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The Sellers of Labor and Corporate Mergers

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I. The Problem

At least since Adam and Eve were driven from the Garden of Eden, the survival of man demanded the burden of work. "From childhood to the grave, the wage earner is haunted by the specter of poverty and misery." When discharged from work, a person's attitude, reflecting the stage of unemployment, goes "from optimism through pessimism to fatalism." As the length of the unemployment period increases, one may even become unemployable. Because of the psychological effects of unemployment, which some believe reduces the effectiveness of a person as a good worker, many employers "... have a policy of not hiring people who have been unemployed for longer than a certain period."

Corporate mergers increase unemployment and contribute greatly to a slower job growth. Absent any statistical studies in this area, it is impossible to offer any estimate of the number of jobs eliminated as a result of corporate mergers. The Temporary National Economic Committee did note, however, in its 1941 report, that unless the trend toward economic concentration was reversed "... the opportunity of those individuals who will constitute the next generation will be completely foreclosed." Increased economic concentration is, likewise, having a detrimental effect on the ability of unions to bargain collectively for the rights of employees.

Statistics compiled by the Federal Trade Commission show a total of 1,528 acquisitions of manufacturing and mining firms with assets of ten million dollars or more from 1948 through 1970. It is obvious that one cannot conclude what the net effect of the total number of mergers had on employment. To make this type determination, a case-by-case study would be required. The effect upon employment would depend on the type of merger involved and the degree of consolidation that followed.

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1 A. Epstein, Insecurity, A Challenge to America 17 (2d ed. 1938).
3 Tucker, Some Correlates of Certain Attitudes of the Unemployed, 35 Arch. Psych. 7 (1940).
7 FTC, Statistical Report No. 7, Large Mergers in Manufacturing and Mining, 1948-1970 6 (1971). The total number of corporate mergers during 1970 was 2,916, which represented a 35.8 percent decline from the 1969 total of 4,542. This was due in part to a lack of confidence and a weakness in the securities markets. H. Res. 161, 92d Cong., 1st Sess. 439 (1971).
8 Of the total number of 1,528 large mergers reported by the FTC during the period of 1948-1970, the classification was as follows: 234 horizontal, 194 vertical, 1,100 conglomerate, 743 product extension, 66 market extension, and 291 other. FTC, supra note 7, at 7.
A higher degree of consolidation will normally follow horizontal mergers, and to a lesser extent, product and market extension mergers. With these mergers, the facilities of the companies can more easily be brought together. Consequently, one could expect a reduction in the number of employees needed to maintain the same level of production. Conglomerate mergers, which create an umbrella against market risk and uncertainties, present different and peculiar problems to employees.\footnote{9} No attempt is made in this article to measure the total impact which corporate mergers have on employees. Such a bold project would require facilities and financial resources not within the possession of nor available to the writer at the present time. The purpose of this article is limited to a discussion of the federal antitrust laws as a possible way of effectively protecting employees. Particular attention will be focused on the right of employees to initiate private antitrust actions.

If the federal antitrust laws were vigorously enforced in connection with corporate mergers, employees would be protected against sudden terminations, unfavorable transfers, and loss of retirement benefits. As Judge Learned Hand stated in \textit{United States v. Aluminum Co. of America},\footnote{10} the most basic assumption drawn from the history of all antitrust statutes is that the congressional purpose "... was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." An economic system so described would generate more jobs and increase employee protection through the forces of free competition.\footnote{11}

Congress passed the Celler-Kefauver amendment to section seven of the Clayton Act out of a "... fear of what was considered to be a rising tide of economic concentration in the American economy."\footnote{12} This rising tide of economic concentration was causing a loss of local control over industry;\footnote{13} it was threatening the organization of industry in small units. "Where an industry was composed of numerous independent units, Congress appeared anxious to preserve this structure."\footnote{14} Former Chief Justice Warren, writing for the Court in the

\footnote{9 See S. Res. 40, pt. 8A, 91st Cong., 1st Sess. 453-57 (1969). Conglomerates may alter collective bargaining and seriously reduce the power of the strike. With the conglomerate, the union may experience increased difficulty in identifying the company charged with the duty to bargain. Collective bargaining may also be affected if conglomerates reduce the effective force of strike power. Within the conglomerate, the struck company can be supported by the parent and the other companies operating under the same umbrella. With their vast resources, conglomerates are able to sustain a strike for a prolonged period of time.}

\footnote{10 148 F.2d 416, 429 (2d Cir. 1945).}

\footnote{11 Besides the forces of free competition, employees may seek to gain protection by organizing into labor unions. For this device to provide effective protection, it would be essential for the union to be of sufficient size and power to check the power of the corporate employer. One of the stated purposes for the Celler-Kefauver Act, Clayton Act § 7, 15 USC § 18 (1970), was to check the growth of large labor unions. "The concentration of great economic power in a few corporations necessarily leads to the formation of large nation-wide labor unions. The development of the two necessarily leads to big bureaus in the Government to deal with them." H.R. REP. No. 1191, 81st Cong., 1st Sess. 13 (1949).}


\footnote{13 Brown Shoe Co. v. United States, 370 U.S. 294, 316 (1962).}

\footnote{14 Id. at 333.}
Brown Shoe case, spoke of this as "... the economic way of life sought to be preserved by Congress."15

To look upon the federal antitrust legislation as being purely economic in nature is erroneous and self-defeating; the legislation was designed to achieve a social balance, a system of political independence, and an economic way of life.16 As the Supreme Court noted in United States v. Philadelphia National Bank,17 Congress, with passage of section seven of the Clayton Act,18 was expressing concern "with the protection of competition, not competitors."19 Competition, considered conceptually, is the economic way of life which controls all segments of our society, including employment opportunities and protection of workers.

Following this idea of competition, Judge Dawson, in United States v. Kennecott Copper Corp.,20 stated: "[W]e are concerned not alone with the probable effects of a merger upon a particular line of commerce but also its probable effects upon the economic way of life in the industry."21 A similar judicial philosophy was expressed in United States v. White Consolidated Industries, Inc.22 by Judge Battisti:

This case is not so much a contest between the United States Department of Justice and the two defendant companies as a skirmish in a broader battle over the direction American economic life will take in the coming years.23

Congress considered the tendency toward economic concentration to be "undesirable from a social standpoint."24 As recorded in the final report of the Temporary National Economic Committee, a reversal of the tendency toward economic concentration was essential to protect ourselves from the domination of economic authority.25 Permanent decentralization was considered necessary "... if the ideals of a democratic social and economic structure for all our people are to be achieved."26 Under this democratic structure, it was recognized and

15 Id.
19 United States v. Philadelphia Nat. Bank, 374 U.S. 321, 367 N. 43 (1963). But see how Professor Turner uses this language to support certain mergers that yield significant economics. Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1324, 1353 (1965). The weakness in Professor Turner's logic is that he ignores the social and political consequences of mergers, which he measures by purely economic standards.
20 231 F. Supp. 95 (S.D.N.Y. 1964). See also Kennecott Copper Corp. v. F.T.C., 467 F.2d 67 (10th Cir. 1972).
25 TNEC Report, supra note 5, at 3. The TNEC Report, although released in 1941, is still significant to an understanding of the Celler-Kefauver Act which amended section seven of the Clayton Act in 1950. In the House Committee Report favoring this amendment, the findings of the TNEC Report were incorporated. H.R. Rep. No. 1191, 81st Cong., 1st Sess. 2 (1949). These TNEC findings have also been relied on by the Supreme Court. Brown Shoe Co. v. United States, 370 U.S. 294, 314 (1962).
26 TNEC Report, supra note 5, at 4.
reaffirmed that "... all power originates in all of the people and not in any part of them."27

As a result of the unchecked trend of economic concentration, the people have been forced to surrender local self-government.28 Governors of great states and mayors of large cities have been forced to beg the central government "... to undertake Federal enterprises in the local communities to solve local problems of unemployment."29 This trend must be reversed, according to the early congressional findings, if the opportunities of future generations are not to be completely foreclosed.30 In the 1914 Clayton Act debates, Congressman Kelly observed that the evils which have brought concentration of wealth are the same evils that have caused a diffusion of poverty.31

All members of our society, seeking protection of their special interest, must of necessity rely on the preservation of the economic way of life constructed upon the forces of free competition. The nature of the special interest is immaterial; it may involve business interest, employment protection, or consumption. It would be impossible to have separate economic systems—one for business and capital investments and one for employment interest. The federal antitrust laws were passed to protect a single economic system.32

The Sherman Act was passed by Congress in a social setting of economic suppression.33 The late Justice Harlan saw the people of this country being placed in bondage to the great aggregations of capital controlled by a few individuals and corporations.34 With this concentrated economic power, there was a philosophy that workers should be suppressed into industrial slavery, and that the enormous profits should be distributed to the relatively small number of share-

27 Id. at 5. "If the political structure is designed to preserve the freedom of the individual, the economic structure must not be permitted to destroy it." Id. In the House Committee Report, favoring the anti-merger bill, it was observed that the alternative to capitalism is some form of statism. H.R. REP. No. 1191, 81st Cong., 1st Sess. 13 (1949). Congressman Celler, in the debates, was of the opinion that our political system could be changed from democracy to socialism unless mergers were stopped. 95 CONG. REC. 11486 (1949) (remarks of Congressman Celler). He stated: "I want no manner or kind of collectivism or totalitarianism. These mergers are usually the forerunners of collectivism and socialism and therein lies the danger." Id. Congressman Patman of Texas declared: "Merger must be stopped now, or else the big corporations will become so big that there will be nothing left to do except for the Government to take them over... This is the very thing we all are trying to avoid." Id. at 11498 (remarks of Congressman Patman). See also the acerbity Justice Douglas expressed in the dissenting opinion filed in United States v. Steel Co., 334 U.S. 495, 534 (1948); and the concurring opinion filed in United States v. Pabst Brewing Co., 384 U.S. 546, 553 (1966).

