] "the statute does not leave us free to strike down mergers on the basis of sheer speculation or a general fear of bigness."[116]

Many commentators see the *United States v. General Dynamics Corp.*[117] decision as the critical point at which the courts demonstrated their willingness to seriously consider a more thorough economic approach to merger analysis. In that case, the government attempted to prove a section 7 violation primarily by using statistics which indicated that the already high level of concentration in the coal industry was increasing and that the merger would substantially enlarge the market share of the acquiring firm.

Despite the soundness of these allegations, the Court refused to prohibit the merger. After emphasizing that mergers must be "functionally viewed," the Court examined a variety of factors that demonstrated that the acquisition would not cause any adverse competitive effects.[118] The Court noted that coal manufacturers were becoming less able to compete with manufacturers of other energy sources, that the industry had already lost its single largest purchaser, the railroads, and that because the electric utility companies were now the mainstay of coal consumption, competition in the coal industry was centered around the ability to enter into long term supply contracts.[119] Because the acquired firm controlled less than one percent of the uncommitted coal reserves, it thereby had less ability to compete for long term contracts. The firm's impact

110 Sullivan, *supra* note 19, at 2.
111 370 U.S. 294 (1962).
112 *Id.* at 344.
113 *Id.* at 321-22.
114 *Id.* at 322 n.38.
115 386 U.S. 568 (1967).
116 *Id.* at 590 (Harlan, J., concurring) (citing General Foods Corp., 3 TRADE REG. REP. (CCH) § 17,465, at 22,749).
117 415 U.S. 486 (1974).
118 *Id.* at 497-98.
119 *Id.* at 499.

on the coal industry was thus far less significant than the statistics of market share seemed to indicate.[120] The Court noted that a firm's "probable future ability to compete" was a much more important consideration than mere evidence of its past production.[121]

Since *General Dynamics*, the courts have continued to expand their examination of the "realities" of particular markets. In *United States v. Marine Bancorporation*,[122] the Supreme Court held that in applying the potential competition doctrine to commercial banking, courts must consider the extensive state and federal regulations that apply to that area. Such regulations create substantial barriers to market entry. Thus, the likelihood that a merger would reduce competition by removing a potential entrant is decreased.[123] The Court also examined the probable future effects of a merger in *United States v. Citizens and Southern National Bank*.[124] In effect, the Court held that the acquisition involved would not lessen competition since no competition in the market existed and none was likely to develop between the parties in the future.[125]

As the courts have expanded their economic analysis of mergers, antitrust enforcement has also experienced a parallel development regarding the applicability of the "rule of reason."[126] Professor Sullivan has observed that the courts have "expanded the scope of the rule of reason and reduced the reach of per se rules, thus calling for fewer rules and more analysis."[127] Simultaneously, he concludes, courts have narrowed their inquiry under the rule of

---

120 *Id.* at 501-02.

121 *Id.* at 503.

122 418 U.S. 602 (1974).

123 *Id.* at 605-06.

124 422 U.S. 86 (1975).

125 *Id.* at 121.

The lower courts have also used a variety of factors in discounting the relevancy of market share and market concentration data. They have pointed to the "weak financial reserves" of the acquired company, United States v. International Harvester Co., 564 F.2d 769, 773 (7th Cir. 1977); the probable exit from the market if the merger were enjoined, FTC v. National Tea Co., 603 F.2d 694, 698-700 (8th Cir. 1979) (thereby comparing what would happen if the merger occurred with what would happen if it did not); low barriers to entry resulting from low technological expertise or limited capital requirements, Whittaker Corp. v. Edgar, 535 F. Supp. 933, 950 (N.D. Ill. 1982); unhealthy or deteriorating market position, Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 276-77 (7th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982); and the absence of synergy in such areas as advertising and promotional techniques, United States v. Crowell, Collier and MacMillan, Inc., 361 F. Supp. 983, 991 (S.D.N.Y. 1973). Further, in exploring these factors, the courts have looked for a reasonable probability, not a mere possibility, that anticompetitive consequences would occur. *See, e.g.*, Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 274 (7th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982).

126 The rule of reason requires that the factfinder weigh all the relevant circumstances of a case in deciding whether a restrictive practice actually constitutes an unreasonable restraint on competition. *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

127 Sullivan, *supra* note 19, at 2.

reason to reflect only competitive, usually efficiency, effects.[128] Although the primary cases reflecting this change do not involve section 7 of the Clayton Act, they are worthy of note because they reflect the current movement toward an economic approach to antitrust enforcement.

In *Continental T.V., Inc. v. GTE Sylvania Inc.*,[129] the Court was confronted with the issues of whether territorial restrictions on the sale of franchised products should be governed by the per se rule or the rule of reason and whether the distinction between "sale" and "nonsale" transactions expressed in *United States v. Arnold, Schwinn & Co.*[130] had lost its validity.

In choosing to apply the rule of reason, the Court overruled *Schwinn*, stating that the per se rule should only apply when the conduct involved was "manifestly anticompetitive."[131] The territorial restrictions in *Continental* did not fall within that category. Instead, the Court recognized that some vertical restrictions tend to promote competition "by allowing the manufacturer to achieve certain efficiencies in the distribution of his products."[132] The Court also noted that economists had identified numerous ways that manufacturers could actually use such restrictions to compete more effectively.

The Court stated, for example, that such restrictions could be used to attract competent and aggressive retailers, to encourage promotional activities, and to ensure that adequate service and repair facilities were made available.[133] As a result of this "economic utility," the sale/nonsale distinction outlined in *Schwinn* was essentially "unrelated to any relevant economic impact."[134] Any departure from the rule of reason, the Court concluded, "must be based upon demonstrable economic effect [and not] formalistic line drawing."[135] The Court has similarly restricted the use of the per se doctrine in other decisions as well.[136]

---

128 *Id.*

129 433 U.S. 36 (1977).

130 388 U.S. 365 (1967). In *Schwinn*, the Court held that once a manufacturer had parted with title, dominion, and risk of loss over a product, any effort to restrict the territory in which the product would be sold or the persons to whom it would be transferred would be governed by the per se rule. *Id.* at 382. On the other hand, where the manufacturer retained such indicia of ownership, and the function of the dealer was actually indistinguishable from that of an agent or salesman of the manufacturer, the rule of reason would apply instead. *Id.* at 380-81.

131 433 U.S. at 49-50.

132 *Id.* at 54.

133 *Id.* at 55.

134 *Id.* at 56.

135 *Id.* at 58-59.

136 In Broadcast Music, Inc. v. Columbia Broadcasting Sys. Inc., 441 U.S. 1 (1979), a case dealing with the legitimacy of blanket licenses for copyrighted musical compositions, the Court indicated that the decision of whether to apply the per se rule or the rule of

Finally, the recent Supreme Court decision, *Jefferson Parish Hospital District No. 2 v. Hyde*,[137] further exhibits an increasing reliance on economic theory in antitrust analysis. The case involved an exclusive contract requiring that all anesthesiological services for the petitioner's patients be performed by a particular firm of anesthesiologists. As a result of this arrangement, Dr. Hyde, an anesthesiologist who was not a member of the firm, was denied admission to the hospital's medical staff. The contract also had the effect of creating a "tying agreement" under which all patients using the hospital's operating facilities, and thus needing an anesthesiologist, would be "forced" to accept the services of one of the members of the firm.

While retaining the traditional per se label for tying agreements, the Court nevertheless held that "every refusal to sell two products separately cannot be said to restrain competition."[138] Tying agreements, according to the Court, are condemned only when the seller has sufficient market power to force a purchaser to do something that he would not otherwise do in a competitive market.[139] Thus, any inquiry into the validity of a tying arrangement must focus on the agreement's market impact or economic effect.[140]

Using a rather strange example, the Court noted that "when a purchaser is 'forced' to buy a product he would not have otherwise bought even from another seller in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed."[141] Thus, the Court held that although patients who would have preferred an outside anesthesiologist may have been inconvenienced, and although Dr. Hyde must now open his practice elsewhere, there had been no showing that the market had been affected or that the contract was the type of restraint on

---

reason depended upon whether the practice was one "that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.' " *Id.* at 19-20 (citing United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978)). Since the blanket licenses could reduce costs, thereby benefiting both sellers and buyers, and were a necessary consequence of an efficient operation, they would not be prohibited under the law. In United States v. United States Gypsum Co., 438 U.S. 422 (1978), the Court held that even the exchange of price data may, in certain circumstances, increase economic efficiency and thus render markets more competitive. Additionally, in both Monsanto Co. v. Spray-Rite Serv. Corp., 104 S. Ct. 1464 (1984), and National Soc'y of Professional Eng'r v. United States, 435 U.S. 679 (1978), the Supreme Court reiterated that the rule of reason is to be judged "primarily by its 'market impact,' " 104 S. Ct. at 1470, or its "impact on competitive conditions." 435 U.S. at 688.

137 104 S. Ct. 1551 (1984).

138 *Id.* at 1558.

139 *Id.* at 1559.

140 *Id.* at 1561, 1566.

141 *Id.* at 1560.

competition that the antitrust laws prohibited.[142]

2. The New Merger Guidelines—A Sign of the Times

Although an examination of the Justice Department's 1984 Merger Guidelines is beyond the scope of this article,[143] a brief characterization demonstrates that current merger enforcement embraces the economic approach to merger analysis.

