QUANTITATIVE SUBSTANTIALITY AND THE CELLER-KEFAUVER ACT — A LOOK AT THE RECORD

By MILTON HANDLER*

There is an apocryphal tale about a celebrated law professor (needless to say, not connected with Columbia) who invited a friend into a neighboring bar for a drink. While the friend nursed a glass of sherry, the professor silently downed a bottle of scotch. He followed this feat by polishing off a bottle of rye, and then assaulted a bottle of gin. When the last drop of gin was gone, the friend who could take the silence no longer turned to his host and said, "Nice day, isn't it?" The professor glared at him. "What did you come here for," he growled, "to talk or to drink?"

Unhappily this professor, unlike the one in the story, is here to talk—since Charlie Dunn and Breck McAllister are making me speak for my dinner. Some day I hope our Antitrust section will restrict its educational efforts to its daytime sessions and devote its post-prandial activities to subjects less vital but more amusing than the merger problem which the distinguished Chairman of the House Committee on the Judiciary and I are supposed to discuss.

I deem it a high honor to share the same platform with the Congressman. His contribution to antitrust has been substantial, whether measured quantitatively or qualitatively. He has rendered a useful public service in his Cassandra-like warnings regarding the current wave of mergers. We may appropriately and affectionately compare him with a gadfly, prodding the Executive Branch of the Government into greater exertions and stimulating the Antitrust Bar into an agonizing reappraisal of first principles.

The Congressman, in keeping with the importance of the occasion, has not confined his remarks to the merger question but has dealt, in statesmanlike fashion, with other matters of large dimension. I use the word "statesmanlike" with some trepidation, as he is fond of defining a statesman as a dead politician. I fear also that he will not like much of what I have to say for I am here to take issue with some

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of the views of his present subcommittee as expressed in its recent Interim Report.[1]

While we see eye to eye on many questions of antitrust, we are in complete disagreement on the fair meaning and effect of the 1950 amendments to Section 7 of the Clayton Act, which bear his name and that of Senator Kefauver. Our differences center primarily upon the true import of the legislative history of this enactment.

Of course, it may seem presumptuous to debate the meaning of a statute with its legislative author. Who better than he should know the purpose and intention of the legislators? But the statute and legislative record must speak for themselves; their meaning is as readily ascertainable to judges, commissioners and lawyers as to the members of the legislature.

As Mr. Justice Holmes has stated:

> "We do not inquire what the legislator meant; we ask only what the statute means."[2]

The Congressman's position is that Congress intended to adopt the test of quantitative substantiality as the controlling criterion in measuring the legality of mergers and stock acquisitions.[3] He takes the Federal Trade Commission to task for disregarding the Congressional intent as well as the judicial precedents in its decision in the *Pillsbury* case[4] and he soundly raps the knuckles of the membership

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1. Interim Report of the Antitrust Subcommittee of the Committee on the Judiciary (1955).
2. Holmes, *Collected Legal Papers*, 207 (1920), quoted by Jackson, J. in *Schwegman Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 397, 71 S.Ct. 745, 95 L.Ed. 1035 (1951).
3. Interim Report of the Antitrust Subcommittee of the Committee on the Judiciary (1955) pp. 18-25.
4. *In the Matter of Pillsbury Mills, Inc.* FTC Docket 6,000, December 28, 1953, CCH Trade Reg. Rep. ¶11, 582 (FTC 1954):

"The Commission's insistence in Pillsbury upon an economic extravaganza in order to meet the test of illegality would seem to indicate an attitude of disdain for the congressional intent and for judicial precedents as well . . . . (p. 23)

"But the principal effect of the Commission's *Pillsbury* decision is largely to obliterate the distinction between the Sherman Act and Celler-Kefauver Act. It is true that the Commission pays lip service to the distinction between the two acts, stating:

'. . . amended Section 7 sought to reach the mergers embraced within its sphere [in] their incipiency, and to determine their legality by tests of its own. These are not the rule of reason of the Sherman Act, that is, unreasonable restraint of trade, nor are Section 7 prohibitions to be added to the list of per se violations. Somewhere in between is Section 7, which prohibits acts that "may" happen in a particular market, that looks to "a reasonable probability," to "substantial" economic consequences, to acts that "tend" to a result. Overall is the broad purpose to supplement the Sherman Act and to reach incipient restraints.'