28 TNEC REPORT, supra note 5, at 5.
29 Id. at 6.
30 Id. at 9.
31 51 CONG. REC. 9087 (1914) (remarks of Congressman Kelly).
32 The late Justice Harlan, describing the condition of the country in 1890, the year Congress passed the Sherman Act, observed: [T]here was everywhere, among the people generally, a deep feeling of unrest. The Nation had been rid of human slavery... but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations... Standard Oil Co. v. United States, 221 U.S. 1, 83-84 (1911) (concurring and dissenting opinion).

34 Standard Oil Co. v. United States, 221 U.S. 1, 83-84 (1911).
holders. Life of the American workers was described as being "... so inhuman as to make our former Negro slavery infinitely preferable."

The social unrest of the people in their struggle with economic concentration represented a serious threat to our entire legal system; it was compared with the unrest leading to the American Revolution and Civil War. Congressman Kelly, in the Clayton Act debates, warned that unless the "brazen defiance" of the antitrust laws was stopped "... the masses of the people will forget their patient endurance of injustice and long suffering submission to wrong on the part of exploiting combinations and start a conflagration against which fire insurance will offer no protection."

If employees are to be protected against corporate mergers and resulting increases in economic concentration, the antitrust laws must be vigorously enforced. Since passage of the Sherman Act in 1890, most congressional action in the field of antitrust has been aimed at improving enforcement. In 1941, the Temporary National Economic Committee called for the "... vigorous and vigilant enforcement of the antitrust laws." With the Celler-Kefauver Act, Congress sought to plug the loopholes in section seven of the Clayton Act.

Consistent with the congressional policy opposing the concentration of economic power, the Supreme Court, starting with the Brown Shoe case, has been systematically striking down corporate mergers. To the extent that corporate mergers are challenged by the Justice Department or the Federal Trade Commission, employees are protected; the possible loss of jobs is avoided. In Ford Motor Co. v. United States the employees received specific and more definite protection. The decree protected employees of the New Fostoria plant by ordering Ford to condition its divestiture sale on the purchaser's assuming the existing

36 Id. "The result is physical and moral degeneracy—work, work, work without recreation or any possibility of relief save that which dissipation brings." Id.
37 Id. at 39.
38 51 CONG. REC. 9087 (1914) (Remarks of Congressman Kelly).
39 "If the Sherman Act had been executed by the responsible officials, few of the three hundred monopolies or trusts that are now in existence ... would be in existence now." 51 CONG. REC. 14260 (1914) (remarks of Senator Borah). A lack of congressional confidence was expressed in the Attorney General's enforcement policy. Id. at 14514, 14260; id. at 14261 (Senator Lane suggested that if the Sherman Act was sufficient, Congress should turn its attention to the responsible officials and pass laws to force them to do their duty).

There was also congressional opposition to the loose judicial construction of the Sherman Act. Id. at 15985 (remarks of Senator Borah); id. at 9077 (remarks of Mr. Volstead); id. at 14222 (remarks of Senator Thompson); id. at 9674 (remarks of Mr. Buchanan). Following these debates Congress passed the bill, creating the Federal Trade Commission, 38 Stat. 717 (1914), as amended 15 U.S.C. §§ 41-58 (1970) and enacted the Clayton Act, 38 Stat. 730 (1914), as amended 15 U.S.C. §§ 12-27 (1970).

wage and pension obligations and to offer employment to any employee displaced by a transfer of nonplug operations from the divested plant.\textsuperscript{44}

Employees have adequate protection against the loss of jobs resulting from illegal corporate mergers; however, the problem is that too few of these mergers are actually challenged by one of the two official enforcement agencies.\textsuperscript{45} In search of a reason for this enforcement experience, one is left only to speculate. It was recently suggested that special treatment was given to certain merging corporations.\textsuperscript{46} Most decisions not to prosecute a merger are probably based on economic philosophy.\textsuperscript{47} Some suggest that governmental self-restraint in the prosecution of mergers is preferable. Unlike private antitrust suits, public enforcement agencies are encouraged to take a "relatively calm and rational approach" to corporate mergers.\textsuperscript{48}

Private antitrust suits, an alternative to official governmental action, may be the only way to ensure a vigorous, untarnished enforcement policy.\textsuperscript{49} Section four of the Clayton Act allows any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws to sue and recover threefold the damage sustained.\textsuperscript{50} In addition to treble damages, section 16 of the Clayton Act authorizes any person, firm, corporation, or association to seek injunctive relief against threatened loss or damage by a violation of the antitrust laws.\textsuperscript{51}

To sue for treble damages under section 4 of the Clayton Act, one must show

\textsuperscript{44} Id. at 572. Ford did not challenge the portion of the decree that protected employees.

\textsuperscript{45} During the year 1967 the Federal Trade Commission reported a total of 1,496 corporate mergers, of which only 16 were challenged; for 1968, there were 2,442 mergers, of which 124 were challenged. For the year 1967, there were 169 major mergers (acquired firm had $10 million or more in assets), of which 6 were challenged; in 1968 there were 193 major mergers, of which 9 were challenged. Thomas, \textit{A Challenge to Conglomerates: Private Treble Damage Suits}, supra note 39, at 314-15.

\textsuperscript{46} The most notable contemporary case involved the ITT settlement. An appeal of an adverse ruling by the government was allegedly dropped after a $200,000 political contribution. United States v. Int'l Tel. & Tel. Corp., 324 F. Supp. 19 (D. Conn. 1970). There are numerous news stories on the matter. N.Y. Times, Mar. 1, 1972, § 1, at 1, col. 4; id., Mar. 3, 1972, § C, at 1, col. 4; id., Mar. 9, 1972, § C, at 1, col. 6; id., Mar. 9, 1972, § C, at 28, cols. 1, 3; id., Mar. 12, 1972, § 1, at 50, col. 1; id., Mar. 12, 1972, § 4, at 1, col. 6; Newsweek, Mar. 20, 1972, at 24; Time, Mar. 20, 1972, at 13; id., Mar. 27, 1972, at 86; id. at 28; id., Apr. 3, 1972, at 15; id. at 40; id., Apr. 10, 1972, at 29.

\textsuperscript{47} Professor Day suggests that prosecution of mergers and the decision to seek divestiture must involve broader public interest considerations. For this reason, he is willing to exclude all private antitrust actions against mergers. Day, \textit{Private Actions Under Section 7 of the Clayton Act}, 29 A.B.A. Antitrust Sec. 155, 162 (1965). See also C. Kaysen & D. Turner, \textit{Antitrust Policy, An Economic and Legal Analysis} 117, 258 (1959); \textit{but see} United States v. Pabst Brewing Co., 384 U.S. 546, 552 (1966).


\textsuperscript{49} Professors Kaysen and Turner urge: "There should be no private right of action based on the acquisition of 'unreasonable market power.'" C. Kaysen & D. Turner, \textit{supra note 47}, at 258. "It is unfair for private plaintiffs to collect treble damages for conduct the illegality of which cannot be readily determined in advance." \textit{Id}. at 257. There is judicial authority for the proposition that "[i]there can be no claim for money damages for a violation of Section 7 of the Clayton Act." Gottesman v. General Motors Corp., 221 F. Supp. 400, 402 (S.D.N.Y. 1963), cert. denied, 379 U.S. 922 (1964); \textit{but see} Gottesman v. General Motors Corp., 414 F.2d 956 (2d Cir. 1969). There appears to be little merit in the position denying any treble damage relief to private plaintiffs alleging a violation of section seven of the Clayton Act. Thomas, \textit{A Challenge to Conglomerates: Private Treble Damage Suits}, \textit{supra note 39}, at 292. \textit{See} Calnetics Corp. v. Volkswagen of America, Inc., 348 F. Supp. 606 (C.D. Cal. 1972).


an injury to his "business or property"; this same requirement is not included in section 16 of the Act for one seeking injunctive relief. "The most likely explanation" for the wording of these two sections of the Act, according to the Supreme Court, "... lies in the essential differences between the two remedies." It was noted in Hawaii v. Standard Oil Co. that "... there is a striking contrast between the potential impact of suits for injunctive relief and suits for damages."

