Nonefficiency Goals in the Antitrust Law of Mergers

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ABSTRACT

Robert Bork, former judge for the District of Columbia Circuit and antitrust scholar, has characterized the social and political goals underlying merger law as “pure intellectual mush.”¹ Social and political values have formed the foundation of the most famous United States Supreme Court decisions interpreting section 7 of the Clayton Act,² the primary statutory standard for judging the legality of corporate acquisitions. Judge Bork’s dismissive and derogatory comments challenge both judges and scholars to provide a rigorous intellectual foundation and a procedure for incorporating these values into the merger law enforcement process.

Current trends in antitrust policy also force decision makers to confront directly whether anything is wrong with mergers other than the potential increase in market power associated with one firm’s acquisition of stock or assets of another. The statutory standards in the Clayton Act for judging the legality of mergers have not been amended since 1950, but courts have differed widely in their application of those standards—from the per se, populist approach of the Warren Court to the rule-of-reason, economic efficiency approach of the Burger Court. In the past, proposed amendments to the Clayton Act³ have recommended prohibiting all mergers between large firms on the grounds that bigness is bad for social and political reasons. The current trend, however, is toward enforcement and statutory amendments based on economic theories that would permit mergers regardless of the size of the firms involved if the merger would not lead to an excessive increase in market power. The proposed Merger Modernization Act of 1986,⁴ reintroduced as part of the omnibus “competitiveness” package of the Reagan administration in 1987⁵ would, by statutory amendment, eliminate from consideration in merger cases all concerns

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other than those associated with market power. It is important, then, to appreciate the nature or character of those social and political goals not served by an exclusively economic orientation. This focus is likely to continue during the Bush administration.6

This Article focuses attention on goals other than economic efficiency by contrasting them to economic goals both in terms of their substantive content and their underlying assumptions. Alternative articulations of the nonefficiency goals are examined to state as precisely as possible what legislators, judges, and scholars had in mind when advocating these goals. Although one can easily appreciate the political and social values scholars and policy makers espouse, it is difficult to identify from the current literature in this area either the connection between mergers generally and undesirable consequences or those particular mergers most likely to have unwanted side effects. Although this Article calls for greater specificity and precision by proponents of nonefficiency goals, it also argues that many of these goals can be included systematically in antitrust enforcement. In response to the appeal of social and political values and their established place in antitrust cases, this Article suggests a more dynamic and democratic interpretation of economic efficiency that incorporates a broader spectrum of values.

I. INTRODUCTION

A. Antitrust, Economics, and Politics

Antitrust scrutiny of corporate acquisitions of the stock or assets of other corporations relies heavily, if not exclusively, on economics.7 The federal administrative officers with primary responsibility

6. At the time of preparation of this Article for publication, there is no indication that the administration of President Bush will change the focus of antitrust enforcement from efficiency goals to social and political goals in the merger area. Such commentary as exists suggests that the main themes of the Reagan agenda in the antitrust arena will continue. See, e.g., Looking Forward: Antitrust in the Bush Administration, 3 ANTITRUST 6 (Spring 1989) ("Basically, there will be continuity.").

7. Former Attorney General Edwin Meese, III, stated that the Reagan administration’s review of the antitrust laws was based on an attempt to effect changes that will “benefit consumers and businesses alike. The contribution of economics to the law in this area has been of vital importance.” Meese Lauds Role Played by Economists in Restoring Sanity to Antitrust Laws, 50 Antitrust & Trade Reg. Rep. (BNA) No. 1250, at 187-88 (Jan. 30, 1986). “‘[W]e have seen dramatic evidence how economic ideas can help bring sanity to the law.’ Antitrust analysis based on sound economic thinking ‘has helped slash through the thickets
for enforcement of the antitrust laws explicitly identify the preservation of an efficient marketplace as their goal.  

of bad antitrust case law."  

8. Several generations of Assistant Attorneys General for the Antitrust Division of the Justice Department have described their enforcement priorities along economic lines. Former Assistant Attorney General Douglas H. Ginsburg said that the Antitrust Division's objective with respect to enforcement priorities is "to forestall private conduct inimical to competition and to ensure that antitrust enforcement, both public and private, does not discourage business firms from efficient procompetitive conduct."  

8. Shift in Analytical Approach Highlights Antitrust Conference, 49 Antitrust & Trade Reg. Rep. (BNA) No. 1240, at 829 (Nov. 14, 1985). Ginsburg told the House Judiciary Subcommittee on Monopolies that, applying sound economic and legal principles, the Division stood "ready, able and willing to block" mergers and acquisitions that would result in the facilitation of collusion or an expansion of a firm with significant market power. Ginsburg Defends Administration's Record and Proposals to Achieve Antitrust Reform, 50 Antitrust & Trade Reg. Rep. (BNA) No. 1255, at 399 (Mar. 6, 1986).  

Speaking about the administration's antitrust policy, J. Paul McGrath, former Assistant Attorney General of the Antitrust Division, said:  

The objective is to preserve competition, which is important to our free-market system. Where competition may be hindered by mergers or by other kinds of conduct, obviously we should do something about it. On the other hand, we should not interfere with transactions that aren't likely to lessen competition. Most mergers do not lessen competition, do not create economic dislocations and therefore should not be attacked.  

McGrath, We Harm the Economy if We Artificially Restrict Mergers, U.S. News & World Rep., May 14, 1984, at 77. McGrath characterized antitrust enforcement as changing with our understanding of the economy and the antitrust rules followed by enforcers today as focusing on economic efficiency and consumer welfare, regardless of size.  

ABA Section Meeting Examines Facets of Proposed Legislation, 50 Antitrust & Trade Reg. Rep. (BNA) No. 1261, at 665 (Apr. 17, 1986). Donald I. Baker, another former Division Chief, observed that antitrust in the United States "has coincided with our gradual rise to economic prominence in the non-Communist world. We have thus been spared the hard choices of whether competition and antitrust would in fact produce better 'political' results for our citizens."  

Yet today, "as during the Great Depression, broad public faith in competition seems to have declined, and we have to worry about the legislative consequences of such decline."  

8. Shift in Analytical Approach Highlights Antitrust Conference, supra, at 832. He recognized two themes running through antitrust cases and literature: one, a concern with "economic efficiency," the other, "a populist concern about entrepreneurial independence and equality."  

Id. According to Baker, competition "tends to provide the most effective spur to imagination and efficiency— simply because it rewards the successful innovator and cost-cutter, while penalizing the economic laggard."  

Evisceration of Antitrust Enforcement Scored During House Oversight Hearing, 50 Antitrust & Trade Reg. Rep. (BNA) No. 1254, at 351 (Feb. 27, 1986). William F. Baxter, former Division Chief, pointed out that antitrust doctrine in the mid-1980s, as distinguished from one or two decades ago, was more disciplined and more national,  

Conference Board Probes Trends of Enforcement, Economic Theory, 50 Antitrust & Trade Reg. Rep. (BNA) No. 1257, at 473 (Mar. 20, 1986); however, Senator Howard M.
partment Antitrust Division Guidelines, which the Federal Trade Commission follows to a great extent, reflect this focus by identifying a myriad of market characteristics that are relevant to an antitrust inquiry. Industrial organization economists traditionally identify these characteristics as being the determinants of whether a firm, either alone or in conjunction with others, has power to influence the price in a market. Senior Reagan administration officials maintained that their view of the goals and purposes of the antitrust law of mergers was consistent with Supreme Court precedent and did not reflect a change in policy. According to those officials, the Guidelines were designed to create certainty in the busi-

Metzenbaum characterized Baxter as a "known opponent of the antitrust laws." Shift in Analytical Approach Highlights Antitrust Conference, supra, at 831.

Commissioners of the FTC have similarly expressed their concern with maintaining the competitiveness of the marketplace as the primary if not exclusive goal of antitrust law. FTC Chairman Daniel Oliver stated that the FTC's role is to protect the freedom of the market - to police the market in order to correct, where possible, imperfections that may exist - by promoting competition among businesses and by protecting consumers from being deprived of the ability to make adequately informed purchases." Oliver, Strenio Confirmations to FTC Posts Seem Likely Soon, 50 Antitrust & Trade Reg. Rep. (BNA) No. 1254, at 355 (Feb. 27, 1986). He offered support for the Reagan administration's Merger Modernization Act of 1986 because it was a "constructive step in the ongoing effort to achieve economically rational enforcement policy" under Clayton Act § 7. Oliver Calls § 7 Proposal "Constructive Step" To Rational Enforcement Policy, 50 Antitrust & Trade Reg. Rep. (BNA) No. 1267, at 934 (May 29, 1986). Describing the antitrust reform package, James C. Miller, III, former FTC chairman, stated that the package is a "modernization" of the antitrust laws, "not a repeal." Miller told reporters that the package affirmed the Reagan administration's belief that antitrust laws promoted competition. He said that the bills furthered the administration's goal of maximizing competition by making it "achievable." Reagan Administration Unveils Antitrust Reform Package; Rodino Attacks Proposals, 50 Antitrust & Trade Reg. Rep. (BNA) No. 1253, at 307 (Feb. 20, 1986). FTC Commissioner Mary Azcuenaga stated, with respect to the enforcement of Clayton Act § 7, that the goal is to protect competitive opportunities for American business. Shift in Analytical Approach Highlights Antitrust Conference, supra, at 831. Commissioner Andrew J. Strenio, Jr. stated, however, that the FTC should "promote the welfare of American consumers both through fostering competition in the marketplace and enforcing rules designed to protect consumers when there is market failure." Oliver, Strenio Confirmations to FTC Posts Seem Likely Soon, supra, at 355.


10. See Department of Justice Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶¶ 13,101, 13,102 and 13,103.
ness world, so that private decision makers will know which acquisitions are likely to be challenged.¹¹

Scholars have disagreed about whether the Justice Department Guidelines actually change the law.¹² The efficient operation of markets has not always been the sole concern of the Court in merger cases. For instance, Justice Douglas’ opinions reflect a concern for the workers and communities affected by mergers and the preservation of small businesses to encourage the entrepreneurial spirit.¹³ These opinions also indicate affirmative disapproval of mergers that result in one of the merging partners having a competitive advantage in its market due to a less costly way of doing business.¹⁴ Courts and Congress have suggested that some current policy statements of Justice Department antitrust enforcers do not reflect the law accurately.¹⁵ Academic commentators and scholars

12. See id.
14. In FTC v. Procter & Gamble Co., 386 U.S. 568, 572-73 (1967), Justice Douglas, writing for the Court, objected to the acquisition of Clorox Co. by Procter & Gamble on the grounds, among others, that economies of scale in advertising would give Procter & Gamble an impermissible competitive edge over competitors in the bleach market. The Court affirmed a FTC decision that had reject[ed] as specious in law and unfounded in fact, the argument that the Commission ought not, for the sake of protecting the “inefficient” small firms in the industry, proscribe a merger so productive of “efficiencies.” The short answer to this argument is that, in a proceeding under section 7, economic efficiency or any other social benefit resulting from a merger is pertinent only insofar as it may tend to promote or retard the vigor of competition.


15. In the federal courts, a number of opinions reflect this concern. See Allis Chalmers Mfg. Co. v. White Consol. Indus., 414 F.2d 506, 524 (3d Cir. 1969), cert. denied, 396 U.S. 1009 (1970) (courts will pay the Merger Guidelines some deference, but they do not have the force of law and are in no way binding); United States v. Hammermill Paper Co., 429 F. Supp. 1271, 1280 (W.D. Pa. 1977). See also United States v. E.I. DuPont De Nemours & Co., 353 U.S. 586, 590 (1957) (any failure on the part of the Department to challenge a merger does not constitute a binding administrative interpretation that the merger is not violative of the Clayton Act); Fruehauf Corp. v. FTC, 603 F.2d 345, 353-54 (2d Cir. 1979) (the Guide-
also disagree about the appropriate focus of merger law policy. 

Scholars such as Professors Schwartz and Curran emphasize the goals of diversity and equal opportunity while denying that Supreme Court opinions reflect a concern for efficiency alone. Professor Flynn and numerous others criticize the economic efficiency emphasis as relying on sweeping assumptions, hidden value choices, and a cloister mentality that systematically excludes values such as equity, fairness, and justice. On the other hand, commentators such as Bork decry the uncertainty, and, indeed, the unconstitutionality, of delegating to judges the power to determine the propriety of mergers under the "loose, mock-Jeffersonian" standards suggested by those who emphasize nonefficiency goals. Professor Elzinga argues that many of the social and political values are already incorporated into the efficiency perspective and need not be given separate attention.

The revealed intent of the Reagan administration was to eliminate from the Clayton Act any ambiguity surrounding the goals underlying the law. The proposed Merger Modernization Act would have amended section 7 of the Clayton Act so that courts would focus attention exclusively on the ability of merging firms to
substantially increase their market power, defined as the "ability of one or more firms profitably to maintain prices above competitive levels for a significant period of time." According to the accompanying memorandum, the amendment stated that section 7 is directed against mergers that threaten to increase consumer prices. Division of opinion over the proposed amendment parallels the dispute over the underlying goals of the current section 7; and approval of the amendment depends on the extent to which social and political goals in antitrust law are important.

The choice of enforcement strategies comes before policy makers at a critical time. The average annual number of acquisitions in the first six years of the Reagan administration was twice that of the four years of the Carter administration. At the same time, the enforcement record of the Justice Department reflected a decrease in the percentage of reported premerger transactions that resulted in enforcement actions. In this political climate, an appreciation of the alternative policy options is particularly important.

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- economic factors relevant to the effect of the acquisition in the affected markets, including (i) the number and size distribution of firms and the effect of the acquisition thereon; (ii) ease or difficulty of entry by foreign or domestic firms; (iii) the ability of smaller firms in the market to increase production in response to an attempt to exercise market power; (iv) the nature of the product and terms of sale; (v) conduct of firms in the market; (vi) efficiencies deriving from the acquisition; and (vii) any other evidence indicating whether the acquisition will or will not substantially increase the ability, unilaterally or collectively, to exercise market power.

Id. See also Justice Department Merger Guidelines, 46 Antitrust & Trade Reg. Rep. (BNA) No. 1169, at S-1, S-6 to S-8 (June 14, 1984) [hereinafter Justice Guidelines].


26. The percentage dropped from 1.15% in 1979 to .29% in 1986. House Judiciary Committee's Charts on Federal Antitrust Enforcement, Federal Merger Enforcement (1979-1986), supra note 25, at 452. The percentage was obtained by dividing the number of enforcement actions by the Department of Justice in 1979 (10) and 1986 (7), by the number of premerger transactions reported in 1979 (868) and 1986 (2406).
B. Antitrust and Empiricism

The inspiration for the tremendous reliance on economics and efficiency criteria for antitrust law policy in general and merger law policy in particular has come from two, not necessarily related, sources: empirical social sciences and the ascendancy of the free market school of economics. Often citing the empirical research of industrial organization economists, the Supreme Court in the post-Warren period slighted political and social concerns with an increasing focus on the market and its characteristics. This led to an explicitly efficiency based enforcement program in the merger area in the Reagan years.\textsuperscript{27} Empirical descriptions of the effects of market concentration on prices (or profits) provided a basis for a policy that focuses on market structure. The lack of empirical evidence of the relationship between mergers and the rise of undesirable social and political events may not have caused the lack of concern for nonefficiency goals, but the absence of an empirical foundation may inhibit the advocates of nonefficiency goals or diminish their persuasiveness. Free market economists believe that these goals are unclear and imprecise and that their introduction into analysis would introduce "inconvenience," "lack of predictability," and "general mess" compared to purely economic analysis.\textsuperscript{28}

To explore the possibility of adding substantive content to these nonefficiency goals, this Article will focus on the formulation of hypotheses that relate merger law policies to measurable social and political consequences flowing from those policies as well as on hypotheses that relate structural characteristics of industries to social and political phenomena.\textsuperscript{29} This Article will show that much can be learned simply by asking the proper questions, or, alternatively, by asking the questions properly.

To incorporate social and political goals into merger law policy in a rigorous and systematic fashion it is first necessary to separate

\textsuperscript{27} The merger enforcement guidelines the Justice Department issued reflect this focus. See Justice Guidelines, supra note 23.


\textsuperscript{29} The focus on hypothesis formation rather than testing not only establishes whatever research agenda is possible for these goals, but saves the author the criticism and cavils of pettifogging number crunchers.
efficiency and nonefficiency considerations. To identify that subset of policy concerns about which hypotheses will be formed, this Article begins in Part II by distinguishing efficiency from nonefficiency goals. In Part III, the legislative, judicial, and scholarly sources of the nonefficiency goals are examined to assess what the proponents of various social and political policies intended to achieve by their interpretations of the Clayton Act. Relying on these sources, Part III attempts to classify and interpret these nonefficiency goals in a way that will make them amenable to the process of hypothesis formation without altering the substance of the goals their proponents developed.

In Part IV, the lessons of the previous sections are applied to a reformulation of merger law policy through a broader interpretation of the meaning of economic efficiency. The current interpretation is shown to be narrower than is required even by the neoclassical economic framework within which the proponents of current antitrust policy operate.

II. EFFICIENCY AND NONEFFICIENCY GOALS CONTRASTED

A. Introduction

To distinguish between the current narrow or “neo-classical” view of efficiency and the broader view of efficiency to be developed in this Article, a distinction is drawn between what are referred to currently as efficiency goals and what will be categorized as nonefficiency goals. Although it is tempting to label these two categories “economic” and “noneconomic” goals, those labels are less useful than the ones proposed because there is substantial economic content even in the social and political goals. Professor Pitofsky, for instance, discussing noneconomic concerns that should be disregarded in antitrust law, includes

(1) protection for small businessmen against the rigors of competition, (2) special rights for franchisees and other distributors to continuing access to a supplier’s products or services regardless of the efficiency of their distribution operation and the will of the supplier (a kind of civil rights statute for distributors), and (3) income redistribution to achieve social goals.30

30. Pitofsky, supra note 28, at 1058.
The confluence of economic, social, and political goals embodied in these concerns suggests the need to find another term to capture the subset of economic goals the Reagan administration pursued. Efficiency goals of concern to the Reagan administration in interpreting the antitrust laws related to the prices at which goods are sold, the cost at which goods are produced, and the quantity of goods produced. For the purposes of this Article, nonefficiency goals include all other concerns embodied in a multivalued approach to antitrust. This is a precise but most restrictive definition of efficiency. In Parts B and C of this section, two conceptual categories of relevance to antitrust law, productive efficiency and allocative efficiency, are considered. After the boundaries of what are currently understood to be the efficiency goals have been defined, Parts III and IV contrast the other goals.