First, the new Guidelines formally recognize that mergers play an important role in our free enterprise economy by facilitating the efficient flow of investment capital and redeploying productive assets.[144] Since the Justice Department views most mergers as either neutral or beneficial in their effects, the Guidelines seek to avoid as much "unnecessary interference" as possible.[145]

Second, the Guidelines indicate that the basic goal of merger enforcement is to prevent the exercise of "market power."[146] In seeking to accomplish this goal, the Justice Department will place primary emphasis on the use of economic theory in analyzing the effects of mergers.[147] In focusing its attention on market power, the Department will generally direct its enforcement policy only at horizontal mergers or other mergers that have "horizontal effects."[148] As a result, the Guidelines drop the traditional distinction between horizontal, vertical, and conglomerate mergers[149] and impliedly reflect the position that many of the consequences flowing from vertical and conglomerate mergers are no longer considered to be anticompetitive.

The method for determining the relevant product and geographic markets further emphasizes the Department's attempt to

142 *Id.* at 1567-68.

143 For a more thorough discussion of the Merger Guidelines, see generally Cann, *supra* note 6.

144 1984 GUIDELINES, *supra* note 21, § 1.

145 *Id.*

146 The term "market power" is defined as the "ability of one or more firms profitably to maintain prices above competitive levels for a significant period of time." *Id.* In order to understand this term, one can envision a firm selling a product for which there are no reasonable substitutes and for which the consumer has no alternative source of supply. In such a situation, the seller (a monopolist) can both raise price and lower output without any worry of competitive ramifications. In markets where there are only a few firms producing the product, such firms may cooperate with each other to collectively achieve the market power of such a monopolist. J. Zuckerman, A Walk Through the Merger Guidelines 3 (Remarks before the 8th Annual Antitrust Law Seminar of the Antitrust Section of the State Bar of Michigan, June 18, 1982).

147 *See id.*

148 Statement by Attorney General William French Smith Releasing the New Department of Justice Merger Guidelines 3 (June 14, 1982).

149 Under the 1968 GUIDELINES, *supra* note 22, the Department of Justice specifically addressed all three types of mergers and the potentially anticompetitive effects that could result from each. *See* §§ 4-10 (horizontal), §§ 11-16 (vertical), and §§ 17-21 (conglomerate).

carry out a more economically oriented approach to enforcement. The Department's analysis, which is substantially more extensive than that employed under earlier guidelines, is directed at examining customer and supplier responses to hypothetical increases in price.[150] As a result, the relevant market will not only include firms producing the same or reasonably substitutable products but also firms producing items that are not reasonable substitutes at prevailing prices (but products that would be acceptable substitutes if there were a price increase). The relevant market would also include firms that do not presently produce the item but could produce it within one year if they so desired.[151] Under this definition, the general tendency will be to include a larger number of firms within its boundaries which will reduce both the overall level of market concentration and the percentage of market share held by each member.

Additionally, the Department has replaced the traditional four-firm concentration ratio[152] with the more economically realistic Herfindahl-Hirshman Index (HHI)[153] in the belief that the HHI more accurately reflects the level of concentration within a market.[154] In evaluating the effect of horizontal mergers, the Depart-

---

150 1984 GUIDELINES, *supra* note 21, § 2.11.

151 *Id.* §§ 2.2, 2.21.

152 Under the four-firm concentration ratio, the combined share of the four leading firms in the market was used to gauge market concentration. When the combined share of these four firms was 75% or more, the market was considered to be highly concentrated. 1968 GUIDELINES, *supra* note 22, § 5. In a market found to be concentrated, the Justice Department would have ordinarily challenged mergers between firms accounting for the following percentages of the market:

Acquiring Firm	Acquired Firm
4%	4% or more
10%	2% or more
15% or more	1% or more

In a less concentrated market (in which the four leading firms accounted for less than 75% of the market), the following percentages would apply:

Acquiring Firm	Acquired Firm
5%	5% or more
10%	4% or more
15%	3% or more
20%	2% or more
25% or more	1% or more

Percentages not shown in these tables would be interpolated proportionately. *Id.* §§ 5, 6.

153 The HHI is calculated by adding the squares of the individual market shares of the firms within the market. For example, if the market is composed of six firms, one of which has 40% of the market, one of which has 20%, and the remaining four have 10% each, then the HHI would be 2,400 ($40^2+20^2+10^2+10^2+10^2+10^2=2{,}400$). The HHI may range from 10,000 (where one firm has total control of the market) to a number approaching zero (when the market is totally decentralized). 1982 GUIDELINES, *supra* note 30, III (A), n.29. For a discussion of the Herfindahl Index, see Weinstock, *Using the Herfindahl Index to Measure Concentration*, 27 ANTITRUST BULL. 285 (1982).

154 1984 GUIDELINES, *supra* note 21, § 3.1. As David Weinstock has pointed out, the four-firm ratio did not take into account "the relative sizes of the four leading companies"

ment of Justice will consider both the post-merger level of concentration under the HHI and the increase in that concentration attributable to the merger.[155]

Because market concentration and market share statistics present only a "historical picture of the market," the Department will interpret such data, under the *General Dynamics* reasoning,[156] in light of other relevant circumstances to determine the probable "future effects" of the merger.[157] The Department will examine such factors as the changing market conditions, the financial health of the firms within the market, ease of entry, firm conduct, market performance, efficiencies, and a variety of other factors regarding the nature of the product and the terms of its sale.[158]

Finally, the 1984 revisions specifically refer to the issue of efficiencies.[159] The Guidelines indicate that "the primary benefit of mergers to the economy is their efficiency-enhancing potential, which can increase the competitiveness of firms and result in lower prices to consumers."[160] As a result, in recognizing that "some mergers that the Department otherwise might challenge may be reasonably necessary to achieve significant net efficiencies," the Department has agreed to consider evidence that a merger will achieve such efficiency before deciding to challenge.[161]

In light of these policies, many commentators believe that the new merger Guidelines represent a much more permissive approach to merger enforcement. They point to the broadening of the relevant market definition, the incorporation of qualifying economic factors, the contraction in the doctrines of potential competition, barriers to entry, and vertical integration, and the deletion of any reference to reciprocity or entrenchment. They fear that not only will the Guidelines permit mergers that would have been challenged under previous standards, but that the Guidelines will also reduce the risk of a government challenge and thereby *encourage*

---

and failed to recognize that "four equal-size firms may compete with each other differently than four firms of disparate size." *Weinstock, supra* note 153, at 285. For example, a market in which the top four firms had shares of 15% each would have the same concentration ratio (60%) as a market in which the leading firm had a 54% share and the next three firms had a two percent share each. Statement by Attorney General William French Smith Releasing the New Department of Justice Merger Guidelines 5 (June 14, 1982). The HHI, on the other hand, reflects not only the total composition of the market (not simply the top four firms), but it also gives proportionately greater weight to the shares of the larger firms. 1982 GUIDELINES, *supra* note 30, § III(A).

155 *Id.* § 3.11.

156 415 U.S. 486 (1974); *see* notes 117-21 *supra* and accompanying text.

157 1984 GUIDELINES, *supra* note 21, § 3.1.

158 *Id.* §§ 3.2-3.5.

159 *Id.* § 3.5.

160 *Id.*

161 *Id.*

merger activity that otherwise would not have been attempted.[162]

II. Implicit Values and the Myth of Economic Objectivity

One of the alleged benefits of an economic approach to merger analysis is that it allows decision-makers to formulate policy without resorting to subjective and unpredictable value judgments.[163] Decisions can be based on such objective factors as the HHI,[164] hypothetical price increases, production substitution, shipment patterns and price movements, market conditions, balance sheets, and product homogeneity. There is no need to consider the nebulous concerns of local grocery stores, community pride, civic ties, employee dissatisfaction, or opportunities for the "average man." Such an approach, however, is not completely objective, but instead reflects a variety of value choices which often represent the pursuit of one set of values at the expense of another.

A. *Economic and Multivalued Theories: Often Alternative Means to the Same End*

The economic approach to merger analysis often reflects some of the same social and political concerns that Congress originally expressed. In other words the economic approach may result, at least in part, from a decision to employ an alternative means for preserving some of those values referred to throughout the legislative history. For instance, Congress was concerned that the vast accumulation of political and economic power in the hands of a few large corporations would ultimately lead to a rising demand for government intervention and supervision. Government regulations and political collectivism can result, however, from a variety of factors other than the concentration of wealth or power and should not be viewed soley as a response to increased concentration.

In fact, merger activity can help *prevent* some of the same government intervention that Congress sought to avoid when it enacted anti-merger legislation. Indeed, attaining efficiencies can lead to lower or stabilized prices, thus increasing consumer satisfaction and decreasing the demand for government intervention. Lower prices may lead to reduced inflation and a reduction in imports, thus lowering demands for protectionism. Improving our international competitive position would increase the demand for exports, enhance job security, decrease labor and management tension, and lower unemployment, all of which would similarly reduce

162 For a more extensive discussion of the Merger Guidelines, see generally Cann, *supra* note 6.
163 *See* Sullivan, *supra* note 19, at 9.
164 *See* note 153 *supra*.

the demand for government supervision. Higher employment rates may in turn reduce the demand for a variety of social services, thereby tempering the need for bureaucracy. Mergers may facilitate the pooling of expertise, the reduction of risk, and the diffusion of costs that may be required to encourage research and development, technological innovation, modernization, and increased product quality and safety. These, in turn, have a tendency to refuel our competitive position and satisfy consumer need. Additionally, mergers may provide a valuable mechanism for revitalizing outdated or mismanaged operations that might otherwise fail, thereby enhancing both employee and community welfare.