There would be little difference in the impact of a single suit or a hundred suits in which only injunctive relief is sought. One injunction is just as effective as 100; likewise, 100 injunctions are no more effective than one. "The position of a defendant faced with numerous claims for damages is much different." At first glance, it might appear as if the Hawaii Court was suggesting a stricter position for treble damage suits. This, however, is not in fact the case. The Court was not concerned with the number of treble damage claims that might be filed; rather, it was concerned with the possibility of duplicative recoveries of damages.

Treble damage relief was denied to the State of Hawaii suing under section four of the Clayton Act in its parens patriae capacity, as opposed to its proprietary capacity. With injunctive relief, the Court reasoned that the capacity of the state, parens patriae or proprietary, would be of little consequence. The State of Hawaii in its proprietary capacity could sue for damages under section four of the Clayton Act. Injured in its capacity as a consumer, the state could recover damages measured by the amount of the overcharge. This same right of recovery is given "... to every citizen of Hawaii with respect to any damage to business or property." It is this citizen-right that precludes the State of Hawaii from recovering damages in its parens patriae capacity. If permitted, both the state and the citizen could recover damages for identical losses; the Court refused to open this door to duplicate recoveries.

The State of Hawaii argued that it should be allowed to prosecute an antitrust claim in its parens patriae capacity because "protracted litigation [would] render private citizens impotent." Unless the state is allowed to sue for injury to her quasi-sovereign interest or for injury to the general economy, antitrust viola-

53 Id. at 251.
54 Id. at 262.
55 Id. at 261.
56 Id.
57 Id. at 264.
58 Id. at 261.
59 Id. at 262.
60 Id. at 263. Recognition of this citizen right indicates that the Court was not concerned over the number of suits filed for damages. The impact of damage claims referred to by the Court, id. at 262, related only to potential duplicative recoveries. Besides the parens patriae action, the State of Hawaii had sought to include all consumers in a proposed class action. This proposal was dismissed by the lower court on the ground that the class was unwieldy. Nevertheless, the Court conceded that the State might be allowed to bring a class action on behalf of some or all of the consumer citizens. Id. at 266.
61 In its parens patriae capacity, the State of Hawaii was seeking "... to recover damages for injury to its general economy." Id. at 264. Injury to the general economy is only "... a reflection of injuries to the business or property of consumers, for which they may recover themselves under § 4." This is the duplicative recovery referred to by the Court.
62 Id.
63 Id. at 265.
tions would go virtually unremedied. The Court responded, however, that "[p]rivate citizens are not as powerless . . . as the State suggests."

Relief under section four of the Clayton Act could have been denied Hawaii, acting in its parens patriae capacity, on two theories. Conceivably, the Court could have concluded that there was no causal connection between the alleged antitrust violation and the alleged injury to the general economy of the state—the basis of a parens patriae action. Section four of the Clayton Act requires that the injury for which treble damages is sought be "... by reason of anything forbidden in the antitrust laws. . . ."

Lower courts interpreting the section four causal connection language have denied relief to persons who can only trace remote injuries to an antitrust violation. As the Tenth Circuit noted in the Nationwide Auto Appraiser Serv. v. Association of Casualty & Surety Co.:

The directness rule has been criticized, but it appears to be through the years a practical application of the Clayton Act, and in view of the lapse of time, it must be assumed that it accords with the intention of Congress.

It would have been difficult for the State of Hawaii to satisfy the directness requirement in a suit advanced in its parens patriae capacity. The injury was directed at the citizens of the state, thereby causing an indirect injury to the general economy. As the Hawaii Court noted, injury to the general economy is only a reflection of the injury to the citizens. Although the Court could have denied relief to Hawaii in its parens patriae capacity for lack of directness, such, however, was not the case.

Relief was denied on the ground that the state's general economy was not

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64 Id.
65 Id. Citizens can combine their resources by filing a class action in order to gain "... a more powerful litigation posture." Id. at 266. It was further noted that Congress provided treble damages and the right to recover cost and attorney fees as an effective incentive for citizen suits. Id.
66 15 U.S.C. § 15 (1970) (emphasis added). The Hawaii Court did refer to lower court opinions that had denied relief on the basis of no causal connection or proximate cause. "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." Id. at 262, n. 14.
68 382 F.2d 925 (10th Cir. 1967).
69 Id. at 929. See also Snow Crest Beverages v. Recipe Foods, 147 F. Supp. 907 (D. Mass. 1956). For criticism of these cases, see Thomas, A Challenge to Conglomerates: Private Treble Damage Suits, supra note 39, at 299-305.
70 See note 61, supra.
71 It remains unclear why the Court did not merely rule that the injury to the general economy of Hawaii was remote. Perhaps the Court is at a crossroads where causation is involved. For example, the Court was moving to liberalize its stand on proximate cause between injury and an alleged antitrust violation. Hanover Shoe v. United Shoe Mach., 392 U.S. 481 (1968); Perkins v. Standard Oil Co., 395 U.S. 642 (1969). In Perkins, the Court stated that "artificial limitations" of causal connection cannot be accepted. "If there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what that evidence proves is for the jury." Id. at 648. Since the Hanover and Perkins cases, however, the Court has denied certiorari in cases in which the plaintiff lost on causal connection arguments. See cases cited in note 67, supra.
"business or property" as these terms are used in section four of the Clayton Act.72 According to the Supreme Court, "business or property" . . . refer to commercial interests or enterprises.73 A state can thus recover under section four for injuries to its commercial interest—this is "business or property."74 It can recover " . . . for those injuries suffered in its capacity as a consumer of goods and services."75 It cannot, however, recover "for economic injuries to its sovereign interests."76

The question toward which the balance of this article is directed is whether employees injured by reason of an illegal corporate merger have standing to sue for treble damages under section four of the Clayton Act.77 In spite of the fact that the Sherman Act has been on the books since 1890, and the Clayton Act since 1914, the standing of employees as a private antitrust plaintiff is not a settled question. There are, of course, cases which support standing as well as cases that deny standing to employees. But much of what one finds on this topic in judicial opinions is only dicta. Surprisingly, the issue had never been, until 1972, squarely considered by any appellate court.78

II. An Unsettled Question

Whether an employee has standing under the federal antitrust laws to challenge an illegal corporate merger which causes him to lose his job is a significant, but yet unsettled question. Employees terminable at will (i.e., any person employed for an indefinite term79) found very little protection under the common law. A salaried employee had no vested right to continued employment unless provided by contract. Protectable personal rights were generally measured only by contracts.80

74 Id.
75 Id. at 265.
76 Id.
77 In light of the Supreme Court's distinction between §§ 4 and 16 of the Clayton Act, employees could more easily establish a right to injunctive relief against mergers which violate § 7 of the Clayton Act. Id. at 261. Injunctive relief in private suits may present additional problems not addressed by the Court in Hawaii; therefore, the topic appears too broad to cover in this article. Primary attention in this article will be restricted to the scope of § 4. See Calnetics Corp. v. Volkswagen of America, Inc., 348 F. Supp. 606 (C.D. Calif. 1972).
78 In fact, only a few trial courts have been directly confronted with the question. Wilson v. Ringsby Truck Lines, Inc., 320 F. Supp. 699 (D. Colo. 1970) (upholding the standing of employees). The issue has also been presented to the Tenth Circuit. Most recently, the Tenth Circuit denied standing to an employee discharged as a result of a merger. Reibert v. Atlantic Richfield Co., Civil No. 72-1283 (10th Cir., Jan. 8, 1973). However, there are two cases currently pending before the same circuit. Mans v. Sunray DX Oil Co., Civil No. 71-1410 (10th Cir., filed July 26, 1971); Jobe v. Amerada Petroleum Corp., Civil No. 72-1341 (10th Cir., filed May 10, 1972).
80 There was not even any protection to the employee who was injured on the job through an act of negligence by a fellow employee. Priestly v. Fowler, 150 Eng. Rep. 1030 (Ex. 1837). For discussion see C. Auerbach, L. Garrison, W. Hurst, & S. Mermin, The Legal Process, 15-31 (1961).
The freedom of every man to deal or refuse to deal with his fellow men has long been recognized as an inherent and inalienable right. A person has a right to refuse to enter into a contractual relationship, and the motive for such refusal is immaterial. "To make his motive in exercising this privilege the subject of judicial inquiry would be a step beyond what the courts have yet done, or what we think they can wisely do in the present stage of our economic order." In the 1908 decision of *Adair v. United States*, the Supreme Court struck down as unconstitutional a statutory provision that made it a criminal offense to bar employment or threaten any employee with loss of employment because of certain stated reasons, including membership in a labor union. The Court ruled that, absent a contract between the parties,

"It is not within the functions of government... to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another." Justice Frankfurter later noted that the *Adair* decision had drawn much criticism, which was reflected in later decisions of the Court.

Neither the Commerce Clause nor the Due Process Clause was thereafter conceived... to be confined within such doctrinaire and frozen bounds as were confined the assumptions which underlay the decision in the *Adair* case. ... We have come full circle from the point of view in the *Adair* case.