B. Productive Efficiency

When referring to the internal operation of a business firm, economists often speak in terms of productive efficiency, which is one way of measuring the performance of a firm. The content of this term in economic theory is not always clear, but a useful general interpretation is that an organization is productively efficient if it gets the best possible results from its efforts. As applied to the firm, the relevant interpretation for antitrust purposes is the

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31. See R. Bork, The Antitrust Paradox 91 (1978). By contrast, Robert Bork has identified efficiency with a broader notion of consumer welfare that includes all the things that are understood to be good about competition as that word is used in everyday speech, such as "low prices, innovation, choice among differing products—all things we think of as being good for consumers." Id. at 61. This broader approach to efficiency is discussed in Part IV. Because the focus of antitrust laws outside the Clayton Act is on anticompetitive acts other than mergers, it will be useful to explore the implications of market power obtained through merger for the ability of firms to engage in anticompetitive acts other than raising prices and decreasing output. The FTC has focused on such anticompetitive behavior. According to Jeffrey Zuckerman, Director of the Bureau of Competition, "[b]ased on anecdotal evidence, there are enormous amounts of nonprice predation." Efforts to Reform Antitrust Law Will Come From Different Directions, 52 Antitrust & Trade Reg. Rep. (BNA) No. 1297, at 45 (Jan. 8, 1987).


33. This definition is suggested in D. Watson, Price Theory and Its Uses 178-79 (2d ed. 1968). See also R. Fare, S. Grosskopf, & C. Lovell, The Measurement of Efficiency of Production (1985) ("[E]fficiency is the quality or degree of producing a set of desired effects." Id. at 1-2.).
supply of goods at least cost. The Justice Department Guidelines adopt this definition, stating that "[t]he primary benefit of mergers to the economy is their efficiency-enhancing potential," and enumerating examples of efficiencies that the Department recognizes as relevant evidence. These examples of how a firm might lower its costs include "achieving economies of scale, better integration of production facilities, plant specialization, lower transportation costs, and similar efficiencies relating to specific manufacturing, servicing, or distribution operations of the merging firms ... [as well as] reductions in general selling, administrative, and overhead expenses." This discussion illustrates the meaning and role of productive efficiency in merger cases and why it is an appealing criterion from both a normative and empirical point of view.

Although the Supreme Court specifically identified productive efficiencies as a justification for ancillary restraints of trade under the Sherman Act's rule of reason, their status is less certain in merger cases. The early cases either rejected productive efficiency arguments as a defense or regarded the existence of cost advan-

34. In microeconomic theory, this quality of a firm's production process has been alternatively described as "economic efficiency." See, e.g., R. Arney, Price Theory: A Policy-Welfare Approach 198 (1977); R. Leftwich, The Price System and Resource Allocation 22 (7th ed. 1979). That term suffers the same defect as the term "economic" in describing one set of concerns in merger law policy; it is insufficiently precise to distinguish between productive and allocative efficiency. See infra text accompanying notes 47-59 for a discussion of allocative efficiency and other types of efficiency.

36. Id.
37. See, e.g., Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54 (1977) ("Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. These 'redeeming virtues' are implicit in every decision sustaining vertical restrictions under the rule of reason."). See also Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210, 211 (D.C. Cir. 1986) (Bork, J.) (group boycott, Sherman Act section 1 case) ("Because we find that Atlas' policy is designed to make the van line more efficient rather than to decrease the output of its services and raise rates, we affirm [the District Court's granting of summary judgment for Atlas]"), cert. denied, 479 U.S. 1033 (1987); Ball Memorial Hosp. v. Mutual Hosp. Ins., 784 F.2d 1325, 1338 (7th Cir. 1986) (Easterbrook, J.) (Sherman Act sections 1 and 2, market power analysis in denial of injunction) ("The antitrust laws protect efficient production for the benefit of consumers.").

38. FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967) ("Congress was aware that some mergers which lessen competition may result in economies but it struck the balance in favor of protecting competition."); United States v. Philadelphia Nat'l Bank, 374 U.S. 321,
tages resulting from a merger as evidence of a probable and imper-
missible restraint on competition. More recent commentary, how-
ever, has suggested that the courts are becoming more receptive to 
productive efficiency defenses in merger cases. In *Christian Schm"
itet Brewing Co. v. G. Heileman Brewing Co.*, the Sixth Cir-
cuit pointed out that the increased productive efficiency by merging 
 firms that harmed competition was not the type of antitrust 
injury remedied by an injunction to prevent a merger. The poli-

cies of the Reagan administration also indicated greater acceptance of the productive efficiency defense. For horizontal mergers, the Justice Department may permit some mergers that it might have otherwise challenged if they are "reasonably necessary to achieve significant net efficiencies."\textsuperscript{43}

From a normative viewpoint, the productive efficiency goal is appealing because it has societal implications that are independent of the goals of the producer, or more generally, the organization attempting to accomplish a particular result.\textsuperscript{44} The notion of productive efficiency, unlike some other economic concepts,\textsuperscript{45} does not include any implications about who gets the good once it is produced or whether the good has any value. The notion refers only to the method by which the good is produced. It may be considered non-controversial because using the smallest quantity of scarce resources to produce a product necessarily results in more left over for the production of other things.\textsuperscript{46}

From an empirical viewpoint, the productive efficiency criterion is appealing because it clearly specifies cause, effect, and a connecting theory. The desired effect of merging is the reduction of production cost, an effect that is at least theoretically and often practically measurable. The merging itself does not result in cost with caution in this area lest its decision "over the long run deter new market entry and tend to stifle the very competition it seeks to foster."

\textit{Id.} (Harlan, J., concurring) (citations omitted).

\textsuperscript{43} Justice Guidelines, supra note 23, at S-8.

\textsuperscript{44} R. FARE, S. GROSSKOPF \& C. LOVELL, supra note 33, at 4. "The notions of technical and structural efficiency are independent of the behavioral goal postulated for the producer. That is, a producer is either technically and structurally efficient or inefficient, regardless of the producer's behavioral goal." \textit{Id.}

\textsuperscript{45} \textit{Id.} "However, the notion of allocative efficiency is clearly goal-related, in the sense that different goals generate different allocative efficiency requirements." \textit{Id.} For discussion of allocative efficiency, see Part II.C.

\textsuperscript{46} On the other hand, it might be argued that productive efficiency is not always desirable. One of the inputs to the production of goods and services is labor and one might plausibly argue that it is better to use more workers than fewer; it results, for instance, in the retention of workers and thereby minimizes human dislocation even though a lower cost, perhaps more technologically advanced or capital intensive, method of production is available. \textit{See, e.g., United States v. Falstaff Brewing Corp., 410 U.S. 526, 543 (1973)} (Douglas, J., concurring). In addition, some would like to have the power to decide which goods have value and which do not and would conclude that producing a valueless product, even by the least cost means, is undesirable. For a product thought by some to be harmful, production at high costs would require a high price that would presumably discourage consumption.
savings, but the reorganization of the production process might. The explanation for how cost savings result from reorganization has been the subject of extensive economic research. Policy makers are thus satisfied that there is some connection between reality and the alleged relationship between mergers and productive efficiency.

C. Allocative Efficiency

Productive efficiency, as applied in the antitrust context, refers to the way in which a producer of goods or services fashions, markets, and distributes its product. Allocative efficiency, however, is concerned with the way in which a society’s resources are allocated among alternative production and consumption uses. An allocation system is considered allocatively efficient if resources are employed in their highest valued use as measured by the buyers’ willingness to pay for those resources. Because allocation of resources among consumers and producers in a market economy is dictated by the value these parties place on alternative uses for those resources, allocative efficiency questions inevitably involve a determination of the appropriate price at which each product is to be sold. Because the price influences the quantity of each product that will be purchased, allocative efficiency also involves an examination of the appropriate output level for each product. As with productive ef-

49. Id. The technical economic requirements for allocative efficiency are translated into practice in antitrust policy by focusing on the price and output effects of decisions by individuals and by firms. For a useful discussion of the underlying theory of individual choice and the theoretical equivalencies that underlie the requirements, see, in order of increasing technical complexity, M. Spencer, Contemporary Economics 478-81 (2d ed. 1974); E. Browning & J. Browning, Microeconomic Theory and Applications 514-25 (1983); and L. Friedman, Microeconomic Policy Analysis 382-88 (1984).

One may look at this pricing criterion as the solution to a societal cost/benefit problem. At a price equal to the marginal cost of production, the price paid by the rational buyer is not greater than the benefit derived from the purchase of the good. At a higher price, the cost to some purchasers of acquiring the product may be greater than the associated benefit. By restricting output and charging a higher price, the producer will gain profits above the return necessary to keep him in business, but the costs of production of another unit, being lower than the price being charged, would, from a societal viewpoint, justify the production and sale of another unit of output. Some buyers would benefit from this production, but the
efficiency, the clear specification of cause and effect and the existence of an accepted explanation for why some mergers lead to allocative inefficiencies provide an appealing foundation for policy makers who prefer to have an empirical basis for decision making.\textsuperscript{50}

sales cannot occur without a reduction in price. At a price below the cost of producing an additional unit, the marginal cost, there will be no justification for the production of an additional unit because at that level the benefit to society, as measured by buyers' willingness to pay for another unit, is less than the societal cost of production. Only at a price equal to marginal cost will the additional benefit and additional cost to society of producing another unit be equalized; thus the appropriate price and appropriate level of output are determined. (For a discussion of allocative efficiency with this cost/benefit flavor, see R. Bork, \textit{supra} note 31, at 100-01. Bork's discussion of allocative efficiency in the antitrust context, \textit{id.} at 91-104, is much more complete than this Article and is useful as a reference to an exposition of allocative efficiency by one who believes that efficiency concerns are the only relevant antitrust concerns.)

The system is allocatively inefficient at a price greater than marginal cost because the wrong goods are being produced; alternatively, goods are being produced in the incorrect proportion, because buyers are being forced, by prices greater than marginal cost in some market(s), to buy products to which they assign less value. Resources are being allocated to production that is not justified from a cost/benefit point of view. The size of the resources pie to be shared by those in an economy is determined not only by the quantity of items produced but also by the value placed on those items. Pricing each product at a level equal to average total cost and marginal cost gives the largest total pie to be shared.

Some economists dispute that an allocatively efficient economy gives the largest pie. Briefly, their argument is that a certain amount of market power, and hence price greater than average total cost, is necessary to finance technological developments that will spur more rapid growth of the economy and, consequently, a bigger pie. \textit{See, e.g.}, J. Galbraith, \textit{American Capitalism: The Concept of Countervailing Power} (1952); J. Schumpeter, \textit{Capitalism, Socialism, and Democracy} (1954). For a general discussion, see J. Koch, \textit{Industrial Organization and Prices} 214-16 (1974).

50. The price at which a product is sold raises both equity and allocative efficiency considerations, which must be distinguished in order to separate efficiency and nonefficiency goals. The equity consideration in pricing is related to a preference for a particular income distribution; the allocative efficiency consideration is closely tied to the output level of each product produced. The distributional consideration involves a choice of who receives how much wealth. If other things are equal, the seller receives more wealth if it sells the product at a high price than at a low price. When the price charged to buyers is equal to the average total cost of producing the product, the producer does not make more than a normal profit. \textit{See, e.g.}, P. Scherer, \textit{supra} note 48, at 14. The normal economic profit is considered by economists to be a part of the cost of production. \textit{See, e.g.}, J. Koch, \textit{supra} note 49, at 17; P. Samuelson, \textit{Economics} 457 (6th ed. 1984). Normal economic profit is defined as the profit sufficient to keep the seller in business. \textit{See, e.g.}, W. Shepherd, \textit{Market Power and Economic Welfare} 26 (1970). Average total cost is therefore the total cost, including normal economic profit, of producing a given number of units divided by the number of units produced. \textit{See, e.g.}, P. Samuelson, \textit{supra}, at 457. Because there is no surplus return to capital, investors earn a return just sufficient to encourage them to continue to engage in the enter-
Concern with the power of a firm over the price of its product has been explicitly recognized in antitrust law for decades, particularly in its connection with monopoly and market power: “Monopoly is a protean threat to fair prices. . . . Perhaps no single fact manifests the power and will to monopolize more than price control of the article monopolized.” The Supreme Court recognized the distributional implications of the price level and its relationship to competition in Reiter v. Sonotone Corp. In that case, Chief Justice Burger stated: “It is in the sound commercial interests of the retail purchasers of goods and services to obtain the lowest price possible within the framework of our competitive private enterprise system. The essence of the antitrust laws is to ensure fair price competition in an open market.”

The federal circuit courts first made the connection between the price and marginal cost equality and allocative efficiency in cases involving regulated industries. The Supreme Court applied this approach in finding a violation of section 1 of the Sherman Act in a collective refusal by dentists to cooperate with insurers’ requests for X-

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51. See, e.g., Allen Bradley Co. v. Local 3, Int’l Bhd. of Elec. Workers, 325 U.S. 797 (1945). The purpose of the Sherman Act “was to protect consumers from monopoly prices.” Id. at 806 (discussing Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940)).
54. Id. at 342.
55. The Temporary Emergency Court of Appeals in Standard Oil Co. v. FERC, 612 F.2d 1291 (Temp. Emer. Ct. App. 1979) described the key to economic efficiency and minimizing economic distortions as:

a free market economy . . . [where] buyers and sellers through the forces of demand and supply find the equilibrium price where demand equals supply. At that point the economy operates most efficiently. . . . It is at this price that resources will best be allocated. As Samuelson states: “The final competitive equilibrium is an ‘efficient’ one. Because prices equal marginal costs, output is being maximized, inputs are being minimized; . . . From so efficient a final point, you can no longer make everyone better off. You can help (A) only by hurting (B).”

Id. at 1296 (citations omitted). In National Ass’n of Greeting Card Publishers v. United States, 607 F.2d 392, 402 (D.C. Cir. 1979), cert. denied, 444 U.S. 1025 (1980), the court, discussing marginal cost pricing theory, stated that “[t]raditional economic theory concludes that a price set at marginal cost achieves the optimum equalization of the current cost to society of employing scarce resources and the value to consumers of using those resources.”
rays, identifying social welfare with the ability of the market to provide consumers with prices equal to marginal cost.\footnote{56} 

As the Seventh Circuit recognized, the terminology of allocative efficiency is becoming more prevalent in the circuit courts in the antitrust context: "The allocative-efficiency or consumer-welfare concept of competition dominates current thinking, judicial and academic, in the antitrust field."\footnote{57} Price and output considerations are also becoming the focus of Supreme Court antitrust opinions such as \textit{NCAA v. Board of Regents}.\footnote{58} From an empirical perspective, the cause of enhanced prices or decreased output—quantifiable bad effects—is the exercise of market power, which is measured by a variety of tests, some in themselves empirically based.\footnote{59} The explanation for why and under what circumstances market power leads to enhanced prices is provided by generally accepted microeconomic principles. Again the empirical approach provides some rational basis for policy making.

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\footnote{56} FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986). Comparing the dentists' actions with price fixing, the Court held:

A refusal to compete with respect to the package of services offered to customers [the forwarding of x-rays to insurance companies along with claim forms], no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them. Absent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services, . . . such an agreement limiting consumer choice by impeding the "ordinary give and take of the market place," . . . cannot be sustained under the Rule of Reason.

\textit{Id.} at 459 (citations omitted).
\footnote{57} Chesapeake & Ohio Ry. Co. v. United States, 704 F.2d 373, 376 (7th Cir. 1983) (Posner, J.).
\footnote{58} 468 U.S. 85, 106-08 (1984):

The anticompetitive consequences of this arrangement are apparent. . . .

Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference. . . . A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law. Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit.

\footnote{59} Market power is often inferred from market concentration, see F. Scherer, \textit{supra} note 48, at 56, or from the relative ability of firms to raise price above marginal cost, see J. Koch, \textit{supra} note 49, at 161-72.
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III. Nonefficiency Goals: Their Roots and Content

A. Introduction

This section discusses a number of social and political goals of antitrust. Part B discusses the process of hypothesis formation, to establish the criteria by which the nonefficiency goals are to be evaluated; the following parts examine the various goals. Part C explores the goal of preservation of political freedoms—from Jefferson’s vision of agrarian democracy through nineteenth-century fears of rebellion and anarchy, to twentieth-century concern with communism, National Socialism, and overzealous regulation. Part D describes quality of life issues, from the values of community and citizenship to the protection of nonentrepreneurial freedoms, emphasizing the advantages of locally owned businesses and the dangers to community values of excessive corporate discretionary power. Part D identifies characteristics of a “good society” and distinguishes them from other nonefficiency values that one might promote through the antitrust laws. Many of these characteristics fall under the categories of political freedoms, but others describe a cultural ambiance allegedly lost through overconcentration of economic wealth and power. Part E describes the goal of protecting entrepreneurial freedom—the opportunity for individuals to embark upon entrepreneurial endeavors, and the desirability of preserving a place in the market for small firms. These sections will draw on a sample of authorities large enough to give broad representation to all expressions of sentiment that purport to give substantive content to the goals relating to the protection of citizens as participants in a democracy, as residents of communities, and as would-be entrepreneurs.