Additionally, it can be argued that some mergers actually have the effect of reducing the absolute political power of large firms and increasing the diversity of effectively-expressed political positions. To illustrate the former, assume a merger betwen two small firms within a market, each of which controls five percent of that market. Further assume that, due to various economies, the resulting firm increases its market share to fifteen percent and that a substantial portion of this increase comes from a corresponding decrease in the market share of one of the larger firms. If political economies of scale rise and fall relative to firm size, it is conceivable that the *increase* in political power of the merging firms may be more than offset by the corresponding *decrease* in the political power of the larger firm, thus resulting in an overall deconcentration within the market.

A similar argument may be made with regard to the number and potential diversity of political views. While mergers often mute the political position of the acquired firm,[165] undesirable consequences may not always result. A distinction must be made between the number of political positions held and the number effectively expressed. While a merger between two parties has the potential of reducing the number of positions *held* from two to one, it may also, by way of combining needed resources, *increase* the number of positions effectively expressed from zero to one.

Thus, several effects of merger activity may promote social contentment, thereby reducing the demand for government intervention. It is plausible, therefore, that the efficiency goals of economic analysis may be implicitly based upon some of the same values found in a more liberal approach to merger policy.

B. *Imperfect Information: An Invitation to Subjectivity*

One criticism of the multivalued approach to merger enforcement is that it permits the imposition of a decision-maker's per-

165 *See* Pertschuk & Davidson, *supra* note 81, at 7.

sonal views as to what is socially or politically desirable. Robert Bork has indicated that the delegation of such nebulous authority would be unconstitutional since it would endow such decision-makers with legislative powers.[166]

Economic theory, however, can become so speculative in practice that it results in decisions which are just as subjective and susceptible to personal bias as those about which Bork expressed his concern. The lack of perfect information regarding market conditions and consumer/supplier response, combined with a host of interpretations of that information, invariably requires that choices among various alternatives be made. As economic analysis becomes more sophisticated and the number of relevant economic factors continues to increase, the number of options confronting decision-makers will also multiply. As the ability to exercise such discretion increases, so does the vulnerability of the decision-making process to social and political bias. That merger policy tends to change with changes in administrations seems to support this conclusion.

One way in which a decision-maker's social or political biases may be manifested is through the determination of the relevant geographic and product markets. Commissioner Pertschuk recently delivered a seething commentary on this point at a gathering of economists.[167] He noted that when examining a proposed merger between the third and fourth largest companies in an industry, the Washington economist would argue that such a merger would in fact be pro-competitve because it would present a goad to the two larger firms. On the other hand, if the two largest firms attempt to merge, the economist would be quick to point out that it would not lessen competition because "the relevant geographic market is not the United States, but the world or, given the prospects of interplanetary commerce, the universe."[168] Similarly, if the two largest "breakfast cereal manufacturers in the universe" desired to merge, the economist would simply define the relevant product market to include "egg breeders, croissant bakers, Egg McMuffin vendors, [and] lox and cream cheese purveyors." All would be "sheparded into one great breakfast food market in which the cereal giants will be seen to occupy exceedingly modest market shares."[169]

As reflected in these comments, some believe that under the current economic approach to merger analysis, it is possible that the decision whether to allow a merger may be made *first* (on the basis of political or social biases) and then the relevant market de-

166 *Panel Discussion*, *supra* note 18, at 238 (comments of R.H. Bork).
167 *See generally* M. Pertschuk, *supra* note 16.
168 *Id.* at 3.
169 *Id.*

fined as broadly or as narrowly as is necessary to accomplish that pre-determined result. Certainly, the *SCM* titanium debate lends credence to this argument and suggests that it might be wise to de-emphasize "the role of market definition" in economic policy.[170] In *SCM*, the Federal Trade Commission refused, by a 2-2 vote, to attack SCM Corporation's acquisition of two manufacturing facilities owned by Gulf and Western Industries Inc. in Ohio and New Jersey.[171] Although the overall market concentration placed the acquisition in the "highly concentrated" category, there was disagreement over whether all of Europe's production capacity should be included in the definition of the market.[172] Expanding the market to include the European capacity had the effect of bringing the concentration figures just within the cut-off points under the merger guidelines.[173] Critics of the transaction, of course, protested the inclusion of all European capacity, while defenders asserted that the titanium dioxide market was indeed worldwide.[174]

In addition to market definition, some of the other assumptions underlying the economic approach may be less than completely objective. For example, there is nothing sacred about the 1000 and 1800 HHI thresholds for dividing markets into unconcentrated, moderately concentrated, and highly concentrated categories.[175] Additionally, the use of a wide variety of "other factors" to discount the relevance of concentration and market share data[176] present the decision-maker with so many choices that the opportunity for making decisions based on personal preferences is greatly increased.

Political pressures might also influence the "choices" that are ultimately made. The recently proposed merger between LTV's Jones and Laughlin steel subsidiary and Republic Steel tends to illustrate this.[177] Although the Assistant Attorney General vetoed the initial merger plan, a revised plan was later approved after

170 *See* Joffe, *Guidelines—Past, Present and Future*, 50 ANTITRUST L.J. 187, 201 (1982).

171 45 ANTITRUST & TRADE REG. REP. (BNA) No. 1139-751.

172 *Id.*

173 *Id.*

174 *Id.*

175 The justification often given for these figures, namely that they roughly correspond to four-firm ratios of 50% and 75%, is not completely accurate. Because the relevant markets are defined more broadly, thus increasing the number of firms contained therein and reducing the overall market concentration (HHI), these two sets of figures are no longer directly comparable. As a result, not only is the setting of these thresholds an exercise of discretion, but the ability to manipulate the level of market concentration within them (by way of market definition) serves to further enhance the discretionary powers vested in enforcement officials. *See* 1984 GUIDELINES, *supra* note 21, § 3.1. For a discussion of the four-firm concentration ratio, see note 152 *supra* and accompanying text.

176 *See* 1984 GUIDELINES, *supra* note 21, §§ 3.2-3.5.

177 *See It's a Deal—Justice Says Yes to LTV Steel*, TIME, Apr. 2, 1984, at 75. The merger between LTV and Republic, the third and fourth largest steel producers, would cause the

Commerce Secretary Malcolm Baldridge publicly referred to the veto as a "world-class mistake." Although all the circumstances affecting the reversal are not known, some critics suggest that the Assistant Attorney General was merely "bowing before White House pressure."[178]

Further, the economic approach assumes that people—whether consumers, corporate managers, judges, or economists—act in a rational and predictable manner. This assumption, however, is debatable. For example, in defining the relevant markets under the 1984 Guidelines, the Department of Justice hypothesizes a price increase (usually five percent) in order to determine whether consumers would then switch to a substitute product or whether potential producers would then enter the market.[179] Despite the neatness of this approach, consumers might choose, nevertheless, to act irrationally by maintaining their loyalty to a local retailer, preferring a more attractive label, or wanting to belong to the "Pepsi Generation," all of which would serve to undermine such objective criteria. Similarly, despite the apparent availability of a profit, a manager might decide not to enter a particular market for a variety of reasons, such as failure to recognize the opportunity, a fear that prices might later return to their original level, poor health, advanced age, or satisfaction with the status quo.

Managerial decisions, often the result of very complex sets of circumstances, further complicate the relationship between theory and practice. Mergers are often undertaken for reasons other than management's desire to increase efficiency. Each corporation is a "microcosm" in which decisions involve complicated and dynamic interactions of various internal forces.[180] A decision may be the result of a series of "choices or compromises among alternative possible strategies,"[181] or an attempt at speculation, or it may be largely an "ego trip for prestige and power-hungry managers."[182] Additionally, the decision to merge may be based on incorrect or misinterpreted information because it is often extremely difficult to predict which merger will yield efficiencies and which will not.[183] This fact is reflected in the substantial number of recent divestitures.[184] In other words, the decision to merge is often unrelated to a quest for efficiency; and even when the decision is made with

---

resulting company to replace Bethlehem Steel Corp. as the nation's second largest producer. *Id.*

178 *Id.*

179 1984 GUIDELINES, *supra* note 21, §§ 2.11, 2.21.

180 Sullivan, *supra* note 69, at 1234.

181 *Id.*

182 F. SCHERER, *supra* note 85, at 563.

183 Fisher & Lande, *supra* note 102, at 1624.

184 W.T. Grimm & Co., *supra* note 10, at 3.

efficiency in mind, the desired results are not always achieved. By failing to recognize these defects in the market system (even if only temporary in nature), antitrust officials are making the judgment that whatever efficiencies can in fact be achieved outweigh the cost (and corresponding benefits) of a stricter merger policy.

Additionally, the frailties of judges and economists reduce the objectivity and predictability of the economic approach. For example, the courts have admitted that they "are of limited utility in examining difficult economic problems"[185] and that "judges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition."[186] They have indicated that "incredibly complicated and prolonged economic investigation" is "often wholly fruitless when undertaken"[187] and that courts are sometimes reluctant to "ramble through the wilds of economic theory."[188] Although courts have come a long way in their ability to analyze antitrust issues, some decisions are clearly based on something less objective than pure economic data.

Similarly, economists cannot totally divest themselves of all biases when analyzing a variety of imperfect information. The economist is not free of all proclivities, nor is the economic theory to which he subscribes. Instead, it must be recognized that "economic theories are not simply means for analyzing problems" but are alternative methods of inquiry that come already linked to "a particular view of the world" or to a particular "set of convictions about what is important."[189] When an economist chooses to subscribe to a theory, it is likely that it will be one that is compatible with his own "particular view of the world."[190]

One bias inherent in the current economic approach to merger enforcement is the belief that consumer welfare will best be served when the marketplace is left alone as much as possible. Government regulation of the market should be kept at a minimum to avoid any "unnecessary interference" which might frustrate lawful activity and to allow the self-correcting capacities of the free market to operate.[191] The preoccupation with the evils of market power is, of course, the primary manifestation of such a view. But, such circumstances as unemployment, plant closings, increased interest

---

185 United States v. Topco Assoc., Inc., 405 U.S. 596, 609 (1972).

186 Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 343 (1982) (citing United States v. Topco Assoc., Inc., 405 U.S. 596, 609-10 (1972)).

