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Interlocks in Corporate Management and the Antitrust Laws

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INTERLOCKS IN CORPORATE MANAGEMENT AND THE ANTITRUST LAWS

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The practice of interlocking directorates is the root of many evils. It offends laws human and divine. Applied to rival corporations, it tends to the suppression of competition and to violation of the Sherman law. Applied to corporations which deal with each other, it tends to disloyalty and to violation of the fundamental law that no man can serve two masters. In either event it tends to inefficiency; for it removes incentives and destroys soundness of judgment. It is undemocratic; for it rejects the platform: "A fair field and no favors,"—substituting the pull of privilege for the push of manhood.

L. Brandeis, *Other People's Money* 35 (1914).

I. INTRODUCTION

The 1960's are witnessing another spasm of interest in the antitrust problems posed by interlocks in corporate management. Similar bursts of interest have occurred in the past, and on each occasion some alteration in the federal policy toward interlocks has occurred. The earliest and most sustained of these bursts of interest took place during the Progressive Era and produced section 8 of the Clayton Act,[1] the only portion of the antitrust laws to deal expressly with interlocks among ordinary, unregulated commercial and industrial corporations. This section, which is the focus of current attention, provides in part as follows:

> No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000 engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers subject to

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1 15 U.S.C. § 19 (1964).

> the [Interstate Commerce] Act . . . if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition between them would constitute a violation of any of the antitrust laws . . . .[2]

During the New Deal the investigations of the Temporary National Economic Committee touched on the interlock question, but only in an incidental manner;[3] there was no contemporaneous change in antitrust policy, but some restriction on interlocking relations was written into every major New Deal regulatory statute.[4] Immediately following World War II, the Department of Justice publicized a study on the extent of interlocks; the Department indicated it was dealing with interlocks on an informal basis and was seeking voluntary resignations rather than pressing for lawsuits.[5] The Department was evidently successful in securing the voluntary resiguations of directors who were informed that their continuing in both positions raised important antitrust problems.[6] But in February, 1952, the Department, while confirming its continuing desire to seek compliance with section 8 without litigation, filed four actions based squarely on the section.[7]

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2 Another portion of § 8 places limits on horizontal interlocking directorates among banks and trust companies; it has been amended from time to time although the portion of § 8 quoted in the text has not been. Section 10 of the Clayton Act, 15 U.S.C. § 20 (1964), prohibits a common carrier subject to the Interstate Commerce Act from having annual dealings in excess of $50,000 with any supplier with which it shares a director, president, manager, or purchasing or selling officer except by competitive bids regulated by the Interstate Commerce Commission. Since the focus of this article is on the basic antitrust rules applicable to unregulated corporations, it will deal only tangentially with the rules applicable to regulated corporations.

3 *See* D. Lynch, Concentration of Economic Power 231-32, 359 (1946).

4 These include the Federal Communications Act of 1934, 47 U.S.C. § 212 (1964); Federal Power Act of 1935, 16 U.S.C. § 825d (1964); Public Utility Holding Company Act of 1935, 15 U.S.C. § 79 (1964); Civil Aeronautics Act of 1938, 49 U.S.C. § 1379 (1964). A useful chart of the federal statutes appears in Jacobs, *Interlocks*, 29 ABA Antitrust Section 204, 214-15 (1965). For a fuller analysis of the similarities and differences among the various statutes see Note, *Interlocking Directorates: A Study in Desultory Regulation*, 29 Ind. L.J. 429 (1954).

5 *See* Kramer, *Interlocking Directorships and the Clayton Act After 35 Years*, 59 Yale L.J. 1266, 1270-71 (1950). According to Mr. Kramer, then a high-ranking official in the Antitrust Division, the Department unearthed about 1500 interlocks; he did not indicate how many of these violated § 8.

6 *Id.* at 1271.

7 The press release stated:

> The Antitrust Division will maintain a continuing watch over the directorship field and, in cases in which individuals continue to serve on the boards of competing companies after notification by Division that they are violating this statute, it will proceed to file legal actions to terminate such directorships.

Department of Justice Press Release, Feb. 27, 1952. Three of the four cases filed involved John M. Hancock; the fourth involved Sidney J. Weinberg. *See* United States v. W. T. Grant Co., 345 U.S. 629 (1953); United States v. Sears, Roebuck & Co., 111 F. Supp. 614 (S.D.N.Y. 1953).

At about the same time the Federal Trade Commission submitted a comprehensive report on interlocking directorates, thus demonstrating that agency's continuing concern

These tangible expressions of policy mirror a lingering apprehension in many quarters that interlocking relationships are the visible ties linking a small group of men who wield vast political and economic power. Since many conceive of the antitrust laws as designed to prevent concentrations of power, the idea that all interlocking directorships must be smashed has remained one of the intellectual undercurrents coursing beneath the surface of antitrust activity. Nevertheless, the amount of federal litigation directed against interlocks has always been paltry.[8] Statistics on the number of lawsuits filed under section 8, however, fail to tell the whole story. The FTC has made some effort to deal with interlocks via section 5 of the Federal Trade Commission Act,[9] and the Department has on occasion employed the Sherman Act.[10] Moreover, the absence of litigation may indicate that

with the problem. FTC, REPORT ON INTERLOCKING DIRECTORATES (1951). The report revealed a great many interlocks among the corporations studied. For the most part the interlocks were vertical or indirect and thus not covered by § 8.

8 The Department of Justice brought only ten cases to enforce § 8 and five cases to enforce § 10 during the period beginning with the effective date of the Clayton Act and ending in January, 1965. STAFF OF HOUSE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., REPORT ON INTERLOCKS IN CORPORATE MANAGEMENT 227 (Comm. Print 1965) [hereinafter cited as STAFF REPORT]. The cases filed on February 27, 1952 were the Department's first major efforts. *See* Kramer, *supra* note 5, at 1270. During the same period the FTC filed only thirteen complaints under § 8; twelve of these were dismissed when the directors involved resigned one of the directorships. STAFF REPORT 227. One of the few issues fairly well settled in this area is that the discontinuance of the interlock does not automatically render the case moot. *See* United States v. W. T. Grant Co., 345 U.S. 629 (1953). The thirteenth case ended in a cease-and-desist order entered by consent. STAFF REPORT 102.

9 Central Linen Serv. Co., Nos. 8558, 8559, TRADE REG. REP. ¶ 5625.60 (FTC, Mar. 13, 1964) (consent order).

10 Prohibitions against various kinds of interlocks appear in the following consent decrees: United States v. True Temper Corp., 1959 Trade Cas. ¶ 69,441 (N.D. Ill.); United States v. Arthur Murray, Inc., 1958 Trade Cas. ¶ 69,192 (W.D. Mo.); United States v. Linen Supply Institute, 1958 Trade Cas. ¶ 69,120 (S.D.N.Y.); United States v. National Cranberry Ass'n, 1957 Trade Cas. ¶ 68,850 (D. Mass.); United States v. Greyhound Corp., 1957 Trade Cas. ¶ 68,756 (N.D. Ill.); United States v. National Linen Serv. Corp., 1956 Trade Cas. ¶ 68,398 (N.D. Ga.); United States v. Shubert, 1956 Trade Cas. ¶ 68,272 (S.D.N.Y.); United States v. General Outdoor Advertising Co., 1955 Trade Cas. ¶ 68,169 (N.D. Ill.); United States v. New Wrinkle, Inc., 1955 Trade Cas. ¶ 68,161 (S.D. Ohio); United States v. Northland Milk & Ice Cream Co., 1955 Trade Cas. ¶ 68,091 (D. Minn.); United States v. American MonoRail Co., 1955 Trade Cas. ¶ 68,041 (N.D. Ohio); United States v. R.L. Polk & Co., 1955 Trade Cas. ¶ 67,943 (E.D. Mich.); United States v. General Ry. Signal Co., 1955 Trade Cas. ¶ 67,992 (W.D.N.Y.); United States v. Pittsburgh Crushed Steel Co., 1954 Trade Cas. ¶ 67,892 (N.D. Ohio); United States v. Food Mach. & Chem. Corp., 1954 Trade Cas. ¶ 67,829 (N.D. Cal.); United States v. Liberty Nat'l Life Ins. Co., 1954 Trade Cas. ¶ 67,801 (N.D. Ala.); United States v. United States Rubber Co., 1954 Trade Cas. ¶ 67,771 (S.D.N.Y.); United States v. Liquid Carbonic Corp., 1952-53 Trade Cas. ¶ 67,248 (E.D.N.Y. 1952); United States v. L.A. Young Spring & Wire Corp., 1950-51 Trade Cas. ¶ 62,908 (E.D. Mich. 1951); United States v. Textile Mach. Works, 1950-51 Trade Cas. ¶ 62,709 (S.D.N.Y. 1950). Some of these interlocks would not be covered by existing § 8.

The Department also attacked interlocking directorates between securities issuers and investment bankers in United States v. Morgan, 118 F. Supp. 621 (S.D.N.Y. 1953), a Sherman Act case. The Government contended that the defendants had used interlocking directorates to stifle competition for the underwriting of securities. With some asperity Judge Medina decided the Government had failed to prove its case. For a debate on Judge Medina's perceptiveness see Steffen, *The Investment Bankers' Case: Some Observations,* the Department's campaign to secure voluntary compliance is notably successful.[11] And obviously the very existence of section 8 prevents many illegal interlocks from arising in the first place. The belief persists, however, that the Government's attack on corporate interlocks under the antitrust laws has been conducted with all the observable success and fervor that attended the major campaigns of the Italian army during World War II.

Several factors may account for the Department's lack of success. For example, a director may often avoid a judicial decision by resigning from one of the boards as soon as suit is filed. This does not make the case moot since the Government is entitled to injunctive relief whenever necessary to prevent a recurrence of the interlocking relation.[12] The cases give little guidance, however, on exactly what facts will be deemed sufficient to indicate a reasonable possibility of recurrence.[13] It may be said that a voluntary resignation, even if under pressure, gives the Government much of the relief it could obtain in a lawsuit, and at much less cost. Although this is true, it iguores the interest of the Government in making law as well as winning cases; precious little law has developed regarding interlocks.

The enforcement agencies claim that the loopholes in section 8 are the major factor preventing enforcement of the antitrust laws against interlocks. Since 1950 they have requested legislation to correct those weaknesses.[14] In 1964 Representative Celler, the Chairman of the House Judiciary Committee, called for new, tough legislation to plug the holes in section 8 and directed the Antitrust Subcommittee Staff to conduct a study and submit recommendations.[15] One of

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64 YALE L.J. 169 (1954); Whitney, *The Investment Bankers' Case—Including a Reply to Professor Steffen*, 64 YALE L.J. 319 (1955); Steffen, *The Investment Bankers' Case: Observations in Rejoinder*, 64 YALE L.J. 863 (1955); Whitney, *The Investment Bankers' Case: A Surrejoinder*, 64 YALE L.J. 873 (1955). The essence of the debate was that Professor Steffen, who helped prepare the Government's case, thought the judge muffed his job rather badly. Mr. Whitney, who led the successful defense, thought the opinion a piece of judicial statesmanship.

11 *See* Jacobs, *supra* note 4, at 209.

12 United States v. W.T. Grant Co., 345 U.S. 629 (1953).

13 In *Grant* the Supreme Court held that the trial judge did not abuse his discretion in dismissing the Government's complaint despite the following facts: (1) Hancock refused to terminate his interlocking directorates until after the suit was filed in spite of five years of administrative efforts; (2) he refused to acknowledge that the interlocks were illegal; and (3) he refused to promise not to commit similar violations in the future. The Court noted, however, that if it had been "sitting as a trial court, this showing might be persuasive." *Id.* at 634. In a subsequent case, United States v. Newmont Mining Co., 1964 Trade Cas. ¶ 71,030 (S.D.N.Y.), the district court denied the defendant's motion for summary judgment in the face of essentially the same showing. The matter now rests with the discretion of the trial judge, and there is very little circumscribing that discretion.

14 *E.g.*, Kramer, *supra* note 5, at 1274-75; STAFF REPORT 102.

15 110 CONG. REC. 5766 (1964).

the recommendations of the Staff Report was a model bill broadening the coverage of section 8, as recommended by the enforcement agencies, to be used as a basis for a full investigation into the actual impact of corporate interlocks.[16] In October, 1965, Representative Celler introduced H.R. 11572 embodying the recommendations of the Staff Report;[17] the bill died in committee when the 89th Congress ended. Representative Celler introduced a similar bill in January, 1967, but there has been little observable progress since it was sent to committee.

The enforcement agencies had pointed to four separate loopholes in section 8. First, section 8 is limited to situations in which the person through whom the interlock is effected is a director of both corporations. If he were a director in one company and a nondirector officer in the other, section 8 would not apply even though the situations are functionally identical. Secondly, section 8 does not cover vertical interlocks—interlocks between two companies at successive levels of production or distribution. Thirdly, section 8 does not cover indirect interlocks. For example, two members of an investment banking firm may serve on the boards of competing corporations although the same individual may not serve on both boards. Fourthly, section 8 does not cover interlocks between corporations only potentially related horizontally or vertically.[18]

The Celler bill, which is tailored to meet these objections, makes it unlawful

> for any natural person who is a director, officer, or employee with management functions, of any person engaged in commerce at the same time to hold the position of director, officer, or employee with management functions, or to have a representative or nominee who represents such person as a director, officer, or employee with management functions, in any other person (a) who is an actual or potential competitor, or (b) who is an actual or potential customer, or supplier, or source of credit or capital, or (c) whose principal business in purpose or in fact is the holding of stock in, or control of, any other person in commerce.[19]

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16 STAFF REPORT 225-32.