Actually many of the earlier cases explicitly recognized limitations to the liberty of contract concept and the right of a person to enter into or refuse to enter into a contract.

A clear distinction must be drawn between statutory law and common law, and between public law and private law. Action considered legal in terms of

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84 208 U.S. 161 (1908).
85 Erdman Act, 30 Stat. 424 (1818).
87 Railway Employees' Dept. v. Hanson, 351 U.S. 225, 239-41 (1956) (concurring opinion). Justice Black, in *Lincoln Union v. Northwestern Co.*, 335 U.S. 525 (1949) stated: "This Court beginning at least as early as 1934... has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases." *Id.* at 536.
88 Consider the cases cited in notes 81, 82, 83, *supra*. Particular attention is directed to *Huskie v. Griffin*, 75 N.H. 345, 74 A. 595 (1909).
private contract or tort law may be illegal when measured by the antitrust laws.\textsuperscript{90} Private contract rights "must be exercised in subordination to the law."\textsuperscript{91} Granted rights must be exercised independent of the broader aspects of the antitrust laws. It is erroneous to assume that a person has an absolute right to exercise a contractual privilege in the presence of violation of the antitrust law.\textsuperscript{92}

A seller has a right to refuse to deal with any person.\textsuperscript{93} This may not, however, give him the right to fix prices in violation of the antitrust laws as a condition to a decision to deal with a buyer.\textsuperscript{94} Nor can this right to refuse to deal be used in an attempt to monopolize.\textsuperscript{95} An employer, beyond any question, has the right to terminate any employee not protected by a contract. As the \textit{Adair} Court reasoned:

The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employé to quit the service of the employer . . . is the same as the right of the employer . . . to dispense with the services of such employé.\textsuperscript{96}

The statement of equality of right of the employer and employee is firmly supported by common law authority. It is a principle that furnishes to the parties the greatest amount of freedom within the private realm. With this freedom, an employee could theoretically increase his protection by demanding a written contract. The problem is that this equality of rights exists only in theory. As Senator Wagner noted when Congress was considering passage of the Norris-LaGuardia Act:\textsuperscript{97}

To the employee out of work the job means everything—rent, food, and clothing for his wife and children. To the large business organization no worker is indispensable; there is always another to take his place. . . . The employee must either accept the terms of employment as they are tendered or go hungry.\textsuperscript{98}

A person selling his labor can realistically demand an employment contract only if there are many purchasers of labor. This could have been accomplished only through the congressional purpose of the antitrust laws—". . . to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of

\textsuperscript{90} Simpson v. Union Oil Co., 377 U.S. 13 (1964). "Here we have an antitrust policy expressed in Acts of Congress. Accordingly, a consignment, no matter how lawful it might be as a matter of private contract law, must give way before the federal antitrust policy."

\textsuperscript{91} Id. at 18.

\textsuperscript{92} Northern Securities Co. v. United States, 193 U.S. 197, 351 (1904). In this case, the right sought to be exercised was the right to sell stock in a company.


\textsuperscript{94} United States v. Colgate & Co., 250 U.S. 300 (1919).

\textsuperscript{95} United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

\textsuperscript{96} Lorain Journal v. United States, 342 U.S. 143 (1951).

\textsuperscript{97} Adair v. United States, 208 U.S. 161, 174-75 (1908).


\textsuperscript{99} 75 CONG. REC. 4916 (1932) (remarks of Senator Wagner).
industry in small units which can effectively compete with each other. With the economic way of life envisioned under the antitrust laws, employees would have had the freedom to move from one employer to another.

The right of an employer to terminate an employee terminable at will may be held subservient to the antitrust laws. An employee would thus have the right to demand the preservation of the economic way of life that likewise protects his freedom. At common law, there is some authority which holds that even an employee terminable at will had a right to an "open market." In Huskie v. Griffin, the court stated that "... one who interferes with this free market must justify his acts or respond in damages." The right to deal or not to deal with others is not absolute. "It is a qualified one, and the rightfulness of its exercise depends upon all those elements which go to make up a cause for human action."

A. Authority Favorable to Standing

On the specific question of standing of employees under the federal antitrust laws to sue for treble damages, the judicial authority is divided. Nevertheless, there appears to be a current trend toward granting standing. For an employee to have standing under section four of the Clayton Act, he must be a person injured in his "business or property" by reason of anything forbidden by the antitrust laws.

As noted above, the Supreme Court recently held in the Hawaii case that "business or property" refers to "commercial interests or enterprises." Examined superficially, one might take this to mean that only persons operating a business or holding tangible property would be permitted to file suit under section four. Actually, nonbusiness persons, such as consumers, have been held to have standing to recover damages for injury resulting from an antitrust violation. The term "commercial interests or enterprises" must, therefore, include more than a business and tangible property. Based on Hawaii, "commercial interests" would include those things capable of being measured in economic and commercial terms.

Objection to classifying the general economy of the State of Hawaii as "business or property" or as a "commercial interest" appeared to rest on an inability to measure the value of, and therefore the loss to, the general economy in economic or commercial terms.

99 United States v. Aluminum Co. of America, 148 F.2d 416, 429 (2d Cir. 1945); see Brown Shoe Co. v. United States, 370 U.S. 294, 316 (1962).
100 A failure to achieve the economic way of life required employees to seek protection through the same device that defeated their rights—the concentration of power. See note 11, supra.
102 Id. at 345, 74 A. at 595.
103 Id. at 348, 74 A. at 597.
104 Id. at 349, 74 A. at 598.
107 Id. at 263-65.
Even the most lengthy and expensive trial could not, in the final analysis, cope with the problems of double recovery inherent in allowing damages for harm both to the economic interests of individuals and for the quasi-sovereign interests of the State.\textsuperscript{108}

The Supreme Court was willing to allow the recovery of damages for harm to the "economic interests of individuals." Employees have a commercial interest in their jobs. If a job or accumulated pension benefits are lost as a result of an antitrust violation, this is a loss capable of being measured without the expectation of a double recovery. It would thus be reasonable to consider employment, even if terminable at will, under the "business or property" phrase of section four of the Clayton Act. This conclusion finds more definite support in the Hawaii opinion.

When the Court interpreted "business or property" to mean "commercial interests or enterprises," Roseland v. Phister Mfg. Co.\textsuperscript{109} was approvingly cited as authority.\textsuperscript{110} The Roseland case involved the issue of standing of employees under section four of the Clayton Act; and the issue was resolved in favor of standing. In short, the Seventh Circuit held that "business or property" includes "the employment or occupation in which a person is engaged to procure a living."\textsuperscript{111} Stated more fully:

The language of the statute [section 4 of the Clayton Act] is general and all inclusive. It includes any person who shall be injured in his business or property. We assume that the word business was used in its ordinary sense and with its usual connotations. It signifies ordinarily that which habitually busies, or engages time, attention or labor, as a principal serious concern or interest. In a somewhat more truly economic, legal and industrial sense, it includes that which occupies the time, attention, and labor of men for the purpose of livelihood or profit—persistent human efforts which have for their end pecuniary reward. It denotes "the employment or occupation in which a person is engaged to procure a living."\textsuperscript{112}

Under this definition, approved by the Supreme Court, "business" means that which habitually busies, or engages time, attention or labor. Sebastian DeGrazia, writing about the work ethic and the innate drive of man to hold a job and to work, places into the same category the office and plant worker, the self-proprietor and the larger-scale retailer.\textsuperscript{113} He states that "[b]usiness . . . stems from the word 'busy' and means the state of being busy."\textsuperscript{114}

Several courts have explicitly upheld the right of employees to sue for treble damages under the antitrust laws. In three of the cases, the plaintiffs involved were commission sales agents,\textsuperscript{115} while a fourth decision, Radovich v. National

\textsuperscript{108} Id. at 264.
\textsuperscript{109} 125 F.2d 417 (7th Cir. 1942).
\textsuperscript{111} Roseland v. Phister Mfg. Co., 125 F.2d 417, 419 (7th Cir. 1942) (emphasis added).
\textsuperscript{112} Id. (emphasis added).
\textsuperscript{113} S. DeGrazia, The Political Community, A Study of Anomie 68 (1948).
\textsuperscript{114} Id.
Football League, involved an employee of a professional football team who was blacklisted by the league. Three other cases involved plaintiffs that could be classified as entrepreneurs, based on their degree of ownership of the corporate business affected. With this classification of plaintiffs, a court could conceivably avoid extending standing to the ordinary salaried employee or wage earner. The existing employee cases could be distinguished by the directness of the injury.

Standing will be denied to a private antitrust plaintiff unless he can establish that there is business or property and that this business or property was injured as a direct result of an antitrust violation. In Dailey v. Quality School Plan, Inc., the Fifth Circuit observed that the commission sales agent cases must be distinguished from the mere employee whose injury is only derivative. A salesman or sales manager develops a territory which is equated to an entrepreneurial enterprise or a distinct business. What happens with this sort of reasoning is a fusion of two separate statutory requirements—"business or property" and causal connection.

