CORPORATE CONSOLIDATION AND THE CONCENTRATION OF ECONOMIC POWER: PROPOSALS FOR REVITALIZATION OF SECTION 7 OF THE CLAYTON ACT

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CONCENTRATION OF ECONOMIC POWER:
PROPOSALS FOR REVITALIZATION OF
SECTION 7 OF THE CLAYTON ACT

For fifty years there has been a steady trend toward a centralization of
c power within industrial America. Each succeeding study has shown a greater
proportion of the industrial economy dominated by huge corporate entities. 1

1. In 1929, 130 corporations, each capitalized at more than $100,000,000, controlled
nearly 82% of all the assets of the 573 corporations whose stock was traded on the New York
Stock Exchange. By 1933, 0.15% of the corporations of the nation owned 53.25% of all cor-
porate assets. Wilcox, COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY 299 (TNEC
Monograph 21, 1940). According to the War Production Board, 100 corporations handled
approximately 75% of all prime war contracts. Hearings before Subcommittee No. 3 of the
Committee on the Judiciary on H. R. 2337, 79th Cong., 1st Sess. 6 (1945) (cited hereafter as
the growth of which has been largely characterized and achieved by the acquisition or consolidation of smaller corporations.\(^2\) Public concern in the trend was commanded by two separate, yet interrelated considerations: first, the lessening of the competitive factor in industries dominated by larger and fewer competitive units;\(^3\) and secondly, the political ramifications of the increasing concentration of private economic power.\(^4\) Evidence of such concern is to be found in the Sherman \(^5\) and Clayton Acts,\(^6\) and it has been

1945 HEARINGS). Less than 1\(\frac{1}{2}\)% of all of the industrial employers in the United States employ about 55% of all the industrial workers. \textit{Id.} at 13.

While a recent study demonstrates that the largest corporations failed to increase as rapidly as did their smaller competitors during the war period and immediately thereafter, \textit{Financial Trends of Large Manufacturing Corporations, 1939–1946, Survey of Current Business, Nov. 1947, p. 16}, the report correctly notes that: "these changes, however, must be interpreted in the light of the usual cyclical factors which influence the behavior of firms of different size. Experience indicates that incomes of smaller concerns are typically more sensitive to cyclical swings in business activity, and that as a consequence the relative importance of the largest corporations regularly increases in depression and is reduced in prosperity." \textit{Id.} at 24.

2. The share of the small firms in total net manufacturing income was cut from 23% in 1918 to 11.5% in 1942. \textit{Monopoly Subcommittee of House Committee on Small Business, United States versus Economic Concentration and Monopoly 383 (1946).} Manufacturing businesses employing less than five hundred persons accounted for 51.7% of the total manufacturing employment in 1939. By 1944 they accounted for only 38.1% of this total. Firms with less than fifty employees in 1939 accounted for 34% of the total employment, but by 1943 they represented only 25% of the total. \textit{Id.} at 97. This decrease in the portion of the economy made up of small corporations has been effectuated in large part by acquisition by large corporations, judging from the vast number of mergers occurring in the past fifty years. Podell, \textit{Our Anti-Trust Laws and the Economic Situation}, 17 A.B.A.J. 255, 256 (1931), FTC, \textit{Relative Efficiency of Large, Medium-Sized, and Small Business 111, 128 (TNEC Monograph 13, 1941)}, Handler, \textit{Industrial Mergers and the Anti-Trust Laws}, 32 Col. L. Rev. 179, 180 (1932).

Four distinct waves of mergers are discernible in the past half century. The first, from 1890 to 1904, was motivated both by the onslaught of mass production and by the drive for monopoly status. FTC, \textit{op. cit. supra} at 111–2. The second and extraordinary movement of the twenties was largely financial in origin, and was inspired by the opportunities for promoters' profits in the capitalization of increased assets and of intangible values realized through the sale of new securities. \textit{Id.} at 128, 135. A third merger period, during the late thirties, was activated principally by the desire for marketing outlets and distributive economies, \textit{id.} at 136, while a fourth, now pending, seems encouraged by the accumulation of large wartime working capital, by the unbalanced activities of many companies, and by the desire to achieve a strong strategic position before the return to a buyers' market. \textit{New Mergers, New Motives, Business Week, Nov. 10, 1945, p. 68; Trend to Mergers, Business Week, Sept. 9, 1944, p. 52; Merge and Save, Newsweek, June 17, 1946, p. 76; Get-Togethers, Time, Aug. 5, 1946, p. 86; Growth of Business Units: Effect of War and Shortages, United States News, May 10, 1946, p. 48.}

3. FTC, \textit{op. cit. supra} note 2, at 132–40; WILCOX, \textit{op. cit. supra} note 1, at 121–89; see generally BURNS, \textit{The Decline of Competition} (1936).

4. See the statement of Senator O'Mahoney discussing the potential political power of several of the nation's giant corporations. 1945 HEARINGS 7–13. See also WILCOX, \textit{op. cit. supra} note 1, at 18; Note, 54 Yale L. J. 860, 866 (1945).


in an effort better to effectuate this legislation that Congress has, since 1945, been re-examining the limitation placed on intercorporate stock holding by Section 7 of the Clayton Act,\(^7\) which provision has failed to offer more than a slight deterrent to the concentrative trend.\(^8\)

**Merger-Methods and Causes: Relation to Competition**

An understanding of the merger device is prerequisite to a consideration of legislation intended to inhibit its use. The control of separate corporations may be accomplished in a variety of ways. Although acquisition of a majority of a corporation's outstanding voting stock may be necessary to a true parent-subsidiary relationship and assured domination, the holding of as little as ten percent may well be sufficient to permit actual control.\(^9\) Completed unification may be effected by sale of physical assets with majority approval, or by technical merger or consolidation for which consent of two-thirds of all classes of stock is commonly required. In either case the actual consideration may be securities of the acquiring corporation or cash.\(^10\) In form there are important differences in the foregoing methods of combination; in terms of control and competitive results, they are almost identical.