B. Hypothesis Formation

The purpose of this Article is to explore whether nonefficiency goals are too unknowable and too undefinable to be appropriate values for merger law enforcement policy. The criterion for the determination is a quasi-empirical one: whether the goals can be stated in a way that will make them susceptible to empirical analysis. The benefit of such an approach is that it may translate an
analytical approach that Judge Bork referred to as "poetry" into a more rigorous and systematic framework. Empirical analysis would enable enforcers or policy makers to evaluate systematically the relationships between the structure of markets and conduct of firms on the one hand and undesirable social and political consequences on the other. Hypothesis formation and testing aids in evaluating the likely effect of any particular policy option or enforcement emphasis and highlights the consequences of neglecting to reflect a particular set of values in an enforcement strategy or in the interpretation of a statute.

A proper empirical approach requires an underlying theory that describes how failure to prevent identifiable mergers and acquisitions will lead to identifiable undesirable consequences. Such an approach also requires rigorous identification of the classes of undesirable mergers and acquisitions and the detrimental effects and a prediction of a relationship between the two. The neoclassical economic approach provides this theoretical explanation by examining the incentives competitive forces create and the likely reactions of economic actors who, guided by the desire to maximize profits, respond in predictable ways. Because competitive forces change in systematic ways as a market becomes more concentrated, the theory suggests, incentives are created under specified conditions that encourage or allow economic actors to raise prices above cost. Merger law enforcers, then, must identify when firms obtain sufficient power in the market to influence price. Because the focus of this approach is on the economic actors' price and output determinations and on their cost-cutting behavior, the natural tendency is to focus on the productive and allocative efficiency consequences of responses to market stimuli. Theories of cause and effect thus lead to the statement of hypotheses that form the foundations for enforcement policy.61

60. Professor Walter Adams, supporting a proposal to eliminate the requirement of proof of anticompetitive conduct when monopoly power occurs in the relevant market, argued that the rule would serve to diversify social and political power. Robert Bork replied that this argument was "more poetry than analysis." "No-Fault" Monopolization Proposal Debated by Presidential Commission on Antitrust Reform, [July-Dec.] Antitrust & Trade Reg. Rep. (BNA) No. 880, at A-22 (Sept. 14, 1978).

61. In response to criticism that the underlying assumptions of neoclassical explanation are unrealistic, some economists argue that the predictive power of the theory gives validity
The empirical approach requires a statement of the hypothesized relationship between specified events and/or consequences. Economists, for instance, hypothesize a positive relationship between a firm's market share and the firm's ability to charge prices that are higher than marginal cost. Two identifiable and measurable events are specified and the relationship between them is described. In this example, a theory, based on a set of assumptions about the motivations of economic actors, describes how actors will respond to the acquisition of the power to influence prices in the market. Empirical work, moreover, supports the conclusion that as the market becomes more concentrated, the difference between price and marginal cost increases. The main body of this Article to the explanation. See, e.g., M. Friedman, The Methodology of Positive Economics, in Essays in Positive Economics 3 (1953). This argument suggests a second approach to hypothesis formation. If a relationship between identifiable acquisitions and identifiable social and political outcomes exists, it might be possible to test whether this relationship actually occurs in our society without having a theoretical explanation for why the relationship exists or how an acquisition causes or contributes to a particular result. If the relationship is empirically verifiable, then there is a basis for designing a policy, once it is agreed that the outcome is to be avoided and that avoiding this outcome does not lead to other undesirable consequences; that is, that the costs are not too high.

Two dangers to this latter approach should make one cautious even if they do not deter one from using it. The first is that empirical examination of the relationship between two observable events does not mean that there is any causal connection between them. A third variable may influence both events. A study of the coincidence in Norway of the high birth rate of human beings in certain years and the frequency of stork sightings during those years is cited frequently. See, e.g., D. Barnes & J. Conley, Statistical Evidence in Litigation: Methodology, Procedure, and Practice 379 (1986). A policy of killing storks might be thought, on the basis of the empirical evidence, to be a means of preventing the "delivery" of so many babies. Demographers, however, pondering the empirical evidence, noted a third variable, severity of the winter, that apparently influenced both events. The severe winters led to people spending more time at home with fires in their fireplaces. This unusual propinquity, the demographers theorized, gave rise to increased birth rates, while the warmth of the chimneys—due to constant fires—enhanced the birthing prospects for storks, who routinely build their nests around chimneys. Id. Similarly, there might be no causal relationship at all between two phenomena even though an empirical relationship exists. One court, in the process of examining empirical evidence in a discrimination case, observed that Manhattan has had no forest fires since the Forest Service started putting up Smokey the Bear posters. Louis v. Pennsylvania Indus. Dev. Auth., 371 F. Supp. 877, 885 n.14 (E.D. Pa. 1974). Insisting on a theoretical foundation for a hypothesis helps prevent erroneous or misleading conclusions based on empirical testing.

explores the extent to which similar hypotheses can be formed about social and political values and their relationship to mergers and acquisitions.

One unavoidable step in hypothesis formation is a statement about the direction and nature of the causal relationship. Section 7 of the Clayton Act presents the opportunity to control firm, market and industry structure, and size as well as the behavior of firms. By manipulating these variables, alternative social and political, as well as efficiency, objectives can be achieved. By their nature, these control points are theoretically the explanatory variables, in the sense that they are thought to "explain" or "influence" the social and political characteristics of our society. Inappropriate size, structure, or behavior is said to cause undesirable social and political effects and the social and political character of the country is said to "depend" on the size, structure, and behavior of firms, markets, and industries; hence the dependent variables are those identifiable and specific consequences of changes in the explanatory variables. The following sections explore the extent to which rigorous statements or hypotheses can be formed regarding the explanatory variables subject to control under the Clayton Act and the dependent variables identified as nonefficiency goals.

C. Protection of Citizens' Political Rights

Thomas Jefferson's vision of society is a historical foundation for the fear of the political power of large economic units. To extrapolate from Jefferson's writings to the ultimate judgment against corporate power, however, takes a combination of two strains of his work. From his theory of government, the societal vision called for

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James Koch points out, this may be an example of a third variable simultaneously influencing the two variables being studied. J. Koch, supra note 49, at 191. In a study by Koch and Fenili, concentration was not a significant predictor of price-cost margins when other factors, such as the rate of technological change and product differentiation, were taken into account. Koch & Fenili, The Influence of Industry Market Structure Upon Industry Price-Cost Margins, 18 Rivista Internazionale di Scienze Economiche e Commerciali 1037 (1971). But many other studies support the underlying hypothesis that industrial concentration is positively correlated to high profit and price. For a survey of the empirical literature on this point and the associated methodological criticisms, see F. Scherer, supra note 48, at 267-95 and cited references.
the wide dispersion of political power;\(^6^3\) from his views on the nobility of "cultivators of the earth," one finds a generalized distaste for manufacturing and business.\(^6^4\) His obvious distaste for manufacturers, "pander[ers] of vice," is not merely class bias but part of a political theory predicting that corporate power will lead to dissatisfaction among the people and ultimately to rebellion and revolution.\(^6^5\) In Jefferson's view, the power of large organization oppresses the people; thus, in both the economic and governmental spheres, small units with dispersed power centers are preferable. At this historical stage, of course, how the existence of corporate power results in rebellion is unspecified; the mechanism is not worked out. The fear of permitting men of business to acquire "kingly" power by amassing economic power, however, lay at the foundation of the Sherman Act, passed in 1890. Senator Sherman's remarks indicate: "If the centered powers of this combination are intrusted to a single man, it is a kingly prerogative, inconsis-

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63. See Letter to Samuel Kercheval from Thomas Jefferson (July 12, 1816), printed in 15 THE WRITINGS OF THOMAS JEFFERSON 38 (A.E. Bergh ed. 1907):

[(I)In government, as well as in every other business of life, it is by division and subdivision of duties alone, that all matters, great and small, can be managed to perfection. And the whole is cemented by giving to every citizen, personally, a part in the administration of the public affairs.]

See also Letter from Thomas Jefferson to Joseph Cabell (Feb. 2, 1816), printed in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 660-61 (A. Koch & W. Peden ed. 1944):

What has destroyed liberty and the rights of man in every government which has existed under the sun? The generalizing and concentrating of all cares and powers into one body, no matter whether of the autocrats of Russia or France, or of the aristocrats of a Venetian senate.

64. See Letter from Thomas Jefferson to John Jay (Aug. 23, 1785), printed in 8 THE PAPERS OF THOMAS JEFFERSON 426 (J. Boyd ed. 1973):

Cultivators of the earth are the most valuable citizens. They are the most vigorous, the most independent, the most virtuous, and they are tied to their country, and wedded to its liberty and interests, by the most lasting bonds. . . . I consider the class of artificers [i.e., manufacturers] as the panderers of vice and the instruments by which the liberties of a country are generally overturned.

65. Id. This theory is evident from Jefferson's comments on the political turmoil in France:

Nor should we wonder at this pressure [for a fixed constitution in France], when we consider the monstrous abuses of power under which this people were ground to powder; when we pass in review the weight of their taxes, and . . . the shackles on commerce by monopolies; on industry by guilds and corporations.

THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON, supra note 63, at 88-89 (emphasis added).
tent with our form of government, and should be subject to the strong resistance of the State and national authorities.”

This general fear of concentrated aggregations of capital carried over to the legislative history of the Clayton Act, when, in 1914, it was raised in the merger context. In this legislative history, two mechanisms were implicit in fears that the economic power of corporations might destroy democratic institutions: (1) rebellion or revolution by the masses and (2) the self-defensive adoption of collectivist or socialist policies by a government threatened by corporate usurpation. Reference to the potential of social and political power to cause rebellion or “social disruption” was quite possibly a reaction to labor and “anarchist” and farm unrest during this historical period. These references suggest a fear, reminiscent of Jefferson’s view of the French Revolution, of popular (or populist) uprising in the streets against corporate power. Others, who hypothesized that popular sentiment against large corporations would lead to a democratically elected socialist government, perceived a more peaceful, but no more acceptable, socialistic alternative mechanism.

67. See House Committee Report Accompanying Proposed Clayton Act, H.R. Rep. No. 627, 63d Cong., 2d Sess. 19 (1914): “The concentration of wealth, money, and property in the United States under the control and in the hands of a few individuals or great corporations has grown to such an enormous extent that unless checked it will ultimately threaten the perpetuity of our institutions.” See also 51 Cong. Rec. 9086 (1914) (statement of Rep. Kelly):

Enterprises with great capital have deliberately sought not only industrial domination but political supremacy as well. . . . Great combinations of capital for many years have flaunted their power in the face of the citizenship, they have forced their corrupt way into politics and government, they have dictated the making of laws or scorned the laws they did not like, they have prevented the free and just administration of law. In doing this they have become a menace to free institutions and must be dealt with in patriotic spirit without fear or favor.

After World War II, when Congress amended the Clayton Act, the fear of emergent socialism was replaced by a fear of communism on the one hand, and totalitarianism patterned after National Socialism on the other. Elaborating on Representative Nelson’s view that the public would never allow great concentrations of economic power to rest in private hands, one scenario was based implicitly on a Marxist theoretical perspective. Marxist theory had based its projection of the demise of capitalism on the “prediction that concentration of wealth and power would be carried so far in capitalist countries as to deprive most people of protection from monopoly and to leave them without interest in the survival of private enterprise.” Alternatively, a danger to democracy in America was presented by the German, Italian, and Japanese experiences during the 1930s when industrial monopolies seized the government, inserted leaders such as Hitler, and forced the world into war. The legislative history clearly reflects Congress’ concerns that, when power is entrusted to the hands of a few, “either socialism or a totalitarian form of government has taken over.” These concerns are stated, however, without specifying, even as clearly as Karl Marx had done, the mechanism of transfer of control. Professor Schwartz identifies the reason for imposing antitrust laws on Germany and Japan after World War II as a desire to create alternative and diffuse centers of power that could not be marshalled behind authoritarian regimes. Professor Pitofsky is as

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As surely and rapidly as the properties of all the people pass into the hands of a few trust magnates, public sentiment, rapidly forming, when once fully aroused, will multiply the socialistic vote as a protest against monopoly privilege. And the day when the people must choose between public ownership of trusts for the benefit of all and the private ownership of the trusts for the privilege of the few, will witness the final triumph of socialism in this country.

71. Id. See also 95 Cong. Rec. 11,494 (1949) (statement of Rep. Yates).
specific as anyone about the mechanism for a totalitarian coup when he describes a scenario in which, during a period of domestic stress or disorder, corporations, in some unspecified manner, "facilitate the overthrow of democratic institutions and the installation of a totalitarian regime."\(^7\)

This survey reveals a variety of views of the political implications of corporate power, including (1) rebellion or revolution leading in unknown directions, (2) state ownership of the means of production (by means of socialism, communism, or some other kind of collectivism), or (3) what might, for the sake of contrast, be referred to as corporate control of the means of governance (in a totalitarian, National Socialist mold). Naturally, these extreme forecasts are modified in less dramatic implications of the excessive economic power of corporations. Short of collectivism, one may fear excessive regulation of corporate activity, often described as a "command economy," in which the government exercises considerable power in the market.\(^8\) Short of totalitarianism, one may fear domination of political life by corporate interests. The modern literature emphasizes these same two strains—excessive government regulation of corporate activity and excessive corporate influence in governmental activity—having less concern with the rebellious nature of the American citizenry.

1. Excessive corporate political influence

Corporate political power may be a reflection of power in a particular market or a result of accumulation of wealth generally, without reference to market concentration. Focusing on concern with market power, Professor Pitofsky argues that although it may be impossible to prove that high levels of concentration in markets are incompatible with democratic institutions, it seems unlikely, given what theories of cartel behavior say about cooperative behavior, that a trade association of small firms in an industry would have as much political clout as a single firm of comparable size.\(^9\) Professor Elzinga notes that small enterprises without trade associations, located in only a single congressional district are in an

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77. Pitofsky, supra note 28, at 1054.
78. See, e.g., M. Spencer, supra note 49, at 36, 675.
79. Pitofsky, supra note 28, at 1055.
even worse political position. Allowing markets to become concentrated, then, has political implications as well as efficiency implications. From these perspectives, the key variables for political power are large market share within a product market and the ability to extend political influence throughout the Nation.

Other commentators suggest that conglomerate corporations, because they draw power from a variety of markets, have a particularly great ability to make an effective presentation of their case for favorable government treatment and can mobilize support for their position from a wider range of sources. Elzinga suggests that an enterprise acquired by a conglomerate suddenly has more political access because frequently, conglomerates restructure the legal representation of formerly independent firms so that they acquire increased representation in Washington, D.C. He raises these points in the context of the ability of firms with political power to gain economic advantage over smaller rivals rather than political power for its own sake. The analysis, however, is suggestive of how political power is acquired and used. Professor Cann suggests that the very variety of agencies with which a conglomerate will deal permits some sort of economy of scale to arise, not because of the assortment of repeated dealings with a single agency but because of dealings with many agencies.

Others fear the accumulation of economic wealth generally. Professor Schwartz fears that the concentration of wealth will dominate the government through control of the press, educational institutions, politics, and the legal system. Professors Carstensen

80. Elzinga, supra note 22, at 1197.
82. Elzinga, supra note 22, at 1197-98. Elzinga cites the example of the conglomerate acquisition of O.M. Scott grass seed company by ITT as a restructuring that is likely to make the federal government far more approachable than it was before: "Scott may be more likely to use this new position to gain favors regarding taxes, import competition, government contracts, and other amenities." Id. at 1198.
84. Schwartz, supra note 76, at 867:
The centers of great wealth will own and influence newspapers, magazines and broadcasters, direct the development of universities, retain the ablest lawyers,
and Questal refer, without being specific, to disclosures of unlawful corporate contributions as "forceful reminders of the risks to an open political system that concentrations of economic wealth create." These examples describe the dangers to democratic processes from large accumulations of wealth rather than from market power in a particular market. A systematic approach to analyzing the problems of excessive corporate influence must identify one of two different sources of influences, high concentration in a market or wealthy corporations, perhaps conglomerates, to accurately describe the correlations and connections between corporate power and the purported demise of democracy.

Three different theories regarding the influence of corporate interests on governmental decision making emerge: excessive corporate political power arises from excessive concentration in a particular market, or from conglomerate organization, or from large aggregations of wealth. Each separately, and perhaps in combination with the others, can be subjected to hypothesis formulation.

2. Excessive governmental regulation of corporations

The fear of excessive regulation is a logical descendant of the fear of socialism. Arguments along regulatory lines suggest that if a single firm dominated all markets, this firm would undoubtedly have to report its activities in detail to the government. The firm also would be the constant subject for governmental oversight and investigation, and eventually would come under direct governmental control. Legislative history also suggests a similar process by which big business begets big unions and a correspondingly big government arises to keep them all in line.

Professor Brodley identifies intolerance of the discretionary authority corporations exercise on the local level as triggering pres-
sure for excessive regulation. The social consequences of the choices of a single firm with market power or great wealth may give rise to pressure for pervasive regulation ranging from restrictive state takeover legislation to far greater intrusions. For example, legislation might require a periodic review of corporate charters and require that corporate governing boards become directly representative of, or even elected by, the various constituencies affected by corporate behavior: employees, consumers, suppliers, local communities, regions and even the Nation as a whole. This vision is not too far removed from some current regulatory areas. Corporate decisions having "social impact" might become subject to governmental review.