Actually the causal connection requirement of section four of the Clayton Act is far too complex and vague for courts to adopt and follow such a simplistic approach. In Perkins v. Standard Oil Co., the Supreme Court declared that "artificial limitations" to causal connection cannot be accepted. The Court held that if there is sufficient evidence to support an inference of causation, the ultimate conclusion to be reached is a question for the jury. "Each case contains a unique combination of facts, and cannot be fitted into narrow categories."

There is no room for a distinction between sales commission employees and the ordinary employees when faced with the issue of whether employment is business or property. And, except perhaps in Dailey, courts have not been inclined to accept this distinction. In Nichols v. Spencer International Press,
Granting that the antitrust laws were not enacted for the purpose of preserving freedom in the labor market, nor for regulating employment practices as such, nevertheless it seems clear that agreements among supposed competitors not to employ each other's employees not only restrict freedom to enter into employment relationships, but may also, depending upon the circumstances, impair full and free competition in the supply of a service or commodity to the public.129

Similarly, the court in Roseland interpreted the section four language, "business or property," to include "employment or occupation in which a person is engaged to procure a living."130 No distinction was made between commission salesmen and ordinary employees.

Neither was any such distinction or limitation recognized in Vandervelde v. Put & Call Brokers & Dealers Ass'n131 or Bay Guardian Co. v. Chronicle Publishing Co.132 In Vandervelde, the court observed that "[u]ntil the last decade, Courts denied standing to employees seeking to recover salary lost when their employers' business was injured by an antitrust violation."133 The court then noted:

[M]ore recent decisions have accorded an employee standing to prove, if he can, that his loss of salary or the other prerequisites of employment was a sufficiently foreseeable consequence of a violation to render the connection between the wrong and the injury direct.134

In Bay Guardian, the court, relying on Perkins, explicitly stated "... that a question of fact can be presented by persons of 'mere employee' status."135

A distinction between commission salesmen and ordinary salaried employees can be compared to a distinction between professional baseball and professional football. There are times when a court becomes baffled by a distinction that "... is a historical accident and an anomaly based on historical rather than legal or even rational grounds."136 This was the situation created when the Supreme Court ruled that professional baseball was exempt from the antitrust laws.137 Shortly after this exemption had been reaffirmed, the Court declined to extend it to professional boxing or professional football.138

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128 371 F.2d 332 (7th Cir. 1967).
129 Id. at 335-36.
130 Roseland v. Phister Mfg. Co., 125 F.2d 417, 419 (7th Cir. 1942).
134 Id.
A judicial lesson to be learned from the professional baseball cases is that courts should avoid creating precedent that cannot withstand the test of time. In *Flood v. Kuhn*, the Supreme Court was urged to eliminate the spurious distinction which exempted professional baseball from the antitrust laws, but included professional football. Justice Blackmun, writing for the Court, admitted that the baseball exemption was, at best, of dubious validity. The exemption is an anomaly, and an aberration confined to baseball.

Although an admitted aberration, it had stood for half a century and was therefore entitled to the benefit of *stare decisis*. Still there was not a single Supreme Court Justice who argued with the distinction between baseball and the other professional sports which enjoyed no exemption. Chief Justice Burger concurred in the *Flood* opinion; however, he stated that "... like Mr. Justice Douglas, I have grave reservations as to the correctness of *Toolson v. New York Yankees*..." Justice Douglas, filing a dissenting opinion, noted that he had joined the Court's opinion in the *Toolson* case. He went on to say, however, that "... I have lived to regret it; and I would now correct what I believe to be its fundamental error."

Justice Marshall's dissenting opinion filed in *Flood* appears to represent the sentiment of the Court. Except for *stare decisis*, this opinion could well have been the majority view. It was first noted that *Federal Club v. National League* and *Toolson* "... are totally at odds with more recent and better reasoned cases." One of the more recent cases to which he made reference was *United States v. Topco Associates*, wherein the Court had declared:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.

If the Supreme Court now regrets the distinction between professional baseball and professional football, it is highly unlikely that it would accept a distinction between commission salesmen and ordinary-salaried employees. As Justice Marshall observed in his dissenting opinion in *Flood*: "The importance of the antitrust law to every citizen must not be minimized. They are as important to baseball players as they are to football players, lawyers, doctors, or members of any other class of workers."

If the antitrust laws are the Magna Carta of the free enterprise system, their

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140 *Id.* at 282.
141 *Id.*
142 *Id.* at 282-83.
143 *Id.* at 285-86.
144 *Id.* at 286, n. 1.
145 *Id.* at 288. *See* Amateur Softball Ass'n of America v. United States, 467 F.2d 312, 314 (10th Cir. 1972).
146 259 U.S. 200 (1922).
149 *Id.* at 610.
protection cannot be restricted to commission salesmen or blacklisted football players. Protection must be extended to cover "members of any other class of workers." This was explicitly done in *Wilson v. Ringsby Truck Lines, Inc.*, wherein the court refused to dismiss a private antitrust action filed by employees as a class action.

The plaintiffs in *Wilson* were employees who worked as truck drivers and warehousemen. Claiming that their employer, Ringsby, had agreed with other common carriers to divide up the market, clearly an antitrust violation, the employees sought treble damages under section four of the Clayton Act. In compliance with the division of market agreement, Ringsby discontinued some of its former business. This resulted in a reduction in wages and other compensation to the plaintiff employees.

Judge Arraj rejected the defendant's motion to dismiss the complaint, a motion grounded on the premise that employees lack standing. Recognizing that the antitrust standing cases are "... more than a little confusing and certainly beyond our powers of reconciliation," Judge Arraj ruled that the "plaintiffs should be permitted to bring this action." The conclusion that the plaintiff employees had standing was not explicitly based on a determination that employment is "business or property." This appeared to have been assumed by the court. Of greater concern to the court was the problem of directness or causal connection of the injury to the alleged antitrust violation.

Causal connection is such a haunting and evasive phrase that it will possibly never be understood to any explainable point. This is probably what Judge Arraj felt when he said that antitrust standing cases are "... more than a little confusing and certainly beyond our powers of reconciliation." Because some courts consider treble damages to "... be a severe penalty for a defendant and a 'windfall' for a plaintiff, ..." they have tended to develop "... rules designed to limit the classes of plaintiffs which can assert an antitrust violation."

152 Id. at 700.
153 Id.
154 Id.
155 Id. at 701.
156 Id. at 702.
157 Id. The commission salesmen cases were cited by the court. See text accompanying note 115, supra.
158 Judge Arraj's observation of the directness requirement was that "... we have some doubt that either the 'direct injury' or 'target area' approach to standing is a correct interpretation [of § 4 of the Clayton Act]." Id. The interesting point about this observation is that Judge Arraj's court is within the jurisdiction of the Tenth Circuit, which had earlier reaffirmed the directness requirement in *Nationwide Auto Appraiser Serv. v. Association of C. & S. Co.*, 382 F.2d 925 (10th Cir. 1967). Judge Daugherty, in *Mans v. Sunray DX Oil Co.*, Civil No. 70-C-140 (N.D. Okla. 1971), stated that Judge Arraj had rejected the teaching of the Tenth Circuit by reading the direct injury requirements out of the case. Judge Arraj, however, noted in his written opinion that the Tenth Circuit, in the *Nationwide Auto* case, had not mentioned any of the employee standing cases. It was therefore concluded that *Nationwide Auto* was not "dispositive of the issue now before us or that the court of appeals so intended." *Wilson v. Ringsby Truck Lines, Inc.*, 320 F. Supp. 699, 702 (D. Colo. 1970).
B. Authority Against Standing

In *Corey v. Boston Ice Co.*, a case decided in 1913, the court held that the loss of salaries and jobs does not create a right under the antitrust laws because there is no injury to "business or property." The plaintiffs owned a considerable amount of stock in the corporation; they were directors and the principal officers of the company. It was alleged that the defendant, in violation of the antitrust laws, acquired control of the plaintiff's corporation. Following this acquisition of control, the plaintiffs were ousted as directors and officers of the company.

Three years prior to *Corey*, relief under the antitrust laws was denied to a stockholder and creditor of a corporation allegedly ruined as a result of the defendant's illegal monopoly. The court reasoned that "[t]he injury complained of was directed at the corporation, and not the individual stockholder. Hence any injury which he, as a stockholder, received was indirect, remote, and consequential." "[I]njuries to the corporate business are not injuries to the plaintiff's business, and for such injuries only the corporation may pursue the statutory remedy." By creating specified categories of antitrust plaintiffs, such as employees, stockholders and creditors, to measure the directness of injury, the earlier courts took a much too simplistic approach to causal connection. From a view of the early standing cases, one can see an economic system of small business units in which the principal stockholder played a multiple function. Besides being the stockholder, he was the director, officer, and creditor of the corporation. Perhaps because of the closeness of these roles, the courts classified them the same. Injury to any one of these roles was considered indirect, remote and consequential.