The incentives to corporate expansion policies and the impelling reasons for specific mergers and consolidations are legion. And while mergers may be justifiable from the standpoint of the firms concerned,\(^11\) it does not follow...
that the results of all are in the public interest. Any type of merger tends to produce a concentration of power with dangerous political implications; but the economic effects are dependent upon the particular type of merger involved and upon the nature of the market structure in the industry.

Study of the effect on competition of horizontal mergers, i.e., unification of corporations within the same industry performing similar functions in the productive process, has shown that the monopolistic components of price are likely to be present in a greater degree where the number of competitors is few, or, when the number is larger, where one or several are large enough to dominate the field.\(^2\) Price fixing through price leadership or through domestic or international agreements becomes more probable; and competition tends to be diverted on a large scale into advertising.\(^3\)

Acquisitions extending vertical integration in an industry, i.e., a combina-

12. During the depression years of 1929 to 1932 very little change appeared in the price of products of industries dominated by one or few producers, while the prices in non-concentrated industries were falling sharply. MONOPOLY SUBCOMMITTEE, \textit{op. cit. supra} note 2, at 92. But see Neal, \textit{Industrial Concentration and Price Inflexibility} (1942). An interesting example of the monopolistic effect upon the economy of dominance of an industry by a few large firms can be seen in American Tobacco Company v. United States, 328 U.S. 781 (1946); see also Rostow, \textit{The New Sherman Act}, 14 U. of Chi. L. Rev. 567, 580–6 (1947).

13. The reason why a small number of concerns can often exercise considerable control over prices in their industry has been set out by Rostow, \textit{supra} note 12, at 576–7: "Such sellers are conscious in every phase of their market policy of the fact that what they do will have an effect on the market as a whole. Their output is a significant share of total supply. If they produce more, it can be sold only at a sacrifice of price. If they alter their policy as to price or output, they know that their rivals will follow suit. A price cut therefore can rarely change any seller's share of the market. It can only lead to a decline in the profits of all sellers, unless the elasticity of demand is considerable—and monopolistic sellers habitually underestimate the elasticity of demand for their products. Fear of spoiling the market is therefore a deep-seated and characteristic quality of many markets dominated by a few large firms."

This phenomenon, as well as its results on advertising and cartels, is discussed in: Burns, \textit{op. cit. supra} note 3, at 76; Chamberlin, \textit{op. cit. supra} note 11, at 7; Hamilton and Till, \textit{op. cit. supra} note 11, at 14; Handler, \textit{A Study of the Construction and Enforcement of the Federal Anti-Trust Laws} 40–45 (TNEC Monograph 38, 1941); Wilcox, \textit{op. cit. supra} note 1, at 121; 1945 Hearings 231.
tion of corporations performing different functions in the process of manufacture and distribution of a particular product, may lead to monopolistic price conditions if such conditions already are present in one of the constituent horizontal sectors. In the petroleum industry, for example, control of the pipelines by the major refiners often enables them to prevent competitors from distributing gasoline in the market areas, by charging exorbitant rates for the piping of crude oil. The result is a diminution of competition, and such an effect in any industry will often lead to defensive integration on the part of competitors. While competition may remain in such an oligopolistic industry, study of particular vertical mergers is justified to ascertain if they may not, in fact, tend toward monopoly.

Mergers promoting diversification of output and geographic extension are very similar in their relation to competition. Not in themselves harmful, such mergers nevertheless warrant investigation to guard against possible future deleterious effects upon competition.

**Mergers and Section Seven**

The weakness of the Clayton Act in meeting the outlined problems of corporate unification finds its genesis in ambiguous and conflicting wording. Section 7, implemented by the enforcement provisions of Section 11, proscribes stock acquisition in any one of three situations:

"Where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

14. For discussion of these conditions see Comment, 51 Yale L. J. 1338 (1942).


16. An objective observer might find many of the diversifications of questionable value, and feel that they resulted in a corporation too complex for any management to operate efficiently, FTC, *op. cit. supra* note 2, at 116, but mergers of this type, known as either complementary or chain mergers, have become increasingly more important since 1920. *New Mergers, New Motives*, Business Week, Nov. 10, 1945, p. 80.

17. 38 Stat. 734 (1914), 15 U.S.C. § 21 (1940). This section provides that the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Authority, and the Federal Reserve Board shall exercise jurisdiction over their respective provinces, and gives the Federal Trade Commission authority in all other cases. The normal procedure is for the FTC to issue a complaint where it suspects a violation, hold a hearing, and then issue a stock divestiture order. The role of the Justice Department in Section 7 enforcement is discussed in note 47 infra.

Handicapped by the lack of a clear expression of Congressional intent, courts, interpreting the first standard, have been particularly perplexed in determining whether the area in which competition must be lessened is the industry as a whole, or only the corporations which are party to the acquisition. A literal reading of the wording of the clause would seem to indicate that competition between the corporations involved is the criterion to be applied. Further it is claimed that the Clayton Act was intended for the prophylactic purpose of preventing restraints on competition in their infancy, and a holding that the area of concern is the industry would be to make the test essentially similar to that of the Sherman Act.