187 *Id.* at 351 (quoting Northern Pac. R.R. v. United States, 356 U.S. 1, 5 (1958)).

188 405 U.S. at 609-10 n.10.

189 Sullivan, *supra* note 19, at 12.

190 *Id.*

191 *See* M. Pertschuk, *supra* note 16, at 2, 3; Sullivan, *supra* note 69, at 1216.

rates, or dying communities—as "temporary" and as "individualized" as they may be—would tend to support the argument that this policy represents a subjective evaluation based on relative costs and benefits.

A second bias of the economic approach is the almost sacred status accorded to efficiencies. Although this issue will be discussed in more detail later, some preliminary observations are in order. First, and most importantly, the decision to formulate a policy which will pursue economic efficiency is the exercise of a value judgment. Although the value of an efficient economy is almost universally recognized, how that value should be ranked in comparison to others is subject to disagreement. While it is safe to assume that most people would prefer to see an efficient allocation of resources, it is not clear whether they would choose this value over, and at the expense of, other values. There are those, for example, who would be willing to sacrifice some degree of efficiency in order to walk to a corner grocery store,[192] talk to a friendly proprietor, buy hand-made articles, or work for a locally-owned enterprise. To such people, consumer or social welfare is defined in terms that transcend higher output or lower prices.

The position of economic efficiency in the pecking order of social values, then, inherently involves a subjective decision-making process. In fact, the statutory language of section 7 does not mention efficiency. "[T]he basic concepts of the antitrust laws . . . were adopted without being subjected to critical economic scrutiny of any kind."[193] Thus, the evolution of efficiency goals—from the time of the Clayton Act, through the Warren Court era, and to its present status at the pinnacle of antitrust values—is primarily a consequence of the visions (or biases) of the caretakers of antitrust enforcement.

Finally, the argument that the pursuit of economic efficiency merely represents a choice of one value over another finds support in the fact that antitrust policy deviates from its loyalty to the goal of efficiency when necessary. Courts have recognized that competition, and thus the efficiencies gained thereby, must sometimes give way to other social values. For example, the courts have acknowledged that some sort of accommodation must be made between labor policy and antitrust policy. In doing so, they have not only recognized the obvious statutory exemption of labor organizations from the antitrust laws, but they have also gone on to carve out a nonstatutory exemption in regard to remedies.[194] The non-

192 *See* Sullivan, *supra* note 19, at 11.

193 Bork, *supra* note 60, at 180.

194 As the Supreme Court noted in Connell Constr. Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616 (1975), "a proper accommodation between the

statutory exemption is founded upon a "strong labor policy favoring the association of employees to eliminate competition over wages and working conditions."[195] Courts have chosen to set aside competition and/or efficiency considerations in favor of other values in numerous other situations as well.[196]

Whether a result of an alternate choice of means, imperfect information, human frailties, or personal or theoretical bias, economic analysis is less objective than its proponents claim. This myth of objectivity, however, is only one of the inherent dangers of the economic approach to merger enforcement. The next section of this article examines others.

III. Further Dangers of the Economic Approach: A Selected Analysis

This article has discussed several dangers of the economic approach to merger enforcement. With regard to the legislative history, the economic approach often disregards such social and political issues as the concentration of power, the role of small business, and the values of local independence and community commitment.[197] Instead, the economic approach attempts to gain credibility by "excluding relevant concerns that are difficult to quantify or to fit into mechanical models."[198] Secondly, by regulating only horizontal mergers or mergers with horizontal impact, the economic approach dismisses many effects of vertical and conglomerate mergers and restricts the relevance of such doctrines as potential competition, entrenchment, foreclosure and barriers to entry. Finally, because of the presence of such factors as imperfect

---

congressional policy favoring collective bargaining . . . and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions." *Id.* at 622.

195 *Id.*

196 Although not exempting "professions" from the antitrust laws, *see, e.g.*, Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); National Soc'y of Professional Eng'r v. United States, 435 U.S. 679 (1978), the Supreme Court has acknowledged that in certain instances individual states "may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.' " Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975) (quoting United States v. Oregon State Medical Soc'y, 343 U.S. 326, 336 (1952)). The "failing firm" defense, which allows a merger to take place despite its anticompetitive consequences, was developed in part as an attempt to avoid the economic and social losses to the stockholder and to the local community that would result from closing down a business. *See* United States v. General Dynamics Corp., 415 U.S. 486, 507 (1974). Even the rule of reason, *see* note 126 *supra* and accompanying text, permitting the use of "reasonable" restraints of trade, has been used to effect a variety of values (such as the "marketability" of small businesses) that cannot be designated as purely economic. *See* Mitchell v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711) (cited in National Soc'y of Professional Eng'r v. United States, 435 U.S. 679 (1978).

197 *See* notes 37-48 *supra* and accompanying text.

198 Sullivan, *supra* note 69, at 1237.

information and personal and theoretical biases, the economic approach is not quite as "economic" as it initially appears.

This section will explore some additional problems inherent in the economic approach to merger analysis, including the recipiency of efficiency benefits, the tangible and intangible transaction costs that accompany "merger mania," and the increase in the discretionary powers of corporate managers. First, however, a few general observations are in order.

Although efficiency is one of the factors which will be weighed in deciding whether a particular merger will be challenged,[199] it has not, of course, attained the status of a complete "defense." "[P]ossible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."[200] Thus, any position which allows efficiencies to justify an accumulation of unregulated market power would be clearly contrary to legislative intent.[201]

Second, the value of efficiency should be placed in its proper perspective. In a variety of circumstances, society has chosen to place other social values above the pursuit of economic efficiency.[202] It is not clear why efficiency has become such a dominant force in merger policy (making non-economic factors increasingly irrelevant) when it is, in its broader context, held in less esteem.

Finally, while predictability of enforcement is a laudable goal of the economic approach, it should not be pursued at the expense of implementing congressional intent. If certainty were the primary goal of antitrust legislation, section 7 of the Clayton Act could be amended to simply permit *all* mergers or to prohibit *all* mergers. But the Supreme Court has recognized the danger "of subverting

---

199 1984 GUIDELINES, *supra* note 21, § 3.5.

200 FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967); *see also* RSR Corp. v. FTC, 602 F.2d 1317 (9th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323-24 (1897).

201 *See* Lande, *supra* note 3, at 83, 129, 134, 141.

202 For example, in the area of credit extension, it is conceivable that it would be more "efficient" for many customers (in the form of lower costs) if credit companies discriminated against divorced women or the elderly. *See* M. Pertschuk, *supra* note 16, at 7. Similarly, it might be more efficient to quickly terminate electrical or oil service to those with doubtful credit or frequent arrearages. It might be more efficient to deny hospital services to the poor, to strictly enforce the featherbedding laws, to do away with import quotas, or to ban plant closing laws. It might be more efficient to allow price discrimination, to do away with affirmative action training programs, or to repeal the wide variety of legislation designed to perpetuate small business. *See* Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076, 1077 (1979). If statistics show that one out of nine white male applicants are hired as compared to only one of ten women and minority applicants, would it be right to encourage personnel managers, in the name of efficiency, to interview only the former? In each of these instances, of course, society has placed other social values above economic efficiency.

Congressional intent by permitting too-broad economic investigation."[203] This danger is further intensified because "any judicial dream of gaining certainty through contemporary economics will inevitably be shattered because economics itself evolves."[204]

A. *Efficiency and Its Recipients*

There is no question that many mergers have the capacity to increase economic efficiency and provide substantial benefits to consumers.[205] Nevertheless, since the dominant theme of merger policy has arguably changed from avoiding the "rising tide of concentration" to the pursuit of the efficiency benefits of mergers, some skepticism is warranted. This is especially true since present enforcement—with its higher HHI thresholds, broader relevant markets, and disregard of most conglomerate mergers—allows most mergers to be consummated *without any regard* to whether efficiencies result. As a consequence of this more passive approach to merger activity, economic and political concentration may increase more substantially than the efficiency that may result from only a portion of that activity.

Several scholars have questioned the efficiency benefits resulting from merger activity[206] and recent statistics seem to support this skepticism. For example, the total dollar value of divestitures increased by 50% from 1982 to 1983, with a number of corpora-

203 United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362 (1963).

204 Sullivan, *supra* note 19, at 12.

205 For example, the Federal Trade Commission has indicated that the Levi Strauss consent agreement led to a price reduction in blue jeans and saved consumers 75 million dollars. *See* Wines, *supra* note 103, at 1207. Fisher and Lande have pointed to such success stories as Delta—Northeast, North Central Airlines—Southern Airways, Jones and Laughlin—Youngstown Steel, Albi—Helena Rubenstein, and of course Philip Morris—Miller Brewing. Fisher & Lande, *supra* note 102, at 1621, 1623.