17 For a full description of the bill, complete with a parade of horribles that might ensue from its enactment, see Lombard, *The Corporate Management Interlocks Bill*, 21 BUS. LAW. 879 (1966).

18 *See* Letter from FTC Chairman Paul Dixon to Representative Celler, Nov. 30, 1962, in STAFF REPORT 102.

19 *See* CCH, CONGRESSIONAL INDEX 4364. The present limitation requiring at least one corporation to have $1,000,000 in aggregate capital, surplus, and undivided profits is retained. There is a new exemption for interlocking relationships "when one of the persons

Thus the Celler bill deals explicitly with three of the four weaknesses pointed out by the enforcement agencies; it does not literally cover indirect interlocks. Nevertheless, to the extent that those interlocks involve vertical interlocks, the bill would cover them too. In the hypothetical case in which two members of the same investment banking firm served on the boards of competing corporations, the bill's prohibitions on vertical interlocks would destroy the relationship.[20]

Since an avowed purpose of the Celler bill was to provoke discussion, this article will focus on the bill, which embodies long requested changes and raises the pertinent questions. For the purpose of obtaining a better understanding of why section 8 emerged in its present form, consideration will initially be given to the role played by interlocks in the thinking of the Progressive Era. Discussion will then focus on some of the issues presented by the attempt to amend section 8, both in terms of underlying theory and of precise formulation in the Celler bill.

II. The Progressive Era

A. The Political Setting

As early as 1908 the Democratic platform had called for a law "preventing the duplication of directors among competing corporations."[21] In 1912 the antitrust plank in the Democratic platform called for the use of criminal sanctions against "trusts and trust officials" and suggested supplemental legislation that would lead to "the prevention of holding companies, of interlocking directors, of stock watering, of discrimination in price, and the control by any one corporation of so large a proportion of any industry as to make it a menace to competitive conditions. . . ."[22] Unlike the Democratic platform, neither the Republican nor the Progressive platform attempted an enumeration of practices to be prohibited; both platforms instead espoused the idea of a federal trade commission. The Progressives forthrightly insisted

involved directly or indirectly owns more than 50 per centum of the voting stock of the other or others, or where 50 per centum or more of the voting stock of each of the persons involved . . . is directly or indirectly owned by the same person." Finally, the Attorney General is empowered to approve an interlocking relationship upon "due showing . . . that such relationship in consideration of all the relevant factors accords to the maximum extent practicable with the objectives of the antitrust laws."

20 Under the Celler bill, which reaches interlocks between potential customers and suppliers, it would make no difference whether the investment banking firm were actually selling its services to the competing corporations. If it were decided to restrict the act to interlocks between corporations with an existing customer-supplier relationship, of course some transactions would have to be proved; these would ordinarily be present.

21 K. Porter & D. Johnson, National Party Platforms 1840-1956, at 146 (1956).

22 *Id.* at 169.

on the inevitability and desirability of combination and advanced the commission as an instrument for holding these powerful combinations accountable to the law. The Republicans urged a commission as an aid to the vigorous enforcement of the Sherman Act, but did not specify the exact role the commission should play.[23]

These differences in platforms mirrored a fundamental cleavage among the parties on the trust issue. The Progressives subscribed to Theodore Roosevelt's view that competition was no longer a viable principle of economic organization, but was a divisive social force interfering with the attainment of the harmony and social solidarity that Roosevelt sought.[24] The Democrats, on the other hand, shunned the idea of a commission since it presupposed an undesirable amount of governmental involvement in the economy. Preservation of competitive conditions and the eradication of private monopoly through the flat prohibition of specifically defined practices such as interlocking directorates was the heart of their program.[25] Their platform, however, suggested a ban on all interlocks, not merely interlocks between competitors.[26]

As it happened, the trust issue became the core issue of the 1912 campaign. Woodrow Wilson had been seeking an appealing issue that would dramatize the differences between his program and Roosevelt's. Louis D. Brandeis convinced Wilson that the trust question was such an issue and began to shape Wilson's thinking on that question.[27] Although Wilson was greatly influenced by Brandeis, the two men approached the trust question from different standpoints. Brandeis was an economist, a social scientist.[28] Wilson was a moralist who had a keen appreciation of the power of oratory to move men and was not one to clutter a clear moral issue with the baggage of abstract theory or masses of data.[29] Wilson did not find economic theory

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23 *Id.* at 178, 184.

24 *See* S. HAYS, THE RESPONSE TO INDUSTRIALISM 1885-1914, at 88-89 (1957).

25 Votaw, *Antitrust in 1914: The Climate of Opinion*, 24 ABA ANTITRUST SECTION 14, 25 (1964).

26 The ban was apparently intended to be part of a federal corporation law. The Democrats of 1912 seemed aware that the corporate form itself posed social, moral, and political questions; the platform indicates that direct federal control of that form was contemplated as a solution.

27 *See* A. LINK, WOODROW WILSON AND THE PROGRESSIVE ERA 20-21 (1954) [hereinafter cited as LINK]; A. MASON, BRANDEIS 377-78 (1946) [hereinafter cited as MASON]. *See also* Leuchtenburg, *Introduction: Woodrow Wilson and The New Freedom*, in W. WILSON, THE NEW FREEDOM 1, 4-5 (W. Leuchtenburg ed. 1961).

28 The classic example of Brandeis' method is his haudling of the case of Muller v. Oregon, 208 U.S. 412 (1908). A good account of the episode may be found in S. KONEFSKY, THE LEGACY OF HOLMES AND BRANDEIS 83-91 (1961).

29 *E.g.*, T. COCHRAN & W. MILLER, THE AGE OF ENTERPRISE 193-94 (rev. ed. 1961); Leuchtenburg, *supra* note 27, at 5-6.

stimulating and publicly referred to economists as "those tedious persons."[30] To him, "competition" connoted a liberating force in society that enabled each man to capitalize on his own abilities rather than a structural model of a market.[31]

In his campaign speeches Wilson emphasized that personal relations between man and man had broken down with the development of the giant business corporation. The hierarchical structure of the corporation centralized the power of decision in a few hands. The remainder of the people were mere employees with little chance for advancement.[32] Moreover, the few at the top had allied with the political leaders to solidify their already commanding position, and the people were effectively denied access to their representatives.[33] Furthermore, the information needed for effective political action was denied to the people. In politics as in industry they had lost control of their destiny; they had to be content with what their "guardians" gave them.[34] To Wilson, the most serious consequence of this was that the spirit of enterprise and self-reliance of the people would be eroded and America's ability to regenerate itself would thus be forever lost.[35]

Wilson denied that technological imperatives demanded the degree of concentration existing in American industry. He distingnished between "big business," which was to some extent inevitable, and "trusts," which were not.[36] Many of the vast combinations had, by artful contrivance, been expanded to the point that diseconomies of large scale had set in.[37] If smaller, more efficient rivals could enter the field, the trusts would topple. Wilson's program aimed at outlawing

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30 W. WILSON, THE NEW FREEDOM 101 (W. Leuchtenburg ed. 1961) [hereinafter cited as WILSON].

31 An excellent study of Wilson's background and thought on economic issues is W. DIAMOND, THE ECONOMIC THOUGHT OF WOODROW WILSON (1943).

32 WILSON 20-22, 25-26.

33 *Id.* at 29-30, 78-85.

34 *Id.* at 47-58.

35 *E.g.*, *id.* at 39, 59-64 (essay entitled *Life Comes From the Soil*). The following extract capsulizes Wilson's views:

> America stands for opportunity. America stands for a free field and no favor. America stands for a government responsive to the interests of all. . . . We purpose to prevent private monopoly by law, to see to it that the methods by which monopolies have been built up are legally made impossible. We design that the limitations on private enterprise shall be removed, so that the next generation of youngsters . . . will not have to become proteges of benevolent trusts, but will be free to go about making their own lives what they will. . . .

Id. at 131-32.

36 *Id.* at 102. Interestingly, Wilson draws much the same distinction that has been drawn by the Supreme Court in the anathematized *Standard Oil* and *American Tobacco* cases. *See* Standard Oil Co. v. United States, 221 U.S. 1, 75 (1911); United States v. American Tobacco Co., 221 U.S. 106, 181-82 (1911). The basic idea seems to have been that growth by internal expansion was "normal," whereas growth by merger was not.

37 WILSON 103-04.

those practices that prevented the entry of "Jack the Giant Killer": price discrimination, tying contracts, exclusive dealing arrangements, and a "community of interest" between the trusts and the capitalists that prevented the potential entrant from securing needed capital. It was here that interlocks played their role.

The credit of the country, Wilson wrote, had become "dangerously centralized" in the hands of the Money Trust—"capitalists who wish to keep the economic development of the country under their own eye and guidance" and who, even if honest and public-spirited, "by reason of their own limitations, chill and check and destroy genuine economic freedom."[38] This Money Trust crushed those whom it found troublesome. Alluding to the Pujo Committee investigations, Wilson outlined the role that interlocks played in facilitating the Money Trust's operations: The directorate of any great bank was known to be interlaced with as many as sixty security issuers, railroads, manufacturing corporations, and distributing companies. This had led to a widespread public distrust of the bankers' motives and a suspicion that their objectives might be dangerous to a free society:

> [W]hat we have got to do is to disentangle this colossal "community of interest" . . . . [N]o single, avowed, combination is big enough for the United States to be afraid of; but when all the combinations are combined . . . then there is something that even the government of the nation itself might come to fear . . . .[39]

Although Wilson's discussion of interlocks highlighted the possibility of a supercombination, it also suggested another, less dramatic, aspect of the interlock question: the elimination of opportunities for young men. Wilson was less concerned with general mobility than with the reduced chance to get to the top. If one thinks of a place on the board of a large corporation as the top, there are only so many spots available. Any man holding more than one spot restricts the opportunities available. From this angle the interlock problem becomes one of simple arithmetic and the relations among the firms thus linked become unimportant. Studies that simply indicate the number of directorships held by a given individual without much consideration of the relationship among the firms attest to the persistence of this strain of thought.[40]

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[38] *Id.* at 111-12.
[39] *Id.* at 110-11, 113.
[40] The TNEC and the 1965 STAFF REPORT went in for this sort of nose-counting. *See* D. LYNCH, *supra* note 3, at 231; STAFF REPORT 114-18, *passim*. *See also* FTC, *supra* note 7, at 255-79.

Four days before Wilson's first inaugural the Pujo Committee presented its report on the Money Trust. The report confirmed suspicions that there was indeed a Money Trust, that it was directed by a handful of powerful investment bankers headed by the Morgan interests, and that the power wielded by this group represented a serious threat to American democracy.[41] Brandeis approved the report as far as it went, but deemed the Committee's recommendations "entirely inadequate."[42] His series of articles on the Money Trust popularized the Committee's findings and riveted public attention to the practices of what Brandeis termed "our financial oligarchy."[43]

The core of the Money Trust, Brandeis wrote, was a small group of leading investment banking firms that had eliminated competition among its members and, through financial patronage, had induced smaller but still important investment banking houses to act as jobbers or distributors for them instead of distributing securities on their own accounts. Similar patronage had elicited the cooperation of hundreds of smaller firms scattered throughout the country. Thus the "inner group" controlled a strategic position between investors and security issuers and, from this position, had expanded to acquire control over the nation's quick capital by controlling the depositories, commercial banks, trust companies, and insurance companies. At the same time they gained control of the issuers of securities.[44]

In this endeavor the interlocking directorship was the Money Trust's most effective device:

> The term "interlocking directorates" is here used in a broad sense as including all intertwined conflicting interests, whatever the form, and by whatever device effected. The objection extends alike to contracts of a corporation whether with one of its directors individually, or with a firm of which he is a member, or with another corporation in which he is interested as an officer or director or stockholder. The objection extends likewise to men holding the inconsistent position of director in two potentially competing corporations, even if those corporations do not actually deal with each other.[45]

Brandeis criticized the prevailing common-law rule that contracts between a corporation and one of its directors, and contracts between

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41 *Report of the Committee Appointed Pursuant to House Resolutions 429 and 504 To Investigate the Concentration of Control of Money and Credit* 129-30 (1913), *quoted in* R. ROBERTSON, HISTORY OF THE AMERICAN ECONOMY 321 (2d ed. 1964).

42 MASON 413.

43 L. BRANDEIS, OTHER PEOPLE'S MONEY (2d ed. 1932) [hereinafter cited as BRANDEIS].

44 *Id.* at 28-44.