"However, in the context of the entire opinion this statement appears to be window dressing designed principally to obscure the fact that the Commission has by an interpretative device weakened the Celler-Kefauver Act as an effective weapon to deal with mergers and acquisitions." (pp. 23, 24) of the Attorney General's Committee for its approval of the *Pillsbury* rationale.[5]

It is my considered judgment that the Congress did not adopt quantitative substantiality as the controlling test of legality, that the legislative record viewed as a whole discloses no such intention, that the Commission's *Pillsbury* decision is faithful to both the legislative history and the court rulings, and that the Antitrust Subcommittee's distempered criticisms are wholly without merit.[6]

Let's look at the record.

By the record I mean the hearings, the Committee Reports and the debates preceding the enactment of the legislation—not statements made since the measure became law.

There is, of course, a very serious question whether even the antecedent legislative materials may properly be consulted. Twice the Supreme Court has held that the key words of this statute, "substantially lessen competition" "in any line of commerce," as used in other sections of the Clayton Act, are so clear as to preclude recourse to the "extraneous statements and often unsatisfactory aid" of Committee Reports.[7] The least that can be said for these decisions is that they served notice on Congress, when legislating in 1950, that its purposes must be embodied in the statutory text and not in extrinsic writings.

Does the statute on its face provide for quantitative substantiality?

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5. "Regrettably, the report of the Attorney General's Antitrust Committee appears to approve wholeheartedly the *Pillsbury* rationale; in fact, that report suggests economic criteria for testing the legality of horizontal mergers that go beyond *Pillsbury*, although the caveat is added that 'not . . . all, several, or any of these guides may be significant or even relevant in a given case.' Furthermore the Attorney General's Antitrust Committee seems on all fours with *Pillsbury* in suggesting that 'in no merger case—horizontal, vertical, or conglomerate—can a "quantitative substantiality" rule substitute for the market tests Section 7 prescribes.' "

6. My comments relate to the substantive law only; I express no opinion about the length of the hearings on the remand.

7. With respect to "in any line of commerce," the Supreme Court in *Van Camp & Sons Co. v. American Can Co.*, 278 U.S. 245, 253, 49 S.Ct. 112, 73 L. Ed. 311 (1929) said:

   "The words being clear, they are decisive. There is nothing to construe. To search elsewhere for a meaning either beyond or short of that which they disclose is to invite the danger, in the one case, of converting what was meant to be open and precise, into a concealed trap for the unsuspecting, or, in the other, of relieving from the grasp of the statute some whom the legislature definitely meant to include."

   And, with respect to "substantially lessen competition or tend to create a monopoly," the Court in *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 42 S.Ct. 360, 356, 66 L.Ed. 653 (1922) said:

   "Much is said in the briefs concerning the Reports of Committees concerned with the enactment of this legislation, but the words of the act are plain and their meaning is apparent without the necessity of resorting to extraneous statements and often unsatisfactory aid of such reports."

   Cf. Jackson, J. concurring in *Schwegmann Bros. v. Calvert Distillers Corp.* 341 U.S. 384, 395, 71 S.Ct. 745, 95 L.Ed. 1035 (1951).

It forbids stock and asset acquisitions, "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

The statutory text affords little aid or comfort to the proponents of quantitative substantiality.

The statute plainly requires that the legality of a merger be determined by its potential effect on competition in the relevant market. What that effect is or may be is a question of fact which cannot be resolved without defining the market and weighing the probable economic repercussions of the acquisition on the competitive texture of the industry. If the study of these effects constitutes an "economic extravaganza," let us not forget that it is the Congress and not the Commission that has made the investigation mandatory.

But the Congressman will undoubtedly reply that the modern trend in the interpretation of statutes is not to limit the inquiry to the words of the law but to consult the relevant legislative materials. I would not foreclose an examination into the history of the enactment. But the record must be considered in its entirety. It is not proper to pick and choose—to quote only selective passages which support a predetermined thesis.

What does the record show?

One searches the reports and debates in vain for any statement, directly or inferentially, affirming quantitative substantiality as the hallmark of illegality.