The connection of excessive regulation to merger law is made explicit through Professors Blake's and Jones's interpretation of the underlying purposes of the antitrust laws and the prohibition of mergers as a regulatory measure: "The overriding purpose of antitrust policy . . . is to maintain an economy capable of functioning effectively without creating an abundance of supervisory political machinery." Prohibiting a merger can avoid the necessity for a regulatory apparatus for each of the many problems associated with large firms, and minimize the intrusion of government into economic affairs. The concern Blake and Jones articulated is not limited to the evolution of state ownership but also to "informal governmental supervision—through congressional investigations, government-industry consultations, and executive pressure." Professor Schwartz notes that regulation will not curb corporate political power satisfactorily because regulatory decision making will be

89. Blake & Jones, In Defense of Antitrust, 65 Colum. L. Rev. 377, 383 & n.24 (1965) (referring to President Kennedy's intervention in the steel price increase in 1962). Although he acknowledges the possibility that concentration in particular markets might eventually lead to such pervasive regulation, Pitofsky views the American economy as being far from this level of concentration today. He cites a lack of increase in concentration among the top 200 firms and the probable decentralization of most markets due to increased foreign competition and decreased transportation costs (which increase ease of entry). Pitofsky, supra note 28, at 1058.
90. Blake & Jones, supra note 89, at 383.
91. Id.
dominated by corporate interests. This conclusion suggests that an antitrust solution is a more preferable mechanism of control of corporate power than regulation, while assuming implicitly that pro-corporate interests will not dominate the antitrust enforcement process.

Assuming, for the sake of developing the issue of the appropriate form of regulation, that there is a relationship between firm size, either relative or absolute, and the undesirable characteristics (the subject of the remainder of this Article), the question is whether antitrust law is the preferred form of regulation. This question has at least two parts: (1) whether merger law is less intrusive than other forms of regulation and (2) whether merger law, applied appropriately, can reduce the pressure for regulation of big firms.

The intrusiveness of merger law will depend, of course, on the complexity of the criteria by which the legality of a proposed merger is to be judged. It is hard to imagine a more straightforward approach than that embodied in those bills that proposed to outlaw mergers of companies resulting in a merged firm greater than a specified size. Yet even the most well-known of these proposals allowed as an affirmative defense that “(1) the transaction will have the preponderant effect of substantially enhancing competition; [and] (2) the transaction will result in substantial efficiencies.” This approach amounts to a failure to simplify the process compared to the strict economic efficiency approach; it transfers the burden of proof from the government, who would, under the present section 7, have to show that the merger may substantially lessen competition, to the acquiring firm, which must justify the transaction. Such legislation, of course, presumes a myriad of undesirable consequences associated with size without considering them or investigating them specifically, and shifts the burden to the acquiring firm to demonstrate that those consequences are outweighed. Although the Justice Department’s approach may result

92. Schwartz, supra note 76, at 868.
93. See also Brodley, supra note 88, at 876 (suggesting that merger law may be a less onerous alternative to other forms of regulation).
94. Small and Independent Business Protection Act of 1979, S. 600, 96th Cong., 1st Sess., 125 CONG. REC. 12,792, § 3(a)(1)-(2) (1979). Senator Kennedy’s Act prohibited, inter alia, acquisitions that would lead one corporation to acquire another if each firm had assets or sales exceeding two billion dollars. Id. § 2(a).
in undesirable political and social effects of mergers, the "simple" prohibition discourages experimentation with different forms of ownership and control and interferes with what the Reagan Justice Department described as the "important role [of mergers] in a free enterprise economy"—to "penalize ineffective management and facilitate the efficient flow of investment capital and the redeployment of existing productive assets."\(^5\)

A second, relatively straightforward, approach was embodied in a proposed new section to the Clayton Act. The section would require any corporation that, as a result of an acquisition, had total assets and annual net sales (the sum of the two figures, divided by two) exceeding two billion dollars, to file an extensive "plan of divestiture" with the FTC and Justice Department.\(^6\) The reporting and approval requirements of the proposal hardly constitute minimal intrusion into the structuring of the economy. Yet the proposals must be compared to the potential intrusiveness of hypothetical responses to public pressure to reduce the discretionary political, economic, and social power of large corporations.

This analysis suggests two conclusions. The first is that the argument for prevention of overregulation by government rests on the same logical foundations as the other nonefficiency goals; it will be sensible to respond to perceived ills through merger law only if there is a correlation between the variables subject to control under antitrust law, such as market concentration or corporate size, and those undesirable social, economic, and political events.\(^7\) The second is that even with such a correspondence, merger law may not be a perfect substitute for other forms of regulation. As with any proper analysis of regulatory alternatives, the costs of each alternative must be considered, along with its limitations.

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97. One may plausibly argue that even if there is no connection in reality, there may be a public perception of a connection that will lead to pressure for government regulation. This argument suggests that even if there is no correlation, merger law will serve the will of the people by prohibiting those corporate characteristics that make the people uneasy. My rationalist bias makes it difficult to accept such an argument even though I present an argument for a more democratic interpretation of the concept of efficiency. *See infra* Part IV.
3. Incorporating concern for political freedoms into merger law enforcement

The corporate threat to political freedom may be usefully divided into two perspectives: a cataclysmic view, which predicts overthrow of the government by social unrest or corporate coup with substitution of a socialist, communist, national socialist, or other totalitarian regime, and a view that predicts a more subtle, incremental shift in the locus of power between the governmental and corporate sectors. Under either view, the explanatory variables, or some subset of them, cause, or are identified with, corporate political influence or government regulation that is by some measure excessive. Identification of the dynamics of the expected result affects the statement of the hypothesis. At some point the absolute wealth of corporations may become so immense that no legislator can afford to vote in any manner contrary to the dictated wishes of the corporations (a cataclysmic view), or alternatively, that as the wealth of corporations increases we expect legislatures to favor corporate interests (an incremental view). Applying the hypothesis formation process to these views indicates that some of them are hopelessly vague, that some may be unripe for implementation in antitrust enforcement although susceptible to clear articulation, and that others are potential avenues for modification of current enforcement policy.

a. Cataclysmic models of political harms

The cataclysmic political events, the dependent variables in our analysis, include the ascendancy of autocrats or aristocrats, social revolution and unrest, socialism, communism, or national socialism. The causes, or explanatory variables, are variously identified as "[t]he generalizing and concentrating all cares and powers into one body,"98 "the shackles on commerce by monopolies; on industry by guilds and corporations,"99 the amassing of economic power and the entrusting of the concerted power of a huge combination to a single man,100 "the concentration of wealth, money and prop-

98. The Life and Selected Writings of Thomas Jefferson, supra note 63, at 660-61.
99. Id. at 88-89.
100. 21 Cong. Rec. 2457 (1890) (statement of Sen. Sherman).
property in the U.S. under the control and in the hands of a few individuals or great corporations,\textsuperscript{101} "enterprises with great capital" or "great combinations of capital,"\textsuperscript{102} the passing of "the properties of all the people . . . into the hands of a few trust magnates,"\textsuperscript{103} great concentrations of economic power in private hands,\textsuperscript{104} and "concentration of wealth and power."\textsuperscript{105} All but one of these proffered explanatory variables involves the accumulation of wealth and property and the power over goods and people that accompanies wealth. The accumulation of wealth presumably leads to political power both because there is enough wealth in an absolute sense that the possessor can afford to spend some on political influence, and because the possessor has relatively more wealth than others who desire to influence the political process. Commentators speak of "concentrated wealth" in both its absolute and relative senses. This dependent variable, concentrated wealth, is a characteristic of an economic system quite distinct from market share or concentration within a market, which is clearly the focus of current merger law enforcement.\textsuperscript{106}

Market share, by contrast, is a purely relative characteristic, comparing one firm's proportion of total sales or output, for instance, to those of the others in the market. Various concentration indices measure the dispersion of sales across firms within a market and do not imply command over economic or political resources outside the market. These market-specific variables, suggested by Jefferson's concern for the detrimental effects of monopolies, guilds, and corporations, are measures of structural characteristics of a market that are predicted to lead to the diminution of the freedom of citizens that will "[grind] them to powder."\textsuperscript{107}

\begin{footnotesize}
\textsuperscript{101} H.R. Rep. No. 627, supra note 67.
\textsuperscript{102} 51 Cong. Rec. 9086 (1914) (statement of Rep. Kelly).
\textsuperscript{106} See supra Part I.A.
\textsuperscript{107} See The Life and Selected Writings of Thomas Jefferson, supra note 63, at 88. To the extent that the diminished freedoms are political freedoms, the discussion of hypothesis formation in this section is relevant. The empirical treatment of other "freedoms" is treated in the following sections.
\end{footnotesize}
Relying on these catastrophic visions for hypothesis formation suggests discrete alternatives for dependent variables, such as the advent of communism, anarchist revolution, or national socialism. One might predict, for instance, that the concentrated wealth of corporations will lead to communism, national socialism, or anarchy even though none of these events has occurred. The task is then to identify key characteristics of these alternative forms of government or to define what is meant by social unrest so that episodes or events can be identified for purposes of comparison. Because the predicted results of increasing corporate wealth or market concentration are inconsistent with one another, have little theoretical foundation, and have not materialized in this country, however, a serious problem arises even prior to consideration of the ability to define the phenomena predicted. If one identifies socialism or communism by a key characteristic of state ownership of the means of production and national socialism as corporate domination of governmental processes (in the German or Italian models of the thirties), then conflicting hypotheses might predict that the increasingly concentrated wealth of corporations will lead to increasing government control of business or the opposite, increasing corporate control of government. Stating the possible hypotheses in this way indicates the fundamental underlying problem with these cataclysmic predictions; with very little, if any, theory behind the predictions, one has no reason to favor one over the other and the hypotheses suggest merely that as corporate wealth increases, something will happen. Inevitably over the years the relationship between government and business will change because of changes in a variety of other variables such as tax policy, environmental policy, foreign policy, and macroeconomic policy that may be due to exogenous forces other than the changes in corporate wealth. The lack of an underlying theory prevents us from analyzing the validity of the assumptions that describe motivations behind the changes in the corporate government relationship and from segregating the influence of exogenous variables or even determining whether they are, in fact, exogenous. The evidence supporting the hypotheses is thus likely to be anecdotal and subject to infinitely varying interpretations.

The lack of theory, the conflicting nature of underlying predictions, and the lack of evidence that any of the hypothesized
changes in governmental form have materialized make it difficult to incorporate these cataclysmic theories into merger law policy. A crucial difficulty lies in the inability to identify systematically specific mergers that are likely to have detrimental effects. Proposals to prevent all mergers that would result in a firm greater than a specified size seem to offer a rather broad gauge approach when one has no way of estimating how big is too big for purposes of political stability or identifying whether the key control variable is the size of an individual firm, the size relative to other potential political actors, or the size of the industry as a whole. Even if one ignores concentrated wealth and focuses on market concentration, it is hard to state systematically how power to affect market price is related to changes in forms of governments; even if one assumes there is a relationship, it is unclear whether the same market share that gives rise to pricing power also gives rise to political upheaval.

Although hypotheses may be advanced about the relationships between economic variables such as concentration of wealth and market share or concentration and broad political variables, an a priori notion of the effect of relevant economic variables on cataclysmic political changes is necessary. This stuff fairly qualifies as mush.¹⁰⁸

b. Incremental models of political harms

Emphasizing excessive government regulation of corporate activity and excessive corporate influence in governmental activity, modern commentators have focused on two strains of analysis that modify the dramatic predictions of cataclysmic collapse of our political system. An incremental approach to this concern considers the relationship among three explanatory variables—market concentration, concentration of wealth, and the conglomerate form of organization—and two dependent variables—the levels of corporate political influence and government regulation of corporate activity. Excessive governmental regulation of corporate activity is relevant to merger law to the extent that mergers produce particular effects in our society. Accordingly, the relationship between mergers and undesirable social effects is explored in separate dis-

¹⁰⁸ See supra text accompanying note 1.
cussions devoted to those identifiable effects. This section discusses corporate political influence.

The theories of excessive corporate influence rely on several different approaches to sources of political power. The most straightforward is that associated with Professor Schwartz, who suggests that the great wealth of corporations, presumably concentrated wealth in both its relative and absolute senses, will permit them to finance politicians and engage in massive lobbying efforts favoring corporate interests. This problem is compounded by the existence of conglomerate corporations whose growth is unlikely to be checked by an enforcement strategy focusing on market concentration. A second, distinguishable, approach is derived from commentators such as Professors Pitofsky and Elzinga, who suggest that single firms gain more political clout per dollar than do trade associations with an equivalent budget for acquiring political influence. This argument rests on the greater efficiency of a monopolist, a single management attempting to influence government policy, relative to a cartel with its potentially divergent interests and potential for destructive self-serving behavior. This is a market concentration analysis rather than a wealth concentration argument because it focuses on the detrimental effect of increasing the market share of a single firm so that it has single managerial control over the manner in which the political influence funds available in an industry are spent.

The first approach suggests that as the resources available to a firm or to the corporate sector increase, both absolutely and relatively in comparison to political opponents, the political climate increasingly will favor that firm's interests or corporate interests generally. A parallel hypothesis is that the political climate will become more favorable to corporate interests as the wealth of the corporate sector increases. Pursuing this market theory of democracy requires, as all proper tests of hypotheses do, a precise statement of the explanatory and dependent variables. The explanatory variable, amount of wealth, appears to be easier to quantify than the dependent variable, amount of political influence, if one is will-

109. See Schwartz, supra note 76.
110. See Pitofsky, supra note 28.
111. See Elzinga, supra note 22.
ing to accept the dollar value of the firm’s available resources as an absolute indicator of power to affect a political decision. However, not all of a corporation’s assets are available for lobbying, so the proper measure is discretionary wealth—assets available for expenditure in this fashion—not a readily available figure.

As the logic underlying the hypothesis suggests, difficulties multiply if one employs a bargaining model of political influence because some measure of the relative ability of opponents to buy favorable political outcomes would be necessary. This latter measure presents great difficulties. Assuming a number of available measures of the discretionary corporate wealth of a firm of any given type, it is unclear how much is available to their opponents or, for that matter, who their opponents are. One can probably measure the corporate wealth of a tobacco firm, for instance, in an attempt to estimate its influence over legislation banning cigarette advertising, but it is difficult, if not impossible, to measure the wealth of those who seek or would benefit from the ban. Who are the opponents of tobacco advertising whose relative wealth is to be compared? And should the corporate wealth of advertising agencies be included on the side of the tobacco company, simply because they share an interest in promoting the health of a client industry?

In addition to the difficulties in properly defining and measuring the values of the explanatory variables in this wealth concentration approach, it is difficult to measure the impact of corporate expenditures. Measuring the effect of expenditures on politicians and lobbying presents two alternative approaches, which might be characterized as output and input measures of political influence. Using an output measure, for instance, assume that as the wealth of the Fortune 500 firms increases (relative to that of noncorporate interests, however measured), the win/loss ratio for corporate interests in legislation improves. This hypothesis would require an examination of individual pieces of legislation to see whose interests are favored; and it is often difficult to tell whether corporate or noncorporate interests benefit from a particular piece of legislation. Broader measures of political success, such as the correspondence between increases in corporate size and a simultaneous shift to the right in politics generally, are fraught with other difficulties involving the influence of other, exogenous variables.
To avoid the difficulties involved in measuring the ability to influence political events, input measures may be employed. The use of input measures assumes that outcomes, in terms of political influence, will be proportionate to the effort (or money) expended in attempting to influence the outcome. One might, for instance, measure how the relative proportion of total contributions made to politicians by corporations changes over the years as the relative and absolute wealth of corporations changes. Alternatively, one might compare changes in the relative numbers of lobbyists (or dollars spent on lobbying) by corporate and noncorporate groups as the concentration of wealth changes. Because these input measures involve somewhat fewer subjective judgments and available data, a number of studies have attempted to test hypotheses involving the relationship between concentration of wealth in the hands of corporations and the relative expenditures on political interests. One general problem with input measures is that they do not clearly reflect success in lobbying. It would be consistent with a finding of increased relative corporate expenditures to conclude that, over time, corporations needed to increase expenditures just to maintain the political power they had at one time.

Political power of conglomerate corporations is thought to arise from their economic constituencies in many political districts and the fact that they do business with so many different parts of the government bureaucracy. Professor Blake argues that an investment in goodwill is more valuable to the conglomerate firm because it is spread over more types of deals made by the various divisions of the company, suggesting that large investments in lobbying or political goodwill can be amortized over a larger number of possible payoffs. This goodwill may affect either purchasing decisions by the government or the political process. If the ability of the conglomerate firm to affect political outcomes is due to its large size, then the hypotheses relating corporate size to political

113. This same problem arises in studies of whether large or small firms are more successful innovators. Funds expended on research and development do not necessarily translate into success at an equal rate for different types of firms. For a review of the literature on this subject, see F. Scherer, supra note 48, at 413-15, 418-22.
114. Blake, supra note 81, at 591.
power discussed above apply; the success in obtaining favorable political treatment will be due to the same factors for any firm, conglomerate or not, with equivalent resources. The difficulties in proof will also be the same. If the conglomerate form is something special, then it may be either that a conglomerate corporation has subsidiaries scattered throughout the country, thereby gaining leverage with politicians throughout the country, or that it deals with such a variety of governmental agencies that it gains political leverage. Either explanation may plausibly account for increased political power for conglomerate corporations and offer interesting explanatory variables for empirical research. The possibilities for hypothesis formation and the associated difficulties with hypothesis testing, such as the difficulty of measuring success in political persuasion or in drawing inferences from input measures, are quite similar to the problems of measuring the effects of size generally.

Many of the same arguments apply to hypotheses involving market concentration as an explanatory variable, although with this variable new problems arise. The argument is that increased corporate political power arises from an economy composed of concentrated industries or that a corporation with a large market share will be in a better position to seek government favors. One underlying explanation is that increased prices due to the market power of a firm in a concentrated industry mean greater profits, some of which might be spent discretionarily on political outcomes. An alternative argument, referred to above, is that a single firm can more efficiently arrive at and support a given political position compared even to a collection of small firms with the same amount of money to spend. An economy composed of concentrated industries, then, will have more political representation from the corporate perspective per dollar spent even if the concentrated corporate sector of the economy does not make higher profits. The hypotheses presented to test these theories ideally would compare two economies, a concentrated and an atomistic one, with all other conditions equal. Alternatively, one could compare the United States

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115. The empirical literature on the relationship between concentration rates and prices and profits provides evidence in support of the suggestion of increased profitability in concentrated industries. See, e.g., F. Scherer, supra note 48, at 276-85.
116. See supra text accompanying notes 110-11.
economy at times when the relative level of corporate wealth was constant but the relative concentration of American industry was different. A more sophisticated multivariate time series analysis might separate out the relative influences of various explanatory variables on the efficiency of political expenditures.