On the other hand, it is contended that where any competition exists between two corporations it is not only "substantially lessened," but in fact entirely eliminated by merger; and thus the first interpretation would outlaw every merger between even slightly competing corporations, a result belied by the very existence of the qualification. Furthermore, unless the industry as a whole is the area to be used as the test, the first clause would comprehend all mergers and the last two would be superfluous. And it is argued that the principal purpose of the Clayton Act was not to supplement the Sherman Act by attacking monopolies in their incipiency, but rather to reduce business uncertainty by enumeration of outlawed practices.

19. Almost every conceivable viewpoint and interpretation of the proposed statute may be found in the Congressional debates on Section 7. The debate is reported in 51 Cong. Rec., parts 9 and 14, passim (1914).

20. Counsel for the FTC told the House Committee that the Clayton Act was aimed at getting mergers "in their incipiency" and "nipping the whole thing in the bud." 1945 Hearings 51, 56. See International Salt Co. v. United States, 68 Sup. Ct. 12 (1947). Most observers would, however, agree with Irvine, The Uncertainties of Section 7 of the Clayton Act, 14 Corn. L. Q. 28 (1928), that at least of coordinate importance to Congress was the reduction of business uncertainty through the enumeration of outlawed practices. See Levy, The Clayton Law—An Imperfect Supplement to the Sherman Law, 3 Va. L. Rev. 411 (1916); Note, 34 Col. L. Rev. 968 (1934).

21. Under the Sherman Act there was no question but that the test of monopolistic practices and power was the effect upon the industry. Northern Securities Co. v. United States, 193 U.S. 197 (1904). At the time of passage of the Clayton Act, the Sherman Act was believed to have been emasculated by the Supreme Court's "rule of reason," which condemned not all monopolistic practices but only those which were "unreasonable." Standard Oil v. United States, 221 U.S. 1 (1911); United States v. American Tobacco Co., 221 U.S. 106 (1911). See 96 U. of Pa. L. Rev. 591 (1948), and particularly id. at 593, n. 17.

22. See Commissioner Van Fleet's dissenting memorandum in Fisk Rubber Co., 10 F.T.C. 433 (1926). The last two clauses might, however, still be meaningful as applied against vertical mergers and mergers for the purpose of diversification.

23. Note, 38 Yale L. J. 830 (1929); see also note 20 supra. Neither courts nor Commissioners have concealed their attempts to write the Sherman Act into the Clayton Act. Dissenting in Matter of Temple Anthracite Coal Co., 13 F.T.C. 249, 262 (1930), Commissioner Humphrey said, at 263: "I cannot believe that the mere acquisition by one corporation of the stock of two or more competing corporations is a violation of the law, even if the competition between the competing corporations is thereby eliminated. I think the test is whether such acquisition results in restraining commerce." On appeal Humphrey's attitude was apparently adopted, and the Commission's decision reversed. Temple Anthracite Coal
The issue presented by this conflict of views has never been definitively settled by the courts. In the early leading case of *International Shoe Company v. Federal Trade Commission* 24 the Supreme Court applied the test of the corporations to measure the effect upon competition of the merger of two of the largest firms in the shoe industry, and finding little direct competition between the two firms, permitted the merger. 25 In the few cases since decided, however, lower courts have tended to use the industry test. 26

Another vexing problem, foreseen by Congress at the time the Clayton Act was passed, has been to determine what constitutes a "substantial lessening of competition." 27 It has been clearly decided that a "substantial lessening of competition" requires that substantial competition exist prior to the merger in question, 28 but the amount of competition which will be called "substantial" has not been finally determined, and the courts have decided each case on its own merits. 29


25. The Court's finding that there was no substantial competition between the merging companies upset the conclusion of the Commission, Matter of International Shoe Co., 9 F.T.C. 441 (1925), and of the circuit court of appeals, International Shoe Co. v. Federal Trade Commission, 29 F.2d 518 (C.C.A. 1st 1928). Justices Stone, Holmes, and Brandeis dissenting, found sufficiently substantial competition to justify the Commission's order, and criticized the majority for endeavoring to substitute its view for that of the appropriate administrative agency.

26. The same courts have been wont to speak of "public injury" as an additional requirement for action under Section 7, but the decisions indicate that this means, in fact, only that the industry test is being employed. V. Vivaudou v. Federal Trade Commission, 54 F.2d 273 (C.C.A. 2d 1931); United States v. Republic Steel Co., 11 F. Supp. 117 (N.D. Ohio 1935). See also dissent of Commissioner Humphrey in Matter of Arrow-Hart & Hegeman, Inc., 16 F. T.C. 393, 423 (1932); 33 Ops. Att'y Gen. 225, 241 (1922); Irvine, supra note 20, at 40. But cf. In re Pressed Steel Car Co. of N. J., 16 F. Supp. 329 (W.D. Pa. 1936); Parkersburg Rig and Reel Co., 34 F.T.C. 1527 (1941); see Ronald Fabrics Co. v. Verna Brunswick Mills, Inc., CCH Trade Reg. Serv. ¶ 57,514 (S.D.N.Y. 1946); Purdy, Lindahl, and Carter, op. cit. supra note 9, at 364.

27. Congressman Volstead told the House: "No one can tell how the word 'substantial' will be construed. As used in this section it may mean that the competition must be largely lessened. This word 'substantial' is so indefinite that it affords the courts no guide. As applied to the facts in any ordinary case of conflicting testimony it will give them a license to hold that anything short of almost entire elimination of competition is legal." 51 Cong. Rec. 9078 (1914).