206 F. SCHERER, *supra* note 85, at 546. Professor Scherer, for example, has indicated that there is substantial evidence that "mergers seldom yield substantial cost savings, real or pecuniary," *id.* at 546, that there "is scant evidence that conglomerate mergers have done much on average to enhance industrial efficiency" and that conglomerate activity may in fact have had a "negative net efficiency effect." *Id.* at 563. Pertschuk has suggested that "the acquisitive instinct is fueled more by corporate imperialism, our distorted tax structure and the vagaries of the stock market" than by motives of efficiency. M. Pertschuk, *supra* note 16, at 3. "Few if any such economies flow from conglomerate mergers." Pertschuk & Davidson, *supra* note 81, at 5; Furthermore, "as firm size increases from large to giant, research and development effort does not increase proportionately." *Id.* at 16 (citing Kamien & Schwartz, *Market Structure and Innovation: A Survey*, 13 J. OF ECON. LITERATURE 1, 9-11 (1975)). Similarly, Professor Mueller has stated that on average, conglomerate mergers have "not resulted in increased economic efficiency." Mueller, *The Effects of Conglomerate Mergers: A Survey of the Empirical Evidence*, 1 J. OF BANKING AND FIN. 315, 344 (1977) (cited in Pertschuk & Davidson, *supra* note 81, at 17). Fisher and Lande have concluded that "efficiencies tend to exist for firms only up to some particular size," and that some mergers "actually result in higher overall costs." Fisher & Lande, *supra* note 102, at 1606, 1603-04.

tions divesting large businesses they had acquired only recently.[207] Similarly, the actual number of corporate divestitures rose 33% during the first quarter of 1984.[208] Further, such experiences as that involving U.S. Steel's acquisition of Marathon Oil Co. (which critics charge has led to reduced efficiency, new borrowing, increased interest payments, the necessity of importing, and the potential loss of American jobs),[209] highlight that costs of unfettered merger activity may be higher than initially predicted.

Additionally, not every merger involves a large firm acquiring a poorly-managed company and, by the use of economies of scale or other efficiencies, nurses the acquired firm back to competitive health. Instead, "profitability data suggests that the firms being taken over are well run and are not being improved by their acquirers."[210] As Steve Axinn has indicated, "mergers—with increasing regularity—involve the elimination of the most aggressive and top performing managements in the industry; the ones with the best records—not the mediocre or poor performers."[211]

Several other factors suggest that a more permissive merger enforcement policy may not result in increased efficiency. Because the fees of financial intermediaries commonly soar into the millions, it is possible that a merger could be based in part upon human avarice rather than on corporate synergy or efficiency potential. This is especially true since these fees may be substantially greater when a deal is consummated than when it falls through.[212] The economic costs of merger activity are substantial as well, including legal and banking fees, the diversion of corporate financial and managerial resources, the preoccupation of both talent and assets in defending hostile takeovers, and the loss of productivity resulting from the operation of a business about which management may know quite little.[213] Finally, efficiency gains may often be achieved by internal expansion; thus, any efficiency gains attained

207 W.T. Grimm & Co., Press Release No. 24060-97446, at 2 (Jan. 12, 1984) (published by Doremus & Company, Chicago, Illinois). During both 1982 and 1983, divestitures represented a full 37% of the total merger/acquisition/divestiture activity. W.T. GRIMM & Co., 1983 MERGER STAT. REV. 4.

208 W.T. Grimm & Co., *supra* note 10, at 3.

209 *See* 129 CONG. REC. H5130 (daily ed. July 13, 1983) (statement of Rep. Seiberling).

210 *The Small and Independent Business Protection Act of 1979: Hearings on S. 600, Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 27-29 (1979) (statement of A.F. Dougherty, Jr.) (cited in Pertschuk & Davidson, *supra* note 81, at 19 n.97).

211 Axinn, *supra* note 100, at 206.

212 *See* Taylor, *The Superstars of Merger*, TIME, May 14, 1984, at 46, 47. Rohatyn commented that "[t]he level of fees has reached a point that is difficult to justify and invites the suspicion that there is too much incentive to do a deal. Fees are sometimes ten times as large when a deal closes as when it doesn't, so you'd almost have to be a saint not to be affected by the numbers involved." *Id.*

213 Statement of Michael Pertschuk, *supra* note 15.

through merger activity must be measured in light of the corresponding gains available under more socially acceptable corporate growth.[214]

Even if it is assumed, however, that the economic approach to merger enforcement results in substantially increased output, lower prices, and/or improved product quality, this does not end the inquiry. Two issues remain to be addressed. First, it must be recognized that what actually constitutes "efficiency" is open to question. Efficiency may be defined in terms broader than price, output, and product quality. For example, it may be defined as the most effective means of meeting consumer demand—no matter what form that demand may take—or as the maximization of consumer welfare or satisfaction. Under this definition, an "efficient" economy would respond to even "irrational" consumer preferences, including desires for local grocers, customer-proprietor contact, and other "quality of life"[215] factors.

Alternatively, efficiency could be defined as the most effective way of meeting the demands of each of the several components of the economy. Under this definition, an efficient economy would not only satisfy the various needs of consumers, but should also provide for reasonable returns to shareholders, encourage employee contentment, ensure the continued existence of the small entrepreneur, preserve entry opportunities, and protect the community from which business draws its support.[216]

Even if efficiency were defined narrowly, long term costs should be weighed against short term benefits. For example, mergers that merely transfer assets, such as oil reserves,[217] may cause temporary price reductions for consumers, but may ultimately add nothing in the form of new resources to be used in the future.

Second, assuming that reducing government interference will result in substantial efficiency gains, the question of who will actually receive the benefits of those efficiencies remains. If these benefits line the pockets of large corporations, rather than being passed along to the consumers in the form of lower prices, larger quantities, or better quality, then the antitrust laws are not serving their purpose of ensuring that customers reap the "benefits of price

214 United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 370 (1963).

215 Sullivan, *supra* note 19, at 11.

216 Statement of Joseph Brodley, *supra* note 72. Professor Brodley's observation that the real efficiency issue is whether merger enforcement "effectively implements the social policies" of Congress is consistent with this definition.

217 See *Misgivings About Big Mergers*, TIME, Mar. 26, 1984, at 53, for a discussion of Mobil's announcement that it would pay $5.7 billion for Superior Oil and the growing antimerger sentiment in Congress resulting from the decreasing number of competitors in the oil industry. *Id.*

competition."[218] As Robert Lande concluded, "Congress wanted to encourage economic efficiency," but it also wanted to ensure "that the fruits of this efficiency were passed on to consumers"[219] and that consumers would receive their "fair share" of any efficiency gains.[220]

Whether efficiency is defined solely in terms of consumer welfare or whether it encompasses the welfare of employees and the community as well, any enforcement policy which adopts a blanket endorsement of mergers under a banner of enhanced economic efficiency is addressing only one side of the issue. If, under the current economic approach to merger enforcement, efficiency gains are passed on to shareholders only, or if they are siphoned off to lawyers, bankers, and corporate managers, or if they are simply used to acquire more companies in the gamesmanship of power, then that policy is of questionable value. Any policy which chooses to encourage merger activity must in turn accept the accompanying responsibility of analyzing its consequences.

B. *Transaction Costs*

Proponents of the economic approach to merger enforcement policy argue that most mergers are either neutral or beneficial in their effects and that as a result corporations should be allowed to engage in merger activity free from non-competitive "value" constraints. This argument, however, fails to take into account the substantial transaction costs which accompany merger activity.

To begin, mergers can indeed be "wonderful for lawyers and bankers, stock jobbers, arbitrageurs and finders"[221] since such financial intermediaries can sometimes command staggering fees.[222]

---

218 Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 538 (1983).

219 Lande, *supra* note 3, at 151; *see also id.* at 105. For example, Congress chose to prohibit trusts despite their efficiency because they tended to retain the resulting benefits. *Id.* at 91.

220 *Id.* at 112. An examination of recent attempts to amend the merger statutes, *see* notes 88-97 *supra* and accompanying text, reveals that Congress is still trying to implement this goal. In S. 2277, for example, mergers between energy concerns would be exempt from the provisions of that bill if they would result in a "material increase in new energy exploration, extraction, production, or conversion." S. 2277, 98th Cong., 2d Sess. § 3(k)(2)(c)(1) (1984). Similarly, in H.R. 3561, 98th Cong., 1st Sess. (1983), certain sizable mergers would be prohibited unless they would result in such benefits as offering new goods or services, quality enhancement, or price reduction. *Id.* § 7B (d)(2)(B).

221 CARY, *When Firms Merge*, N.Y. Times, June 23, 1978, at A25, col. 2 (cited in Pertschuk & Davidson, *supra* note 81, at 19 n.96).

222 An example is the Gulf—Socal merger. Standard Oil of California's takeover of Gulf Oil represents the largest corporate acquisition in U.S. history, $13.2 billion. W.T. Grimm & Co., *supra* note 10, at 1. The three financial intermediaries who assisted in the transaction will receive fees totaling an estimated $62.5 million. Taylor, *supra* note 212, at 46, 47. Financial intermediaries, usually investment banking firms, received an estimated $11.7

When one adds to these costs the dollars spent for attorneys,[223] public relations firms and for the managers who plan, seek out, analyze, defend against, or implement corporate takeovers, the total may approach as much as five percent of the cost of the acquisition.[224] Even though this may be a relatively small percentage of total cost, this large amount of capital might be better spent on the direct production of needed goods or services.