45 *Id.* at 51-52.

corporations having a common director, are not void but merely voidable. He thought these contracts should be void to protect the shareholders who failed to get the benefit of disinterested judgment from all their trustees and the consumers to whom the costs of graft and inefficiency were passed.[46] But the most compelling reason for prohibiting interlocking directorates was the impossibility of breaking the power of the Money Trust "without putting an end to the practice in the larger corporations."[47] Brandeis dramatized his point with evidence showing that the members of J. P. Morgan & Company and the directors "of their controlled trust companies and of the First National and National City Bank together" held 341 directorships in 112 corporations having aggregate resources or capitalization of 22,245,000,000 dollars.[48]

Therefore, Brandeis referred to all the problems that the Celler bill now seeks to bring within section 8. In defining "director" in functional rather than in formal terms[49] Brandeis noted that the sharing of officers could be as troublesome as the sharing of directors; he dwelt at length on vertical interlocks; he alluded to the problems of indirect interlocks; he specifically pointed out that interlocks between potential competitors created problems. Of course he also touched on the restriction of opportunity and the threat of a supercombination.

Wilson and Brandeis saw the first fruitful results of their work on January 3, 1914, when it was announced that J. P. Morgan, Jr. and many of his associates were withdrawing from the boards of thirty corporations. Wilson was initially skeptical, but was assured by advisers that the impact of the announcement had been profound and that it signaled a willingness on the part of big business to capitulate in the face of his assaults.[50] Although elated, Wilson asked Congress for tougher antitrust legislation on January 20, 1914.

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46 A similar critique of conventional state corporation law may be found in Pam, *Interlocking Directorates, The Problem and Its Solution*, 26 HARV. L. REV. 467 (1913). In most states today, a contract between two corporations sharing a director may be attacked by either corporation on the ground that it is unfair, even if a disinterested majority of both boards voted for the contract. *See generally* R. BAKER & W. CARY, CASES ON CORPORATIONS 452-69 (3d ed. 1959).

47 BRANDEIS 62.

48 *Id.* at 30-33. Brandeis was also able to construct a partly supposititious "endless chain" of transactions between corporations that counted J.P. Morgan or one of his associates among their directors. *Id.* at 52-54.

49 It might be asked why the FTC could not urge this functional definition of "directors" under present § 8. The insuperable obstacle seems to be that in § 10 and in that portion of § 8 dealing with banks, Congress clearly used "director" in a formal sense as designating a position and not as a substitute for "manager."

50 *See* 4 R. BAKER, WOODROW WILSON: LIFE AND LETTERS 369-70 (1931).

B. Legislative History

In his address to Congress Wilson spoke exuberantly about the end of the antagonism between big business and government and the dawn of an era of good feeling[51] and claimed that business awaited

> laws which will effectually prohibit and prevent such interlocking of personnel of the directorates of great corporations . . . as in effect result in making those who borrow and those who lend practically one and the same, those who sell and those who buy but the same persons trading with one another under different names and in different combinations, and those who affect to compete in fact partners and masters of some whole field of business. . . .[52]

In this speech Wilson returned to his campaign theme: The legislation would do more than eliminate existing evils; it would create opportunities and open "the field . . . to scores of men who have been obliged to serve when their abilities entitled them to direct." He also asked for prohibitions on certain unfair practices and the creation of a federal commission with investigatory and advisory powers to aid in antitrust enforcement.

Two days later Representative Clayton had embodied the President's requests in two bills.[53] One bill created a trade commission; the other contained the amendments to the Sherman Act, including prohibitions, enforced by criminal sanctions, on exclusive-dealing arrangements, tying contracts, price discrimination, holding companies, and interlocking directorates. As enacted, the Clayton Act omitted the criminal penalties and banned price discrimination, tying arrangements, exclusive-dealing clauses, and holding companies only insofar as the effect of these practices would be "to substantially lessen competition or tend to create a monopoly in any line of commerce."[54] Section 8, however, fared better. The House committee amended the bill to provide that at least one of the interlocked corporations must have one million dollars in aggregated capital, surplus, and undivided profits—a limitation fully consistent with the Brandeis-Wilson view that the interlock presented a problem only when used to join large

[51] More experienced in dealing with big business, Brandeis was less sanguine: "Confidentially, I think he rather overdid the era of good feeling." MASON 402.

[52] H.R. REP. No. 627, 63d Cong., 2d Sess. 17-18 (1914).

[53] 51 CONG. REC. 2142 (1914).

[54] 38 Stat. 730 (1914). Senator Reed of Missouri described the effect of the legislative process: "When the Clayton bill was first written, it was a raging lion with a mouth full of teeth. It has degenerated to a tabby cat with soft gums, a plaintive mew, and an anemic appearance." LINK 72.

corporations and one that is preserved by today's proposed amendments. The Senate merely removed the criminal penalties without changing the standard of illegality.

As early as April, 1914, substantial business opposition to the Clayton bill had developed.[55] Wilson himself began to doubt the wisdom of the bill's inflexible approach; its criminal sanctions seemed harsh and its method of clear-cut definition of certain offenses might prove too rigid to deal adequately with the creativity of the trust builder. By June he had made up his mind.

Although Brandeis had written that Wilson's original legislative proposals, including the request for a weak commission, had "paved the way for about all I have asked for,"[56] he had been working with George Rublee on a bill to create a trade commission with broad powers to prohibit unfair trade practices.[57] These proposals were subsequently embodied in a bill introduced by Representative Stevens, but the Stevens bill had been killed in committee.[58] On June 10, 1914, five days after the Clayton bill and the bill establishing a weak commission[59] had been approved by the House, Wilson told Brandeis, Rublee, and Stevens that he would make the proposal for a strong commission the heart of his program. This switch must have been hard for Wilson to make. It meant federal involvement in the economy to an unprecedented extent and espousing a position that, superficially at least, seemed identical to Roosevelt's. Nevertheless, Wilson worked hard to marshal Senate support for the strong commission.[60] When the trade commission emerged from the Senate, it had been given regulatory power, and the House was won over in conference. But after Wilson became committed to the Brandeis-Rublee approach, he virtually ignored the Clayton Act.[61]

This shift of emphasis from the Clayton bill, with its philosophy of specific definition, in favor of a regulatory commission, with power to deal with "unfair methods of competition," seems to have been a major cause of section 8's emerging in its present form. Many persons

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55 LINK 70-71.

56 MASON 401.

57 LINK 71.

58 Baum & Baker, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition*, 7 VILL. L. REV. 517, 526 (1962).

59 Representative Covington had introduced a bill creating a commission with investigatory and advisory powers. *See* S. REP. No. 597, 63d Cong., 2d Sess. 8 (1914). This bill did not differ significantly from the Trade Commission Bill introduced earlier by Representative Clayton. *See* Baum & Baker, *supra* note 58, at 525.

60 *See* 4 R. BAKER, *supra* note 50, at 372-73.

61 LINK 72.

who understood the interlock problem and who might otherwise have worked to amend the Clayton bill may have felt that a bitter struggle to broaden the coverage of the Clayton bill would be unduly costly since the commission could handle any interlock not covered as an "unfair method of competition." Another factor was the domination of the thinking about interlocks by the image of the Money Trust. By the middle of 1914 the threat from that quarter seemed much reduced. The Money Trust's power stemmed its control over the money market during a period of high demand for capital.[62] But this demand had been slowing, and some later commentators believe that the bankers themselves had been forced to stimulate it.[63] In any event, the panic of 1907 had shaken much of the faith that had been placed in the bankers. Moreover, the previously enacted Federal Reserve Act was viewed as a direct attack on the problems of the money supply.[64] Also the elder J. P. Morgan had died on March 31, 1913, thus depriving the Money Trust of the personality who many deemed indispensable to its continued power.[65] A final factor was the business opposition to the Clayton bill; congressmen responsive to this wanted the weakest possible measure.[66] It is thus clear that Congress did not want to include any other interlocks under the rigid prohibition of section 8; it is not clear, however, that Congress deliberately refused to change section 8 because it wished to exclude all other interlocks from antitrust coverage.[67]

III. The Issues of Today

A. *General Observations*

The present proposal to expand the coverage of section 8 raises again several issues about interlocks raised during the Progressive Era and then left unanswered. The 1965 Staff Report enumerates these issues. First are the matters of antitrust significance: "(1) impairment or elimination of competition between the firms in which interlocking directors provide an effective liaison; (2) preferential treatment in the supply of material and credit to favored companies; and (3) with-

62 *See* T. Cochran & W. Miller, *supra* note 29, at 150; R. Robertson, *supra* note 41, at 320.

63 T. Cochran & W. Miller, *supra* note 29, at 188-89.

64 R. Robertson, *supra* note 41, at 322.

65 Brandeis felt that Morgan or one of similar stature would be required to achieve the objectionable results at which the act was aimed. *See Hearings Before the House Comm. on the Judiciary on Trust Legislation*, 63d Cong., 2d Sess., pt. 2, at 943 (1914).

66 According to 4 R. Baker, *supra* note 50, at 377-80, the hand of the opposition was strengthened by a depression that occurred during the summer of 1914.

67 *But see* Jacobs, *supra* note 4, at 213.

holding of credit and capital from 'outside' competitors." Second is the conflict-of-interest problem when the corporations deal with each other. Third is the adverse effect on the quality of management as the overburdened director stops managing and the elimination of opportunity tends to "constrict the management pool." Last is the fear that so much power will be concentrated in so few hands as to be a threat to a free society.[68] The Progressive Era discussions of the interlock question dealt with all these facets. If we have made any progress, it lies in our recognition that certain problems are conventionally considered of antitrust significance and others are not.

In essence, the proposed legislation would establish a rule of per se illegality for interlocking relationships not now covered by section 8.[69] If this new rule is to be consistent with the logic behind per se illegality, there must be some determination that each class of interlocks is so likely to have an adverse impact on competition and so unlikely to improve competition, that dispensing with an examination of the effects of any individual interlock is warranted.[70]

An interlock not covered by section 8 is not immune from attack under the antitrust laws. To the extent that interlocks may be reached under the Sherman Act or section 5 of the Federal Trade Commission Act,[71] alternative standards exist for judging the legality of interlocks, and these may be evolved on a case-by-case basis. Furthermore, under these statutes the courts and the Commission have developed rules of per se illegality for other business practices such as price-fixing,[72]

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68 STAFF REPORT 17.

69 It may be thought that the requirement that one of the linked corporations have $1,000,000 in capital, surplus, and undivided earnings, or the exemption in the proposed amendments for interlocks where one corporation owns more than 50% of the voting stock of the others or the same person owns more than 50% of the voting stock of the linked corporations makes the per se label inapplicable. But the imposition upon the Government of the burden of establishing the existence of one or two triggering facts, in addition to establishing the existence of the arrangement, is not necessarily inconsistent with a rule of per se illegality, which eliminates the necessity of inquiring into the effects of the particular arrangement in the case. *Cf.* Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50, 51, 59 (1958).

70 *See* C. KAYSEN & D. TURNER, ANTITRUST POLICY 143 (1959).

71 It would be beyond the scope of this article to canvass the issue of § 5's relation to the other antitrust laws; for those interested in the problem, the literature is extensive. *E.g.*, Oppenheim, *Guides to Harmonizing Section 5 of the Federal Trade Commission Act With the Sherman and Clayton Acts*, 59 MICH. L. REV. 821 (1961); Pearson, *Section 5 of the Federal Trade Commission Act as Antitrust: A Comment*, 47 B.U.L. REV. 1 (1967). It may be noted, however, that on several occasions the section has been used to reach practices not covered by the Clayton Act yet identical to proscribed practices in their impact. *See generally* Atlantic Ref. Co. v. FTC, 381 U.S. 357 (1965); FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392 (1953).

72 United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927); *cf.* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951).

resale-price maintenance,[73] and group boycotts.[74] Hence, the rejection of the proposed legislation would not preclude the evolution of a per se rule with respect to interlocks; it would simply shift from the Legislature to the courts the responsibility of deciding whether a per se rule is warranted. Since the courts can draw on the experience of concrete cases and since very little is known about the actual effects of interlocks,[75] letting the courts decide may be the wisest course. In either case, we must endeavor to develop some framework for analysis. The following tentative analysis is offered as a possible spur to that development.

B. The Talent Market

The market for directors or other high-level executive talent is, in a sense, like any other market. Candidates for executive positions offer their services in the market-place to the consumers of talent—the corporations. A major premise of the antitrust laws is that the consumers in any market are presumably best able to decide what they want and the antitrust laws should serve to maximize consumer choice and satisfaction.[76] The most prevalent defense of interlocks is that they make available to the employing companies the best men available.[77] Any restriction on interlocking directorates, or other interlocks, however slight, restricts the freedom of choice of the buying corporations. Telling Corporation *X* that it may not have a given individual on its board because he also serves on the board of Corporation *Y* takes the decision away from the consumer; it forces Corporation *X* to take less than it deems best. It is no answer to say that if the particular individual is on the board of Corporation *Y* and also on the board of ten or fifteen other corporations, he will not be able to devote enough time to the affairs of Corporation *X*. Assuming Corporation *X* is fully informed about his commitments, Corporation *X*

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73 Dr. Miles Medical Co. v. John D. Parke & Sons Co., 220 U.S. 373 (1911).