Yet another alternative approach would be to study the comparative political effectiveness of two similar industries with different degrees of concentration, to test the single firm/trade association proposition directly. With this approach comes the difficulty of finding industries that are similar, or, perhaps more basically, of determining on what dimensions the industries must be similar to provide a controlled test. At a minimum the industries must have the same kinds of political concerns. This approach might also mean that the industries must produce the same kinds of products so that they present the same safety risks potentially subject to regulation, or have the same kinds of production processes so that they present the same sort of environmental, health, and occupational safety concerns to the regulators. Inevitably the measures will be complicated by the fact that the products or production processes or market constraints (such as demand in the natural monopoly industries) of some industries may generate greater public interest and scrutiny and, hence, governmental interference. This factor is difficult to quantify; nevertheless, a number of empirical studies of these phenomena have been attempted.117

Although the measuring instruments are at best imprecise, the hypotheses are relatively clear, at least in part because the basic assumption of the theory of how the results are achieved is implicitly understood—increased wealth buys political results by contributing enough to elect favorable politicians or to put persuasive force behind a particular administrative or legislative position. The question of what enforcement policy one would adopt once the relationship between corporate wealth and favorable political outcomes were understood remains. Presumably enforcers or policy makers would have to decide in general how many resources corpo-

rations should be allowed to spend or how to limit corporate contributions to politicians. From a merger law perspective, this decision is difficult to make without prohibiting mergers of firms over a certain size. It does seem reasonable to ask for some justification for determining what the maximum size should be in relation to the largest permissible size.

At the least, the hypotheses can be stated clearly and the issue has been joined clearly. It is not enough for those advocating the pure efficiency approach merely to assert that this is "‘mush’" and accordingly dismiss it. Serious problems clearly arise in deciding what the appropriate level of political power is and whether merger law is the appropriate vehicle for curbing political power. This is an implementation issue, however, rather than an assertion that either the goals or mechanisms are too vague to be appropriate for antitrust enforcement.

D. Protection of Citizens’ Quality of Life

1. Protection of communities

The Jeffersonian notion of the perfect society has also motivated a concern for the preservation of small-business towns whose economies are characterized by diverse, small, locally owned enter-

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118. See supra text accompanying note 1.
119. An even sneakier issue underlies the question of incorporating political concerns into the enforcement process: how should we make policy under uncertainty, such as that resulting from contradictory or anecdotal empirical evidence? This question, of course, permeates the problems of decision making generally, not just decision making in a democracy. The resolution in a democracy will inevitably depend on the importance of the decision and the political predilections of the policy maker. The test proposed in this Article for whether a goal is an appropriate candidate for consideration in antitrust enforcement is whether it can be stated in a clear fashion; more precisely, whether one can propose a hypothesis relating two variables, one a controllable explanatory variable, the other a policy objective. With respect to these political goals, although one is unable at this stage to draw guidelines to determine to what degree discretionary wealth or market concentration is threatening to political freedoms, the failure to include these concerns in antitrust enforcement should be based on the difficulty of implementation or disagreement with the proposition that corporate political power is bad rather than on the notion that the goals are too poetic or "mushy" to be worthy of serious consideration. It is not enough to say that generalized reactions against the political power of large corporations are merely "misguided populist residue." Pertschuck & Davidson, supra note 117, at 6.
This concern is based, as were the political concerns, on the view that decentralized power and decision making leads to an improved quality of life for citizens and economic health for their communities. Rather than being an attack on bigness per se, these criticisms aim at mergers that result in domination of local economic or social interests by outside forces, usually an external corporation that acquires the local company. The fact that outside interests control corporate decision making implicitly means that local economic effects are given less weight. The result is that business decisions may have severe local economic effects on local business people who lose customers and clients, on workers who lose employment, on municipalities and states that suffer tax losses, and on the citizenry that depends on the services they provide.

A second concern is the loss of freedom due to the shift in control from local interests to outsiders. As he was fond of doing in merger cases, Justice Douglas referred to Justice Brandeis' "Curse of Bigness" in *Standard Oil Co. v. United States* when reminding the Court that, in addition to the price effects of acquisitions of local firms by outside interests, a serious loss in citizenship occurs: "Local leadership is diluted. He who was a leader in the village becomes dependent on outsiders for his action and policy." Congressman Bryson also made the connection to merger law, while indicating the real source of his concern, regional differences between north and south, when he stated: "*It is through mergers . . . that so many of the local southern communities have come under the domination of big business—outside northern big business." In addition to the effect of mergers on the redistribu-

120. See SMALL BUSINESS AND CIVIC WELFARE, S. Doc. No. 135, 79th Cong., 2d Sess., 92 CONG. REC. 1261 (1946), in which this terminology is used and the characteristics and stereotypes of small-business towns are discussed.


122. 337 U.S. 293, 318 (1949) (Douglas, J., separate opinion).

123. Id. at 319.

124. 95 CONG. REC. 11,495 (1949) (statement of Rep. Bryson) (emphasis added). Congressman Bryson also stated:

Under local ownership, most of the income derived from the operation of the mills remains in the communities in which the mills are located. It is plowed back into these communities in the form of new investments in other factories, shops, and enterprises of one type or another. In other words, under local management the legitimate profits of industry tend to remain at home and promote
tion of wealth through the enhancement of prices, then, there is a redistribution of control from local individuals to absentee managers.

The shift in the locus of control is aggravated, as Professor Carstensen notes, by the differential in the level of concern of local and outside management for the interests of the community. "Discretionary power" held by large, absentee corporations is defined as "the 'range of managerial choice not dictated by or fully predictable from pure profit maximizing behavior.'"\(^{125}\) It is the power to make decisions that adversely affect the lives of other people without having to take into account the associated costs that permits arbitrary decisions detrimental to the common good.\(^{126}\) For Justice Douglas, the experience of a small town in his home state of Washington that was abandoned after an out-of-state corporation acquired the major employer epitomized the difficulty.\(^{127}\) "Central-

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the well-being of the home town. In contrast, under the new outside ownership, the profits are siphoned off to distant areas, which in the case of the textile industry, usually happens to be New York City—a metropolis which of all communities in the country is least in need of additional supplies of capital.

*Id.*

The anti-big city bias is apparent in the words that follow this part of Congressman Bryson's speech:

Moreover, large portions of these profits which are drained off to these metropolitan centers are not put to work in the form of new capital investment but are used for such nonproductive purposes as speculation in the stock market, buying useless luxuries, gambling at the race track, paying night-club bills, and engaging in the other frivolities of the cosmopolitan idle rich.

*Id.*

He believed that greater reinvestment in the business sector under local ownership, and greater investment in the community would result:

Under local ownership, there are strong social and civic ties that bind the community together. Under outside ownership, these ties are weakened and broken. Merchants and manufacturers do not get together in local organizations for the obvious reason that the owners of the manufacturing firms live elsewhere. Hence the drive for civic improvements of one kind or another generally tends to disappear in towns which have become the victims of outside ownership.

*Id.*

\(^{125}\) Carstensen & Questal, supra note 81, at 864 n.121 (quoting Brodley, Potential Competition Mergers: A Structural Synthesis, 87 YALE L.J. 1, 35 (1977)).


ized decision makers, far removed from the areas affected by their actions, may choose a course that substantially and needlessly disrupts the lives of their employees and the stability of entire communities.” 128 Focusing only on profit and loss to their corporations, “men on the 54th floor” of their New York skyscrapers “decide the fate of communities with which they have little or no relationship.” 129

None of the concerns articulated above are efficiency concerns. They are concerns for the economic or cultural survival of small communities, for redistribution of control from local to outside forces, or for other measures of quality of life from educational expenditures to charitable contributions—nonprice effects of mergers. Several sources, such as lack of economic diversity within a community—domination by a single employer—and external control, give rise to a multiplicity of ills. A useful analysis would attempt not only to identify cause and effect relationships but to discern which relationships are the result of mergers and which could be incorporated into antitrust enforcement effectively.

These concerns fall into two analytical categories that are considered separately. The first are quantifiable measures of economic and social well-being and include such factors as the level of capital investment in the community in which the income is generated, the level of charitable corporate contributions to the community, or the effects on tax revenues and employee dislocation due to corporate relocations. The second category includes concern for the loss of power or freedom to control one’s destiny that accompanies the increase in discretionary power by absentee managers. This category is probably not quantifiable even though anecdotal evidence may convince policy makers that it is the result of mergers. Both can be incorporated into merger law policy usefully.

2. Protection of local interests through merger law enforcement

Discussions of objective measures of community well-being assert that mergers cause specified undesirable consequences. Appar-
ently those mergers that result in the shift of corporate control away from the locality cause the undesirable results. Consider two such objective measures, the reinvestment of locally generated profits in the community and corporate charitable and civic contributions, as illustrative of the analysis necessary to support an enforcement strategy that takes these concerns into account. One may start with evidence that the locus of control often shifts away from the community as a result of mergers. Professor Blumberg reports that from 1949 to 1968, the 200 largest American corporations acquired 3,908 companies with assets of $50.2 billion. Of these acquisitions, New York corporations gained a net transfer of control of 986 companies involving $13.228 billion of assets previously headquartered in other states, thereby increasing the share of assets of the largest 200 firms that were controlled from New York from 36.5% to 45.8%. The next step is to demonstrate that this increase in control results in a decline in the level of local reinvestment of profits derived from community activities and a decline in local corporate charitable contributions. Both examples present concerns that can be articulated rigorously and tested empirically and that, if considered important from a policy perspective, must be balanced against efficiency concerns.

A variety of empirical approaches include a study of the relationship between locus of control and civic involvement. These approaches have examined corporate contributions to local charities. Recognizing the relationship between increasing external control of local enterprises and the general increase in size of firms, Blumberg cites data showing that the larger the firm, the smaller the percentage of net pre-tax income or sales contributed to charity. Blumberg suggests that keeping corporations small would increase the total dollar amount of charitable contributions. In addition, Professors McElroy and Siegfried, surveying firms in an attempt to identify the beneficiaries of charitable contributions,

131. Id. at 60 (citing Council for Financial Aid to Education 1972 Corporate Support of Higher Education (1972)).
132. McElroy and Siegfried suggest that the decline in contributions as size increases is not as great as estimated by many investigators. See McElroy & Siegfried, The Effect of Firm Size and Mergers on Corporate Philanthropy, in The Impact of the Modern Corporation 99-138 (B. Bock ed. 1984).
found that seventy percent of contributions by large firms are made to the headquarter's city and that executives in the headquarter's city controlled ninety percent of funds expended on contributions. This data would not be persuasive support for the hypothesis if the headquarter's city contained proportionately more of the firm's employees; but the study also found that charitable contributions per employee averaged $214 for the headquarters' cities compared to $43 per employee in the cities in which plants were located. Whatever gains there may be to productive efficiency, then, there are side effects on the distribution of wealth and on small communities that policy makers might reasonably desire to take into account. A similar tradeoff appears when one examines corporation charitable contributions. The cost of keeping corporations at a particular size to generate a preferred pattern of contributions may be the foregoing of productive efficiencies associated with economies of scale. Again, a tradeoff between efficiency and quality of life may occur.

The inference that acquisitions by large firms leads to changing investment patterns also suggests that a tradeoff may exist between efficiency concerns and community welfare. Although a corporate decision to favor a local investment over a more profitable foreign investment may be contrary to shareholders' interests and the societal interest in generating the largest economic pie of goods

133. Id. at 124.
134. Id. at 125. These analyses apply to all means by which a corporation gets big; no distinction between internal expansion or merger has been made. Recognizing that the data support but do not directly test the hypothesis as it relates to mergers, McElroy and Siegfried investigate both the magnitude of changes in contributions and the characteristics of the beneficiaries that might result from acquisitions. Their approach allows them to identify particular cases in which an acquisition is likely to lead to a decrease in total contributions and to a reallocation of contributions away from the old headquarter's city of the acquired firm. They conclude that the change in level of total contributions will vary with the relative rates of contributions out of profits in the acquiring and acquired firms. Other things equal, because medium-sized firms have the highest rate of contributions, acquisitions of smaller firms by medium firms will increase contributions; and acquisitions of medium firms by large firms would decrease contributions. Id. at 132-33. McElroy and Siegfried find that the distribution of contributions across locales apparently depends on the characteristics of the headquarter's cities, among other factors; contributions to the headquarter's city decrease, for instance, as the size of the headquarter's city increases and the contributions of other firms in the headquarter's city increase. Id. at 126-29. This sort of analysis allows a case-by-case analysis of the impact of a proposed merger on one quantifiable measurement of the welfare of the community occupied by an acquired company.
and services, it does serve local distributional preferences.\(^{135}\) Balancing this allocative efficiency loss is a gain for the community in terms of employment, wealth generation, and general corporate concern for the prosperity of the community. A corporate decision to forego profits to keep a community prosperous may represent a quality of life choice rather than a profit-making choice. Analysis of the tradeoff is hardly a simple matter because economic welfare of one community occasionally is sacrificed for the economic development of another. Acquisitions may lead to a redistribution of economic opportunity.

Whether these relationships between size and contributions to community or charity are valid, objectives that might be achieved by merger law policy are different from the efficiency goals but are not purely poetry or "pure intellectual mush."\(^{136}\) Straightforward hypotheses can be presented for investigating the relationship between acquisitions and objective measures of community involvement or between corporate size and objective measures. To the extent that these objectives are important, empirical investigation comparable to that of the industrial organization economists is needed.

Including concerns for community life in the enforcement process clearly involves difficulties of measurement, political balancing of interests, and projections and weighting of future events. These difficulties, however, are not inherently different from the requirements imposed on enforcers by the current enforcement strategy and their interpretation of the Clayton Act, which requires projections of the likelihood of allocative efficiency losses and productive

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135. Consider the hypothesis that a shift from local to external control will lead to a decrease in local capital investment. If the investment opportunities of local and distant corporations are identical, transfer of control to an external firm might make no difference. The profit-maximizing corporation would always seek the best opportunity wherever located. On the other hand, what appears to be the best opportunity may depend on the flexibility with which a corporation can oversee investments in distant geographic areas, giving the national corporation an advantage in pursuing external alternatives. The national corporation may also have better information about the availability of outside investments. If this assumption is correct, one implication of keeping control in the local community is that less profitable investment choices are made by those with earnings to reinvest. This result means not only that available investment capital is not going to its most profitable, that is, its highest valued use, which implies a loss of allocative efficiency, but corporate profits are lower for the local firm than for the national firm.

136. See supra note 1 and accompanying text.
efficiency gains as a result of the merger. The “mushiest” of the balancing factors is the interference with freedom of contract and the benefits of allowing the market to reallocate property from local ownership to conglomerate ownership; yet these are treated as advantages to merger although the quality of life characteristics are considered too “poetic” to be considered at all. One might give the same treatment to employment effects, and, at the least, these quantitative measures of effect of a merger on a community are substantive enough to be given weight if they are deemed significant by the political process.

3. Protection of nonentrepreneurial freedoms

The antitrust laws have been variously described as a “charter of liberty,” a “charter of freedom,” a “charter of economic liberty,” and a “bulwark against arbitrary action and oppression at the hands of the economically powerful.” Although these phrases suggest individual freedoms, freedom to control one’s destiny, freedom in something other than the economic realm, most predicted dire results fall into one of several categories: (1) impact on industrial structure, conduct, or performance, (2) impact on political freedom, (3) impact on entrepreneurial freedom, (4) impact on wealth distribution, and (5) impact on individuals’ feelings of powerlessness. Although the above cited language often is taken to imply something beyond freedom in the business realm, most of the examples of the ways in which large firms impinge on individual liberty relate to maximum freedom of opportunity, freedom of action, or the range of choices available to both consumers or present and prospective businessmen. In fact, very little in the legal

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137. Blake & Jones, supra note 89, at 384 & n.27.
138. The cures for these ills are the same as the remedies for excessive market power—encouraging the formation of markets of numerous buyers and sellers, ease of entry, protecting business interests. Id. at 384. Interference with freedom in the merger law context usually relates to large firms’ use of economic power to interfere with small firms’ ability to choose which products to make, which technologies to use, where to sell, and how much to sell. Pitofsky, supra note 28, at 1056. Some of these decisions obviously fall within the province of the firm and are subject to market discipline if incorrect. Pitofsky, however, offers the example of the oil company that buys out the coal companies in order to dictate the terms of competition. Id. at 1057. This action by firms in markets closely related to their own is described as an exercise of the discretionary authority of firms that are “relieved to some extent from the unrelenting demands of a market model.” Id. at 1056.
literature addresses the freedoms of the citizen, *qua* citizen, as affected by large firms.

Two catch phrases, one from the legislative history of the Clayton Act and the other from case law, are usually offered as self-proving assertions. The first is taken from a speech Congressman Bennett of Florida gave just prior to the taking of the vote in the House of Representatives amending section 7. He proclaimed that the amendment was necessary because the “greatest value [of the anti-monopoly laws] lies in protecting our citizenry from domination by business interests so large and monopolistic that the voices of average people cannot be heard in their thunder.”139 This speech does not suggest what this phrase means, wedged as it is between anticommunist and anti-union rhetoric. Presumably it is part of the concern either about loss of political power140 or with the discretionary authority of big firms.