In addition to these tangible costs, there are a variety of immeasurable costs which are directly associated with the current wave of merger activity. Many of the nation's leading corporations are diverting substantial resources toward acquisitions and away from improving their present operations through increased exploration, modernization, or research and development.[225] The result is that billions of dollars are being spent to merely transfer existing assets from one corporation to another. In the Mobil—Superior merger, for example, Mobil will acquire Superior's one billion barrels of oil and liquid gas reserves at a price substantially lower than the average cost of exploration.[226] While this transaction will lower Mobil's costs, it will add nothing to the country's present energy resource base.[227]

Not only are businesses choosing to divert capital resources toward "buying rather than building,"[228] but they are rechanneling valuable human energies as well. Managerial creativity, expertise, experience, and leadership capabilities which could be used to more effectively manage existing assets[229] are often being siphoned off in a search for "bigness." As more time is spent on analyzing

---

million in the Phillips Petroleum—General American Oil Co. of Texas acquisition, $10 million in the Diamond Shamrock—Natomas transaction, and $10.5 million in Esmark's takeover of Norton Simon. Weiner, *Deals of the Year*, FORTUNE, Jan. 23, 1984, at 54, 55.

223 For example, attorney's fees in the various attempts to acquire Conoco reached the $13.5 million mark, Fisher & Lande, *supra* note 102, at 1673 (citing Brill, *Conoco: Great Plays and Errors in Bar's World Series*, AM. LAW., Nov. 1981, at 40, col. 3), and in the U.S. Steel-Marathon takeover the winning side incurred $7 million in attorney's fees. *Id.* at 1673 n.307 (citing NAT'L L.J., Feb. 15, 1982, at 2, col. 2, and James M. Griffin).

224 129 CONG. REC. H5128 (daily ed. July 13, 1983) (statement of Rep. Rodino).

225 Cary, *supra* note 221. As Professor Cary has noted, "[O]rganizing and financing new industrial productivity has taken on a secondary role" to the mere "shuffling of pieces of paper" among merger brokers. *Id.*

226 *Misgivings About Big Mergers*, TIME, Mar. 26, 1984, at 53.

227 *See* S. 2277, 98th Cong., 2d Sess. § 2(3) (1984).

228 F. SCHERER, *supra* note 85, at 562.

229 *See* 129 CONG. REC. H5129 (daily ed. July 13, 1983) (statement of Rep. Rodino). For example, Rep. Rodino noted that the "attention of management is being diverted from the critical task of effective use of existing corporate assets," *id.*; that "many corporate managements spend substantial time and resources calculating how and when to buy the securities of other corporations . . . ; [that] [t]his manipulation of assets, instead of the productive management of existing assets, seems a primary goal of these companies," *id.* at H5128; and that "it is time that we get back to the fundamentals: the management of a corporation's own assets for the most productive possible use . . . ." *Id.*

potential targets, implementing those that appear attractive, divesting those that fail, and fending off hostile bids,[230] less time is spent on increasing product quality, innovating, and pursuing internal growth. As Professor Scherer has concluded, many mergers "are a deadly serious but preponderantly sterile game that diverts managerial attention from running existing operations well."[231] That the management of an acquiring firm is often not particularly competent at operating the companies it chooses to acquire further exacerbates the situation.[232]

Any analysis of the benefits and efficiencies which flow from less restricted merger activity should consider some of the costly defensive maneuvers which companies employ to ward off unwanted takeovers, some of which may not be in the best interests of shareholders and employees. For example, when exposed to an unfriendly takeover, managers may move quickly to make their company either less attractive or less vulnerable to the potential acquirer.[233] The target company may acquire a firm that will pose antitrust problems in the event the target is later threatened by acquisition,[234] thus changing what would have been an innocuous conglomerate merger into one that would cause substantial horizontal impact and thus be of questionable legality.[235]

Similarly, if the potential threat comes from a substantial minority shareholder, the target company may buy other companies in exchange for its own stock to dilute or diminish the minority stockholders' share. In order to thwart a challenge from such a stockholder, Walt Disney Productions recently agreed to buy a land development firm and later announced plans to take over a producer of cards and wrapping paper, in exchange for a total of up to 9.5 million shares of Disney stock.[236]

---

230 *See id.* at H5128. Rep. Rodino pointed out that it has been "estimated that as much as 5 percent of the cost of an acquisition may go to the lawyers, investment bankers, public relations firms, and managers either planning for, fighting against, or implementing an acquisition." *Id.*; *see also* 129 CONG. REC. H5129 (daily ed. July 13, 1983) (statement of Rep. Rodino).

231 Scherer, *The Posnerian Harvest: Separating Wheat from Chaff*, 86 YALE L.J. 974, 988 (1977) (cited in Pertschuk & Davidson, *supra* note 81, at 17 n.80.).

232 Statement of Michael Pertschuk, *supra* note 15.

233 *See* Axinn, *supra* note 100, at 206.

234 *See id*; *see also* Kantor, *The Hostile Acquisition*, 50 ANTITRUST L.J. 217, 225 (1982).

235 For example, if the target company takes over a firm that produces the same or substitutable product as that of the target's potential acquirer (and which competes with the potential acquirer in the same geographic market), then the post-HHI might be high enough to invoke a government challenge. *See* 1984 GUIDELINES, *supra* note 21, § 3.11. Such an action may, in some instances, cause the "leading firm proviso" to apply as well. *Id.* § 3.12. Similarly, the target could take over a firm operating in a market in which the target's acquirer was a potential entrant, *id.* § 4.1, or it could take over a disruptive buyer in the potential acquirer's vertical chain of distribution. *Id.* § 4.222.

236 Grieves, *Greenmailing Mickey Mouse*, TIME, June 25, 1984, at 56.

Management might also attempt to make its company less desirable by selling off a portion of the company, perhaps including its own "crown jewels."[237] In each of these instances, corporate management undertakes merger activity in an attempt to retain its own current status. Efficiency is certainly not the goal and in fact, inefficiency may often result. Disney's two acquisitions, for example, were not "natural business partners for Disney" and they have "more than doubled Disney's debt load."[238]

Another costly defensive tactic involves the repurchase of the target's own shares which are currently in the hands of a potential challenger. This maneuver is often used in response to a "greenmailer" who has bought enough stock "to pose either a takeover challenge or the threat of a proxy fight."[239] When repurchasing the stock (in exchange for a promise by the greenmailer not to invest further in the company), not only does the target often pay a premium price, but it also eliminates the profits that other shareholders could have made by selling to the greenmailers.[240] In the Disney transaction, the greenmailer made a profit of $32 million, received $28 million in expenses, and Disney stock dropped nearly $16 a share in five trading days.[241]

"Golden parachute" provisions, which provide that corporate executives will be well compensated if they lose their positions as a result of an acquisition, are a common response to the fear of a corporate takeover. Although these payments may be low in comparison to the total acquisition price, they represent transfers of substantial corporate dollars to an individual. If the Esmark transaction is consummated, for example, the chairman could receive three year's salary, sell his existing shares of stock, and receive a total of $17.4 million.[242]

Thus, an accurate analysis of the efficiencies which flow from

---

237 The courts have recognized that "[w]hen confronted with a threatened change in control, a board of directors of a target company may engage in a corporate transaction with a third party that the board determines in its business judgment to be in the best interests of shareholders." Whittaker Corp. v. Edgar, 535 F. Supp. 933, 951 (N.D. Ill. 1982). "[T]he sale of an asset which has the result of making a company less attractive . . . can be a proper exercise of a board of directors' business judgment." *Id.* While the courts have noted that management cannot simply engage in "a 'scorched earth' policy merely to thwart a hostile tender offer," *id.* (citing Joseph E. Seagram & Sons, Inc. v. Abrams, 510 F. Supp. 860 (S.D.N.Y. 1981)), it is often extremely difficult to determine where the line will be drawn between such a policy and legitimate business judgment.

238 Grieves, *supra* note 236, at 56. The debt load was increased to $850 million. *Id.* In speaking of such scorched earth practices, Jay Marshall of Merrill Lynch has stated that "clearly, in many cases, the executives are just messing up the company. Management's feeling is: cripple us, poke out our eyes and maybe they won't like us anymore." *Id.*

239 *Id.*

240 *See id.*

241 *Id.*

242 *Merger Rules*, TIME, June 4, 1984, at 56.

current merger policy must include consideration of transaction costs and the costs of corporate defensive strategies. Even if transaction costs are viewed as a mere redistribution of assets with nothing being gained or lost, it is important to consider to whom these assets are redistributed. Often, they are not channeled to shareholders, employees, and consumers, but instead end up in the hands of large investment houses, law firms, corporate executives, and greenmailers.[243]

C. *Increasing Political and Discretionary Powers*

The legislative history of the Celler-Kefauver Act reveals that Congress feared that an unbridled accumulation of political and economic power in the hands of a few large corporations would ultimately lead to demand for a politically-collective state.[244] However, because merger activity can lead to efficiencies and thereby increase consumer, employee, and societal satisfaction, such a fear may be somewhat overstated. Nevertheless, even if one admits that a more passive approach to merger enforcement policy could result in decreasing the demand for government intervention, it would also lead to further concentrating political and discretionary power in the hands of corporate management. As a result, regardless of the legitimacy of the political collectivism argument, substantial concern still exists over whether individuals are willing to further surrender the authority to make political and other "quality of life" choices to corporate "philosopher kings."

In regard to political influence, it can no longer be argued that corporations are content to merely produce goods or supply services, leaving the management of the country to the politicians. American industry is intertwined with the political fabric of the nation and exerts substantial influence in a variety of ways. Pro-business lobbying, compromises in product liability laws in such areas as statutes of repose and limitations on damages,[245] the dispute between the Business Roundtable and the American Law Institute regarding derivative suits and the business judgment rule,[246] and

243 *See, e.g.*, notes 222 (investment houses), 223 (law firms), 239-41 (greenmailers), 242 (executives) *supra* and accompanying text.

244 *See* notes 6, 49-50, 74, 77-80 *supra* and accompanying text.