74 Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild, Inc. v. FTC, 312 U.S. 457 (1941). Actually the status of boycotts is less clear than the text would indicate. *See* Rahl, *Per Se Rules and Boycotts Under the Sherman Act: Some Reflections on the Klor's Case*, 45 VA. L. REV. 1165 (1959). Nevertheless, I believe most observers do so categorize them.

75 STAFF REPORT 229-30.

76 Bork & Bowman, *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 365 (1965). Even those commentators who would not agree that this is the sole objective of the antitrust laws accept it as a major premise. Blake & Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 381 (1965). The following analysis does not require that consumer satisfaction be accepted as the sole premise.

77 *See* J. SCOTT & E. ROCKEFELLER, ANTITRUST AND TRADE REGULATION TODAY: 1967, at 52 (1967); Means, *Interlocking Directorates*, 8 ENCYC. SOC. SCI. 148 (1932).

has still decided that, on balance, the individual in question is the best available.

This is not to say that the consumer's choice may never be restricted. Intervention in the market may be warranted if its operation is so imperfect that the consumers of talent persistently make mistakes about who are the best men available. Intervention may also be advisable if the decisions of the consumers, while correct from their point of view, have serious adverse consequences for the operation of other markets or the system as a whole.[78] Nevertheless, the choices of the buyers of executive talent are entitled, by the premises of the antitrust laws themselves, to presumptive validity, and the burden lies on those who would intervene.

C. *Two Reasons for Intervening: Equality of Opportunity and the Fear of an Elite*

Wilson's message to Congress stressed that a ban on interlocks would revivify American business by introducing new leadership and new energy. The men who would then rise to the top were not second-rate; they were "men who have been obliged to serve when their abilities entitled them to direct." This was a direct assault on the major justification for interlocks, a denial that interlocking relationships were necessary to enable corporations to get the best men. In the words of the House report accompanying the Clayton bill: "The idea that there are only a few men in any of our great corporations and industries who are capable of handling the affairs of the same is contrary to the spirit of our institutions. . . ."[79] This theme has persisted; the Staff Report echoes it in its worry about the debasement of management and the construction of the management pool.[80] The report justifies intervention in the market by asserting that the consumers of talent fail to choose the best available by ignoring men of equivalent talent with more time to devote to the corporation's business.

As noted earlier, this line of analysis reduces the interlock problem to a question of simple arithmetic. Regardless of the relationship between the linked corporations, any holding of two positions by one man restricts opportunity. Pressed to its limit, this theory would call for the outlawing of all interlocks, not merely horizontal interlocks between competitors and vertical interlocks between customers and

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78 R. DORFMAN, PRICES AND MARKETS 140-46 (1967).
79 H.R. REP. No. 627, 63d Cong., 2d Sess. (1914).
80 STAFF REPORT 225.

suppliers. Short of this, the theory affords no readily apparent stopping point. But a ban on all interlocks would be the most drastic restriction on the free choice of the buyers of executive talent that could emerge from an attempt to deal with the interlock problem. One might concede that the consumers of talent often make errors in selecting executives and that a number of gifted men languish in the ranks, but it does not follow that the decisions of the buying corporations are so chronically wrong that a wholesale prohibition on interlocks is required. Further, if one agrees that leadership ability is much more widely distributed than the advocates of interlocks contend, one need not argue that it is so evenly distributed that an absolute ban on all interlocks would not lower the level of ability of directors.

Fundamentally, I think, the argument that the talent market contains serious imperfections rests on the idea that celebrities and other notables are likely to be chosen for managerial posts although anonymous persons with equal or greater ability go unselected. In other words, the market operates imperfectly because the buyers of talent have incomplete or inadequate information.[81] Since a decision must nevertheless be made, those who must decide cast about for a substitute for the information they do not have. An individual's high-level position in another firm is some indication that he has the qualifications to serve elsewhere in a similar capacity. An absolute ban on interlocks would kick that crutch out from under those leaning on it, but unless there is some way to increase simultaneously the information available to the consumers of talent—and obviously a ban on interlocks would not by itself accomplish this—it seems probable that other, less rational substitutes for information would be used. Instead of managers in other companies, they might well draw on men within the firm, retired generals, good fellows with the right old school tie, and so forth. Certainly one would expect that those selected would share the same general outlook as those making the selection.[82] It is improbable that there would be a significant increase in social mobility.[83]

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81 Attempts are being made to construct behavior theories postulating such conditions. *See* J. McGuire, Theories of Business Behavior 180-81, 251-52 (1964).

82 In Gilman v. Jack, 148 Me. 171, 91 A.2d 207 (1952), the court was confronted with a director who had been supported by certain banking interests because his views and those of the bankers on financial matters corresponded. The court held that a mere identity of views, leading to political support, was not enough to constitute the director the "representative or appointee" of the bankers. A similar result would probably be reached under § 8.

83 I do not believe that the amount of upward mobility is inadequate. In fact, there seems to be much more mobility now than ever before. *See* Warner, *The Corporation Man*, in The Corporation Man and Modern Society 106-15 (E. Mason ed. 1959).

This raises a related consideration. The persistent fear of an "oligarchy,"[84] or an "establishment,"[85] or a "power elite"[86] often seems to rest on similar grounds. Undoubtedly, the political influence is unevenly distributed in the United States. But at the present time there is no solid evidence of the existence of a single "ruling elite" in the sense of a "unified minority whose choices on matters of government policies, rules, and decisions regularly prevail over the choices of other groups . . . in the system."[87] Nevertheless, among the disadvantaged who know only that their choices are *not* prevailing or that they lack influence, the line between a "ruling elite" and uneven distribution of influence may seem academic and easily crossed. To them, a corporate interlock may be the visible evidence of unjustifiable inequality in influence and status. A ban on interlocks may result in a more egalitarian distribution of high-level corporate positions.

Here again interlocks are merely symptomatic of underlying social inequalities, and an absolute ban on interlocks seems unlikely to increase significantly the opportunity for influence for those whose social status now excludes them. It would be a radical change for the antitrust laws to adopt this sort of egalitarian objective,[88] one which might be expected to increase the likelihood of conflicts among antitrust goals, since the demands of the market might well clash with an objective of equality.[89] Finally, an egalitarian objective, like the restriction-of-opportunity theory, affords no stopping place short of an absolute ban on all interlocks—the most drastic intervention into the executive-talent market possible.

It would seem, therefore, that if there is to be intervention into the executive-talent market, it must be assumed that the buying firms know their own interests best, but certain interlocks may have an adverse impact on competition. This approach allows less intervention into the market because it bans interlocks only when the corporations involved are so related to one another that the possibility of lessening compe-

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84 Brandeis used this term, as well as "Money Trust," throughout OTHER PEOPLE'S MONEY (1914).

85 *E.g.*, THE BUSINESS ESTABLISHMENT (E. Cheit ed. 1964).

86 C. MILLS, THE POWER ELITE (1956).

87 R. DAHL, MODERN POLITICAL ANALYSIS 15-16, 34 (1963).

88 There has been the related objective of preserving small business, always an element of antitrust ideology. It would be ironic to adopt a radical philosophy now when even distrust of big business seems to be weakening. *See* Hofstadter, *What Happened to the Antitrust Movement?*, in BUSINESS ESTABLISHMENT 113, 130-33 (E. Cheit ed. 1964).

89 It might also be argued that it is ultimately futile to go after an "elite." People who believe in a ruling elite are unlikely to be mollified by any success; another conspiracy will always lurk behind whatever is destroyed. *Cf.* Dahl, *A Critique of the Ruling Elite Model*, 52 AM. POL. SCI. REV. 463 (1958).

tition is created. It should be noted, however, that the byproducts of banning interlocks are some opening of opportunities and some equalization in the distribution of influence. It is not suggested that these objectives have no value, but they cannot be pursued directly. In close cases involving interlocks that may threaten competition, these objectives may still be used to tip the scales in favor of prohibition.

D. Interlocks Effecting Common Control

Although much of the discussion about interlocks seems to assume that the major threat to competition posed by them is the bringing under common control of two ostensibly independent corporations, section 8 and the Celler bill apply with equal force whether two corporations share one director, have a complete identity of boards, or share some intermediate number of directors. But sharing one director does not necessarily indicate that two corporations are under common control.[90] If, however, the majority of each board is the same or, a fortiori, if there is a complete identity among the boards, it is apparent that the companies are under unified control. Where this has occurred, the preservation of separate corporate forms should not be permitted to disguise the consolidation.[91] If this centralization of control has resulted from one corporation's owning stock in the other, section 7 of the Clayton Act[92] seems to cover the situation, and the standards that are being formulated under that section could be applied.[93] If section 7 is inapplicable, sections 1 and 2 of the Sherman Act are fully adequate to treat this "combination."[94] It is by no means certain that the standards under the Sherman Act are looser than those presently be-

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90 J. BAIN, INDUSTRIAL ORGANIZATION 106 (1959). It is, of course, theoretically possible for common control to be effected through a single shared director if the board of one of the corporations allows him to make all policy. But it is necessary to ask why a board would do this; ordinarily one would think that directors would guard their prerogatives jealously. One situation in which the board might allow the shared director to decide is presented by the director who is representing some outside power base. An outside power base would probably use some other method for exerting control. Moreover, going after an interlock presupposes that nothing will be done to neutralize the power itself.

91 The "intra-enterprise" conspiracy doctrine has sometimes been thought of as requiring separate corporations within the same enterprise to be treated as if they are entirely separate firms. Properly conceived, the cases believed to support that doctrine do not call for this result. *See* Comment, *Intra-Enterprise Conspiracy Under the Sherman Act*, 63 YALE L.J. 372 (1954).

92 15 U.S.C. § 18 (1964).

93 *E.g.*, United States v. Von's Grocery Co., 384 U.S. 270 (1966); United States v. Continental Can Co., 378 U.S. 441 (1964); United States v. Aluminum Co. of America, 377 U.S. 271 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

94 United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964); United States v. Columbia Steel Co., 334 U.S. 495 (1948); United States v. Yellow Cab Co., 332 U.S. 218 (1947).

ing employed under section 7, but, in any case, the policy of section 7 is relevant in deciding a Sherman Act case.[95]

Since the ban on interlocks has not been limited to cases in which consolidation of control resulted and since a separate rule for interlocks might well be superfluous in such cases, it is necessary to ask why we should ban interlocks that are not so extensive as to result automatically in consolidation of control. The remainder of this article will treat those cases; it will assume that the control groups within the linked corporations are entirely separate and that a given individual holds a managerial position in two corporations because the control group in each corporation has deemed this to be in the best interests of the enterprise.[96]

Under what circumstances, then, would a control group deem it in the enterprise's interest to have as a manager a person performing managerial functions in another corporation? Two broad categories may be discerned. First, the control group may decide, without any external pressure being applied, that the particular individual is more likely than anyone else to benefit the enterprise. Secondly, the appointee may be the representative of an external power that the control group is unable to resist regardless of its personal preferences; capitulation may appear to be in the best interests of the enterprise because of the external power's ability to employ sanctions against the enterprise by inflicting some injury or withholding some boon.[97]

E. Horizontal Interlocks

From an antitrust standpoint, interlocking relations between competing corporations have been of the most concern. If competing corporations share one or more directors, the arrangement is apparently per se unlawful under section 8, but prior to the first judicial construction of that section, considerable doubt existed whether the statutory language would permit a construction of per se illegality. The

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[95] *Compare* United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963), *with* United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964).

[96] *See* United States v. Columbia Steel Co., 334 U.S. 495, 507 n.7 (1948).

[97] It will be assumed throughout that there is an identity of interest between the control group and the enterprise. In practice, however, a control group may be willing to compromise the best interests of the enterprise if it, or any of its members stands to gain thereby and the compromise is unlikely to be detected. For this reason, Brandeis criticized the rule making contracts between interlocked corporations voidable instead of void. *See* BRANDEIS 58-59. At this preliminary stage, it would seem unwise to complicate the analysis by the introduction of a variable about which our theory cannot generalize. Accordingly, this article assumes that problems of conflict of interest can best be handled through mechanisms other than the antitrust laws.

difficulty centered on the requirement that the interlocked corporations "are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws." If the agreement hypothesized were a price-fixing or market-sharing agreement, the section would have the same effect as if it had ended with the word "competitors." This would render the remainder of the section meaningless and violate the traditional canon that all words of a statute are to be given meaning if possible.[98] If, however, the word "agreement" were taken as meaning a merger agreement, this could be avoided.[99] In the *Sears, Roebuck* case Judge Weinfeld rejected this line of analysis and granted the Government's motion for summary judgment. He decided that construing "agreement" to include a price-fixing or territorial division was more consistent with the unqualified language of the section and employed an ingenious constitutional argument to avoid the redundancy.[100]

Even if section 8 were not being reconsidered, Judge Weinfeld's ruling could hardly be taken as having settled the issue. The opinion of one district judge, even so eminent a judge as Judge Weinfeld, seldom makes antitrust law. The argument for prohibiting competing corporations from sharing even one director is that the interlock permits the coordination of policies between nominally independent firms to an extent that competition between them may be completely eliminated.[101] Indeed, if a director, for example, is to be faithful to both corporations, some accommodation must result. Suppose *X* is a director of both Corporation *A* and Corporation *B*. *X* could hardly vote for a policy by *A* that would injure *B* without violating his duty of loyalty to *B*; at the same time he could hardly abstain from voting without depriving *A* of his best judgment. If the firms really do com-

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98 As noted, if the capitulation is sufficiently complete, common control may theoretically result here.