Both the House and Senate Committee Reports[8] view with alarm the increasing tendency toward economic concentration; the loopholes in the prior statute and the need for corrective legislation are emphasized; assurance is given that the bill does not interdict all mergers, that companies in a failing condition may sell their assets to a competitor, that small corporations will not be prevented from merging in order to afford greater competition to large companies; finally both reports make it abundantly clear that the new measure is not designed merely to duplicate the Sherman Act. The Senate Report states:

> "The present wording of H.R. 2734 is intended to cover more than is prohibited by the Sherman Act and yet to stop short of the stated test of the present section 7 of the Clayton Act." (p. 4)[9]

8. House Report No. 1191, 81st Cong. 1st Sess. Aug. 4, 1949; Senate Report No. 1177, 81st Cong. 2d Sess. June 2, 1950.

At no point does either report indicate how much further than the Sherman Act or how much shorter than the existing Clayton Act does the reach of the bill extend. The Senate Committee speaks of "acquisitions that are economically significant."[10] "It is expected," it states, "that, in the administration of the act, full consideration will be given to all matters bearing upon the maintenance of competition, including the circumstances giving rise to the acquisition."[11]

This plainly is not the language of quantitative substantiality.

The effect of an acquisition, according to the House Committee, is to be measured by the "significant reduction in the vigor of competition."[12] Illustrative of such effect are the following:

> ". . . elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition, increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive, undue reduction in the number of competing enterprises, or establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete."[13]

Again, this is plainly not the language of quantitative substantiality.

The House Report refers approvingly to the decision of the Supreme Court in *International Shoe Co. v. Federal Trade Commission,*[14] and quotes the following passage from the Court's opinion:

> "Mere acquisition by one corporation of the stock of a competitor even though it results in some lessening of competition, is not forbidden; the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree, Standard Fashion Co. v. Magrane-Houston Co. (258 U.S. 346, 357); that is to say, to such a degree as will injuriously affect the public." (p.298) [15]

Does this sound like quantitative substantiality?

One of the tests of legality under the 1914 Act was the substantial lessening of competition between the acquiring and acquired companies. This stricter and more restrictive language was construed in

9. The report continues (p.4):
"While on the one hand it was desired that the test be more inclusive and stricter than that of the Sherman Act, on the other hand it was not desired that the bill go to the extreme of prohibiting all acquisitions between competing companies." Later it is repeated (p.5) that the bill "reaches far beyond the Sherman Act."

10. P.5.

11. P.7.

12. P.8. The Committee adds that the effect may be proscribed even though it "may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize."

13. P.8.

14. 280 U.S. 291, 50 S.Ct. 89, 74 L.Ed. 431 (1931).

15. P.7.

International Shoe as requiring proof of the undue lessening of competition in the market as a whole. Certainly the draftsmen by eliminating the reference to acquiring and acquired companies but otherwise retaining the wording of the earlier statute could hardly have expected that the "considerably less restrictive"[16] standard would condemn that which the earlier act had upheld. We are not left to deductive reasoning in reconstructing their intent. *International Shoe* is unequivocally adopted as the rule of construction for the new bill by the House Report which states:

> "The language in the amendment it will be noted follows closely the purpose of the Clayton Act as defined by the Supreme Court in the *International Shoe case.*"[17]

Since *International Shoe* has been widely interpreted as essentially equating the Clayton Act standard with that of the Sherman Act,[18] the Committee's reliance on that decision is patently inconsistent with its avowed purpose of forging a statute that reaches "far beyond" the Sherman Law. It is dubious whether this inconsistency can be satisfactorily resolved. This confirms the truth of the Supreme Court's observation that extraneous statements from legislative reports are unreliable guides to statutory interpretation.[19] One thing, however, is clear. Nothing in this confused picture even remotely suggests an intention to adopt an inflexible rule of quantitative substantiality.

16. House Report, p.6.
17. The same assertion was made in debate on the Senate floor by Senator O'Connor, the Senate Floor Manager. 96 Cong. Rec. 16435 (1950).
18. That is the interpretation placed upon the precedent by the House Committee at page 18 of its recent Interim Report, where *International Shoe* is cited in support of the following statement:

    "Furthermore, the courts held that the Sherman Act's rule of reason requiring extensive inquiry into economic factors to show actual effects was applicable."