Today the reverse may be true, at least as to injury to one in an employee role. Every American city has its successful businessmen, but the American success story has been kaleidoscopic in recent years. Local giants, the boys who have grown up with the town and made good, have shrunk in stature as rapid technological changes, the heavy capital demands of nation-wide distribution, and shifts in the strategic centers for low-cost production in a national market have undercut their earlier advantages of location, priority in the field, or energy; and as Eastern capital has forced them out or bought them out and reduced them to the status of salaried men, or retired them outright in favor of imported management.


Gerli v. Silk Ass'n of America, 36 F.2d 959, 960 (S.D.N.Y. 1929). Paul Gerli, the plaintiff, was a stockholder, creditor, and an employee of a close corporation. But "loss of a corporate office and the salary incident thereto" is not injury to business or property. Id. at 960-61. See also Westmoreland Asbestos Co. v. Johns-Manville Corp., 30 F. Supp. 389, 391 (S.D.N.Y. 1939).
status. As noted earlier, the Vandervelde court ruled that an employee had "... standing to prove, if he can, that his loss of salary ... was a sufficiently foreseeable consequence of a violation..." of the antitrust laws. If Corey is no longer valid precedent, as appears to be the case, there exists very little judicial authority in opposition to the standing of employees.

There is, however, another group of cases in which employees have been denied standing under the antitrust laws. Basically these involved a situation where the employee raised the antitrust claim when the alleged antitrust violation was directed at the employer company. In substance, the courts ruled that the claim if asserted must be asserted by the company. The plaintiffs in Bywater v. Matshushita Electric Industrial Co. were employees and their union of the American manufacturer, Emerson, a company forced out of business because of the competition of Japanese imported television sets.

Denying relief to the Emerson employees, the court ruled that it was the company that was directly affected: "The damage to its employees is only incidental. The damage to the unions is even more remote, one step removed from the employees in the case of the local union and two steps in the case of the international." If an antitrust suit were to be filed it should have been filed by the person toward whom the violation was directed. This is the same theory followed in the nonemployee cases. In fact, with the question of standing, the Bywater court saw no valid distinction between an employee and a licensor; between an employee and a franchisor; or an employee and a motion picture producer. To extend this list, there would likewise be no distinction between an employee and a landlord.

Standing in private antitrust suits has been denied to the franchisor seeking

169 Bywater v. Matshushita Elec. Indus. Co., Ltd., 1971 Trade Cas. 91,201 (S.D.N.Y. 1971); Centanni v. T. Smith & Son, Inc., 216 F. Supp. 330 (E.D. La.), aff'd, 323 F.2d 363 (5th Cir. 1963); Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 (9th Cir. 1951), cert. denied, 342 F.2d 363 (5th Cir. 1963); Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 (9th Cir. 1951), cert. denied, 342 U.S. 919 (1952). Conference of Studio Unions is not very helpful on this issue since the antitrust claim was not isolated from a jurisdictional dispute between two labor unions. One of the arguments made by the defendants was that the entire matter belonged before the National Labor Relations Board. Id. at 53.
171 Id. at 91,203.
to recover for injury to the franchisee;\textsuperscript{176} to the licensor seeking to recover for injury to the licensee;\textsuperscript{177} and to landlords seeking to recover for injury to their tenants.\textsuperscript{178} This does not, however, mean that employees will be categorically denied standing. In fact, to follow any such categorical analysis would be to ignore the factual context in which causal connection must be examined.\textsuperscript{179} The court in \textit{Nationwide Auto Appraiser} explicitly warned against this: "Each case contains a unique combination of facts, and cannot be fitted into narrow categories."\textsuperscript{180}

If clarity of standing is not increased through a comparison of employees with franchisors and landlords, little if any additional help can be gained through a judicial analysis. For example, the Fifth Circuit denied standing to employees in \textit{Centanni v. T. Smith & Son, Inc.},\textsuperscript{181} but then granted standing to employees in \textit{Dailey}. The Ninth Circuit denied standing of employees in \textit{Conference of Studio Unions v. Loew's Inc.},\textsuperscript{182} but lower courts within the same jurisdiction have upheld the standing of employees.\textsuperscript{183} Also, standing was denied to franchisors by the Tenth Circuit,\textsuperscript{184} but at least one district court, in explaining the decision, held that employees had standing.\textsuperscript{185} The Second Circuit has denied standing to licensors, franchisors, and landlords,\textsuperscript{186} and a court from the Southern District denied employees standing in the \textit{Bywater}\textsuperscript{187} case; however, also from the Southern District, employees have been granted standing.\textsuperscript{188}

With the apparent disparity within and among districts and circuits, about the only conclusion to be made is that employees are not categorically denied standing. By examining a theory behind the franchisor and landlord case, one might get a better understanding of the position of employees. Denying standing to a landlord does not in theory mean that he is left without any protection. Injury to the landlord is reflected and may be measured by the injury to the tenant. There is thus created a possibility of a double recovery against the antitrust offender if both the landlord and the tenant were permitted to sue.\textsuperscript{189} If the


\textsuperscript{177} \textit{Productive Inventions \textit{v.} Trico Prod. Corp.}, 224 F.2d 678 (2d Cir. 1955); \textit{SCM Corp. \textit{v.} Radio Corp. of America}, 407 F.2d 166 (2d Cir. 1969).

\textsuperscript{178} \textit{Calderone Enter. Corp. \textit{v. United Artists Theatre Circuit}}, 454 F.2d 1292 (2d Cir. 1971).


\textsuperscript{181} 216 F. Supp. 330 (E.D. La.), aff'd, 323 F.2d 363 (5th Cir. 1963).

\textsuperscript{182} 193 F.2d 51 (9th Cir. 1951).


\textsuperscript{184} \textit{Nationwide Auto Appraiser Serv. \textit{v. Association of C. & S. Co.}}, 382 F.2d 925 (10th Cir. 1967).


antitrust action is filed by the tenant, against whom the antitrust violation is
directed, the chance of any duplicative recovery is avoided and both the tenant
and the landlord are protected.190

Employees may or may not fall within a pattern similar to the landlord; such
would depend on the particular facts. In the case of a merger involving
the employer corporation which results in a loss of jobs and a reduction of bene-
fits, there would be no other person in close relationship to the employee who
could be expected to initiate any litigation. There is a close relationship between
landlord and tenant; franchisor and franchisee; and licensor and licensee. The
loss to one of the parties is interrelated with the loss of the other. This would be
less accurate with the employer and the employee. A relationship obviously
exists between the two, except when this is broken by the employer’s participation
in the wrongdoing. But this relationship will not as likely result in any dupli-
cative recoveries even if both the employer and the employee were granted
standing.

In Wilson, the court upholding the standing of employees noted that the
defendant employer was not the victim of the antitrust violation; it was instead
engaged in the illegal activity.191 Consequently, the injured employees could
not expect any protection from any antitrust action initiated by the employer.
The Second Circuit has, however, taken a contrary position. In Calderone
Enterprises Corp. v. United Artists Theatre Circuit,192 the court considered it
immaterial that the plaintiff-landlord’s lessee was a party to the conspiracy. The
injury to the landlord caused by an antitrust violation involving the tenant was
not direct regardless of the innocence or guilt of the tenant.193 “If the plaintiff
is not within the ‘target area,’ then it is legally immaterial whether the person
through whom the plaintiff derives his injury was a member of the conspiracy
or was innocent of any wrongdoing.”194

Based on Calderone, an employee would have standing if he is within the
“target area.” The bewildering problem is in trying to identify this “target area.”
As identified by the court in Wilson, a private party would be granted “. . . stand-
ing when he is ‘within the sector of the economy in which the violation threaten[s]’
a breakdown’ and is injured by the violation.”195 Causal connection, as explained
in Billy Baxter, Inc. v. Coca-Cola Co.,196 must “. . . link a specific form of illegal
act to a plaintiff engaged in the sort of legitimate activities which the prohibition
of this type of violation was clearly intended to protect.”197

Is employment the sort of legitimate activity which the prohibition of cor-
porate mergers was intended to protect? In Nichols v. Spencer International

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190 Admittedly this is only theory, since the landlord may not recoup his losses; the tenant
may decline to prosecute; or he may even be a party to the wrongdoing. See Calderone Enter.
Corp. v. United Artists Theatre Circuit, 454 F.2d 1292 (2d Cir. 1971).
192 454 F.2d 1292 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972).
193 Id. at 1296.
194 Id.
195 Id. at 1296.
196 Conference of Studio Unions v. Loew’s, Inc., 193 F.2d 183 (2d Cir. 1951), cert. denied,
197 Id. at 187.
the court assumed "... that the antitrust laws were not enacted for the purpose of preserving freedom in the labor market, nor of regulating employment practices as such. ..." Nevertheless, the court upheld the standing of employees, noting that:

[Agreements among supposed competitors not to employ each other's employees not only restrict freedom to enter into employment relationships, but may also, depending upon the circumstances, impair full and free competition in the supply of a service or commodity to the public.]

Another court, denying standing to employees under the special facts involved, stated "... that there is standing only when the injury to the plaintiff is a necessary consequence of an act, intended to further the economic concentration sought by defendants, which must occur to achieve that end."