99 Kramer, *supra* note 5, at 1268-70.

100 This was essentially defendant's argument in United States v. Sears, Roebuck & Co., 111 F. Supp. 614 (S.D.N.Y. 1953). Recent developments in merger law make such a dichotomy meaningless today. Nevertheless, there is room for arguing that the "agreement" hypothesized should not be a naked agreement not to compete, but an agreement not to compete that is ancillary to an integration. *See generally* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775 (1965), 75 YALE L.J. 373 (1966).

101 Judge Weinfeld argued that the "so that" clause eliminated a constitutional difficulty that might have arisen had it been absent. If the statute had ended with the word "competitors," it would literally forbid an interlock between two corporations that competed and were in interstate commerce, even if their competition were solely in *intrastate* commerce. But the "so that" clause requires that the corporations compete in interstate commerce. 111 F. Supp. at 617. This may seem like a hypertechnical argument; I prefer to think of it as an appropriate response to a hypertechnical argument.

pete—in the sense of vying for economic advantage at the expense of the other—there can hardly be any reason for an interlock between competitors other than the suppression of competition.[102]

If an interlock among competitors is being used to suppress competition among them, it would seem that some antecedent agreement not to compete must have been reached. The control group of Corporation *A* would hardly accept on its board a director of Corporation *B* unless the *A* group had already decided not to compete with *B*. Similarly, the control group of *B* would hardly permit one of its directors so to serve unless it had reached a like decision.[103] Finally, there must have been some communication of those decisions between the firms. Although one of the firms may have taken the initiative, it is doubtful that its competitors were coerced into accepting an interlock. Only when one firm is so clearly dominant that its competitors might fear its retaliatory powers would there be the possibility of sufficient external force being applied to induce another control group to capitulate. But if one firm had such dominance, the fear of retaliation would ordinarily be enough to chill the efforts of its rivals without resorting to an interlock.[104]

The underlying agreement may vary in complexity from case to case. In some instances it may be necessary for the firms to negotiate a full-fledged cartel arrangement in order to reduce competitive vigor to an acceptable level.[105] In other cases each firm may believe that rational oligopolistic behavior may be relied upon to achieve the desired results as soon as certain obstacles are removed, and that interlocking relationships will remove those obstacles.[106] Nothing else need be prearranged. It seems clear, however, that an agreement on a plan to facilitate oligopolistic pricing is as illegal as a more complicated cartel arrangement.[107] The formal embodiment of the arrangement,

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[102] J. BAIN, *supra* note 90, at 107; Means, *supra* note 77.

[103] Competitors may have legitimate interests in engaging in collaborative efforts that do not necessarily involve a diminution of competition. Coordination of credit facilities or quality standardization are examples. Nonetheless, it seems that these objectives can be achieved by means other than the sharing of high-level decision-makers.

[104] In American Column & Lumber Co. v. United States, 257 U.S. 377 (1921), the Court struck down defendants' Open Competition plan, largely on the ground that genuine competitors would not give their rivals access to detailed information about their internal affairs. The Court reasoned that the very existence of an agreement to exchange such information warranted the inference that defendants had agreed not to compete.

[105] *See* Markham, *The Nature and Significance of Price Leadership*, in READINGS IN INDUSTRIAL ORGANIZATION AND PUBLIC POLICY 176, 179-81 (Heflebower & Stocking eds. 1958); E. SINGER, ANTITRUST ECONOMICS 91-94 (1968).

[106] A concise statement of the conditions under which cartelization is likely may be found in McGee, *Ocean Freight Rate Conferences and the American Merchant Marine*, 27 U. CHI. L. REV. 191, 197-204 (1960).

[107] *See, e.g.*, FTC v. Cement Institute, 333 U.S. 683 (1948); Sugar Institute, Inc. v. United States, 297 U.S. 553 (1936).

of course, is not an indispensable element of the definition of an agreement proscribed by the Sherman Act.[108] Although the problem of proof may vary, the underlying agreement is in all cases illegal per se under the Sherman Act. Section 8 merely applies a similar per se rule to the mode of enforcing the agreement. The issue, then, is whether this separate per se rule is necessary or desirable.

An interlocking directorate is but one mode of enforcing a collusive agreement among ostensible competitors. Telephone calls, trade association meetings, business lunches, as well as the more titillating techniques of secret hotel meetings and elaborate codes, are all available as alternatives.[109] The interlocking directorate device is markedly inferior to the other possibilities in one respect: It is comparatively obvious. Information on persons serving as high-level officers or directors of our larger corporations and extensive disclosure is required by law; the application of modern data-retrieval techniques can reveal every major interlock. Why then should one method of implementing collusion be singled out for per se treatment, especially when other techniques are apparently superior? If the interlock is outlawed, will not the collusively-inclined turn to these?

Perhaps an answer is suggested by another question: If the interlock device is so flawed, why should it ever be used? The answer may be that each signatory of a price-fixing or similar agreement is under a tremendous temptation to "chisel" on his fellow signatories by lowering his price. This centrifugal force can quickly shatter the cartel unless each member knows that any chiseling on his part will be quickly detected and that he can trust his fellow members not to chisel—if for no nobler reason than they know that their chiseling will be detected.[110] For these conditions to be met the cartel managers or the other firms must have access to adequate information about the operations of each member.[111] In many cases market transactions are made under conditions making sufficient information available, but in other cases it may be necessary to enforce the arrangement by a technique which gnarantees that no firm will be able to keep its operations secret. If, for example, the industry faces large, powerful buyers who are able to extract price concessions or enforce a system of

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108 *See generally* Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals To Deal*, 75 HARV. L. REV. 655 (1962).

109 *See, e.g.*, American Tobacco Co. v. United States, 328 U.S. 781 (1946); Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).

110 J. BAIN, *supra* note 90, at 107.

111 *See* D. DEWEY, MONOPOLY IN ECONOMICS AND LAW 18-19 (1959).

sealed bids, the news that one member has broken the front may not reach the others through normal channels until well after the transaction.[112] A system whereby each agrees to supply information on his prospective bid is obviously subject to the same infirmity as the bare cartel agreement, depending as it does on each member's keeping the faith.[113] But if one member of the board may be counted on to broadcast each operation to other members of the cartel, the temptation to cheat is kept to a minimum.

This presupposes that the board, if the interlock is of directors, is making the decisions in question, or at least has access to information about the decisions in advance of their becoming operationalized. If this is not a foregone conclusion, it may be necessary to include this point in the agreement. Of course, it may still be possible to work around the common director, but it would be much more difficult.[114]

If the preceding analysis is correct, the following conclusions seem warranted. First, a direct interlock between competitors would not occur in the absence of an agreement not to compete, which is itself illegal per se. The real objective is that underlying agreement; on this, the law is clear. But the very clarity of the law has increased the evidentiary problems of establishing the existence of the agreement. Because the interlocking directorate device must operate on the surface, it is unlikely to be employed if there is a less overt technique for assuring the members of the cartel the necessary information about the operations of each signatory firm. Prohibiting the interlock itself would cut off each firm from information about the others and encourage the cartel to crumble through its inherent instability. As to this class of cartels, the need for proving the existence of an agreement would be eliminated, and establishing the existence of the interlock would be fairly easy.

Therefore, although the direct interlock between competitors is only an enforcement mechanism, there is good reason for applying a per se rule to it as well as to the agreement it implements. In the first place, the interlock seems intended solely to suppress competition. No legitimate reason for the sharing of directors by competitors ap-

112 In the electrical equipment cases, it seems that internal pressures to perform had combined with the system of sealed bids to cause periodic breakdowns in the cartel. *See generally* J. FULLER, THE GENTLEMEN CONSPIRATORS (1962); R. SMITH, CORPORATIONS IN CRISIS 113-66 (Anchor ed. 1966); C. WALTON & F. CLEVELAND, CORPORATIONS ON TRIAL: THE ELECTRIC CASES (1964).

113 *E.g.*, Sugar Institute, Inc. v. United States, 297 U.S. 553 (1936).

114 Indeed, the very effort to work around him might arouse his suspicions unless elaborate schemes were devised and implemented.

pears. The vague defense that the individual is "the best man" prompts the further question: Why is he the best man? Certainly a ban on interlocks among competitors would be a comparatively slight restriction in the firm's choice of directors. All the executives and directors of noncompeting firms remain available. It may be said that an individual's job with competing firms has given him a specialized expertise in that industry. But surely the firm could turn to its own personnel for the necessary knowledge. Moreover, most believe the function of the outside director is to supply breadth of view to counterbalance the inside directors' expertise.[115] No legitimate purpose is apparent. The interlock is easily definable and lends itself to summary treatment. If it is vital to the continued existence of the agreement, prohibiting it will, without more, lead to salutary effects.

Two qualifications may be urged to this rule. It may be argued that the Government should be required to prove that the corporations sharing a common director control a siguificant percentage of the relevant market. It may also be contended that the per se rule should admit a de minimis exception. Requiring the Government to prove that the linked corporations control a specified percentage of the relevant market is supported by logic and precedent. First, a cartel arrangement will be effective only if a sufficient percentage of the relevant market is brought under control to give the members of the cartel some market power. If the interlocked corporations do not have a sufficient portion of the market, the interlock can cause little harm, whatever the parties may have intended.[116] Furthermore, in all the leading price-fixing cases, with the exception of *Kiefer-Stewart*,[117] the defendants did control a commanding share of the relevant market;[118] hence, this requirement may be deemed a necessary element of the Government's case in price-fixing cases and a qualification on the per se rule applicable thereto. Nonetheless, I believe that it would be preferable not to impose a similar requirement for interlocks among competitors. In the first place, it is often very difficult to determine just what the relevant market is;[119] some commentators now feel that a disproportionate

[115] *See* Weinberg, *A Corporation Director Looks at His Job*, 27 HARV. BUS. REV. 585 (1949).

[116] *See* R. CAVES, AMERICAN INDUSTRY: STRUCTURE, CONDUCT, PERFORMANCE 42-43 (2d ed. 1967).

[117] Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951).

[118] *E.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

[119] *Compare* United States v. Continental Can Co., 378 U.S. 441 (1964), *with* United States v. Aluminum Co. of America, 377 U.S. 271 (1964).

amount of time and energy has been devoted to making this determination, time and energy which might be better spent inquiring into the effects of the challenged arrangement.[120]

Furthermore, if the market could be defined with precision, there would still be a question of how much must be controlled before undesirable effects show up.[121] It would be worthwhile making these inquiries only if interlocks could produce so many beneficial results that we would hesitate to outlaw them in gross. So far as interlocks between competitors are concerned, few benefits should be expected. Only the presumption against restricting the buyers' free choice remains, and it would not seem strong enough to justify complicating every horizontal interlock case.

The de minimis exception involves similar considerations. Two corporations may account for so small a percentage of the relevant market that a threat to competition stemming from an interlock between them is inconceivable. The above discussion of market percentages seems to cover the de minimis exception in this sense. But a de minimis exception may mean something else. Two large, diversified firms may make competing products, but those products may account for so small a portion of each firm's sales that it is unlikely that they would bother establishing an interlock simply to control the market in that product. This argument was raised, but rejected on the facts, in *Sears, Roebuck.*[122] It seems to have prevailed, however, in *Paramount Pictures Corporation v. Baldwin-Montrose Chemical Company*,[123] in which two directors of Paramount were challenged by an opposition faction within the Paramount management. One of the challenged directors was also a director of General Artists Corporation, a talent agency, which had an ownership interest in one television program and, to that extent, competed with Paramount for the television market. The other director was a director of Baldwin-Montrose and Feuer & Martin Productions, Incorporated, a producer of musical comedies on Broadway, which received royalties from phonograph records made from shows it produced and, to that extent, competed with Paramount in the phonograph records market. The case is an appealing one for a de minimis exception since the firms joined to Paramount accounted for a miniscule portion of the markets in which they confronted Para-

120 Low, *Introduction*, in ECONOMICS OF ANTITRUST 1, 18 (D. Low ed. 1968).
121 For a discussion of monopoly indices see E. SINGER, *supra* note 105, at 63-72.
122 United States v. Sears, Roebuck & Co., 111 F. Supp. 614, 620-21 (S.D.N.Y. 1953).
123 1966 Trade Cas. ¶ 71,678 (S.D.N.Y.).

mount and received only a small part of their revenues from those markets.