29. Decisions construing Section 7 and Section 3, which uses the phrase "to substan-
Yet a third ambiguity in the wording of Section 7 which has proven troublesome has been the use of the phrase, "may be." Although the effect of these words would seem to be to prohibit any stock acquisition which would possibly cause a substantial lessening of competition, and such an interpretation would be supported by the legislative history of the Act, courts have uniformly required a showing that a merger would probably lessen competition, or tend to monopoly.

A more important defect in the Act was its failure to control merger by acquisition of assets, i.e., direct purchase of corporate properties. The Federal Trade Commission, charged with the enforcement of the Act, early ruled that it had no jurisdiction over the purchase of assets. The Supreme Court continued this emasculation of the Act in 1925 in Thatcher Manufacturing Co. v. Federal Trade Commission. The Court there held, four justices temporarily lessen competition" in a similar manner, have ranged over a wide variety of interpretations. In V. Vivaudou v. Federal Trade Commission, 54 F.2d 273 (C.C.A. 2d 1931), the court could find no substantial lessening of competition in the merger of two directly competing corporations with combined annual sales of seven million dollars in a 125 million dollar industry, while in Matter of Vanadium-Alloys Steel Co., 18 F.T.C. 194 (1934), the F.T.C. dissolved a merger where the product manufactured in common by the merging companies constituted 22.5% of the total output of one of the companies and 54% of the total output of the other, and where the company emerging from the merger would have produced 12.5% of the total output of such product in the industry. In International Salt Co. v. United States, 68 Sup. Ct. 12 (1947) the Supreme Court invalidated tie-in agreements involving a business of $500,000 annually, a minute portion of the total salt business, and in Oxford Varnish Co. v. Ault & Wiborg Co., 83 F.2d 764 (C.C.A. 6th 1936), Section 3 was used to bar an agreement involving less than 1% of the industry in question.

30. The phrasing of Section 7, "where the effect of such acquisition may be to substantially lessen competition," is similar to that of Section 3, which forbids tie-in clauses where their effect "may be" to substantially lessen competition.

31. Congress was warned that the phrase "may be" was necessary instead of "is," as the bill originally provided, in order to make certain that all acquisitions which might possibly lead to a lessening of competition were prevented, 51 Cong. Rec. 9201 (1914), and the bill was unanimously so amended. Id. at 14463-4. Cf. International Salt Co. v. United States, 68 Sup. Ct. 12 (1947) (§ 3 of Act). See also Purdy, Lindahl, and Carter, op. cit. supra note 9, at 364.

32. Interpreting a similar clause in Section 2a of the Clayton Act in Corn Products Co. v. Federal Trade Commission, 324 U.S. 726 (1945), Chief Justice Stone said for the Court, at 738: "It is to be observed that Section 2a does not require a finding that the discriminations in price have-in fact had an adverse effect on competition. The statute is designed to reach such discriminations 'in their incipiency,' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect. Cf. Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356-7. But as was held in the Standard Fashion case, with respect to the like provisions of Section 3 of the Clayton Act, prohibiting tie-in clause agreements, the effect of which 'may be to substantially lessen competition,' the use of the word 'may' was not to prohibit discriminations having the mere possibility of these consequences, but to reach those which would probably have the defined effect on competition." In accord is United States v. Republic Steel Co., 11 F. Supp. 117 (N.D. Ohio 1935) (§ 7 case).


34. 272 U.S. 554 (1926). This opinion also decided the cases of Federal Trade Commission v. Western Meat Co., and Swift & Co. v. Federal Trade Commission.
dissenting, that although the Commission might include in a stock divestiture order an injunction against asset acquisition while the stock was being divested, it was without power to order divestment of assets acquired prior to any Commission action, even though the assets had been acquired only because of control exercised by stock obtained in violation of Section 7.35 This holding was extended in Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission 36 to deprive the Commission of dissolution power if, after commencement of proceedings, but before issuance of a divestment order, the acquiring corporation should complete the merger and rid itself of the stock.37 Since almost sixty percent of all recent mergers have been by asset acquisition,38 it is apparent that the exclusion of such acquisitions has served narrowly to limit the scope of the Act. Thus, initial statutory omissions and ambiguities, accentuated by devitalizing judicial interpretation, have led to the abandonment of Section 7 as a weapon of anti-trust enforcement.39

LEGISLATIVE REVITALIZATION

In 1941 the Temporary National Economic Committee recommended comprehensive changes in Section 7,39 the most important of which was provision for compulsory prior approval by the FTC of all asset acquisitions over a fixed size. Introduced in Congress with slight modification in 1945.41

35. See Comment, 75 U. of Pa. L. Rev. 463 (1927). In Atwater v. Wheeling & Lake Erie Ry., 56 F.2d 720 (C.C.A. 6th 1932), the court refused to void certain contracts made by directors of a corporation elected by stock which was held in violation of Section 7. It indicated that it could have cancelled the contracts had the contracts themselves substantially lessened competition, but said: "It has never been held that the acts of directors elected by stock [illegally held] are void or even voidable." Id. at 723.
37. But cf. United States v. Columbia Steel Co., CCH TRADE REG. SERV. ¶ 57,628 (D. Del. 1947), a Sherman Act action in which the government sought a preliminary injunction to preserve the status quo until its suit to enjoin a proposed agreement of merger of steel companies could be decided. The court granted a preliminary injunction enjoining the defendants from making any transfer of assets or paying or receiving any part of the purchase price in consummation of the agreement pending final adjudication of the action.
38. During the years 1939–44, 479 mergers were accomplished by asset acquisition, 345 by stock purchase, and 8 by an undetermined method. Representatives of the FTC have expressed the opinion that the mergers by asset acquisition have been almost entirely motivated by a desire to avoid Section 7. 1945 HEARINGS 68–9.
39. For the FTC’s position on Section 7, see note 8 supra. Nor has the Justice Department endeavored to utilize the section. It is interesting to note, however, that a preliminary examiner for the Interstate Commerce Commission has recommended denial of the application of the president and chairman of the board of the Allegheny Corporation to sit on the board of directors of the New York Central Railroad because of a belief that the publicly-announced purpose of the Allegheny Corporation to merge the New York Central with the Chesapeake and Ohio would violate Section 7. N. Y. Times, Dec. 11, 1947, p. 55, col. 8.
40. TNEC, FINAL REPORT AND RECOMMENDATIONS 38–40 (1941).
41. Senator O’Mahoney introduced S. 615 in the Senate, and Representative Kefauver introduced an identical bill, H.R. 2357, in the House. 1945 HEARINGS 1. The differences
these proposals were favorably reported by the House Judiciary Committee, but were later superseded by a bill, still pending in the present Congress, which would change Section 7 only by including acquisition of assets within its purview.