    In accord are the interpretations of Attorney General Clark and Assistant Attorney General Berge in letters to the House Committee in 1945 when it was considering the revision of the Clayton Act. The following passage from the Attorney General's letter to the Chairman of the Committee is particularly instructive:

    "It has been held that the statute is not applicable unless the combining companies were in substantial competition with each other prior to a merger (*Vivadou v. Federal Trade Commission,* 54 F. (2d) 273, and that it must be shown that competition in the industry generally is affected by a merger (*International Shoe Co. v. Comm.,* 280 U.S. 291)."

    See also, HANDLER, A STUDY OF THE CONSTRUCTION AND ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS (1941) 86.
19. A like inconsistency is found in the passage at the very beginning of the Senate Report:

    "The purpose of the proposed legislation is to prevent corporations from acquiring another corporation by means of the acquisition of its assets, *whereunder the present law* it is prohibited from acquiring the stock of said corporation." (p.2) (Emphasis supplied.)

    The same assurance was given the Senate by Senator O'Connor, 96 Cong. Rec. 16436 (1950).

Certainly the Committee's heavy reliance on *International Shoe,* which emphasized the public interest and the necessity for scrutinizing the market as a whole, is at war with any such approach. On the contrary, it plainly contemplates a qualitative determination of the effect of the merger on competition generally.[20] This need not mean a reversion to Sherman Act criteria. The effect of the merger on the competitive texture of the market is to be considered but the limits of permissive integration are narrower than under the prior law.

The entire case for quantitative substantiality rests upon the following passage in the House Report:

> "Under H.R. 2734 a merger or acquisition will be unlawful if it may have the effect of either (a) substantially lessening competition or (b) tending to create a monopoly. These two tests of illegality are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act."[21]

Since the decision of the Supreme Court in the *Standard Stations* case[22] was handed down two months before the publication of the House Report, it is now contended that the Committee had this recent interpretation of section 3 in mind when it referred to the other section of the Clayton Act.[23]

The argument proves too much.

20. Further evidence of the Congressional purpose to measure the anticompetitive effects of a merger qualitatively is to be found in the exoneration of purchases of bankrupt companies. The exception is stated unqualifiedly in the reports without regard to size, competitive position or volume of business of the failing concern. The stress is not upon the quantity of the competition which will disappear but rather upon the failing condition of the acquired company.

21. P.8.

22. *Standard Oil Co. of Calif. v. U.S.,* 337 U.S. 293, 69 S.Ct. 1051, 93 L.Ed. 1371 (1949).

23. "Of particular importance in connection with this interpretative question is the fact that section 7's (Celler-Kefauver) test of illegality is identical to the test under other sections of the Clayton Act; section 3 for example. Illegality under both sections depends upon whether the 'effect may be substantially to lessen competition'; section 3 proscribing such effects if accomplished through exclusive dealing arrangements, section 7 if accomplished through mergers. The House Judiciary report on the new Antimerger Act points out that the tests of illegality 'are intended to be similar to those which the courts have applied in interpreting the same language in other sections of the Clayton Act.'

"In light of this explicit expression of congressional intent the Standard Stations' decision of the Supreme Court, handed down only 2 months before the House Judiciary report was published, takes on added significance. Construing the effects clause of section 3 the court held that a system of exclusive dealing contracts employed by a leading company in the market and covering a segment of the market that is quantitatively substantial is illegal without more and that it is unnecessary to consider evidence of the actual effects of these contracts or the economic justification for their use. . . .

"This test of illegality, the subcommittee is convinced, was intended by Congress to govern under the new section 7, the Celler-Kefauver Act." Interim Report of the Antitrust Committee, pp. 19-20 (1955).

Why is it that *Standard Stations* is not cited at this point in the report?

Why is it that it is not mentioned anywhere in the report?

Why is it that it is not referred to at any time in the House debates?

Why is no explicit reference to the doctrine of quantitative substantiality made either in the report or the debates?

If the able, experienced and informed lawyers on the Judiciary Committee had intended to adopt this rule, it would have been a very simple matter for them to have said so.