In cases such as *Paramount* a court is likely to go to great lengths to avoid holding the interlock illegal. If a de minimis exception were to be definitely rejected, a court would probably hold that the linked firms were not "competitors" in any meaningful sense of the word. The issue is which approach is preferable. An explicit de minimis exception has the advantage of permitting the courts a greater degree of candor and is more likely to produce consistent doctrine. But a de minimis exception is as vague as a requirement that the Government establish that the defendants account for a significant portion of the relevant market. This would complicate a significant number of cases. Also, it would not be as effective a prophylaxis as a ban on horizontal interlocks without exception. These factors suggest that no explicit de minimis exception should be recognized even at the cost of some doctrinal untidiness.

The proposed amendment would extend the ban of section 8 to interlocks of any "director, officer, or employee with managerial functions." It thus supplements a formal test with a functional one. Once it is established that interlocking directorates between competitors should be illegal per se, such an extension is a logical step; the sharing of a president or a vice-president or, in general, sharing decision-making personnel is as good a way of exchanging information as the sharing of a director. One can certainly sympathize with the government lawyers who sought to purge the board of General Steel Castings Company of those who also served the board of a competing corporation only to be confronted with mass resignations of the common directors whose places were then taken by officers of General's competitors.[124] This and similar cases dramatize the need to extend section 8's prohibition to officers, and the extension could be made without sacrificing the administrative convenience of a per se rule. Also, information about high-level officers is widely disseminated, and detection would be comparatively simple.

Some objection may be made to the extension of section 8 to "employees with managerial functions." First, information about employees below the top echelon is less widely circulated, making detection of interlocks more difficult. Secondly, the shift from a formal to a functional test would allow the defendant to question whether, as a matter of fact, the interlocked employee performed a managerial func-

[124] The incident is recounted in FTC REPORT, *supra* note 7, at 14 n.16.

tion. This would entail an inquiry into the internal organization of the corporations involved and might well bog down the Government in evidentiary problems similar to those involved in proving that a cartel exists. The major value of a special per se rule for interlocks would be compromised. Finally, if the individual is being used as a conduit for information and not for active coordination of policies, it is not necessary that he have any "managerial functions" so long as he has access to the information. He would thus not be covered by the extension.

Although these points have some force, they do not provide a complete answer. To be sure, proving that a particular employee has managerial functions may create evidentiary problems for the Government. Yet failing to include a functional test would afford a means of easy evasion for any firm willing to shoulder the burden of thinking up a title that would not be covered by any reasonable construction of "officers."[125] Moreover, one may seriously doubt that the difficulty of proving what functions an individual performs approaches the difficulty of proving the market effects of a single firm's behavior or a collusive arrangement, because the latter issue requires the hypothesizing of what would have happened if events had been other than they were; proving that an individual has managerial functions does not require a similar excursion into the hypothetical.[126]

One may brush aside any contentions based on the idea that some violations will go undetected or that some nonmanager may serve as a conduit. If this is true, it is no argument against a per se rule for those cases that are covered and are detected.[127] But the objection that the person used as a conduit need only have access to the necessary infor-

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125 Corporation statutes often prescribe that a corporation shall have certain officers, such as a president or secretary. To the extent that the word "officers" is thought to refer to a set of positions roughly defined by such statutes, some functional supplement is necessary. Of course, "officers" could be defined to include not only holders of certain positions but also all those having certain defined functions. It would seem better, however, not to leave it to the courts to work out this definition. In United States v. Newmont Mining Co., 1964 Trade Cas. ¶ 71,030 (S.D.N.Y.), one of the individual defendants withdrew from Newmont's board to serve in what the court termed the "rather ill-defined capacity of financial advisor to the corporation." *Id.* at 79,081.

126 This is, of course, only one reason why proving what functions an individual performs is immensely easier than proving what effects an arrangement will have. For a good survey of the other difficulties, see Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 238-49 (1960).

127 *Cf.* Turner, *supra* note 69:

> [I]t is by no means necessary that the practice subjected to a per se rule be readily identifiable in all cases. Borderline situations are inevitable. It may often be difficult to identify "price-fixing," as the trade-association cases make manifest. Yet this does not destroy the obvious utility and propriety of the rule that price-fixing is illegal per se. There are obvious kinds of price-fixing; there is no reason for the courts to waste their time over them just because less obvious forms require a more searching examination.

Id. at 60.

mation and need not have managerial functions rests on a more substantial basis. The objection suggests that the amendment is based on the fallacious premise that an interlock is a device for consolidating the operations of two firms under one control group.[128] As has been noted, this may occur if the number of shared directors amounts to a majority, but the graver, more prevalent threat is that the interlock may be used as a channel of information to facilitate collusive behavior. There is bite in this argument, but nevertheless the proposed amendment may be the best solution. In the first place, the shared individual often would have to have some "managerial functions" if he is to be assured of access to the information.[129] Moreover, it would be very difficult to draft a statute prohibiting interlocks in those cases in which the shared personnel had access to information that might be used to facilitate collusive behavior. Congress might as well prohibit the sharing of personnel of any kind by competitors. Some may consider this the best answer, but the sharing of, say, a credit manager might serve legitimate functions, and, in such a case, it might be best to allow for judicial development of the rules under the Sherman or FTC Acts.

Thus far, we have considered only direct interlocks among competitors. The enforcement agencies have urged a ban on indirect interlocks as well,[130] and an indirect interlock might also serve as a conduit for transmitting information among competitors. The Staff Report gives three examples of indirect interlocks: (1) Corporations *A* and *B* (assumed throughout to be competitors) each have a director on the board of Corporation *X*, a noncompetitor. (2) Corporation *X*, a noncompetitor, has different representatives on the boards of Corporations *A* and *B*. (3) Corporation *A* shares a director with Corporation *X*, a noncompetitor, which in turn shares a director with Corporation *Y*, which competes with neither *A* nor *X*. *Y* then shares a director with Corporation *B*.[131] Case (1) and Case (2) are structurally identical, differing only as to the corporation to which the shared directors owe their primary allegiance. In Case (1) the directors owe their primary allegiance to *A* and *B*; in Case (2) they owe it to *X*. This makes a good deal of practical difference since, if the directors consider themselves primarily directors of *A* and *B* with the task of promoting the interests of

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[128] J. BAIN, *supra* note 90, at 106-07.

[129] For example, it should be much easier to "work around" an employee without managerial functions; other things being equal, the more highly placed the common individuals are, the more likely it is that they will get the information they seek.

[130] A major point made by the *FTC Report* seems to have been the prevalence of indirect interlocks. FTC REPORT, *supra* note 7, at 17-36.

[131] STAFF REPORT 10.

those corporations, the interlock through *X* becomes merely a complicated reporting system, depending on the willingness of each firm to supply, through its representative on *X*, accurate reports of the firm's operations. Being no better than a conventional reporting system, it is doubtful whether an indirect interlock would be used for such a purpose.

On the other hand, in Case (2) the representative on the boards of *A* and *B* consider themselves primarily agents of *X*. This kind of arrangement will be more trustworthy than a reporting system whenever Corporation *X* is intended to be the instrument for the suppression of competition within the industry of which Corporations *A* and *B* are members. But this presupposes that Corporation *X* stands to profit by the suppression of competition in the *A-B* industry because otherwise it would not bother becoming involved. Corporation *X* may be in the cartel management business, profiting through the sale of management services, or it may be in a straightforward enterprise that somehow stands to profit from the suppression of competition.[132]

Case (3) seems resolvable into either Case (1) or Case (2), depending on whether the *X-Y* liaison has been formed with the intent of suppressing competition in the *A-B* industry. If so, it may function essentially as Case (2). On the other hand, it may be a more complicated version of Case (1). The *A-X* director must report fully and accurately to the *X-Y* director who relays the news to the *B-Y* director. Since the primary allegiance of the *A-X* director is to *A* and that of the *B-Y* director is to *B*, the arrangement is essentially a reporting system. As noted in connection with Case (1), use of interlocks for this purpose seems unlikely.

The crucial issue then becomes: Under what circumstances would a firm "outside" a particular industry find it sufficiently profitable to suppress competition within the industry to become the instrument of that suppression? Apart from the case in which the "outside" firm engages in cartel management, it is difficult to describe these circumstances with any exactitude. One may imagine cases in which the firm is "outside" the industry only because its operations are entirely con-

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132 An example of the latter situation may be afforded by the position of the investment bankers at the turn of the century. Their continued success in underwriting securities depended on the profitability of securities previously underwritten. Many of the indnstries in which the bankers underwrote securities had serious excess capacity because of a gross overestimation of the potential market; the cutthroat competition thus threatened could cause losses to many security holders. By using their good offices to prevent this competition, the investment bankers guaranteed more satisfaction with the securities, and more business for themselves. T. COCHRAN & W. MILLER, *supra* note 29, at 188.

ducted in a geographically different area from that in which the operations of *A* and *B* are conducted.[133] If excess capacity exists in the *A-B* area, there may be temptations to transship into *X*'s area if competition is not controlled.[134] Similarly, although *X*'s product is substantially different from the product of the *A-B* industry, it may feel the effects of competition within that industry.[135] One may suspect, however, that the cases are extremely rare in which the impact on *X* is so substantial that *X* will wish to suppress competition in the *A-B* industry, and that when they occur, they indicate that, for all practical purposes, *X* is in the same industry as *A* and *B* and it was a mistake to exclude it. One may also imagine a case in which *X* is a supplier or customer of the *A-B* industry. Ordinarily, *X* would prefer as much competition as possible in an industry with which it deals, since it thus would be helped in driving a more profitable bargain.[136] It may be, however, that conditions in the *A-B* industry are such that vigorous competition could lead to an unpredictable course of events, and that *X* might consider it more profitable to forego the advantages it would receive from competition in order to impose stability sufficient to make rational planning possible.[137]

In any case, the proposed amendment of section 8 does not deal with these supposititious indirect interlocks except to the extent that the ban on vertical interlocks or interlocks among "potential" competitors will cover indirect horizontal interlocks as well. This excludes, for example, the case in which *X*'s product is sufficiently different from that of *A* and *B* to be classified in a separate industry even though a substantial cross-elasticity of demand exists between them. Although

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133 Under such circumstances, a rise in the price level in either market to the point that an "outside" firm could incur the extra costs of transportation and still make a profit would encourage entry. If transportation costs are very low, the markets are not too distinct. In any case, firms in one area might have to price with an eye on "outside" firms lest entry be encouraged.

134 An example of this phenomenon is the "bootlegging" of automobiles from one area of the country to another. *See* Note, *Restricted Channels of Distribution Under the Sherman Act*, 75 HARV. L. REV. 795, 820 (1962).

135 This difficulty in delineating boundaries between industries because of the frequent absence of any sharp difference in the impact exerted on the price of a product by imperfect substitutes within an industry and imperfect substitutes produced by other industries has long been noted in the literature. *See, e.g.*, J. BAIN, PRICE THEORY 23-27 (rev. ed. 1952). The issue has also bedeviled the courts. *See* United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956).

136 *See* J. BAIN, *supra* note 90, at 332-33.

137 In Professor Galbraith's view, the market is too unreliable to serve as a substitute for rational planning; accordingly firms often take whatever steps are necessary to insure that their calculations will not be upset by extraneous factors, like consumer tastes. *See* J. GALBRAITH, THE NEW INDUSTRIAL STATE 16, 22-34 (1967).

some commentators believe that this should be illegal, prohibiting all "indirect" interlocks seems an unnecessary intrusion into the market.[138]

In sum, the preceding analysis suggests the following conclusions regarding horizontal interlocks: (1) the present per se rule is justified and should be retained; (2) the proposal to expand section 8 to cover interlocking officers and employees with managerial functions, though subject to some criticism, is sound; and (3) indirect interlocks may be used to suppress competition, but the situations in which this is likely to occur appear few and the interlocks themselves do not indicate whether they are being so used. Accordingly, a complicated inquiry into the market effects of the interlocks may be necessary, thus undermining the automatic approach of a per se rule. These interlocks do not represent a serious enough problem to be an independent reason for expanding section 8.

F. Vertical Interlocks

Interlocks between suppliers and customers raise a separate set of issues. In the first place, these interlocks are ordinarily motivated by a desire on the part of the firms to facilitate transactions between themselves. These transactions may flow entirely in one direction, as in the case of a manufacturer joined to a distributor, or mutually advantageous reciprocal dealings may be anticipated, as in the case of a bank seeking depositors sharing a director with a commercial firm seeking a source of credit and contacts.[139] The very existence of an interlock suggests that the firms intend to deal with one another to a greater extent than they would absent the interlock. This tendency has been described as "favoritism" by those hostile to interlocks.[140] Analytically, however, it appears to be merely a form of vertical integration[141] presenting several familiar antitrust questions in an unfamiliar guise.

The proposed amendments to section 8 would establish a more stringent rule for vertical integration through interlock than is presently applied to vertical integration achieved by other means. Vertical integration through asset or stock ownership is made illegal under section 7 of the Clayton Act only when the effect of this integration

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138 If the Celler bill were to be passed in its proposed form, its ban on vertical interlocks would also reach many indirect interlocks.

139 *See* Means, *supra* note 77, at 148-49.

140 *E.g.*, BRANDEIS 51.

141 *See* Means, *supra* note 77, at 150. A thorough discussion of the various forms of vertical integration is Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1 (1959).