A loss of jobs by reason of corporate mergers is a consequence of an act, intended to further the economic concentration sought by defendants. One company has conceded that "[t]he displacement of duplicate employees is a normal consequence of mergers whether they are legal or illegal." By making such a concession, which might on the surface appear to answer the causal connection question, a defendant company would be required to further define the causal connection requirements. For example, the concession would have less force if the plaintiff were required to trace his injury to the lessening of competition or to the anticompetitive effects of a merger instead of to the merger itself. This would, of course, muddle the causal connection issue more than it is already.

About the only conclusion that may be drawn from a review of the authorities is that "causation" is an intricate maze. Formularization of this issue is not attainable, although the certainty of a clear formula might preserve one's sanity. "It may ... be argued that the purpose and language of this legislation are so sweeping that any person injured by the proscribed conduct should be considered within the class which Congress intended to protect." Courts, however, are unlikely to ever accept this simplistic approach to the problem of standing under the antitrust laws. As the Supreme Court recently noted: "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might con-

198 371 F.2d 332 (7th Cir. 1967).
199 Id. at 335-36. The actual word used by the court was "granted," not "assumed." No authority was cited in support of the statement, and as will be shown in the next section of this article, the assumption made by the court is not accurate.
200 Id. at 336.
201 Contreras v. Grower Shipper Vegetable Ass'n of Central Cal., 1971 Trade Cas., 90,452, 90,453 (N.D. Calif. 1971) (emphasis belongs to court).
202 See J. UDELL, supra note 4.
204 Id. at 16. No attempt will be made to answer this additional causal connection problem since the issue is presently pending before the Tenth Circuit. It would seem, however, that if adopted, causal connection could seldom be determined without a complete trial.
ceivably be traced to an antitrust violation." Standing will be granted to some and denied to others.

Once it is understood and accepted that causation is vague and uncertain, one has increased his understanding of the problem. This vagueness and uncertainty simply means that the answer will not be found in logic or by application of a formula. One writer has observed that the judicial expressions of "... ‘causation’ are only verbal formulas used by a court to express its conclusion that..." the defendant should not be compelled to pay treble damages to the plaintiff. Courts may recite incantations about directness, remoteness and causation; however, regardless of the "factual-sounding jargon," it is "... actually... policy, rather than evidence, that is frequently dispositive." This does not mean, of course, that courts will arbitrarily grant or deny standing.

Guidelines and standards, such as the "target area," have been formulated by the courts in an effort to reach rational conclusions. One of the central questions under this approach is whether employment is the sort of activity that Congress sought to protect with the antitrust laws that prohibit certain corporate mergers. If Congress did provide for this protection, the employee would have standing if the loss of jobs and employment benefits was a "sufficiently foreseeable consequence" of an illegal merger.

III. Standing of Employees Defended

A. The Work Ethic

With section four allowing any person injured in his business or property by reason of anything forbidden in the antitrust laws to sue for treble damages, Congress was seeking an army of private litigants to insure a vigorous antitrust enforcement policy. Senator Borah observed that "[t]here could be no safer guardian for the Sherman Antitrust Law than the hundreds and thousands of people who are injured by these monopolies if the law were made easy of enforcement so far as they are concerned." Private treble damage actions were considered to be an even greater deterrent than a mere criminal penalty. If it ever became unprofitable for one to violate the antitrust laws, there will be "... greater respect for the law and more obedience to the law upon the part of those who might violate it." Congressman Webb observed that under section four "... any man through-

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208 Id.
209 Id. at 697.
212 51 Cong. Rec. 15,986 (1914) (remarks of Senator Borah).
213 Id. at 15,986 (remarks of Congressman Webb).
214 Id. at 15,986 (remarks of Senator Borah).
out the United States, hundreds and thousands, can bring suit . . . and thus the
offender will begin to open his eyes because you are threatening to take money
out of his pocket. In addition to treble damages, which were allowed under
the Sherman Act, Congress, in 1914, provided that any person threatened with
a loss could seek injunctive relief. Furthermore, it was made clear that these
private remedies were to be used in the prosecution of corporate mergers.

Congressman Floyd, explaining the report of the Conference Committee,
stated:

If a man is injured . . . by the unlawful acquisition of stock of competing
corporations . . . , he can go into any court and enjoin and restrain the
party from committing such unlawful acts or sue for his damages without
waiting upon the slow tortuous course of prosecution on the part of the
Government.

To be entitled to relief for a Clayton Act violation the private plaintiff is not
required to prove an actual restraint of trade. The private action can be sup-
ported upon proof of “things that lead up to restraint of trade and monop-
olies.”

No particular effort was made by Congress to identify persons who would
have standing to sue. Senator George had assumed that the statute gave standing
to the farmer, mechanic, laborer, and small consumer. The same assumption
was made in 1914 when Congress passed the Clayton Act. Persons suffering the
most from the great combinations of wealth were identified as the “consuming
public”; the “struggling poor of our country”; the employee who loses his
job; and the “citizens and their children” who have the right to enter busi-
ness.

What Congress envisioned in the antitrust laws and in the private remedy
provided for the enforcement of such laws is reflected in words recently expressed
by Mr. Justice Marshall: “The importance of the antitrust laws to every citizen
must not be minimized. They are as important to baseball players as they are to
football players, lawyers, doctors, or members of any other class of workers.”
Congressional action taken subsequent to 1914 confirms the conclusion that the
antitrust laws were enacted for the protection of employees. This subsequent
congressional action is better understood when considered in light of the “work
ethic.”

Based on a deep-rooted obligation to God, country, and to oneself, the

215 Id. at 16,175 (remarks of Congressman Webb).
217 51 Cong. Rec. 16319 (1914) (remarks of Congressman Floyd). Section 16 of the
Clayton Act provides explicitly that private injunctive relief applies to corporate mergers which
218 51 Cong. Rec. 16274 (1914) (remarks of Congressman Webb).
219 21 Cong. Rec. 3150 (1890) (remarks of Senator George). Reference was to the Sher-
man Act treble damage provision which was identical to the present § 4 language.
220 51 Cong. Rec. 16043 (1914) (remarks of Senator Norris).
221 Id.
222 Id. at 16044.
223 Id. at 9088 (remarks of Mr. Mitchell).
institutionalized work ethic requires man to work. Before the great Industrial Revolution, Protestantism was the moving force toward establishing "work" as the key to life. "Luther held that work is a form of serving God." Calvinism required that "[a]ll men, even the rich, must work, because to work is the will of God." Idleness was shunned "as a deadly sin." The work ethic or gospel of work, as it was later called, eventually reached the United States, where it was, in a free enterprise system, to obtain its fullest expression. "The American without a job is a misfit"; he is "a doomed soul."

With the Renaissance, work took on a new character; there developed "... the idea of work for its own sake—work for the sake of work—work as an end and purpose in itself." In a capitalistic society, it is through work that man finds his nobility and worth. "His whole code of ethics is contained in the one precept, 'work!'" Man works hard to become rich so that he can insure a continuity of renewed activity or work.

In America, the linking of work to God is no longer so clear; nevertheless, there are still traces and shadows of the teachings of the great reformers. "The modern doctrine of work affects all countries that try to solve their problems by industrialization." For a strong industrial state, it is now believed that "... all who can must work, and idleness is bad; too many holidays means nothing gets done, and by steady methodical work alone can we build a great and prosperous nation." An American without a job is a misfit, for it is the job that gives man status and a sense of belonging.

Imbued with religion, love of country, desire for material things, family security, and status, work has become part of the psychology of man. "Work itself keeps a man 'normal.'" From childhood we have been taught that the job is everything; without it there is complete frustration. The child has had it "pounded" into his head "subtly and directly, consciously and unconsciously," that the jobless youth will be without income, without status, and therefore without a sex partner. We have also been taught to think upon a job as some standard of morality. Idleness is wickedness. An idle man cannot be a good man. And "[t]he poor are poor because by being idle or unemployed they violate the competitive directive."
With work, man hopes to conquer all his ills—unhappiness, disease, poverty, old age and time itself.\(^2\) Work as a concept has become so deeply implanted in the make-up of Americans that it even preoccupies the notion of leisure. Give an American worker a thirty-hour week and he will use the extra time moonlighting. In the United States, loafing is not considered good form. "Time is money, if for no other reason than that if you loaf you don’t earn money."\(^2\)\(^3\)

A man’s job gives him status in the community.\(^2\)\(^4\) The job gives the father status and authority in the eyes of his children; without his job, the father loses his capacity for leadership.\(^2\)\(^5\) And it is the job that preserves the status of man as a husband.\(^2\)\(^6\) Following a period of unemployment, family contempt for the husband may become openly manifest; there may be a change in the husband-wife relationship, with the role of the husband changing from one of dominance to one of complete frustration.\(^2\)\(^7\) As one wife explained this transformation: "I still love him, but he doesn’t seem as ‘big’ a man."\(^2\)\(^8\)

To understand the psychological effects of unemployment is to better understand the prominence and imperativeness of the work ethic. The intensity of the feeling of anxiety will depend on the degree to which man is removed from his belief system.\(^2\)\(^9\) If adult ideologies and attitudes are only a reflection of childhood indoctrination,\(^2\)\(^6\) then the psychological impact of losing a job must be measured in terms of the early stages of the indoctrination. There is perhaps no belief within our society that is stronger than the work ethic.\(^2\)\(^5\) Thus, if one loses his job, "he should be gripped by acute anomie" or anxiety.\(^2\)\(^2\)

In the United States, a capitalistic society, unemployment results in a higher degree of anxiety than in a country with a different economic system.\(^2\)\(^3\) The work ethic is a vital part of any industrialized society; however, the work ethic teaches one to follow "the directives of the economic ideology."\(^2\)\(^2\)\(^5\) Under the work ethic, we are compelled to follow the "competitive directive."\(^2\)\(^2\)\(^5\) This means

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\(^{242}\) \textit{Id.} at 68.