Prior Approval

The TNEC recommendation of prior administrative approval was based upon the premise that it is both desirable and feasible to determine the legality of a merger before it has become an accomplished fact—thus obviating the extraneous economic hazards which militate against upsetting a completed merger. Prior approval would put an end to newspaper scanning as a means of discovering possible violations, and would permit a consideration of mergers upon their merits, rather than with an eye to the dangerous consequences of dissolving that which has once been united. Many government regulatory agencies already exercise the power of advance decision,

between these bills and the TNEC recommendations were two: (1) the TNEC would have subjected only asset acquisition to prior approval, while the bills included stock acquisition as well; (2) the bills also restored the original ambiguous phrases of the Clayton Act, which had been dropped by the TNEC. Since the bills contained the new standards for prior approval, the inclusion or exclusion of the old language was a matter of little moment.

42. The House Judiciary Committee unanimously approved H.R. 4810, an amended version of H.R. 2357, in 1946. When the Rules Committee refused to grant a rule for this bill, it was replaced by H.R. 5535, which dropped the prior approval system. H.R. 5535 was reintroduced as H.R. 515 by Representative Kefauver in the first 1947 session of the 80th Congress. 1947 HEARINGS 6.

43. H.R. 515 merely adds to Section 7 after the provisions relative to the acquisition of capital stock the words "the whole or any part of the assets." 1947 HEARINGS 1.

44. Such considerations were clearly shown in Pennsylvania R. R. v. Interstate Commerce Commission, 66 F.2d 37 (C.C.A. 3d 1933), subsequently affirmed by an evenly divided Court. 291 U.S. 651 (1934). The Circuit Court said: "We are not primarily concerned with the economic result of our interpretation of the statute. That is a matter for Congress and not the courts, but to force all this stock suddenly upon the market might have such a disastrous effect in these troublous times that it has caused us to consider most carefully the questions in the case." 66 F.2d 37, 40. Another author has compared the problems of dissolving a merger to "unscrambling scrambled eggs." Handler, A Study of the Construction and Enforcement of the Federal Anti-Trust Laws 88 (TNEC Monograph 38, 1941). See also Hamilton and Till, op. cit. supra note 11, at 96; McFarland, Judicial Control of the FTC and the ICC 66-71 (1933); Hale, Trust Dissolutions: "Atomising" Business Units of Monopolistic Size, 40 Col. L. Rev. 615 (1940).

45. "From the beginning, the Commission has had employees assigned the duty of reading the papers to see if there were any violations of Section 7 of the Clayton Act. No such method has been followed in regard to any other class of cases. These employees immediately report any item that appears in the press involving stock acquisition. Then, on the merest ex parte showing, without any preliminary hearing as in other cases, complaint is issued and served upon the respondent. The supposed justification for such action was that the respondent might acquire the assets and oust our jurisdiction." Commissioner Humphrey dissenting in Matter of Arrow-Hart & Hegeman, Inc., 16 FTC 393, 424 (1932).

46. According to counsel for the Federal Reserve Board, that Board and the FTC are the only administrative agencies without the authority to give prior approval. 1945 Hear-
and the Justice Department has occasionally exercised its right to require judicial scrutiny of proposed mergers.\footnote{47} Constant business demand for the attendant certainty has forced the Anti-trust Division to adopt varying systems of informal permissive opinions which have been unsatisfactory both to business and to the Justice Department.\footnote{48} Although the proposed bill promised future immunity for approved acquisitions, and businessmen had favored some system of prior approval at the time of passage of the Clayton Act,\footnote{49} the National Association of Manufacturers fought even this provision in the proposed amendment.

The NAM claimed that its objection to prior approval was grounded on the delays common to FTC activities, and on the harmful effect such delays could have in postponing proposed mergers.\footnote{50} The Commission's actual average in merger cases, one year from the time of complaint to dismissal or order, indicates some valid basis for such fears.\footnote{51} But the objection presup-