245 *See* McCormick, *Symposium: Products Liability, The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U.L. REV. 579 (1981); McGovern, *The Status of Statutes of Limitations and Statutes of Repose on Products Liability Actions; Present and Future*, 1981 PERS. INJ. ANN. (1981).

246 *See* PRINCIPLES OF CORPORATE GOVERNANCE AND STRUCTURE: RESTATEMENT AND RECOMMENDATIONS § 4.01 (Tent. Draft No. 1, 1982); *see also* Scott, *Corporation Law and the American Law Institute Corporate Governance Project*, 35 STAN. L. REV. 927 (1983); Steinberg, *The American Law Institute's Draft Restatement on Corporate Governance: The Business Judgment Rule, Related Principles, and Some General Observations*, 37 U. MIAMI L. REV. 295 (1983); Weiss, *Eco-*

corporate influence in such areas as plant closing laws and tax legislation reveal an influential relationship. Support of Political Action Committees, political-essay "advertising," "shopping" among potential states of incorporation, and the "revolving door" between corporate and government service are further examples of this relationship. By continuing to encourage external expansion, American industry will develop an even greater political voice.[247]

Certainly, pooling capital and human resources by the way of a merger increases both the time and money available to invest in developing favorable political treatment. And as corporations grow in size and diversity, government contacts also increase, making such an investment more cost-effective. Large conglomerates deal with a variety of government agencies at the local, state, and federal levels. As a result of merger activity, a large energy firm, for example, might find it necessary to deal with government officials regulating food and drugs, communications, transportation, agriculture, children's toys, and the media. As contacts increase, the potential political economies of scale will also increase. As Professor Blake indicated, "one of the most potent economies of scale of large conglomerate firms is the effective presentation of their case for favorable treatment by government."[248] The acquired firm's political influence may also rise considerably after a merger. Pointing to the acquisition of Scott Grass seed company by ITT, for example, Kenneth Elzinga observed that the federal government will certainly be "far more approachable" under the ownership of ITT than it ever was when Scott was a small independent entity.[249]

---

nomic Analysis, Corporate Law, and the ALI Corporate Governance Project, 70 CORNELL L. REV. 1 (1984).

247 In addressing the increasing role of business in the political process, Pertschuk and Davidson have stated that conglomerate mergers "present a direct challenge to the *balance* of institutional power" and that such organizations will grow in strength at the expense of the individual and the smaller, less organized, groups. Pertschuk & Davidson, *supra* note 81, at 2 (emphasis added). They fear the growing "maldistribution" of power, the dangers posed to our pluralistic society, the reduction in the number and diversity of political decision-makers, and the increase in the absolute political power of merging firms. *Id.* at 6-7.

In support of their concerns they cite the "incredible array of political and legal talent" marshalled by El Paso Natural Gas in its attempt to legislatively nullify a Supreme Court divestiture order. *Id.* at 12 (referring to United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964)). The authors also point to the muting of Montgomery Ward's position regarding the creation of a Consumer Advocacy Agency after its takeover by Mobil Oil, *id.* at 7, and the "emergence of the Business Roundtable as the preeminent lobbying institution in Washington." *Id.* at 9 (footnote omitted).

248 Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555, 591 (1973) (cited in Pertschuk & Davidson, *supra* note 81, at 10). While the single product firm "has relatively few possible pay-offs over which to amortize large investments in lobbying or political goodwill . . . [a] conglomerate's many divisions . . . deal with every important agency of government, and the number of possible payoffs is much greater." *Id.* at 591-92.

249 Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1198 (1977).

In addition to the growth in the political influence of large corporations, the tremendous discretion vested in the hands of a few powerful individuals is also problematic. Both Congress and the courts have feared that millions of people could lose the power over their own economic welfare and thereby "depend helplessly" on the decisions of distant managers.[250] Commentators and courts have warned that great industrial consolidations are "inherently undesirable" due to the "helplessness of the individual before them;"[251] that masses of small businesses can become subject to the direction of a few large producers;[252] and that the antitrust laws reflect the need to protect the individual from domination "by business interests so large . . . that the voices of average people cannot be heard in their thunder."[253] Policy-makers have also questioned whether society should "depend upon the will of a few men sitting at their council board . . ."[254] and allow such a group, by way of interlocking directorates, to control vast accumulations of wealth.[255]

Despite these concerns, corporate managers have substantial discretion in making decisions which shape the quality of life and future prospects of millions of Americans.[256] Yet, the exercise of such decision-making power is often independent of any marketplace mandates.[257]

In addition to their obvious authority over employees,[258] managers exercise discretionary powers which affect the quality of life

---

250 96 CONG. REC. 16, 452 (1950) (statement of Sen. Kefauver); *see also* United States v. Aluminum Co., 148 F.2d 416, 428 (2d Cir. 1945).

251 148 F.2d at 428.

252 *Id.* at 427.

253 95 CONG. REC. 11,506 (1949) (statement of Rep. Bennet).

254 21 CONG. REC. 2570 (1890) (statement of Sen. Sherman) (cited in Lande, *supra* note 3, at 99 n.136)).

255 *See* Lande, *supra* note 3, at 119 (citing H.R. REP. No. 533, 63d Cong., 2d Sess. 5 (1914) (minority report) (views of Rep. Lafferty).

256 *See* Sullivan, *supra* note 19, at 11; Pertschuk & Davidson, *supra* note 81, at 13; *see also* F. SCHERER, *supra* note 85, at 13; Pitofsky, *supra* note 77, at 1051.

257 Pertschuk & Davidson, *supra* note 81, at 13.

258 In order to appreciate the scope of such discretion, it should be remembered that the largest 500 industrial corporations employ over 14 million workers. More specifically, General Motors alone employs 691,000, while Ford employs 380,077 and IBM 369,545. *See The 500*, FORTUNE, Apr. 30, 1984, at 275-77. (The figures for General Motors and Ford represent averages for the year 1983.).

While many of the decisions affecting employees are market-oriented, such as those regarding the number of workers to be hired or laid off, other choices are much more discretionary in nature. For example, the decision as to *who* will be hired or discharged is not always mandated by economic factors. Other examples include: whether to supply daycare facilities; whether to promote voluntary affirmative action and training programs and, if already mandated by government contracts, the nature and the scope of those programs; whether to award merit-based bonuses or raises and to whom; whether to provide recreational facilities for employees; whether to upgrade working conditions beyond the level required by law; whether to grant leave time for community service; whether to set

of a variety of other groups as well. Management exercises discretion over plant locations, advertising, corporate charitable donations, product development and marketing, production of costly but socially-valuable products, and product safety. Discretionary factors also influence the level of profit, the declaration of dividends, the selection of suppliers, the preservation of the environment, and even the promotion of television programs.[259] Again, these decisions are not based simply upon the economic realities of the marketplace.

Finally, the demands of consumers, employees, and shareholders may often appear, at least in the short run, to be in conflict. As a result, corporate management has substantial discretion determining which group's interest will predominate, which group will be favored at a particular time, and whether managerial self-interest will ultimately control the choices that are made.

IV. Conclusions

A. *A Comparison of the Economic and Multivalued Approaches*

Out of the dichotomy of legislative history and statutory language, two diverse approaches to merger enforcement policy have developed. Under the multivalued approach, concerns regarding political and economic power, small business, local independence, and political collectivisim are taken into account by applying a broader meaning to the term "competition," by defining relevant markets more narrowly, and by liberally applying such doctrines as potential competition, barriers to entry, and foreclosure.

In contrast, the economic or efficiency approach denies the relevance of such non-economic factors and assumes that most mergers are either neutral or beneficial in effect. Mergers are analyzed in terms of their economic impact and potential increases in market power. Competition is defined in a stricter economic context; the ability of the market to regulate itself is stressed; potential efficiencies are placed on a pedestal.[260]

Such decisions as *General Dynamics*[261] and *Marine Bancorporation*[262], as well as the new merger guidelines, demonstrate that the economic approach to merger analysis is currently in favor.[263] Nevertheless, some of the assumptions forming the basis of this approach must be questioned, including the contention that economic

---

mandatory retirement at the statutory minimum; and whether to establish programs for workers displaced by robots or plant relocation.

259 *See* Sullivan, *supra* note 19, at 11, 12; Pertschuk & Davidson, *supra* note 81, at 13.

260 *See* notes 17-30 *supra* and accompanying text.

261 415 U.S. 486 (1974).

262 418 U.S. 602 (1974).

263 *See* notes 117-62 *supra* and accompanying text.

analysis allows for formulating merger policy free of subjective and unpredictable value judgments.

The economic approach is not based solely upon objectivity, but instead reflects a variety of value choices and often represents nothing more than the pursuit of one set of values at the expense of another.[264] The lack of perfect information and varying interpretations of available data make it possible for decision-makers to choose from a wide variety of alternative resolutions. As the number of relevant economic considerations continues to increase, the number of choices presented increases as well. When one adds the realities of human frailty, irrational behavior, and personal and theoretical biases, the vulnerability of such an approach to the social and political views of policymakers is evident.

In exploring the argument that mergers are generally neutral or beneficial in effect and that substantial efficiencies result from a more permissive merger policy, the dangers inherent in the economic approach become more apparent. The approach disregards many of the concerns which Congress expressed and subverts legislative intent to the goal of predictability.[265] Not only does this analysis present a false picture of "objectivity," but it risks examining efficiencies out of context, thus weighing them too heavily. The actual efficiency gains that would result from such a policy, the manner in which such efficiencies should be defined, the recipients of efficiency benefits,[266] and the costs of offensive and defensive merger strategies are all subject to question.[267] Additionally, any argument asserting the neutral or beneficial nature of merger activity should be examined in light of the political and discretionary powers that are vesting in fewer corporate managers.[268] Finally, similar concern should be directed at a merger enforcement policy that not only encourages massive concentration of assets but which also creates an environment so conducive to corporate acquisition that internal growth and the efficient use of existing resources is frustrated.