The most frequently cited relevant phrase from case law comes from *United States v. Aluminum Corp. of America*,141 in which a three-judge tribunal of senior circuit court judges, deciding a Supreme Court case from which a majority of the Justices had recused themselves, alluded to the “helplessness of individuals”142 before large firms, again apparently referring to a loss of freedom by citizens. The phrase in the case referred, without elaboration, to two parts of the legislative history—one describing the powers of a corporation as a “kingly prerogative, inconsistent with our form of

Numerous commentators take this approach to describe the loss of freedom due to discretionary authority of the large corporation. These corporations have influence over a variety of decisions: plant location, advertising strategy, product development, product safety, marketing, the distribution of dividends. See, e.g., Cann, *supra* note 83, at 312; Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 Calif. L. Rev. 1, 11 (1980). Economic performance suffers from the secretive nature of big companies who can afford to develop their own research and thereby refrain from sharing the scientific knowledge with others who, in a competitive industry, would patent the invention in order to prevent someone else from getting it first. Schwartz, *Institutional Size, supra* note 16, at 8-9. Similarly, monopolies in journalism tend to blunt the edge of criticism and big press tend to be lax in their criticism of business. *Id.* at 9-13. These concerns relate to the industry structure best designed to produce products desired by consumers and produce technological advances, one of a collection of “industrial” goals discussed in Part IV.

140. See *supra* Part III.B.
141. 148 F.2d 416 (2d Cir. 1945).
142. *Id.* at 428.
and the other suggesting that inequality of wealth and opportunity was a major social concern. These references are to a speech by Senator Sherman introducing the Sherman Act to the Senate in 1890. When referring to kingly prerogatives, Sherman was concerned only with the power of corporations over "the production, transportation, and sale of any of the necessaries of life." Although others may draw noneconomic threats to individual liberty from this language, there is scant evidence that this was Sherman's concern. Any evidence that he was concerned with noneconomic liberty derives from his reference to the inequality of wealth and power resulting from monopolies. He claimed that only Congress is able to deal with the threat, and that "if we are unwilling or unable there will soon be a trust for every production and a master to fix the price for every necessity of life." This concern for the people's helplessness in the face of the trusts is also reflected in the comments of Senator George of Mississippi, but he too refers to entrepreneurial rights of the people. Despite

143. 21 Cong. Rec. 2457 (1890) (statement of Sen. Sherman).
144. Id. at 2460, 2593.
145. Id. at 2457.
146. Senator Sherman described the intent of the Act as follows:
   "This bill, as I would have it, has for its single object to invoke the aid of the courts of the United States to deal with the combinations described in the first section when they affect injuriously our foreign and interstate commerce and our revenue laws, and in this way to supplement the enforcement of the established rules of the common and statute law by the courts of the several States in dealing with combinations that affect injuriously the industrial liberty of the citizens of these States."

147. Senator Sherman stated:
   "The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition."

148. Id. at 2460.
149. See 21 Cong. Rec. 2598 (1890) (statement of Sen. George):
   "It is a sad thought to the philanthropist that the present system of production and of exchange is having that tendency which is sure at some not very distant day to crush out all small men, all small capitalists, all small enterprises. This is being done now. We find everywhere over our land the wrecks of small, independent enterprises thrown in our pathway. . . ."
the concern for wealth distribution, excessive market power, and economic opportunity, each is discussed in another section of this Article. These commentators draw no explicit distinction between individual liberty and these concerns.

Among antitrust authorities, no one has been as steadfastly concerned with the human liberty and justice implications of the antitrust laws as Professor Louis Schwartz. In several works, Professor Schwartz articulates, as clearly as appears anywhere in the legal literature, the impact of institutional size. To him, freedom of choice and action usually refer to economic and political choice and action. In the economic sphere, businessmen are to be free from direction and coercion of other businessmen; buyers are to be free from concerted exploitation by sellers; sellers are to be free from exploitative buyers. In the political sphere, the concentration of economic power in a few hands and the power of the press, educational institutions and government jeopardize political liberty. To the extent that other forms of human dignity and self-worth are associated with deconcentration, Schwartz associates them with the ability to strike out on one's own, to win fortune from the patronage of one's fellowmen: "Freedom on the economic frontier is today's only substitute for the open Western lands which in other generations nourished American individualism." These are either entrepreneurial freedoms, discussed in the following section, or political freedoms, discussed in the previous section.

According to Schwartz, concentrated power diminished the diversity of products and services, as well as points of view in books, newspapers, movies, sports, and employment opportunities. Although the diversity of products and services is an industrial goal, discussed separately in Part IV, the diversity of points of view suggests a cultural ambiance destroyed by bigness. Schwartz discusses

The people complain; the people suffer; the people in many parts of our country, especially the agricultural people, are in greater distress than they have ever been before. They look with longing eyes, they turn their faces to us with pleading hands asking us to do something to relieve them from their trouble.

150. Schwartz, supra note 76, at 867; see Schwartz, Institutional Size, supra note 16; Schwartz, "Justice" and other Non-Economic Goals of Antitrust, supra note 16.
151. Schwartz, supra note 76, at 867.
the authoritarian aspects of bigness, not only in the context of big business, but also in the context of big government, big unions, armies, charities, and political parties. He believes that antitrust is the obvious remedy for excessive concentration of industrial, commercial, and financial power when organizations can be restricted to units no larger than technological considerations justify or can be subject to price controls and public utility type regulation.

Relevant to the individual liberties issue is Schwartz's claim that bigness leads to immunity from external criticism and inquiry. Apparently quality of life as well as economic performance suffers from the fact that employees will not criticize their employers for fear of losing their jobs. This concern reflects the same kind of feeling of powerlessness and loss of control that generally accompanies corporate abuse of discretionary power. Judge Learned Hand, in *United States v. Aluminum Corp. of America,* wrote that more than an economic motivation lay behind Congress' enactment of the Sherman Act: "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."

Discussion of nonentrepreneurial freedoms boils down to concern with structural and behavioral characteristics of firms and markets as well as other industrial goals, procedural fairness, wealth distribution, excessive corporate political power, and bad effects of centralization and discretionary authority. All but the

153. Schwartz, *Institutional Size,* supra note 16, at 4. The writing of William Curran, *supra* note 16, which combines criticism of the economic implications of bigness with a vague sense of cultural corruption due to large economic units, may be a modern statement of these views. He argues for an alternative set of goals—in fact, an alternative conception of society—based on cooperation and harmony rather than competition. The cultural corruption from bigness comes from its destruction of a sense of community, a oneness, a sharing in the endeavor to satisfy our physical needs. Rather than molding competition to serve larger goals, he would eliminate competition and capitalism as an underlying premise to establish a more harmonious and free society.

155. Id. at 22-23.
156. Id. at 7-8 & n.7.
157. 148 F.2d 416 (2d Cir. 1945).
158. Id. at 427.
last are dealt with elsewhere in this Article. What remains is the redistribution of power from citizens to corporations.

Having stripped away the layers of concern for nonefficiency goals, the core may be a simple concern that large corporations have too much control over our lives. Commentators distinguish this concern from the lack of control over the impersonal forces of the competitive market. Although businesses will constantly be shifting resources from one sector to another and will inevitably disrupt civic life, the decisions of large firms are considered more arbitrary, unfair, and unacceptable.\footnote{159} Professor Scherer describes one of the benefits of competition as the impersonal nature of decision making as compared to decisions made under the personal control of entrepreneurs or bureaucrats: “There is nothing more galling than to have the achievement of some desired objective frustrated by the decision of an identifiable individual or group. On the other hand, who can work up much outrage about a setback administered by the impersonal interplay of competitive market forces?”\footnote{160}

Addressing the goal of defeating this feeling of powerlessness due to corporate exercise of discretionary power and thereby regaining control is in no way incompatible with the empirical approach discussed in this Article. In a democracy, the means of obtaining or regaining power over the external effects of the decisions

\footnote{159. Brodley, supra note 88, at 874, states that: [M]ergers accentuate a basic problem of capitalist societies. . . . These sudden and often hurtful effects, while never welcome, tend to become less acceptable as the decisionmaker grows larger and more remote. At some point, the social consequences subject to sudden single firm choice as a result of merger become so large that they appear simply “unfair” and unacceptable — at which point pervasive regulation is likely.}

\footnote{160. F. Scherer, supra note 48, at 13. As Edward Dauer suggests and administration officials agree, one need not show any more than a politically expressed preference for dealing with smaller corporations to justify a prohibition of large firms in a democracy. Antitrust Dialogue on Social Science, Cultural Values and Merger Law, 33 Antitrust Bull. No. 4 (1989) (forthcoming). To design a less arbitrary and minimally intrusive merger law enforcement policy, however, it would be useful to identify the ways in which large corporations affect our well-being. If the undesirable effect is through the products they sell, the diversity they offer, or the service they provide, the issue is dealt with under industrial goals. If the problem is their political power, the issue is dealt with in that discussion. If the problem is the effect on communities, employees, or would-be competitors, those problems are also discussed in their turn. The underlying problem remains—something less tangible, the feeling of powerlessness, of lack of control.}
of private parties is the political process. Controlling external effects of discretionary power by forcing absentee managers' firms to bear the local costs of their decisions might mean preventing firms from merging unless they agreed not to relocate their production processes, agreed to give reasonable notice of intent to shut down plants, or promised to retrain workers dislocated as a result of their corporate reorganization. Without regard to the desirability of such control of corporate discretion, as an exercise of political power, this control is not analytically different from any regulation of the external effects of corporate activity such as internalizing the environmental costs of pollution. Enforcing the antitrust laws to achieve the other nonefficiency goals also accomplishes the reempowering of citizens and overcomes both the ill effects of the exercise of corporate discretion and the intangible feeling of powerlessness.

E. Protection of Entrepreneurial Freedom

1. The meaning of entrepreneurial freedom

Judicial decisions and commentary concerned with entrepreneurial freedom have revealed two strains of opinion on the subject: the first would protect small businesses in order to increase the freedom of individuals to be self-employed and self-reliant and the second would protect small businesses in order to promote an economic system that better satisfies consumer demands.\(^{161}\) A policy based on the former would encourage enforcement of a set of rules that gives small firms an advantage in the competitive process. The latter would encourage enforcement of a set of rules that places large and small firms on the same footing by eliminating the counterproductive advantages large firms possess in dealing with buyers and sellers.

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\(^{161}\) Perhaps small enterprises should receive preferential treatment. Professor Schwartz lists a variety of areas, from federal projects and utility regulation to banking regulation, which reveal public interest in promoting small businesses. Schwartz, *supra* note 76. Many of the reasons for favoring small enterprise have been discussed in prior sections on decentralized political power, *see supra* Part III.C., advantages to local communities, *see supra* Part III.D., and economic freedoms, *see supra* Part III.E. Others are incorporated into the "middle tier" economic goals such as desirable diversity of products, innovation, and flexibility, which are included in the broader approach to the meaning of competition. *See infra* Part IV.A.
Affirmative historical support for small enterprise stems from Jefferson's preference for decentralized power. The Jeffersonian notion of economic freedom for individuals includes a preference for self-employment as a way to maintain economic as well as political freedom.¹⁶² For other commentators who follow this view, the goal is summarized as the freedom to choose or change one's way of life,¹⁶³ which is enhanced by preserving the opportunity to be self-employed.¹⁶⁴ These statements suggest a private benefit to protecting small firms—the feeling of freedom the availability of economic opportunity generates in citizens and the potential to exercise one's entrepreneurial skill and perhaps acquire material wealth. This concern regularly found expression in the opinions of Justice Douglas.¹⁶⁵ In his majority opinion in *Ford Motor Co. v. United States*,¹⁶⁶ Douglas identified the spirit of the amendments
to the Clayton Act by quoting remarks of its proponent Senator Kefauver: "'[I]f our democracy is going to survive in this country we must keep competition, and we must see to it that the basic materials and resources of the country are available to any little fellow who wants to go into business.'"167 Professor Eleanor Fox has recognized that freedom of economic opportunity is the one central theme of the legislative history of the Clayton Act. She argues that during this period of rugged individualism, people gladly would have sacrificed increased efficiency for increased freedom.168

Jefferson's individual economic freedom is clearly different from the ability of corporations to compete. Although Douglas cited Senator Kefauver as a protector of individual freedom,169 there is substantial reason to believe that Kefauver was concerned not only with the private benefit of economic opportunity but also with the public benefit of constructive competitive behavior. Arguing in 1945 for a strengthening of section 7, Kefauver described the promotion of individual freedom as a way of determining the sort of country in which we will live:170 "When the destiny of people over the land is dependent upon the decision of two or three people in a central office somewhere, then the people are going to demand that the Government do something about it." His primary emphasis combines his concern for the competitive process with concern for individual economic opportunity:

I do want to urge, while there is still time to save our free economy, before we reach the point of concentration where we are going to have a demand for state control of these basic industries, in order to preserve our free-enterprise system where every person and small corporation can have an opportunity of competing, that this committee exercise its good judgment and [amend] section 7 of the Clayton Act . . ."171

Decentralized enterprise is therefore necessary not only to protect individual liberty, but also to ensure competition on the merits.

167. Id. at 569 n.5 (citing Hearing on H.R. 988 et seq. Before Subcommittee No. 3 of the House Committee on the Judiciary, 81st Cong., 1st Sess. 12 (1949)).
169. 405 U.S. at 569 n.5.
170. See Hearings on H.R. 988, supra note 167, at 12.
171. Id. at 13.
The modern political view that small businesses need protection for the good of society reflects the sense that large business overwhelms the individualistic spirit of the small entrepreneur and undermines the ideals of free opportunity; this view suggests that the individualistic spirit contributes a necessary element to the competitive system.  

As this shift in emphasis from individual liberty to procompetitive benefits evolved, it became apparent that tradeoffs between the benefits of small enterprise and productive efficiency existed. In a message to Congress in 1938, Franklin Roosevelt recognized implicitly that a line had to be drawn; he spoke of increasing financial and management control of business by placing it in fewer and fewer hands, thereby eliminating the independent position of small businessmen in American life and destroying private initiative. Roosevelt tempered the Jeffersonian ideal, however, realizing that although gains would result from employing modern methods of production, permitting mergers and acquisitions that merely consolidate control without increasing efficiency would only serve further to destroy individual initiative.

The reach from Jefferson to Roosevelt is a long one. By 1938, the notion of individual self-employment had given way to a recognition of economies of scale and an apparent willingness to sacrifice

172. President Wilson's address to a joint session of Congress on the proposed limitation on interlocking directorates supports this view: "It will bring new men, new energies, a new spirit of initiative, new blood, into the management of our great business enterprises. It will open the field of industrial development and origination to scores of men who have been obliged to serve when their abilities entitled them to direct." See Address by the President on Trusts and Monopolies Before the Joint Session of Congress, H.R. Doc. No. 625, 63rd Cong., 2d Sess. 2 (1914), cited in Fox, supra note 168, at 1149 n.41.

Eleanor Fox, whose discussion of this viewpoint is most instructive, identifies the interests of entrepreneurs and small business as "the heart and lifeblood of American free enterprise," and freedom of economic activity and opportunity as "central to the preservation of the American free enterprise system." Fox, supra note 168, at 1153-54 (recognizing the procompetitive benefits of promoting small business).

173. In his address the President stated: "No one suggests that we return to the hand loom or hand forge. . . . But modern efficient mass production is not furthered by a central control which destroys competition between industrial plants each capable of efficient mass production while operating as separate units." Address by the President, reprinted in Final Report and Recommendations of the Temporary National Economic Committee, S. Doc. No. 35, 77th Cong., 1st Sess. 11 (1945) (cited in Fox, Economic Concentration, Efficiencies and Competition: Social Goals and Political Choices, 46 Antitrust L.J. 882, 890 & n.21 (1978)).
economic freedom (in the Jeffersonian sense) to increase output. Part of the benefit to competition of increasing the size of enterprises through mergers is that it encourages individual enterprise. Significantly, acquisition of small firms permit entrepreneurs, who have developed a new enterprise, to reap the rewards of their ambition and talent by selling to an established firm. This opportunity to be bought out may provide extra incentive to start small enterprises, but it must be balanced against the potentially demoralizing effect of having to compete with some of those would-be acquirers during the entry stage.

These comments, from Jefferson to Wilson, Roosevelt, and Kefauver, present what appears to be a dichotomous choice between economic efficiency and a quality of life or cultural ambiance. Kefauver raises most explicitly the issue of deciding in what kind of country we want to live. Relying on economic efficiency alone ignores the quality of life questions that have two roots—the promotion of the spirit of individual economic opportunity for its own sake and the promotion of competition.

2. Incorporating concern for entrepreneurial freedom into merger law enforcement

If one starts with the broad assumption that the independent variable limiting economic opportunity is the size of enterprises, then the dependent variable might be either individual freedom or individual initiative, the former representing the detrimental effect on liberty and the latter representing the detrimental effect on the competitive process of having large firms. In both cases, the ill effects result from suppression of individual opportunity by the hierarchical or dominating nature of large organizations. To have a co-

174. Wilson suggests that entrepreneurial talent is quite different from managerial talent and that once a firm gets large enough to have over 300 employees, the entrepreneur may desire to sell out to a managerial specialist, such as an existing larger competitor or a conglomerate. Wilson, Small Business and the Jeffersonian Heritage: Portrait of the Entrepreneur, 11 ANTITRUST L & ECON. REV., No. 3, at 33, 48 (1979). Under this theory, motivations to sell may not only be financial but psychological. Wilson states that for the entrepreneurial type of personality, “[f]athering [i]s [w]here [t]he [f]un [i]s.” Id. Stewart suggests that it is the independence from bureaucracy that characterizes the freedom of entrepreneurial opportunity. Stewart, The Case for ‘Smallness’: Entrepreneurship, Conglomerates, and the Good Economic Society, 11 ANTITRUST L & ECON. REV., No. 2, at 67, 71 (1979).
herent merger policy that allows any mergers at all but prohibits those that result in larger enterprises is difficult, at least in part because a merger inherently involves the combining of enterprises and concomitant enlargement. This fact makes it very difficult to employ the merger laws to promote small business for its own sake.

a. Merger law and individual liberty

The inappropriateness of the merger laws as a policy tool for promoting small business for the sake of individual liberty is apparent whether the merging parties are small or large firms. Presumably a major loss in economic freedom occurs when the independent farmer becomes a farm hand and a further diminution occurs whenever more layers of bureaucracy come between the worker and those deciding his economic fate. But is there not a point of diminishing incremental decrease in freedom? Is there any incremental loss in individual freedom when two multibillion dollar firms merge or has all the individual freedom of the sort concerned here already been lost? At this level of enterprise size, there hardly seems to be any additional loss of opportunity to strike out on one's own.