"may be substantially to lessen competition, or to tend to create a monopoly."[142] Vertical integration through requirements contracts or exclusive-dealing arrangements is covered by section 3 of the Clayton Act, which embodies the identical test.[143]

The legal status of vertical integration under either section 7 or section 8 is far from clear. In *Du Pont-GM*[144] the Supreme Court held that Du Pont's holding of twenty-three percent of General Motors' stock would "tend to create a monopoly" in the automotive fabrics and finishes markets. Since GM accounted for half the automobile industry's sales, the Court assumed that it was half the purchasing market as well.[145] The case was widely deemed sui generis since the Court was unlikely to be confronted with the integration of two such colossal firms again;[146] but soon after, the Court invalidated a merger of the Brown Shoe Company, a shoe manufacturer, and G. R. Kinney Company, a shoe retailer.[147] Neither firm had a commanding share of the relevant market at its level, but the Court found a threat to competition stemming from the vertical aspect of the merger. The Court's analysis in these cases and its treatment of later horizontal and conglomerate mergers[148] leave open the possibility that something like a per se rule may emerge. The Court has indicated before that vertical integration was illegal per se,[149] but has withdrawn from that position in later cases.[150]

The treatment of exclusive-dealing contracts has had a similarly checkered career. In the *Standard Stations*[151] case the Supreme Court opted for a fairly automatic test: Exclusive-dealing contracts foreclosing a substantial percentage of the relevant market would be held illegal without further sifting of evidence.[152] Once again, however, the Court pulled back in a later case, suggesting that a thorough examination of all relevant data would be undertaken.[153] In part this change of position may have been a response to the anguished outcry produced by *Standard Stations* on the part of academics who found its test too

142 15 U.S.C. § 18 (1964)

143 15 U.S.C. § 14 (1964).

144 United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957).

145 *Id.* at 596

146 *See* M. HANDLER, ANTITRUST IN PERSPECTIVE 49 (1957).

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

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

149 *See* United States v. Yellow Cab Co., 332 U.S. 218, 224-27 (1947).

150 *E.g.*, United States v. Columbia Steel Co., 334 U.S. 495, 519-26 (1948).

151 Standard Oil Co. of California v. United States, 337 U.S. 293 (1949).

152 *Id.* at 313-14.

153 Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 623 (1961).

crude[154] and defense counsel who found it too restrictive.[155] Of course, the Court could always change direction again, but until it does, neither form of vertical integration can be deemed illegal per se.

The proposed amendment requires a legislative judgment that vertical integration by interlock merits per se treatment although neither Congress nor the courts have meted out this treatment to vertical integration in any other form. This step may be warranted if Congress can determine that vertical interlocks have fewer legitimate interests to support them or are more likely to have more objectionable consequences than other forms of vertical integration. Even if this cannot be established, Congress may decide that vertical interlocks are no less objectionable than other forms of vertical integration and that this is a good starting point for eradicating all forms.

The difficulty is that the uncertainty reflected in the vertical-merger and exclusive-dealing cases is a reflection of the lack of solid empirical data about the effects of those practices, the lack of a conceptual framework for analyzing particular cases, and the failure to ask basic policy questions about vertical arrangements.[156] This circumstance should at least suggest caution on the part of Congress and argue against an uncompromising prohibition on all vertical interlocks while the state of our knowledge is so rudimentary.

Congress has other options, of course. It may, for instance, enact a statute applying the same test to vertical interlocks that now appears in other sections of the Clayton Act. This would shift from Congress to the courts the burden of developing the law on vertical interlocks and would have the advantage of allowing the rules to grow and change as our knowledge increased.

Congress must, in any case, reexamine antitrust policy towards vertical integration, with special reference to vertical interlocks. Thus the following discussion of vertical interlocks will assume this broader context.

What are some of the ways in which vertical integration may be deemed objectionable? It has been noted that the very existence of vertical relations indicates an intention on the part of the firms to increase the extent of their dealings with one another. It may be argued that since this will "harm" competitors at both levels by removing one

[154] *E.g.*, Lockhart & Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act*, 65 HARV. L. REV. 913 (1952).

[155] McLaren, *Related Problems of "Requirements" Contracts and Acquisitions in Vertical Integration Under the Anti-trust Laws*, 45 ILL. L. REV. 141 (1950).

[156] *See* Bok, *The Tampa Electric Case and the Problem of Exclusive Arrangements Under the Clayton Act*, 1961 SUP. CT. REV. 267, 271-73.

supplier and one customer from the market, nothing more need be shown.[157] This view has been criticized for ignoring the interests of the integrating firms and for confusing the protection of "competitors" with the protection of "competition,"[158] and it would probably find few supporters in its bare form.

A slight variation of the preceding argument is that vertical integration may result in cost savings to firms at both levels and thus enable the integrated firm to lower its prices and take business from its rivals. Since a value of the competitive system is that it encourages efficiency, this argument seems to call for the favoring of the interests of the competitors of the integrated firm over the public interest in preserving competition whenever those interests conflict.[159] While some language in the *Brown Shoe* case does suggest that the efficiencies of vertical integration may be an affirmative reason for invalidating a vertical merger,[160] the Court purported to find in the legislative history a choice to preserve small competitors even at the cost of efficiency.[161] To most commentators the legislative history showed congressional approval of both competition and small business, but no preference of one over the other.[162]

Congress could, of course, now decide to prefer one or the other. In the past Congress seemingly has voted to protect small business from more efficient larger firms.[163] And although professors may find the project unappetizing, Congress might do so in the face of overwhelming professorial opposition. Yet the widespread view that integrations producing efficiencies are not to be discouraged on that ground alone is a powerful argument against expanding the coverage of section 8 for that reason. Moreover, an attempt to prohibit interlocks resulting in efficiencies would, as a practical matter, commit Congress to a prohibition of all interlocks between firms standing in a vertical relation. Few firms will enter an interlocking relation unless each firm expects enough tangible gain from the interlock to forego its future freedom to deal in the market.[164] To the extent that the anticipated advantages

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157 *See* Kessler & Stern, *supra* note 141, at 14-15.

158 *Id.* at 42-51; Bok, *supra* note 156, at 293.

159 This is the thrust of the critique of certain antitrust doctrines in Bork & Bowman, *supra* note 76, at 363.

160 Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).

161 *See also id.* at 311-23 (survey of the legislative history).

162 *See* Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1326 (1965).

163 Examples of such voting are the Robinson-Patman Act, the McGuire Act, and the Miller-Tydings Act granting an antitrust exemption to resale-price maintenance. *See generally* J. PALAMOUNTAIN, POLITICS OF DISTRIBUTION (1965).

164 E. SINGER, *supra* note 105, at 206-11; *see* Bork, *Vertical Integration and the Sher-*

represent significant efficiencies, the integrated firm will gain a "competitive" advantage in every case in which the expectations are fulfilled.

It need not be assumed, however, that the expected efficiencies will materialize in all cases. Even when efficiencies do not result, however, there are good argnments for invalidating the integration. First, competitors may be injured even though the interlocked firms are no more efficient than others. More importantly, there is little reason to devote major energies to avoid invalidating an interlock that has little in its favor, either from the viewpoint of one or both of the firms or from the viewpoint of the economy as a whole.

Arguably, however, the tendency of interlocked firms to deal with one another may injure the competitive process itself since it will foreclose competitors at both levels from dealing with the firm linked to their rival.[165] In sum, the argument is as follows:[166] Since each firm may be assumed to be maximizing profits, it will not deal with any firm that cannot meet the going price. If a firm commits itself for some future period to deal with a particular supplier, it is giving up its freedom to make the best deal possible in the market place. Accordingly, the supplier must offer it some special inducement in order to tie it down. If this inducement lies in the superiority of the supplier's product, this is an honestly earned competitive advantage and any injury that the firm's rivals suffer may be ascribed to it and not to the integration. On the other hand, if the added inducement is a price reduction or the equivalent, this tactic should be available to the rivals unless (1) they are less efficient and thus unable to reduce price, or (2) "imperfections" exist in the capital market that prevent the rivals from acquiring the necessary capital to offer an equivalent inducement.[167] Since theory suggests that such imperfections will not exist, the inability to match price reductions suggests that the rivals are less efficient.

In a sense, this theory turns on its head the view equating injury to *competitors* with injury to *competition:* The fact that competitors

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man Act: The Legal History of an Economic Misconception, 22 U. CHI. L. REV. 157, 195-96 (1955).

165 *See* Means, *supra* note 77, at 150.

166 Bork, *Contrasts in Antitrust Theory: I*, 65 COLUM. L. REV. 401 (1965); Bork & Bowman, *supra* note 76; to follow the argument in detail, see Director & Levi, *Law and Future: Trade Regulation*, 51 NW. U.L. REV. 281 (1956); Telser, *Abusive Trade Practices: An Economic Analysis*, 30 LAW & CONTEMP. PROB. 488 (1965).

167 A good deal of disagreement exists on whether the capital market is "imperfect." Part of the disagreement seems to be a dispute on what shall constitute an "imperfection." This would certainly be a fruitful line of inquiry for a congressional committee. In particular, it would be worth knowing whether capital for new entrants is harder to obtain if there are interlocks between investment bankers and existing firms in the industry the seeker of capital intends to enter.

are injured suggests that the competitive process is working well. Since most commentators agree that the dominant goal of the antitrust laws is to preserve the competitive process, we may ignore the asserted interests of the competitors.[168]

Vertical interlocks have a property that makes this theory peculiarly applicable to them: Of all forms of vertical integration, integration by interlocks is the flimsiest.[169] If the integration is by consolidation of assets, subsequent disengagement often proves impossibly complicated.[170] Integration by stock ownership may also be difficult to dissolve because the dumping of stock on the market may so depress its price that a large loss is incurred.[171] No safe generalization may be made about integration by contract, except that the longer the contract term, the more difficult it is to discontinue the arrangement. For example, exclusive-dealing contracts tying up the bulk of customers by the dominant supplier may be justified if there is a strong customer interest in the arrangement *and the contracts last no more than one year.*[172] Unless the boards of the interlocked companies are classified, the continuance of the interlock is ordinarily subject to annual review by each control group.[173] If either group believes that the continuance of the relationship for another year would not be in the best interests of the enterprise, it has only to refuse to reelect the director. There is no obstacle to disengagement from the other firm if the market is offering better goods or better terms.[174]

The theoretical critique of conventional foreclosure theory is thus peculiarly applicable to interlocks. Other forms of vertical integration may persist long after they cease to be advantageous to both firms. For example, a large number of customers may be induced to enter long term exclusive-dealing contracts with the seller who, at that moment, is producing the brand with the most customer acceptance. A competing seller who thereafter produces a superior brand will be unable to secure those outlets unless his product is so superior that the customers will

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168 *Cf.* Turner, *supra* note 69, at 63.

169 Kessler & Stern, *supra* note 141, at 2-8, have noted that different forms of vertical integration vary in the extent to which they require commitment by the firm or allow future flexibility.

170 ATT'Y GEN. NAT'L ANTITRUST COMM. REP. 353-57 (1955). *See generally* Fraidin, *Dissolution and Reconstruction: A Structural Remedy and Alternatives*, 33 GEO. WASH. L. REV. 899 (1965).

171 *See* United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316 (1961). A forced sale often had adverse tax effects as well until Congress amended the Internal Revenue Code to afford relief. INT. REV. CODE OF 1954, §§ 301(f), 1111.

172 United States v. American Can Co., 87 F. Supp. 18, 31 (N.D. Cal. 1949).

173 *See* ABA-ALI MODEL BUS. CORP. ACT § 33, ¶ 2.02 (1960).

174 *See generally* Travers, *Removal of the Corporate Director During His Term of Office*, 53 IOWA L. REV. 389 (1967).

incur the cost of dissolving their contracts to get it. Thus, viewed dynamically, the more permanent forms of vertical integration may operate as a temporary clog on the adjustments that competition would otherwise induce. Vertical interlocks do not pose this problem.

The argument against intervention comes to this. The objective of the antitrust laws is the preservation of the competitive process. No convincing theoretical argument has been advanced to prove that vertical integration, in any form, can injure that process. Although some forms of vertical integration might impede competitive adjustments, a vertical interlock creates no impediments. Observable harm to competitors of one or both of the interlocked firms may occur, but this proves nothing by itself. The harm may be merely the result of efficiencies produced by the interlock, which may often be anticipated. Since a vertical interlock may produce efficiencies and seems to have small potential for injuring competition, it should not be the object of the antitrust laws.

In spite of this, a case may be made for outlawing at least some vertical interlocks. First, independent value must be given the interest of competitors as distinct from the public interest in competition. The major reason for so doing, as Dean Bok has pointed out, is that we are unable to gauge precisely the impact on competition of any particular arrangement.[175] By contrast, the injury to a competitor is often quite tangible.[176] However appealing the theoretical case against intervening may be, it goes against the grain to sacrifice individuals in the name of a theory that is only now becoming articulated.