\begin{footnotes}
\footnote{337. For an example of how the Interstate Commerce Commission utilizes Section 7 in advance of possible violations, see note 39 supra.}
\footnote{47. Section 15 of the Clayton Act, 38 Stat. 736 (1914), 15 U.S.C. § 25 (1940), authorizes and instructs the Justice Department to bring equity proceedings to prevent violations of the Act. Although valuable, such a technique is not a substitute for prior approval because: it leaves to the judiciary the solution of difficult technical problems which might more properly be considered by an expert administrative agency; this preliminary surveillance is not compulsory; the Department of Justice may not hear about a merger until it has become an accomplished fact; and in such cases the Government must, furthermore, assume the burden of proving that a proposed merger will harm competition, instead of requiring the merging corporations to prove that their merger is in the public interest. See United States v. Crescent Amusement Co., 323 U.S. 173 (1944) (injunction granted); United States v. Republic Steel Co., 11 F. Supp. 117 (N.D. Ohio 1935) (injunction denied).}
\footnote{48. The practice of the Justice Department with regard to informal permissive opinions has varied with the Attorneys General. Such opinions were given as early as 1913, but were not in demand at that time. By the mid-twenties, however, the pressure from the business community was so great that such rulings had become established practice, even though a favorable ruling promised immunity only from immediate prosecution. In recent years the trend has once again been away from such rulings. Hamilton and Tull, op. cit supra note 11, at 27, 86–7. But see CCH Trade Reg. Serv. ¶ 54,124 (1947). For an interesting example of prior approval, see 33 Opis. Att'y Gen. 225 (1922).}
\footnote{49. Such men of affairs as George W. Perkins and Judge Elbert H. Gary, fearful that the rule of reason dangerously broadened the Sherman Act, advocated before a Congressional Committee the establishment of a commission with authority to give administrative rulings in advance, thus obviating the uncertainty of the anti-trust laws. Hearings before the Senate Committee on Interstate Commerce, 62d Cong., 2d Sess. 1089, 2407–11 (1912).}
\footnote{50. Memorandum of the National Association of Manufacturers, 1945 Hearings 369–70. This memorandum was the only opposition displayed to the bill at the 1945 Hearings.}
\footnote{51. This figure may be determined from examination of the reported cases over the period 1916–46. The average figure of thirty-eight months in the NAM's tables, 1945 Hearings 370, is misleading in that it ignores the many complaints which were speedily dismissed without a hearing. Although a hearing would, indeed, have been required had the prior approval sections of the bill been passed, it is reasonable to suppose that the great bulk of cases would lend themselves to swift decision. A further consideration is that heretofore the Commission has considered only cases where there was some reason, however slight, to believe that there had been a violation of the law. The great majority of mergers}
poses the impossibility of improvement, and considerable improvement might be expected to result if the present corporate aim of delaying a potential dissolution order were replaced by a corporate desire for speedy approval of projected plans. Legislative directives as to priority and permissible time limitations, and a lessening of the burden on the Commission by requiring prior approval only for acquisitions above a prescribed size, could serve as additional expediting measures.

Despite the advantages which might have accrued from prior approval, the system was dropped by the Judiciary Committee after it was found impossible to gain floor consideration for a bill containing such a proposal.

The Proposed Standards

As presented to the Judiciary Committee, the prior approval system of the bill would have required merging corporations to carry the burden of proof in establishing that the proposed unification was consistent with the public interest as manifested by six criteria. The first three proposed standards, which were retained in the bill until the entire prior approval system was deleted, attempted to specify factors relevant to the desired competitive index. The first standard was to have clarified the old Section 7 criteria—that a merger must not substantially lessen competition, restrain trade, or tend to create a monopoly—by applying the tests sectionally as well as nationally, and by explicitly making the whole industry and not the merging corporations the competitive frame of reference. The second and third standards would have required that, after the acquisition, the size of the acquiring corporation and the diminution in the number of competitors should not be incompatible with "effective competition." The necessity of an affirmative showing that no possible harm might arise from a merger resolves the "may be" problem, but obviously neither this nor the introduction of the new criteria would bring certainty to Section 7. "Effective competition" does little to resolve the ambiguities created by the phrase, "to substantially lessen competition." But certainty cannot be brought into a field that has no absolutes without also introducing undesirable rigidity. The to be submitted for prior approval would probably be of the type so clearly lawful that they are not now considered by the Commission, and under a prior approval system, these would necessitate little delay in granting permission.

52. See 1945 Hearings 64-5.

53. Before rejection of the entire advance approval provision, a proposed limiting size was amended from a book value figure to a certain percentage of sales within the industry. 1945 Hearings 2, 371. Although the latter factor is obviously more relevant to competitive effect, the more definite figure seems better adapted as a condition precedent to jurisdiction. The extent of a particular line of industry is itself a disputable question of fact, and merging corporations could not be certain that the approval provision applied.

54. "That the acquisition will not substantially lessen competition, restrain trade, or tend to create a monopoly (either in a single section of the country or in the country as a whole) in the trade, industry, or line of commerce in which such corporations are engaged." H.R. 2357 § 7(3)(a), 1945 Hearings 2.
new criteria, moreover, do suggest an area of forbidden monopolistic tendency somewhat broader than those heretofore judicially applied. They contribute by directing administrative attention to the problems of relative size and oligopoly which, in the view of most economists, have a direct bearing on competitive practices, but which have only recently been held to be relevant in anti-trust actions.

The fourth of the proposed standards would have required a showing that the acquiring corporation had not indulged in unlawful methods of competition to induce acquisition, and had not otherwise violated the Federal Trade Commission Act. The first half of this provision, depriving the unfair competitor of the fruits of his illegal action, seems a most appropriate penalty. The second half, however, which would prevent an otherwise lawful expansion after any unrelated violation, seems undesirable and excessive, since most of the Commission's reported violations are breaches of minor advertising and labeling regulations.