To promote small enterprise for its own sake through the merger laws requires cases involving enterprises so small that the economic liberty of entrepreneurs is affected by the takeover. If the small firm is closely held, however, the entrepreneur/owner will sell her enterprise only if the price exceeds the value to her of remaining independent. If the individual entrepreneur has decided to share control with others by selling shares in his enterprise, then the owners (shareholders) decide at what price they will sell and those potentially disadvantaged are the management. To the extent that the management and the entrepreneur are the same person, the individual has taken the risk of losing control by going public and, presuming no unfair competitive behavior on the part of the acquiring firm, has received a price that reflects the economic opportunities in the market. The mergers of large firms, then, do not present the issue of interference with entrepreneurial liberty and small firms have self-protective devices that ensure the satisfaction of entrepreneur/owners as long as the rules ensure a fair competitive process.
Neither large nor small firm mergers result in harm to individual liberty as Jefferson perceived it as long as the mergers do not result from or result in individual entrepreneurs being disadvantaged in the marketplace. But the assumption that the acquiring firm has used no unfair tactics and that large firms are unable to disadvantage small firms is critical. Contemporary discussion of protection of small firms focuses more on ensuring that the competitive process is fair to small businesses than protecting each individual’s right to be self-employed.

b. Merger law and procedural fairness

President Roosevelt apparently believed that the economic benefits of small businesses could be achieved by preventing mergers that concentrate control without increasing productive efficiency. If some large scale organizations experience productive efficiency benefits and these are to be achieved, then small businesses will not be assured the same probability of success as the large firms. Following Roosevelt’s suggestion, however, the small scale entrepreneur may be assured that he will not be disadvantaged by practices in which the large firm is able to engage because of size but which have no independent benefit to society. Without diminishing productive efficiency potential, antitrust law may ensure equal entrepreneurial opportunity to compete but not equal probability of success.

It appears that protecting the opportunity to compete is the dominant theme among those of most political persuasions and among historical figures. This distinction between ensuring the right to succeed and protecting the right to compete on fair terms is echoed in modern commentary. Professor Flynn concludes that “powerful buyers and sellers often tell small business where they may sell, to whom they may sell, at what price they may sell and sometimes whether they may remain in business at all.”

175. See Fox, supra note 168.
177. Flynn, Reaganomics, supra note 18, at 302. Flynn states: Where not clearly justified, the exercise of such power interfering with individual economic freedom is just as objectionable as the unjustified exercise of government power interfering with individual political freedom. The refusal to in-
proposes to ensure optimal survival of small business by emphasizing that the "basic purpose of the antitrust laws is to guarantee that everyone engaged in economic activity in this society is entitled, to the maximum extent possible, to have their success or failure governed by a competitive process."178 This is clearly a concern for fair rules rather than special preferences for small firms.

Achieving the goal of ensuring equal opportunity to compete requires a change in current enforcement strategy. One tends to think of the Sherman Act as providing remedies for anticompetitive acts. Section 2 is designed to prevent practices by a single firm other than mergers and acquisitions that might lead to that firm acquiring market power, and section 1 is designed to prevent firms from acting in concert to engage in anticompetitive acts. In addition, numerous other statutes were designed to prevent unfair or disadvantageous practices, prominent among them the Federal Trade Commission Act and the Robinson Patmann Act. However, section 7 of the Clayton Act prohibits mergers when "the effect of such acquisition may be substantially to lessen competition."179 That section is currently enforced to emphasize the efficiency goals to prevent mergers that are likely to allow firms to obtain power to increase prices. An expanded view of competition that takes into account the concern for the economic role of small firms would prevent mergers that unjustifiably permit the acquisition of the power to disadvantage competitors. Part IV considers a broader notion of competition and develops a notion of social efficiency that encourages a balancing of efficiency and nonefficiency concerns.

terject antitrust policy into the situation means that the small businesses have no counterweight to the exercise of undue power by the economically powerful. Thus, we sacrifice the competitive contribution of the small on the altar of an unjustified presumption in favor of bigness. This is an unrealistic blindness to power in the economy.

*Id.*

178. *Id.* at 303.

IV. EXPANDING THE NOTION OF EFFICIENCY AND COMPETITION

The previous sections have described efficiency goals and nonefficiency goals, two contrasting perspectives of the purposes underlying antitrust laws. Current enforcement policy focuses only on the former, considering the latter goals too alien to the notion of competition to be appropriate concerns of antitrust enforcers, too incomprehensible to be relevant to the enforcement process, and, to the extent that they can be articulated clearly, achievable as side-effects of a narrow focus on allocative efficiency. This section presents a broader view of competition that permits the inclusion of a wider variety of concerns and offers a redefinition of efficiency, based on this broader interpretation of competition, that encourages the enforcer to take noneconomic values into account in a systematic way. This perspective is illustrated by extending the notion of efficiency into the concern for distribution of wealth, which many commentators agree is alien to antitrust enforcement. The discussion of distributional equity is designed to demonstrate the ability of the merger law enforcement to address even those concerns totally divorced from the usual focus on allocative and productive efficiency. Throughout this section, the inability of a market power orientation to achieve nonefficiency goals is illustrated. The final section incorporates other nonefficiency goals into the broader view of competition and social efficiency.

A. A Broader View of Competition

Section 7 of the Clayton Act prohibits mergers and acquisitions that may substantially lessen competition. The variety of definitions of competition that appear in the literature offer a choice that affects the way in which the merger statute will be construed. Robert Bork describes and rejects four alternatives before settling on a fifth, which uses the word “competition” to designate “any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree.”

180. See Pitofsky, supra note 28, at 1060; Williamson, supra note 40, at 711.
183. Id. at 61.
Bork uses the concept of consumer welfare to describe all things desirable about competition: not only the fact that low prices result, but that competition encourages innovation, diversity in products, and other preferred properties of industrial and market behavior. In short, consumer welfare is “all things we think of as being good for consumers.”\textsuperscript{184} Bork contrasts this approach with George Stigler’s definition of competition as a state of the market “in which the individual buyer or seller does not influence the price by his purchases or sales.”\textsuperscript{185} Bork then rejects it as being “utterly useless as a goal of law” because it “deliberately leaves out considerations of technology,”\textsuperscript{186} by which he apparently means productive efficiency considerations and other beneficial properties of competition. Stigler’s definition ignores any considerations other than market power.

The greater breadth of Bork’s approach to competition, and to efficiency, is emphasized in his discussion of productive efficiency, in which he includes not only the ability of a particular firm to produce at least cost, but the ability of an industry to satisfy the broad spectrum of consumer demands most effectively. Using this approach, productive efficiency need not refer only to the cost of the output of a firm; it might also refer to the cost of producing anything by any social institution or society.\textsuperscript{187} One might speak, then, of the least costly way of producing technological advances, which might involve a question of finding the kind of industry structure—firms with large or small market shares, firms with massive or meager capital resources—that produces technological advances at least cost.\textsuperscript{188}

\textsuperscript{184.} Id.
\textsuperscript{185.} G. STIGLER, THE THEORY OF PRICE 87 (3d ed. 1966).
\textsuperscript{186.} R. BORK, supra note 31, at 59.
\textsuperscript{187.} See supra note 33 and accompanying text.
\textsuperscript{188.} Issues relating to optimal industry structure and social organization to produce technological advances have been studied at length by industrial organization economists as part of their study of the economic characteristics of firm size. See F. SCHERER, supra note 48, at 413-15. Opportunities for restructuring industries to achieve this goal depend on particular characteristics of the industries involved. The goal of structuring the economy to produce technological advances most efficiently may thus be seen as a species of the productive efficiency goal. The restructuring of an economy to produce a greater variety of products or more rapid technological advance is clearly a distinct goal in itself, separate from what is referred to in Part II.B. as productive efficiency. Judge Bork recognizes this difference, referring to the traditional notion of productive efficiency, which he associates with the writ-
A set of “industrial” goals, then, falls logically between the narrowly defined efficiency goals discussed in Part II and the social and political values discussed in Part III. These goals represent a second tier of desirable properties of the competitive process, that are not price or output or cost-of-production characteristics and were not considered by the Reagan administration to be relevant to the merger law enforcement process. The expanded view of competition suggests properties that are relevant to the merger law inquiry, such as the abilities of an industry to respond flexibly to changes in economic conditions exogenous to the firms (such as recession and inflation), to respond quickly to changes in consumer demand, to develop new products and to invent more efficient production techniques and adapt them quickly to produce a diversity of products that are relevant to merger law.

These industrial goals are acceptable to many of those who advocate an exclusive focus on efficiency goals, but are not accepted as part of the


189. See generally Justice Guidelines, supra note 23. For instance, in some industries, research and development activity is undoubtedly the key to competitiveness and market share. In such an industry a merger between two companies might produce economies of scale in research that would be a factor for consideration in evaluating the anticompetitive effects of the merger under the Justice Department Guidelines.

190. This list can go on almost endlessly. Louis Schwartz adds that free enterprise can give us a wider variety of points of view in books, newspapers, movies, and sports, wider choice of employment, and more responsiveness of firms to local exigencies. See Schwartz, Institutional Size, supra note 16, at 5.

191. Advocates of the efficiency focus argue that a competitive system composed of firms with no market power would produce these desirable “industrial” characteristics automatically, because the market rewards those who adapt most quickly to changes in economic conditions, who engage in the most customer-pleasing product development, or who develop or adopt more efficient production technologies. Thus, there is no need to convince free market advocates to focus on these industrial goals. The goals are best achieved by a free market system without explicit government intervention in these areas. For instance, some economists believe that the existence of monopolies inhibits the adjustment of the economy to conditions of declining demand, as would occur during a recession. A monopolist might find it more profitable to decrease output in response to a decline in demand than to lower price, which would interfere with the market’s ability to reequilibrate supply and demand and aggravate the economic dislocations that result from a recession. By focusing antitrust enforcement on market power that would allow firms profitably to maintain high prices in a period of declining demand, antitrust policy simultaneously accomplishes the allocative efficiency goal of promoting a price equal to marginal cost and the industrial goal of promoting economic stability. See, e.g., Mueller, Antitrust and Economics: A Look at “Competition,”
“market power” focus of the Justice Department Guidelines or the Merger Modernization Act. Many of these industrial goals would fit within Judge Bork’s list of the desirable characteristics of competition and are, according to Bork, part of the “primary value Congress had in mind when it used the word”192 “competition” in the antitrust statutes.

Perhaps the reason some commentators, such as Judge Bork explicitly and free market economists implicitly, include some of these macroeconomics and industrial properties of an economic structure among the antitrust goals and exclude social and political goals is related to the fact that these industry characteristics or goals have an impact on people in society as consumers while the other goals affect individuals in the roles of would-be entrepreneurs, employees, or citizens. It seems likely, however, that the reluctance may also be due to a fear of admitting that conflicting antitrust policy goals must be achieved simultaneously. Professor Eleanor Fox, for instance, who succinctly describes four economic goals as the historical foundations for antitrust policy, rejects the concern for preservation of small firm size for its own sake “[b]ecause of the unusual potential for conflict between this objective and consumers’ interests.”193 The current trend in Supreme Court opinions also illustrates this fear of conflicting goals. Recent opinions describe the antitrust laws as consumer welfare statutes194 and, by defining consumer welfare to exclude other concerns of cit-

10 St. Louis U.L.J. 482, 491-92 (1966). Mueller cites Attorney General Katzenback, who explicitly recognizes the connection between antitrust policy and economic stability: “If you get a rigid price structure, then reactions to changes in the business cycle are stickier and you have more trouble when you start getting into a recession. In this way the antitrust laws are closely related to all indirect monetary controls and other tools of government.” Id. at 492. Gardiner Means describes historical examples that illustrate conditions under which this automatic adjustment of prices to demand does not occur. Means, Conglomerates and Concentration, 25 U. MIAMI L. Rev. 1, 12 (1970).

Similarly, some associate inflation with increasing market concentration, which increases the ability of firms to raise prices even with no change in the underlying costs. See, e.g., Y. BROZEN, CONCENTRATION, MERGERS, AND PUBLIC POLICY ch. 3 (1982); Means, supra, at 14-15.

193. Fox, supra note 168, at 1182.
izens and entrepreneurs, ignore the other social implications of antitrust enforcement policy.\textsuperscript{195}

The nonefficiency goals in Part III are social and political goals that relate to individuals in roles other than consumer. Because the consumer-related goals such as diversity of products, technological innovation, flexibility, or responsiveness to demand have been investigated in some depth by the theoretical and empirical economic literature and because they are not treated with such disdain as are the social and political goals, they will not be treated at length here. It is more interesting to focus on the extreme opposites of the efficiency goals and attempt to determine whether they deserve their characterization as "'pure intellectual mush.'"\textsuperscript{196}

A review of the nonefficiency goals demonstrates that society is concerned with more than either allocative and productive efficiency or the industrial goals. Bork's broadened definition of competition opens the policies of antitrust law to the protection of all things desirable about competition, that is, to all desirable properties that result from decentralized market structures. The broadest useful definition is not too far removed conceptually from Bork's approach, though it may be far removed ideologically. The legislative history, case law, and commentary all suggest that competition yields beneficial results not only for members of society in their roles as consumers, but also in their roles as citizens and entrepreneurs. Accepting this history and scholarship forces one to recognize that a strict efficiency orientation, or even one that included a focus on industrial goals, ignores other values one might choose to achieve by promoting competition. Economists agree that preventing the acquisition and exercise of market power protects individ-

\textsuperscript{195} A second reason for the exclusion may be the empirical support for industrial goals, such as the belief that there is a relationship between industry structures (defined by concentration ratios, for instance) and flexibility, product development, or investment in research and development. See, e.g., J. Koch, supra note 49, at 213-33 (discussing market structure and technological change); F. Scherer, supra note 48, at 407-39 (discussing the relationship between firm size, diversification, and market power as independent variables and invention, innovation, research, and development as dependent variables).

\textsuperscript{196} Judge Bork, who has a penchant for offhand and casual derogation of theories not encompassed in his own world view, has alternatively categorized the social and political goals as "pure intellectual mush." See supra note 1.
ual entrepreneurs. Economists, however, are hesitant to recognize that a legislature might prefer to sacrifice some of the allocative and productive efficiency gains associated with a deconcentrated market to provide additional freedom of entry to would-be competitors.

As an illustration of this apparent professional myopia, consider the failure of economists to systematically incorporate any societal preferences for distribution of wealth into antitrust policy. Because a broad view of efficiency requires that law be interpreted to maximize all of the benefits from competition, the following section examines how a concern for the equitable distribution of wealth can be incorporated into merger law enforcement and illustrates the way in which the maximization of social efficiency, an interpretation of the efficiency goals that maximizes not only the output of goods and services but all desires reflected through the democratic process in a society, may require the balancing of allocative and productive efficiency goals with other values.

B. Social Efficiency and Equitable Distribution

Among the qualities of a competitive economy and an economic system characterized by allocative efficiency is a distribution of wealth that favors providing any surplus of value over cost of production to the consumer rather than to the producer. Because it requires the equality of price and marginal cost, allocative efficiency satisfies this basic distributional preference. Additionally, economists maintain that it is difficult to speak of a more favorable distribution of wealth between consumers and producers in an economy that is not predominantly and systematically characterized by government subsidies to producers who would have to sell at a loss to achieve a more radical distribution of wealth. In any event, not only is the price-equals-marginal-cost goal the only distributional goal given prominence in the antitrust literature, but commentators maintain that the income redistribution achieved through the antitrust laws is trivial.197 Yet there is reason to believe that the original concern with “the dread enhancement of

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197. Pitofsky, supra note 28, at 1059-60. Elzinga, supra note 22, at 1195, recognizes that pursuing a monopoly will benefit whatever class of consumers (rich or poor) buy that monopolist's product.
prices” was a concern for the redistribution of wealth from consumers to producers rather than a concern for inefficiency.

In Part III.C., allocative efficiency and equitable distribution goals were distinguished by describing the emphasis of the former as being the level of output of each product produced and the latter as involving a choice of who receives how much wealth. Although distinguishable as goals, the two are inevitably intertwined because both the level of output and the distribution of wealth are determined by the price charged for the product. If the antitrust laws are to be interpreted as related to the welfare of consumers, then the impact of price on distribution as well as on allocation of resources across production alternatives is reasonably part of the equation.

The significance of the wealth distribution effect of allocative inefficiency and the difference between allocative efficiency concerns and distributional concerns is illustrated by confusion over the words “consumer welfare.” The welfare of consumers is not to be confused with the term of art “consumer welfare,” which is intended as a distributionally neutral term. As the discussion below illustrates, economists view a transfer of wealth from consumers to producers as a neutral event, something with which antitrust policy is not to be concerned.

The approach of the Reagan adminis-
tration was to ignore distributional concerns, relying on the maintenance of the price/marginal cost equality through the pursuit of allocative efficiency to produce the appropriate distribution of wealth. This approach was theoretically correct, because the inability of firms to acquire market power also prevents the undesired transfer of excess wealth to corporations via higher prices. The extent to which the distributional concerns are satisfied, however, depends on the strategy by which allocative efficiency is pursued.