The economic approach to merger analysis is especially troublesome because recognizable boundaries do not exist. Instead, the policy continues to broaden in scope, overtaking and replacing our more traditional antitrust values. The Department of Justice, for example, has recently indicated that efficiencies are not a defense to an anticompetitive merger. Instead, efficiencies will merely constitute one of the many factors that will be considered

---

264 *See* notes 163-96 *supra* and accompanying text.

265 *See* notes 198-204 *supra* and accompanying text.

266 *See* notes 205-20 *supra* and accompanying text.

267 *See* notes 221-43 *supra* and accompanying text.

268 *See* notes 244-59 *supra* and accompanying text.

when deciding whether or not to challenge a merger.[269] But mergers that are truly lacking in anticompetitive effect will be allowed whether or not any efficiency benefits will result. Efficiencies become relevant to merger analysis only when anticompetitive aspects are in fact involved. As a result, "weighing" efficiencies will, despite statements to the contrary, constitute at least a partial defense to anticompetitive conduct.

B. *Reform Proposals*

Alleviating some of the problems caused by present merger enforcement policy is, of course, a major issue. Because 90% of the cases are still instituted by private parties,[270] one approach is to simply encourage courts to engage in a more multivalued analysis of merger activity. Although such an approach would involve a difficult decision-making process, weighing social and political factors would be no more troublesome than judging the scope of probable efficiencies. Professor Sullivan has noted that courts have long dealt with such multifaceted issues and, despite the problems involved, have been able to reach decisions by employing precedent, analogies, and balancing relevant costs and benefits.[271]

Admittedly, at least two factors militate against such a multivalued approach. First, some of the social and political effects of merger activity are simply beyond the scope of section 7 of the Clayton Act.[272] It is difficult to argue, for example, that the language, "substantially lessen competition," could prohibit the creation of absentee management or could prevent a merger because it failed to revitalize a city. Perhaps a more important issue, however, is whether courts should engage in this fundamental process of social balancing. Granting judges the power to enjoin mergers based on their belief that a company's political influence would increase by 4.3% is not the solution. Nor would it be appropriate for judges to allow mergers between firms in Minneapolis and St. Paul but prohibit those between firms in Albany and Buffalo because of "distant ownership." Judges do not possess the expertise or authority to engage in such legislative decision-making.[273] The resolution of significant merger policy issues involving economic and political concentration, local independence, small business, employee and

---

269 U.S. Department of Justice, Statement Accompanying Release of the Revised Merger Guidelines 15 (June 14, 1984).

270 Barnett, *Introductory Remarks*, 50 ANTITRUST L.J. 175, 176 (1982).

271 Sullivan, *supra* note 19, at 4.

272 *See* Statement of Michael Pertschuk, *supra* note 15; *see also Panel Discussion*, *supra* note 18, at 239 (comments of R.D. Joffe).

273 Statement of Joseph Brodley, *supra* note 72; *see also Panel Discussion*, *supra* note 18, at 238, 239 (comments of R.H. Bork).

community welfare should rest with the elected officials who have the authority to weigh these subjective factors.[274]

Indeed, legislators have proposed reforms. Representative Rodino suggested that a "public interest" standard be applied to mergers that would result in the control of five billion dollars in assets and the employment of 25,000 workers.[275] This standard would consider existing and potential competition, the disruption of management and employees, excessive fees and transaction costs, the potential for price reduction, quality enhancement, and the availability of new goods or services.[276] Others have suggested a cap and spin-off approach under which certain mergers would be allowed only if accompanied by a corresponding divestiture of one or more entities of comparable size.[277] Although this approach has several redeeming characteristics, the lure of a lucrative merger may cause the terms of the required divestiture to be less favorable to the corporation, its employees, and the local community than might otherwise have been achieved. Corporate resources may be dissipated; other groups may face additional hardships because of the divestiture and other groups affected by the divestiture may be confronted with additional hardships.

Although less attractive than the cap and spin-off approach, Congress could simply prohibit mergers over a particular size,[278] or it could adopt a sliding scale for horizontal mergers where the HHI thresholds would be lowered as mergers become larger.[279] Additionally, as Professor Brodley has noted, Congress could redefine the term "competition" to specifically include a variety of social considerations,[280] or amend the Clayton Act to prohibit mergers that would injure potential competition,[281] or remove some of the incentives for merger activity by altering the tax laws.[282]

C. *The Need for Congressional Response and Clarification*

All proposals are burdened with their own set of advantages, disadvantages, and value premises. But despite the difficulties inherent in choosing among alternative solutions and judging social costs and benefits, Congress should present some form of legislative clarification. While the debate among legal scholars, judges,

274 *See* F. SCHERER, *supra* note 85, at 563.
275 *See* H.R. 3561, 98th Cong., 1st Sess. § 7B(a)(1)(2) (1983).
276 *Id.* § 7B(d)(2)(B).
277 *See* Pertschuk & Davidson, *supra* note 81, at 21, App. II.
278 *See* S. 600, *supra* note 88, § 2(a) (each corporation having assets or sales exceeding $2 billion).
279 Lande, *supra* note 3, at 139 n.284.
280 Statement of Joseph Brodley, *supra* note 72.
281 *Id.* at 10.
282 *Id.* at 10-11.

and merger officials has been stimulating, a statutory section with such broad social, political, and economic ramifications cannot be left to the interpretive whim of changing administrations.

In attempting to clarify section 7 of the Clayton Act, however, Congress must first recognize the fallacy of the "neutral" merger. Under current enforcement policy, a merger may be viewed as *economically* neutral if it neither enhances the dangers of market power nor provides evidence of substantial efficiency benefits. The probability of a merger being "neutral" in a broader social and political context, however, is quite low. Most mergers are accompanied by at least some socially undesirable consequences. All corporate takeovers result in placing the control over the assets of two previously independent entities in the hands of only one. Similarly, all involve transaction costs and the expenditure of both capital and human resources in the acquisition, rather than in the creation, of goods and services. All, in varying degrees, increase the concentration of economic power, centralize decision-making authority, and place the future of more employees, more consumers, and more shareholders under the discretionary auspices of fewer corporate managers. Additionally, larger mergers will often create greater barriers to entry, increase corporate political influence, and speed the loss of local independence.

By recognizing the improbability of a truly "neutral" merger and by accepting a series of presumptions regarding the undesirable effects that normally accompany merger activity, Congress could establish a threshold (for example, combined sales or assets of five billion dollars) beyond which the burden of proving *counterbalancing* benefits would be placed on the merging parties. Such benefits might include a variety of anticipated efficiency gains. But the acquiring firm's ability to preserve a failing firm, to inject life into a dying community, to provide enhanced job security for employees, to spread the risk of unlucrative, but socially-desirable research and development, or to reduce the power of local monopolies could also be considered.

The burden of proving such countervailing benefits need not encompass the "clear and convincing evidence" standard which is more appropriately applied in defending claims that a merger is *anticompetitive* in nature.[283] Instead, it should be sufficient to negate such socially-oriented presumptions by showing a preponderance of evidence. Imposing this burden in connection with mergers that surpass a given threshold would ensure that sizable mergers were being undertaken with at least some worthwhile purposes in mind. If management is unable to demonstrate any counterbalancing ben-

283 *See* 1984 GUIDELINES, *supra* note 21, § 3.5.

efits, whether in the form of anticipated efficiencies or otherwise, it would be quite reasonable to question the merger proposal and to assume that no harm would result from its prohibition.[284]

Whatever approach is ultimately adopted by Congress, any legislative action should recognize that although economic theory is, and will continue to be, an extremely valuable tool in merger enforcement policy, it possesses implemental limitations. As a result, in determining such issues as the relevant product and geographic markets and the significance, if any, of market share and market concentration statistics,[285] boundaries should be established within which decisions can be objectively made. As Professor Scherer has noted, a sensible merger policy is one that not only takes "into account the costs and benefits of mergers," but also *"the ability of enforcement agencies to weigh those costs and benefits."*[286]

These suggestions for reform, of course, do not imply that the clock should be turned back on economic theory or that advances should be ignored. Instead, they reflect the argument that *if* the economic approach to merger enforcement is deemed to be more desirable than a multivalued form of analysis, then the economic theory forming its basis should be employed only to the limits of objective application. Once enforcement officials surpass the boundaries of ascertainable and objectively interpretable information, they begin to engage in the same speculative and value-laden analysis that they allegedly abhor.

Congress needs to more closely examine the evolution of merger enforcement policy and address the issue of whether some alternative approach would be more consistent with the public sentiment and need. When one compares the concentration of corporate decision-making[287] with the fears expressed in the legislative history of the antitrust laws, it is clear that it is time to return the social, political, and economic destinies of our nation to the American people.

---

284 For a discussion of the role of non-economic concerns and the burden of proof or the burden of persuasion, see generally Schwartz, *supra* note 202.

285 *See* 1984 GUIDELINES, *supra* note 21, § 3.2.

286 F. SCHERER, *supra* note 85, at 544 (emphasis added).

287 Taylor, *supra* note 212. In a recent article on investment bankers specializing in merger and acquisition activity, it was indicated that there are "perhaps ten men guiding the future of corporate America." *Id.* at 46 (comments of I. Boesky).