The fifth condition of the bill as introduced into the Judiciary Committee would have compelled proof that the projected acquisition was "not incompatible with greater efficiency and economy of production, distribution, and management," in significant contrast to the more affirmative requirement, recommended by the TNEC, of proof that the acquisition "will be promotive" of the same ends. Both tests are founded on the Brandeisian belief that the public identification of efficiency and economy with greater size is in the nature of a popular myth, and that bigness may, in some cases, actually be less efficient. The standard of the bill, requiring only proof that the proposed merger would not lead to less efficiency and economy, is demanded by practical considerations in preference to the more visionary recommendation of the TNEC which would have allowed only those mergers leading to

55. 1945 Hearings 128, 284, 333, 338; Rostow, supra note 12, at 575-86. See generally Burns, op. cit. supra note 3; Chamberlin, op. cit. supra note 11.

56. The leading case holding that size alone can be so dangerous as to fall within the ambit of the anti-trust laws is United States v. Aluminum Company of America, 148 F.2d 416 (C.C.A. 2d 1945), 54 Yale L. J. 860 (1945). See Handler, A Study of the Construction and Enforcement of the Federal Anti-Trust Laws 74 (TNEC Monograph 38, 1941).

57. 1945 Hearings 57, 58. For a breakdown of the FTC's activity see Monopoly Subcommittee, op. cit. supra note 2, at 20.

58. "One of the ideas that has confused the public mind and even the minds of public officials and administrators is that competition results in inefficiency and that concentrated power is inevitably efficient." Statement of Edwin L. Davis, Commissioner, Federal Trade Commission, 1945 Hearings 40. It may be pointed out that most of the largest companies attained their position by mergers and consolidations in which the probabilities of greater efficiency were often not considered, that absentee management incident to widespread corporate enterprise is not conducive to efficiency, and that the true technical economies of mass production are founded only on intraplant processes, while the supposed productive economies of interplant organizations are largely achieved at the expense of free competition. FTC, op. cit. supra note 2 passim. See also Purdy, Lindahl, and Carter, op. cit. supra note 9, at 351.
definitely ascertainable economies. Nor is such a stringent rule as that proposed by the TNEC necessary to the maintenance of effective competitive control, and it might, if read literally, preclude an acquisition aimed at the real or imagined stability of diversification when no adverse competitive results could be presumed. However, even the milder requirement of the bill as it went to the Judiciary Committee would add greatly to the burden of the Commission, since intelligent application of the standard would require the evolution and articulation of very elaborate administrative measurements, and since few companies would be unable to produce evidence of expected savings. It was, perhaps, for these reasons that the Committee dropped the provision even while it continued to retain the prior approval plan.

A sixth standard proposed by the TNEC, a requirement that the corporation emerging from the consolidation should not control more than a prescribed proportion of its industry, was omitted from the bill before it was introduced in Congress. This omission would have shifted the difficult burden of drawing the future line from Congress to the Commission and would have left no concrete guide for the judiciary in its review of the Commission's decisions. And to the extent that psychological indisposition to deny to one what others already have achieved influences judicial decision, this Congressional abdication might have made it more likely that smaller companies would have been permitted to merge to a size compatible with that of existing dominant firms. Nonetheless, the omission may have been justified in the interest of lending flexibility to the administration of the proposed revision of Section 7.

The influence of business representatives in the deletion of these standards may well prove to have been shortsighted. Although objections were directed to the vagueness of the new rules and the wide administrative discretion they would necessitate, the terminology of the newly proposed stand-

59. It is the feeling of the sponsor of the bill that an administrative agency would hesitate to make an affirmative finding that a proposed merger would promote greater efficiency and economy in any but the most obvious circumstances, and that a large proportion of all mergers would be blocked on that score alone. Communication to YALE LAW JOURNAL from Representative Estes Kefauver, Dec. 8, 1947. The political difficulties which would beset a bill containing such a standard as that suggested by the TNEC are manifest from the vigor with which counsel for the NAM, who erroneously interpreted the bill to require a positive finding of greater efficiency, attacked such a provision. 1945 HEARINGS 369.

60. Professor Handler, the actual author of the TNEC proposal, had remarked of such a standard in 1932 that the test of highest economical efficiency "is unworkable as a practical matter. The facts are too difficult to ascertain, the evidence too conflicting, and the conclusions too uncertain." Handler, Industrial Mergers and the Anti-Trust Laws, 32 Colum. L. Rev. 179, 268 (1932).

61. The TNEC recommendation did not specify what proportion of their industry merging corporations were to be permitted to control, and Congress was to have inserted a figure in the standard, which figure was to be applicable to all industries.

62. One vexing problem left unsolved in the bill may well be within the sphere of particular competence of administrative discretion, i.e., whether a partial exception should be
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ard's is more specific than that of the old, and administrative decisions would have continued to be subject to judicial review. Loss of the proposed tests, moreover, may lead to a reinterpretation of the first clause of Section 7 resulting in a literal reading of its language, by which it could be used to prohibit every horizontal merger without regard to total competitive conditions.

It appears desirable that legislation be enacted amending Sections 7 and 11 of the Clayton Act by including acquisition of assets and requiring prior approval of mergers by the Federal Trade Commission, conditioned upon the satisfaction of defined standards. The most popular detour about Section 7 would be closed by the inclusion of asset acquisition, and the provision for prior approval of mergers would give Congress an opportunity to resolve the ambiguities which have arisen in the interpretation of the section by setting out explicitly which area of competition is to be taken as the test of a proposed merger, and what is meant by the phrase, "where the effect may be to substantially lessen competition." But since it is doubtful whether Congress will amend the Act, it is probable that any increase in the effectiveness of Section 7 must be accomplished by judicial decision.