The Senate Report appeared a year after *Standard Stations.* The precedent is mentioned not on the important issue of the scope of the statutory yardstick but only in connection with the meaning of the words "section of the country." And in the Senate debates[24] it is cited to assure the lawmakers that the words "may be" require a showing of reasonable probability of the forbidden effects and not the reasonable possibility postulated by *Morton Salt.*[25]

Is it not strange that the really significant aspect of the decision should be totally ignored? Does not this silence take on a special eloquence in view of the express reliance upon *International Shoe* which is the direct antithesis of *Standard Stations*?

The one sentence on which the Committee now relies is a two-edged sword. It refers not to section 3 alone but to the other sections of the Clayton Act containing the same statutory tests. The other sections are 2, 3 and 7.

Substantial lessening of competition was given a qualitative interpretation in section 2, thus necessitating the Robinson-Patman amendments making price discrimination actionable when there is individualized injury, destruction or prevention of competition.[26]

And we have already seen how the broader and less restrictive language of old section 7 fared in the *International Shoe* case.

Hence when the Committee suggests a similar interpretation for

24. 96 Cong. Rec. 16453 (1950).
25. *F.T.C. v. Morton Salt Co.,* 334 U.S. 37, 46-47, 68 S.Ct. 872, 92 L.Ed. 1196 (1948).
26. "This provision accomplishes a substantial broadening of a similar clause now contained in section 2 of the Clayton Act. The existing law has in practice been too restrictive in requiring a showing of general injury to competitive conditions in the line of commerce concerned, whereas the more immediately important concern is in injury to the competitor victimized by the discrimination. Only through such injury in fact can the larger, general injury result. Through this broadening of the jurisdiction of the act, a more effective suppression of such injuries is possible and the more effective protection of the public interest at the same time is achieved." H. Rep. No. 2287, 74th Cong., 2d Sess. p. 8 (1936).
In *F.T.C. v. Morton Salt Co.,* 334 U.S. 37, 49, 68 S.Ct. 822, 92 L.Ed. 1196 (1948), the Supreme Court states: "The Committee reports on the Robinson-Patman Act emphasized a belief that § 2 of the Clayton Act had 'been too restrictive in requiring a showing of general injury to competitive conditions. . . .' "

its bill as had been accorded the other sections of the Clayton Act, why should it be assumed it is referring to section 3 alone rather than sections 2 and 7?

The best that can be said about this legislative history is that it is obscure, ambiguous and inconclusive. The weight of the evidence, I submit, requires the measurement of the potential anticompetitive effects of an acquisition in the industry generally. That is precisely what the Commission did in *Pillsbury* and it is what the Attorney General's Committee advocated. To explore the probable effect of a merger upon the remaining competition in the relevant market, to determine its vigor, vitality, effectiveness and workability—to study the organization and structure of an industry to decide whether the acquisition will substantially and adversely alter its competitive texture —is not to engage in an "economic extravaganza" or to obliterate the distinctions between the Sherman and Clayton Acts. The test is not how substantial is the competition which disappears; rather it turns upon the diminution of competition in the whole industry. The application of the standard need not entail the unlimited, voluminous and speculative studies which the Committee properly deplores, but can be satisfied by a factual inquiry of reasonable proportions. As the Attorney General's Committee states, "*Pillsbury* does not require that all evidence be considered in all proceedings regardless of the competitive character of the market. The Act does not demand an exhaustive economic inquiry for its own sake."[27]

The Federal Trade Commission does not merit censure for eschewing arbitrary and mechanical rules of thumb and for doing the very thing which the Senate Committee anticipated when it said (and I repeat):

> "It is to be expected that, in the administration of the act, full consideration will be given to all matters bearing upon the maintenance of competition, including the circumstances giving rise to the acquisition."[28]

Nor is it fair to charge the Commission with "an attitude of disdain" for judicial precedents. In rejecting quantitative substantiality, it relied upon and followed the Third Circuit's decision in *Transamerica*.[29] It is no answer to say, as does the subcommittee, that "*Transamerica's* precedent value on the interpretative problem here discussed is open to question in view of the new tests of legality intended by Congress."[30] If the broader language of old section 7 does

27. Pp. 123-124.
28. P.7.
29. *Transamerica Corp. v. Fed. Res. System*, 206 F. (2d) 163 (1953) *cert. den.* 346 U.S. 901, 79 S.Ct. 229, 98 L.Ed. 401 (1953).
30. P.22.

not encompass quantitative substantiality, *a fortiori,* it is not supported by the less restrictive wording of the new law. *Transamerica* is squarely in point and the Commission had every right to follow it.[31]

So much then for the legislative record.