The impact on wealth distribution of merger law enforcement depends on strategy in two illustrative areas, among others: (1) deciding the acceptable duration of market power that both allows competitors to take market share from a firm charging supracompetitive prices and prevents excessive transfer of wealth from consumers to that firm in the interim and (2) determining the extent to which productive efficiency gains from a merger should be allowed to offset allocative efficiency losses. From the distributional perspective, and from many others, the enforcement problem is determining the extent to which consumers are likely to be harmed by a merger. The enforcement decisions have a direct effect on the distribution of wealth and, thus, on the welfare of consumers and cannot be ignored in enforcement if the welfare of consumers is an accepted policy goal.

1. Entry barriers and distributional equity

One obvious decision point at which distributional concerns can be factored into the enforcement equation involves the ability of potential competitors to enter a market in which a firm is exercis-
ing market power and charging supracompetitive prices. Contrasting the federal and state horizontal merger guidelines illustrates how the desire to minimize the transfer of wealth from consumers to producers can be implemented in merger law enforcement. The Justice Department Guidelines recognize that if entry into an industry is easy, then a firm acquiring the ability to raise prices to a supracompetitive level will be unable to do so for very long without attracting competition. If entry sufficient to introduce competitive pricing into the market is likely to occur within two years of the merger, then it is less likely that the merger will be challenged.\textsuperscript{202}

Note that during this period, consumers may be paying prices higher than marginal cost, thereby producing the presumably undesirable wealth transfer from consumers to the seller as well as the allocative inefficiency resulting from the supply restriction that accompanies the price increase. Although entry may ultimately correct the allocative inefficiency as new firms enter the market, bid the price down, and increase output to the allocatively efficient level, both the deadweight loss during the two-year period of correction and the wealth transfer during this period are not recaptured. From a cost-benefit standpoint, both are costs of allowing the market to correct the inefficiencies. Focusing only on the deadweight loss due to allocative inefficiencies underestimates the costs of market adjustment. Including the social cost of distributional inequity may lead to the selection of a shorter period by which meaningful entry must be accomplished.

Recognizing that consumer welfare is harmed by an excessively long adjustment period, the states' guidelines adopt a standard that requires proof of the likelihood of easy and meaningful entry within one year: “While entry requiring longer than this period of time can eventually discipline the exercise of market power, during a year consumers will suffer significa\textsuperscript{203}nt harm of the precise nature which the law was primarily enacted to prevent.”

2. Productive efficiency and distributional equity

In general, the discussion of allocative and productive efficiency can be carried out without reference to who gains and who loses as

\textsuperscript{202} NAAG Guidelines, supra note 199, at S-9.

\textsuperscript{203} Id.
a result of inefficiencies. By preventing allocative inefficiencies, society's scarce resources are allocated among their alternative uses in a fashion that maximizes their value. By improvements in productive efficiency, the quantities of scarce resources used to supply goods and services is reduced, freeing resources for alternative uses. As a result of the pursuit of both economic goals, the economic pie to be divided among members of the society is expanded.

Occasionally, and most particularly in the merger area, pursuit of allocative efficiency by preventing the acquisition of market power will interfere with the promotion of productive efficiency. In fact, the Justice Department Guidelines recognize productive efficiencies as "[t]he primary benefit of mergers to the economy" and the prevention of the creation or enhancement of market power through mergers as the "[t]he unifying theme of the Guidelines," while considering the enforcement dilemma as the attempt to "mediate between these dual concerns." Professor Oliver Williamson has formalized this balancing of productive efficiency gains and allocative efficiency losses that may result from a merger in several articles, describing a partial equilibrium "naive trade-off model" and illustrating cases in which the efficiency gains and losses might be balanced to permit an otherwise objectionable merger. His most influential argument is that both the allocative efficiency losses and the productive efficiency gains from a proposed merger are measurable with reference to a partial equilibrium model of projected changes in the quantity demanded of the product in question, the price charged to consumers, and the cost

205. Id. at S-1.
206. Id.
207. Williamson, supra note 40, at 706; see Williamson, Allocative Efficiency and the Limits of Antitrust, supra note 188, at 114-17. A partial equilibrium model focuses attention on a single market while assuming that conditions in other markets remain unchanged. For a discussion of the use of partial equilibrium models in economics, see C. Ferguson, Microeconomic Theory 12 (3d ed. 1972). Interpreting the meaning of "market" broadly, a partial equilibrium model assumes, for the sake of analytical simplification, that policy makers are unconcerned with any ramifications of changes in prices and output levels other than those reflected in the market for the product in question. For instance, Williamson's partial equilibrium model projects cases in which cost savings, i.e., productive efficiencies, more than offset allocative efficiency losses resulting when the quantity of the good supplied decreases as price increases, ignoring other effects of the quantity and price changes.
of producing the product. He concludes that by balancing these costs and benefits, policy makers can decide whether to challenge a merger.

When the gains to society from increased productive efficiency outweigh the losses due to allocative inefficiency, allowing the merger to occur results in a net efficiency gain. Williamson’s encouraging estimates indicate that if demand is relatively elastic (that is, quantity demanded decreases rather sharply in response to a price increase), a five percent increase in price can be offset by a .44% cost savings; if demand is relatively inelastic (little response to a price increase), only a .06% cost savings is needed. For larger price increases, larger cost savings are required; for example, a twenty percent price hike would require a 10.38% cost savings for a demand elasticity of 3 while a 1.10% cost savings would be required for a demand elasticity of .5.208

Using the same information necessary to project the cost savings to offset a price increase in any particular case, antitrust enforcers could readily estimate the wealth transfer resulting from a price increase; and the tradeoff calculus can be expanded to take into account the social costs of the wealth transfer. If, for instance, policy makers were to consider that a dollar transferred away from consumers was a dollar lost to society (an admittedly extreme position), then the cost savings would have to increase above the amount necessary to offset the allocative efficiency loss by an amount equal to the price increase. For a five percent price increase, then, the cost savings to offset both the allocative efficiency loss and the wealth transfer would have to be more than twelve times greater than that estimated by Williamson (5.44% rather than .44%) for the elastic demand case and more than eighty-four times greater for the inelastic demand case (5.06% rather than .06%). For a larger price increase, for example, twenty percent, the cost savings would have to be as much as 30.38% for the elastic demand case.209

The importance of the wealth transfer is a political question, of course, but state Attorneys General, among others, have identified

208. Williamson, supra note 40, at 709.
209. See Fisher & Lande, supra note 14, at 1632-33, 1644-50 (discussing the interplay of distributional concerns and efficiency goals).
this wealth transfer concern as "the explicit and predominant concern of the Congress."\textsuperscript{210} The examples in the previous paragraph gave a great deal of weight to preventing wealth transfers. One can sensibly argue that because producers and consumers are all members of society, it should be indifferent about who gets the money. This is the conventional welfare economics model.\textsuperscript{211} Even Williamson recognizes that accepting the goal of preventing wealth transfer "merely requires that appropriate weights be specified\textsuperscript{212} for the relative importance of producer and consumer interests so that the tradeoff between various objectives including allocative and productive efficiency can be made.\textsuperscript{213}

Although it is inconsistent with both legislative history of the antitrust statutes and Supreme Court precedent to believe that the welfare of consumers, as reflected in wealth transfer, is irrelevant to antitrust enforcement, it is certainly a respectable political position. The point is, however, that it is a political position and, whatever the consensus about the importance of this goal, it can be incorporated in a systematic way into the merger law enforcement calculus.

Ignoring the welfare of consumers merely covers up the difficulties of decision making in a democratic society in which a variety

\begin{footnotes}

210. NAAG Guidelines, supra note 199, at S-3:

Goals such as productive efficiency, though subsidiary to the central goal of preventing wealth transfers from consumers to firms possessing market power, are often consistent with this primary purpose. When the productive efficiency of a firm increases, (its cost of production is lowered) the firm may pass on some of the savings to consumers in the form of lower prices. However, there is little likelihood that a productively efficient firm with market power would pass along savings to consumers. To the limited extent that Congress was concerned with productive efficiency in enacting these laws, it prescribed the prevention of high levels of market concentration as the means to this end. Furthermore, the Supreme Court has clearly ruled that any conflict between the goal of preventing anticompetitive mergers and that of increasing efficiency must be resolved in favor of the former explicit and predominant concern of the Congress.

\textit{Id.} at S-3 (footnotes omitted).


212. Williamson, supra note 40, at 711.

213. Williamson also suggests that specific products for which the interests of users deserve greater weight than those of the sellers may exist; but he disparages the notion of a societal preference against producer interests. \textit{Id.}

\end{footnotes}
of goals simultaneously inform political outcomes. The reliance on partial equilibrium models encourages this simplicity in policy making. Analyzing efficiency effects is easier if other effects are omitted and undoubtedly economic theory has advanced greatly due to this approach. The exclusion of an effect on another actor for analytical purposes, however, does not justify exclusion of the effect for policy formation purposes. For better or worse, this partial equilibrium perspective contains no analysis of the interests of people who might be laid-off as a result of the decreased level of production. Whether the effect on employees of a merger is an appropriate concern is a political question rather than an economic one. The antitrust laws are undeniably political constructs and it is not irrational to treat the results of partial equilibrium analyses as only partial information on the social tradeoffs one might make in deciding whether to permit a merger.

V. CONCLUSION - SOCIAL EFFICIENCY AND THE NONEFFICIENCY GOALS

A traditional course in neoclassical microeconomic theory typically begins with a study of the nature of the utility function, which describes the preferences of the individual.214 The objective of the consumer, as described by the economic actor's utility function, is to maximize his level of satisfaction given his preferences, which guide his tradeoffs between alternative desires, and his available wealth, which constrains his acquisitions and forces him to make choices. Typically, economists consider that the items that make people better off are purchases of goods and services. Accordingly, economists predict that a consumer arranges his purchases to make himself as well off as possible given his limited income.215 There is, of course, no reason to limit the analysis of an individual's well-being to goods and services. If it were as numerically convenient to measure political freedom, for instance, as it is to count an individual's consumption of grapefruit, there would be no theoretical reason why the price of political freedom could not

215. See, e.g., C. Ferguson, supra note 207, at 35.
be considered a constraint on the amount of political freedom one could enjoy.

The same analytical framework applies to decision making by a firm. The preferences of the owner or manager of the firm determine the choices she will make; a profit-maximizing owner might allocate resources differently than a growth or sales maximizing manager, or differently from an owner who simply wants a quiet, stable life. Given the underlying preferences, microeconomics predicts that the decision maker will recognize constraints on her ability to make greater profits, or increase sales or growth. Consumer demand affects the ability to sell more output as certainly as the consumer's wealth constrains his ability to satisfy all his wants. Once again, while recognizing that owners and managers may have a wide variety of preferences, neoclassical microeconomics typically proceeds on the assumption that a firm's only goal is profit maximization. This assumption is necessary, at least in part, because incorporating measurements of profit into quantitative analyses is easier.

Similar to these theories of "optimizing" behavior is the theory of the public household, which recognizes that individuals have public preferences as well as private preferences; that is, individuals have desires that are satisfied by public provision as well as wants that are satisfied by private acquisition. Professor Richard Musgrave, in his classic work on public finance, describes social wants as those that "cannot be satisfied through the mechanism of the market because their enjoyment cannot be made subject to price payments." Because the market fails to reveal consumer preferences for social wants, the political process is substituted for the market mechanism and through the political process prefer-

216. See, e.g., J. KOCH, supra note 49, ch. 3 (considers a variety of alternative motivations for firm owners/managers, including sales maximization, growth maximization, managerial behavior, "Realism in Process," and game theory).

217. Id. at 48: "On the grounds that profit maximization is undoubtedly a major goal of the firm, and also because it is a useful point of departure for our studies, we shall proceed to assume profit maximization as the basic motivating force of the firm." Koch does provide a thorough review of the objections to this assumption at an elementary level. See id. ch. 3. See also F. SCHERER, supra note 48, at 35-37 (acknowledging that management compensation schemes based on sales volume may induce corporations to maximize sales to the detriment of profits).

ences are revealed, however imperfectly. The appropriate level of provision of social wants to satisfy preferences democratically revealed is subject to resource constraints in the same manner as private acquisitions. The difficulty in maximizing social utility lies not in conceptualizing the process of obtaining the correct balance of desired objectives, but in determining what those objectives are and what balance to strike.\footnote{Id. at 12.}

The notions of allocative and productive efficiency, as described in Part III, involve striking the correct balance among alternative goods and services that satisfy private demands of consumers. By focusing antitrust enforcement on the provision of goods and services, allocative efficiency ignores wants that are not traded on the market, the entire spectrum of preferences that are revealed through the democratic process.

The preference for allocative efficiency is itself not revealed through a market process. Although a larger economic pie results from more efficiently allocating scarce resources to the production of goods and services, demand for that larger pie is reflected through the political process, in a political marketplace. In that political marketplace, the larger pie is a particularly attractive commodity, but it competes with other characteristics of a good society. The process of achieving a socially efficient result necessarily requires resolving conflicting demands among politically appealing alternatives given potential conflicts among them and scarce resources with which to satisfy them. Society may choose characteristics of its economic pie that make it taste better or look better or have a more pleasing texture and sacrifice the size of the portions, which, after all, is only one characteristic of the dessert.

In merger policy, the nonefficiency concerns represent the texture, color, and taste of our society—the cultural ambiance. The hypotheses this Article investigates suggest that the characteristics of a good society come from political and entrepreneurial freedom, from community, and from individual control over our economic destinies. The Nation has become familiar with the sacrifice of low cost goods and services in exchange for other social wants, particularly in areas in which private activity results in detrimental public effects. Economic analysis in those areas recognizes that along with
the production of goods comes the production of harms; environmental pollution resulting from private productive activity is an easily recognized example. It is well recognized that the efficient level of output of a product, or, in general, the efficient level of any activity, depends not only on the value of the activity relative to alternative investments of materials and energies, but also on the value or cost of benefits or harms that accompany that activity.

The expanded notion of social efficiency requires a balancing of marginal benefits and marginal costs, incorporating all sources of benefit and cost. For antitrust policy, this notion means that the prevention of mergers whose probable ill effects, including price effects, political effects, distributional effects, employment effects, as well as effects on communities and competitors, must be balanced against the positive benefits, including enhanced productive efficiency, freedom to contract without governmental intervention, and freedom to dispose of one's property. A partial equilibrium analysis, in which only one set of effects is considered, is hardly the only way to proceed in rational policy formation. Environmental law, for instance, explicitly recognizes the multiplicity of values inherent in democratic policy making. The Clean Air Act requires consideration of effects of environmental policy on a variety of interests that are not strictly allocative efficiency concerns; these include the effect of regulations on employment and communities, on consumer costs, on inflation, on recession, and on small businesses. The methodology for balancing a variety of benefits and costs is well recognized in the literature.

Political and social as well as allocative and productive efficiency effects of mergers are all identifiable as results of private behavior, the benefits or costs from which are not all internalized by the private economic actor, the acquiring firm. When considerations other

221. Id. § 7617.
222. See, e.g., P. Downing, Environmental Economics and Policy 26-35 (1984). For more specific applications, see Barnes, Back Door Cost-Benefit Analysis Under a Safety-First Clean Air Act, 23 Nat. Resources J. 827, 844-45 (1983) (discussing the cost-justified level of pollution reduction, incorporating the various marginal costs associated with environmental enforcement); Downing & Watson, The Economics of Enforcing Air Pollution Controls, 1 J. Envtl. Econ. & Mgmt. 219 (1974) (discussing the importance of including a wide variety of costs and the types of costs).
than size of the economic pie are relevant to policy formation, efficiency concerns have no greater inherent claim for priority. It would be consistent with other forms of externalities regulation to require enforcers to consider nonefficiency concerns, such as those suggested in the proposed Merger Limitation Act of 1987.\textsuperscript{223} Such consideration would require proponents of some mergers to establish that there would be no detrimental effects on nonefficiency concerns, such as interests of local communities and affected employees, or on industrial concerns, such as technological innovation and foreign competition, and on efficiency concerns.

The importance to society of any particular set of values is translated into law through the democratic process, which reveals, however imperfectly, the priority to be attached to conflicting goals. This Article should not be interpreted as advocating the primacy of one set of goals over another or, for that matter, advocating the inclusion of any particular efficiency or nonefficiency concern in antitrust enforcement policy. This Article is a response to the domination of policy making by the view that allocative and productive efficiency are the only concerns worthy of consideration in antitrust policy formation. Although potentially a rich analytical tool, neoclassical economics has focused attention on a narrow set of objectives, not because it is incapable of analyzing complex and conflicting concerns, but because it is analytically simpler and more satisfying to use a partial equilibrium framework based on straightforward assumptions about the behavior of individuals that yields a definitive answer. The trap is sprung when policy makers forget that the economic analysis is based on simplifying assumptions. Neither individual nor societal preferences are straightforward; the legislative history of the Sherman and Clayton Acts, and other political, judicial, and scholarly commentary, reveal a vast array of ideals to be served by the protection of competition.

The response of current antitrust enforcers and pro-efficiency commentators is that social and political goals of antitrust are too vague, too mushy, and too unstructured to be appropriate for consideration. The motivation for excluding these goals is the same as the motivation for engaging in partial equilibrium economic analysis that ignores effects outside the narrowly defined market under

consideration—straightforward answers with as few qualifications as possible. A more rigorous response to the policy problem would be to consider how analysis of nonefficiency goals might be structured to make it more susceptible to the powerful analytical tools available.

The thrust of this Article has been to define and articulate social and political goals in a way that will make them susceptible to analysis. The only view expressed is that it is inappropriate in a democracy to reject nonefficiency goals as a foundation for policy without a closer look at theoretical and empirical support for the hypothesized relationships between characteristics of firms and markets and the political and social phenomena that motivated Congress to protect the competitive process.