JUDICIAL REVITALIZATION

In facing the problems of monopoly control in the past decade, the Supreme Court and the lower federal courts have shown an increasing proclivity to defend a more competitive norm, to confine attention to economic results, to limit the spheres of lawful trade advantage to the legislative minimum, and to bring the legal concept of monopoly more in harmony with the economic. Thus, patents have been invalidated where not clearly an in-ma.de when the acquired corporation is bankrupt or approaching insolvency. Recognizing the danger of such exceptions, courts have nonetheless given weight to this factor in the past. E.g., International Shoe Co. v. Federal Trade Commission, 290 U.S. 291 (1930); Aluminum Co. of America v. Federal Trade Commission, 299 Fed. 361 (C.C.A. 3d 1924); In re Pressed Steel Car Co. of N.J., 16 F. Supp. 329 (W.D. Pa. 1936); see Beegle v. Thomson, 138 F.2d 875, 881 (C.C.A. 7th 1943). And it would seem that such compromises with theory might more advantageously be made by the Commission charged with enforcing the statute than by the judiciary.

63. At the time the bill was first introduced, it was expected to pass the House of Representatives and to meet with difficulty in the Senate. Curb on Mergers, Business Week, Jan. 5, 1946, p. 18. Although the proposed amendments have twice received the unanimous approval of the House Judiciary Committee, the Rules Committee has been unwilling to make possible their consideration by the House. H.R. REP. No. 1480, 79th Cong., 2d Sess. (1946) (H.R. 4810); H.R. REP. No. 1820, 79th Cong., 2d Sess. (1946) (H.R. 5535). See note 42 supra. The change in political complexion between the 79th and 80th Congresses would not seem to improve the chance of passage of this legislation.

novation, patent pools and restrictive licensing forbidden, and trademarks narrowly protected. 65

In such cases as Mercoid Corp. v. Mid-Continent Co. 66 and International Salt Co. v. United States 67 the Court has displayed an awareness of the intended prophylactic purpose of the anti-trust laws, saying that it is the tendency to monopoly that is forbidden, and that "it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop." 68 In American Tobacco Company v. United States 69 the Court ruled that a conviction under the Sherman Act for conspiracy to monopolize might be obtained where only the symptoms of monopoly, rather than an express agreement, were visible, symptoms which might as probably have been dictated by self-interest as by a conspiracy. Thus, even if a standard synonymous with that of the Sherman Act be adopted for Section 7, that standard now has changed. A court willing to infer a monopolistic practice in the industrial pattern of the Tobacco case would be most unlikely to permit major steps in the evolution of a similar pattern.

If there is to be any consistency in the clearly indicated judicial trend which has made of the Sherman Act and of Section 3 of the Clayton Act effective weapons against monopolistic tendencies, it would seem unlikely that the Court will overlook the opportunity to utilize Section 7 in a similar direction.

Judicial revitalization of Section 7 could take three forms: a reinterpretation of the meaning of the clause: "where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition"; a reconsideration of the Thatcher and Arrow-Hart rules, which permit acquisition of assets by control of unlawfully acquired stock; and a re-examination of whether asset acquisition is beyond the scope of Section 7.

Reinterpretation of the first standard of Section 7 could take so many forms that it is valueless to speculate on which particular meaning the Court might choose to adopt. A literal reading could prohibit almost every merger, and it is not impossible that a Court which has shown such antipathy toward monopolistic tendencies might choose to set up such a bar. Furthermore, even if the Court did little to change the existing interpretation of the stand-


66. 320 U.S. 661 (1944).


68. Id. at 15.

69. 328 U.S. 781 (1946).
ard, its more favorable attitude toward administrative findings of fact could restore a measure of viability to Section 7. Thus, an FTC finding that a merger would tend to "substantially lessen competition" can be expected to receive a more favorable response today than it would have during the first two decades of the Clayton Act's enforcement.

As to the limitation on the Commission's power imposed by the *Thatcher* and *Arrow-Hart* decisions, it may be enough to point to the protests of justices whose dissenting opinions have often been indicative of future trends in the law. In view of the weakness of these two precedents, the Federal Trade Commission is open to criticism for complaining annually without having relitigated the issue before the present Court.

Even the major detour of merger by sale of assets cannot be considered inviolable, though here a prediction of change is far more speculative. At the turn of the century, corporate combination was most often effected through the holding company device. Asset acquisition might have been omitted from the 1914 Act because of inability to foresee its widespread use as a substitute method, and judicial inclusion might now be held warranted to consummate the legislative purpose. The Court could sustain itself with such a rationale, but the pendency of the present bill, the specific wording of the Act, and the common assumption that asset acquisition is not within the scope of the Act, tend to negate this possibility.

**CONCLUSION**

Legislative revitalization of Section 7 of the Clayton Act is the most desirable method of giving new life to a statute which expresses the public's concern with the deleterious effects of the concentration of economic power. If such legislative action should not take place, the Federal Trade Commission and the Department of Justice would be remiss if they did not accompany a drive for more thorough enforcement of the law with an attempt to secure from the Supreme Court a judicial revitalization of the section.

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71. Justices Brandeis, Holmes, Stone, and Chief Justice Taft dissented in the *Thatcher* case, while Justices Brandeis, Cardozo, Stone, and Chief Justice Hughes were the dissenters in the *Arrow-Hart* case.

72. 1945 *Hearings* 34, 42. The sponsors of the present legislation regard the Congressional failure to include asset acquisition in the Clayton Act as "an oversight." *Id.* at 5, 15. See also Comment, 39 *Yale L. J.* 1042 (1930); Comment, 75 U. of Pa. L. Rev. 463 (1927); 38 *Yale L. J.* 830 (1929). But see 1947 *Hearings* 293.