Should quantitative substantiality, as a matter of policy, be the governing rule, either in the case of mergers or exclusive dealing arrangements?

To answer that question, we first must know what is meant by quantitative substantiality.

In *International Salt,*[32] $500,000 worth of salt per annum, in *Yellow Cab*[33] the annual replacement of fleets of 5,000 cabs, in *Standard Stations*[34] 6.7% of the market for gasoline, 5% of lubricating oil and 2% of tires and batteries were all deemed substantial. If these decisions are reliable guides,[35] then both horizontal and vertical integrations involving relatively small shares of the market would be vulnerable if quantitative substantiality were the prevailing doctrine. Now it may well be answered that these low percentages related only to the special circumstances of the particular cases and are without precedential significance in determining quantitative substantiality in the merger field. But if we borrow the concept from Section 3, how can we be sure that we are not taking over these applications as well?

Do we want to strait-jacket the American economy by prohibiting integration, both vertical and horizontal, of this slight dimension?

Having regard for the present constitution of American industry, which the Committee's studies show to be highly concentrated, how can we fairly ignore the qualitative factor of the economic strength of competitors who may be twice as large as the combining companies?

31. The Subcommittee chides the Commission for ignoring *Hamilton Watch Co. v. Benrus Watch Co.,* 114 F. Supp. 307 (D. Conn. 1953), *aff'd* 206 F. 2d 738 (2d Cir. 1953). (p. 23) That case involved Hamilton's request for a preliminary injunction to stay Benrus from voting its stock in Hamilton. The decision holds no more than that the facts warranted a preliminary injunction. It does not rule that quantitative substantiality is the index of liability under the Celler-Kefauver Act. It does, however, suggest that the fusion of the fourth and fifth largest companies in an industry controlling in the aggregate about twenty percent of the dollar volume of sales contravenes the amended act.

32. *International Salt Co. v. United States,* 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20 (1947).

33. *United States v. Yellow Cab Company,* 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947).

34. *Standard Oil of California v. United States,* 337 U.S. 293 69 S.Ct. 1051, 93 L. Ed. 1371 (1949).

35. For a rejection of the view that foreclosure to the extent involved in these cases deprives competitors of a substantial share of the market, see *Report of the Attorney General's National Committee To Study The Antitrust Laws,* p. 147, n. 73.

How is the public prejudiced if the merger, despite its quantitative substantiality, is entirely consonant with the maintenance of vital, vigorous, effective and workable competition in the industry?

Mergers are not evil in themselves; they are completely neutral; whether they are harmful or beneficent depends on the circumstances. The true test is whether the combination in all reasonable probability will so alter the structure of the industry and the quality of its competition as to deprive the public of the advantages of the competitive organization of the particular market.

The inquiry is not dissimilar to that in Sherman Act cases with two significant differences:

(1) Clayton deals with probabilities and not actualities, with economic effects and not states of mind, with the existence of power and not its predatory or improper exercise; and

(2) The frontiers of illegality have been extended and the thrust of the new Act is directed against concentration as contrasted with Sherman's censure of monopoly or restraints approaching that degree of power.

Quantitative substantiality is equally reprehensible under Section 3. The object of that enactment is to keep the channels of trade open for the efficient distribution of competing products. The issue should not be how many outlets are foreclosed but the exclusive arrangement or tying restriction, but whether competitors have effective access to needed supplies and outlets, it is of no consequence that the seller is of dominant size or that the quantity of commerce which is withdrawn may be substantial.

The rule of reason under the Sherman Act had its genesis in a merger case.[36] That was not the result of accident. Rigid fetters on the purchase and disposition of business properties are inadministrable and will collapse of their own weight. Flexible controls are needed for wise and just solutions. Antitrust cannot survive if reduced to the level of mechanical jurisprudence. To introduce the rigidities of quantitative substantiality into the law of trade regulation is not to befriend antitrust.

36. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911).