Once it is decided to give protection to the interests of competitors, the next question is whether the interest of the interlocked firms in getting the best possible deal gives the competitors adequate protection. In many cases the answer is no. One of the interlocked firms will have an incentive to dissolve the bond only if it believes it can get a better deal in the market. So long as the firm with which it is linked can match the market price and terms, the interlock will tend to persist. An analogous situation is presented by a tying contract with a "competitive terms" proviso.[177] In the *International Salt* case, the Supreme Court held a system of tying contracts containing such a proviso invalid:[178]

> . . . The "Lixator" provision does, of course, afford a measure of protection to the lessee of the tying product, but it

[175] Bok, *supra* note 126, at 295-97.
[176] *Cf. id.* at 293.
[177] *See* Turner, *supra* note 69, at 60-61.
[178] International Salt Co. v. United States, 332 U.S. 392 (1947).

> does not avoid the stifling effect of the agreement on competition. The appellant had at all times a priority on the business at equal prices. A competitor would have to undercut appellant's price to have any hope of capturing the market, while appellant could hold that market by merely meeting competition. We do not think this concession relieves the contract of being a restraint of trade, albeit a less harsh one than would result in the absence of such a provision.[179]

The magnitude of the injury to competitors will depend largely on the share of the market thus foreclosed to them. If the share is small, there may be little or no impact. If it is substantial, they may be seriously disadvantaged. For example, if the interlocked buyer purchases twenty-five percent of the commodities sold, competitors of the interlocked seller may be seriously injured if the interlocked seller increases his share of the market through his "unfair advantage." Thus, if there are ten sellers, each with ten percent of the market, an interlock between one of them and a buyer of twenty-five percent of the product does not by itself amount to foreclosure. But suppose the interlocked seller is able to expand his output without increasing or decreasing his unit costs. His share of the market will expand although he is no more efficient than his competitors.[180] The interlocked buyer will get as good a deal as is available and need not worry that his present seller will get a monopoly; the firms with seventy-five percent of the market afford him enough protection against that.

The competitors of the seller, however, are in for a rough time. They cannot maintain their present outputs unless they lower prices enough to increase the demand for the commodity. Their costs, however, may not permit this. They may be able to reduce their output to the point that the market is cleared at the going price. But this too may prove risky if it means producing at a less efficient level than the interlocked seller; the latter may decide to exploit this advantage to expand his share still further. Even if the competitors are able to reduce their output without any sacrifice in efficiency, they are forced to accept a truncated market because one of their rivals was able to tie up a buyer.

Argnably, under the circumstances outlined, the law ought not to

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179 *Id.* at 397.

180 Although it is partly built on guesswork, the bulk of professional opinion holds that a firm's average cost curve will decline until a minimum optimal scale is reached and thereafter remain horizontal for a considerable range of outputs. *See* J. BAIN, *supra* note 90, at 155; Stigler, *The Economies of Scale*, 1 J. LAW & ECON. 54 (1958). In an industry in which all firms have barely attained a minimum optimal scale, the enlargement of the share of the market by any one of them will not increase its efficiency.

intervene. First, some efficiencies are theoretically possible; these are beneficial to the consumer. Secondly, there is little need to protect one party to the interlock against "coercion" since he can dissolve it himself. Thirdly, competitors may be injured even though no efficiencies are achieved, but no concomitant injury may occur to the competitive process. Even if the interests of the competitors are acknowledged as worthy of protection, it may be impossible to determine in a given case whether the injury to competitors is a result of the superior efficiency of the integrated firm. Knowing only that competitors are injured, the courts or the FTC may begin to equate that injury with an injury to the competitive process and thus invalidate interlocks that produce efficiency.[181] This is little different from striking down interlocks because they are more efficient.

Since past experience suggests that this fear is far from groundless,[182] there is need to appraise the efficiencies that might be lost if it came to pass. First, it would seem that an interlock will not result in the sort of economies in production that may be produced by more permanent forms of integration. The plants of the linked firms will not be fused physically by any interlock. There are, however, other efficiencies that allegedly may result. It may be possible to coordinate the successive stages more completely, and certain "transfer" costs, which would have to be incurred if the transactions were made through the market, may be eliminated.[183] Of course, the very ease of disengagement that reduces the threat to competition of an interlock restricts the extent to which confident long-range planning is possible. But there is a more fundamental objection to "efficiencies" of this sort. Since the interlock will not of itself affect the stability of the ultimate demand for the product, it cannot eliminate all uncertainty. Planning seems to be facilitated only to the extent that the interlocked firms need not worry about their calculations being upset by the intrusions of competitors.[184] In other words, a firm may be able to reduce its costs if it does not have to worry about competition. "Efficiencies" of that sort hardly seem to be entitled to great weight under the antitrust laws. It must be recognized that waste will result under any competitive regime that might be established.[185] Antitrust policy cannot pursue each effi-

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181 *See* Bork & Bowman, *supra* note 76, at 369.

182 *See, e.g.*, Anchor Serum Co. v. FTC, 217 F.2d 867 (7th Cir. 1954); Dictograph Prods., Inc. v. FTC, 217 F.2d 821 (2d Cir. 1954).

183 *See* Means, *supra* note 77, at 148.

184 *Cf.* Bok, *supra* note 126, at 306-07.

185 K. Boulding, Economic Analysis 671-78 (3d ed. 1955).

ciency so single-mindedly that it is willing to encourage even those efficiencies that result from the relaxation of competition.

Where does all this leave us? On the one hand, a vertical interlock does have some potential for efficiencies, but the efficiencies appear either insignificant or of a type entitled to little weight. On the other hand, the dangers posed by interlocks hardly seem substantial. Because of the ease with which either firm can dissolve the relation, they may ordinarily be relied upon to protect their own interests. This same fragility minimizes any chance that the interlock will injure the competitive process. The possibility cannot be excluded, however, that there may be cases in which harm is inflicted on individual competitors even though no social value results from the interlock. Everything else being equal, the degree of harm may be roughly gauged by the share of the market from which competitors are foreclosed by the interlock. It should be emphasized that these conclusions are little more than speculations made in the absence of solid data. Nevertheless, Congress has a decision to make.

Congress may pursue one of several alternatives. It could prohibit only interlocks that "substantially lessened competition or tended to create a monopoly" or met some other vague standard. It could forbid all interlocks between supplier and customer wherever the supplier produced a specified share of the relevant market or the customer purchased a specified share of the relevant market. Or it could proceed similarly to section 10 of the Clayton Act and require that every customer linked to a supplier by an interlock purchase the supplier's goods under a system of competitive bidding. Section 10 requires competitive bidding if the supplier and the carrier sharing a director have annual dealings in excess of 50,000 dollars. Since the interest to be protected is the interest of competitors in not being foreclosed, which is roughly related to the share of the market involved, the statute might well require competitive bidding only when the supplier produces a specified share of the relevant market or the customer buys a specified share.

This last option has much to recommend it. Enactment of a generalized standard would cut the courts adrift and invite the same vacillation that has occurred under similar standards of the antitrust laws. An outright prohibition on vertical interlocks if one of the firms accounts for a critical share of the relevant market seems too severe. Any figure selected is bound to be arbitrary, and the effect of the ban would be a major intervention into the executive-talent market. A competitive bidding system, however, does not require the same degree of intervention. Although the system of competitive bidding may be more cumbersome and expensive for the firms involved, this is a factor to be taken into the calculations of the firms contemplating an interlock. If a firm can decide that an individual is the best man for the job although he has other commitments, it can also make the judgment that he is worth the trouble and cost of a competitive bidding system. The extent to which this will force firms to make a compromise with quality depends on whether a firm's buying a particular supply by competitive bids will be so expensive that this factor can induce the firm to select a candidate who would be considered demonstrably inferior.

One hesitates to suggest the percentage of the market that would call the competitive bidding system into play. Since the consequences of coming within the percentage are less severe than would ordinarily be the case, Congress might well be warranted in resolving doubts in favor of a small percentage. Here too the desire to promote equality of opportunity might also weigh in favor of a small percentage.

G. *Interlocks Between Potential Competitors and Between Potential Customers and Suppliers*

Any attempt to legislate against interlocks between corporations that are only "potentially" related must somehow confine the judicial imagination.[186] In this era of diversification, any corporation could conceivably become the competitor of any other corporation. That a given corporation may become the customer or supplier of any other corporation is even more likely, and it is not terribly difficult to conjure up cases that would be within the statute if the concept of "potentiality" is left unconfined. Indeed, it is not too much to say that unless Congress sets up boundaries to the concept of "potentiality" or, at the very least, guidelines that permit the courts to chart those boundaries, enactment of the proposed amendment might well be tantamount to forbidding all interlocking relations. If it is unsound for Congress to go this far directly, it seems even more unsound for Congress to do the same thing by indirection. What then are the bounds that might be imposed?

As to interlocks between potential competitors, a theoretical case for the protection of potential competition already exists; the Supreme Court has seemingly invalidated a joint venture on the ground that

186 *See generally* Hale & Hale, *Potential Competition Under Section 7: The Supreme Court's Crystal Ball*, 1964 SUP. CT. REV. 171.

potential competition between the firms would be impaired.[187] This theory distinguishes between two cases. First, although not presently in the same market, the firms may exert present influence on each other's behavior. Thus, if one firm is geographically outside the market, firms within the market may recognize that the outsider may enter the market if conditions are right. Accordingly, they may behave in a manner more consistent with competitive objectives. Secondly, although not recoguized as a potential entrant and not exercising any present influence on the behavior of firms inside the market, an outside firm may nevertheless have the potential for entry.[188]

As applied to interlocks this distinction seems to work out in the following manner. If the interlocked firms recognize each other as potential competitors at the time the interlock is established, the motive for its establishment may be the relaxation of the influence of this potential competition. On the other hand, even if the firms do not regard each other as potential competitors when the interlock is established, its existence may prevent the firms from affecting each other's behavior at some future time. Thus, suppose that Corporation *A* shares a director with Corporation *B* and that neither was recognized as a potential entrant into the other's market when the interlock began. Later *A* may have to decide whether to enter *B*'s market or to use its resources in some other way. The interlock with *B* may divert it into other areas.

Is an outright prohibition warranted in either case? On balance, the answer must be "No." Although it may be acknowledged that a recognized potential entrant may affect the behavior of firms in the industry it may enter, certain minimum conditions must be met before that influence can be regarded as significant. The industry must be maintaining prices above competitive levels; the firm must be recognized as one of the more likely entrants; and entry barriers must be low enough to permit the entering firm to set a price no higher than the price that would maximize the profits of the existing sellers.[189] These are only minimum conditions; other conditions may also have to be met before the influence of the outside firm is so important that an interlock would be employed to negate it. The occasions on which this would be true are few. If these conditions are not met, an interlock between two firms that seem to an enforcement agency or a court

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187 United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964).
188 Turner, *supra* note 162, at 1362.
189 *Id.* at 1363.

to be potential competitors may be motivated by honestly competitive objectives. It is very doubtful, however, that a statute can be drawn that, by its terms, will make these rather fine distinctions. In the circumstances, it seems the wiser course to leave the whole problem to the more flexible standards of the Sherman and FTC Acts.

The same reasoning applies with greater force when the firms are assumed not to have recognized each other as potential competitors when the interlock was created. In addition, two other factors now seem present. First, proof of the fact that the two firms are, in actuality, potential competitors will most likely be difficult to unearth. Secondly, if each firm is maximizing profits, it is doubtful that the interlock would divert either firm's energies into an area that was demonstrably less profitable. Only when entering the industry of the other firm appears no more profitable than some other use of the resources is the interlock likely to tip the scale. Admitting that imperfections in knowledge may require some guess work by the firm, one would surmise that the close cases will not predominate.

Concerning interlocks between potential suppliers and customers, the theoretical case is not clear. Some actual transactions would seem requisite to the foreclosure of competitors at either level. But, of course, as soon as the transactions commence, the firms are no longer potentially related. It seems that expanding section 8 to reach interlocks between "potential" customers and suppliers adds little protection to a ban on interlocks between firms having existing vertical relations.

IV. Conclusion

The foregoing analysis has suggested seven conclusions about interlocks. (1) There is value in intervening in the "executive-talent" market only to the extent necessary to achieve clearly defined objectives. (2) Attempting to regulate interlocks on a theory of increasing individual opportunity or preventing the development of an elite seems unwise. These justifications invite massive intervention into the executive-talent market since they do not discriminate between classes of interlocks. (3) The present per se rule for interlocking directorates between competitors seems justified. (4) The logic that supports the preceding conclusion will also justify extending section 8 to interlocking officers and employees with managerial functions between competitors. (5) Though indirect interlocking relations between competitors may serve some of the same functions as direct interlocks, it would not be worthwhile going after these in their own right. (6) The case against vertical interlocks is not so clear. Its theoretical basis is now under direct attack. Yet the antitrust laws have given protection to competitors in many other cases, and theory, however appealing, is ordinarily deemed insufficient to justify the sacrifice of competitors. However, in view of the doubts, an outright prohibition on vertical interlocks is too severe. A system of competitive bidding, to be employed when either of the interlocked firms accounts for a critical share of the relevant market, seems the better solution. (7) Expanding section 8 to cover interlocks between potential competitors and potential customers and suppliers would invite confusion. It would be better to remit this problem to the courts to allow for an evolutionary approach that could take account of the most relevant factors.