\(^{243}\) S. DeGrazia, \textit{supra} note 228, at 217.

\(^{244}\) S. DeGrazia, \textit{supra} note 113, at 122.


\(^{246}\) M. Komarovsky, \textit{supra} note 245, at 23.

\(^{247}\) \textit{Id.}

\(^{248}\) \textit{Id.} Another wife, describing the effects of unemployment, said that her husband, after an extended period of unemployment, no longer sought to hide his despondency. On one evening, she found her husband on a park bench, sobbing like a child. "I’m just no good," he said, as I pulled his head down into my lap. "Why, here I am, almost forty, and a failure. I can’t even pay the rent and buy the groceries for my wife and child next week. I can’t sell myself." Anonymous, \textit{Man Out of Work, By His Wife, supra} note 245 at 200.

\(^{249}\) S. DeGrazia, \textit{supra} note 113, at 113-34.

\(^{250}\) \textit{Id.} at 97.


\(^{252}\) S. DeGrazia, \textit{supra} note 113, at 122.

\(^{253}\) Eisenberg & Lazarsfeld, \textit{The Psychological Effects of Unemployment}, \textit{supra} note 2, at 361; S. DeGrazia, \textit{supra} note 228, at 368.

\(^{254}\) S. DeGrazia, \textit{supra} note 113, at 122.

\(^{255}\) \textit{Id.} at 51.
that jobs, in the United States, are made a direct part of a competitive system. As two companies compete for sales, individuals must compete for jobs.\textsuperscript{258}

Studies have shown that the unemployed American worker suffers a greater degree of anxiety than do their counterparts in Russia. Where "... economic responsibility and competition are reduced, there is a remarkable reduction in the incidence of nervous and mental diseases."\textsuperscript{257} With the loss of a job, there "... is less threat to the ego, and consequently a better adjustment can be more easily made."\textsuperscript{258} Leisure, recognized as one of the fundamental rights of citizens, is even guaranteed under the Russian Constitution.\textsuperscript{259} And, according to Sebastian DeGrazia, the work ethic in Russia does not compel the people to spend their free time moonlighting.\textsuperscript{260}

Adriano Tilgher, recording the evolution of the concept of work, noted the view that "the state has a right to insist that everyone do work as much as he can."\textsuperscript{261} This conclusion of state power was based on the idea that man ought to live by his own works.\textsuperscript{262} Political structures in which the government holds certain defined powers are based principally upon a work ethic that imposes upon man an obligation to work. For example, it is not the state that has the primary responsibility to feed and clothe the people.

Historically, there has been a legal obligation imposed on man to support his family. If the laws of the State of Oklahoma represent the norm, then the following will offer an example of a state insisting that "everyone do work as much as he can."\textsuperscript{263} Under Oklahoma law, a "... husband must support himself and his wife out of the community property or out of his separate property or by his labor."\textsuperscript{264} If the husband fails to support his wife, any other person can supply her with the articles necessary for her support and recover the reasonable value of such articles from the husband.\textsuperscript{265} Where children are involved, it is the parent entitled to custody who has the responsibility for support. Primary responsibility, however, still rests on the father; he must be assisted by the mother, though, if he inadequately supports the children.\textsuperscript{266} This parental obligation does not cease at any certain point in time. Oklahoma law provides: "It is the duty of the father and the mother of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability."\textsuperscript{267}

\textsuperscript{256} R. Lynd & H. Lynd, \textit{supra} note 164, at 49. See also, Nichols v. Spencer International Press, Inc., 371 F.2d 332, 335-36 (7th Cir. 1967).
\textsuperscript{257} Eisenberg & Lazarsfeld, \textit{The Psychological Effects of Unemployment, supra} note 2, at 361.
\textsuperscript{258} Id.
\textsuperscript{259} S. DeGrazia, \textit{supra} note 228, at 150.
\textsuperscript{260} Id. at 368.

How do Russians spend their free time now? Less in overtime, none in moonlighting, more for cultural uplifting, more in collective undertakings, less with commodities, more in political readings; but all told, everyone looks ahead to the goal apparently reached by Americans—much more free time.

\textsuperscript{261} A. Tilgher, \textit{supra} note 225, at 93-94.
\textsuperscript{262} Id. at 93.
\textsuperscript{263} Id. at 93-94.
\textsuperscript{265} Id. § 10.
\textsuperscript{267} Id. § 12 (emphasis added).
Beyond doubt, the state does have the right to insist that everyone work. There is, however, an important correlate to the obligation imposed upon man to work. As Tilgher further found: "The state has the corresponding duty to assure to all its citizens the right to work." It was this duty to which Congress responded when it passed the antitrust laws. As noted in the final report of the Temporary National Economic Committee: "It is the fundamental duty of every society which is devoted to the principles of popular government to leave nothing undone to preserve and guarantee the opportunity to work to every capable and willing man."

The factual setting of this clear statement of the work ethic was a congressional study of the effects of economic concentration upon employment. Senator O'Mahoney, Chairman of the Temporary National Economic Committee, observed that "[t]he central question mark that rises before" the Committee is that of "unemployment — unemployment of capital as well as unemployment of men." In its final report to Congress, the Committee, using the words of Lord Coke, stated that "the monopolist that taketh away a man's trade taketh away his life." Considered in context, this statement would mean that a monopolist that takes away a man's job takes away his life. "The modern worker must find his place in the collective or group enterprises of modern industry which utilize tools that no individual mechanic can carry in his kit."

One of the essential reasons for calling a halt to corporate mergers and further increases in the concentration of economic power was to guarantee the right to work to every capable and willing man. The Committee found that unless the trend toward economic concentration was reversed, "[t]hose individuals who will constitute the next generation will be completely foreclosed." With the antitrust laws, Congress was just as concerned with the preservation of political freedom as it was with economic freedom. In fact the two are inseparable. "Political freedom cannot survive if economic freedom is lost."

The economic system, for example, cannot become so highly concentrated that it makes the competitive directive, of which the work ethic is a part, inoperable. As described by a court, the congressional purpose for the antitrust laws "... was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." It is within this competitive system that all men can enjoy a high degree of economic freedom, and thereby a high degree of political freedom.

268 A. Tilgher, supra note 225, at 94 (emphasis added).
269 TNEC REPORT at 6.
270 Id. at 691-92.
272 TNEC REPORT at 6.
273 Id.
274 Id.
275 Id. at 9.
276 Id. at 7.
277 United States v. Aluminum Co. of America, 148 F.2d 416, 429 (2d Cir. 1945); see Brown Shoe Co. v. United States, 370 U.S. 294, 216 (1962).
Even with the high degree of economic concentration, described as a dangerous level, Congress has consistently expressed faith in a system of free enterprise. Employees, for the most part, must rely on the competitive system for job opportunities and job protection. There are no special statutes which obligate employers to hire and retain any certain number of employees. The principal protection provided to employees by Congress is in the antitrust laws, which were intended to preserve a free market in which all persons could realistically sell their labor.

To insure a policy of vigorous enforcement of these laws, Congress allowed judicial redress to any person injured in his "business or property" or threatened with a loss by reason of any antitrust violation, including illegal corporate mergers. Following the competitive directive, which incorporates the work ethic, employees have standing under the antitrust laws. Work is business. "Business... stems from the word 'busy' and means the state of being busy." Judicial support for this work ethic definition of "business" was expressed in Roseland.

As indicated earlier, the Roseland court interpreted the word "business" as used in section four of the Clayton Act to include "...the employment or occupation in which a person is engaged to procure a living."

**B. Congressional Policy**

One of the strongest expressions of congressional policy that would support the standing of employees under section four of the Clayton Act is found in connection with a statute creating an antitrust exemption. Section 5(b)(9) of the Interstate Commerce Act relieves certain agreements approved by the Interstate Commerce Commission from the operation of the antitrust laws. With approval and authorization of the Commission, two or more common carriers may consolidate or merge their properties. This approval exempts the merger from the proscription of section seven of the Clayton Act.

With this antitrust exemption, Congress recognized a need for some consolidation of common carriers; however, it also recognized that consolidation could impair the rights of workers. Before passing upon any agreement to merge or consolidate, the commission was, therefore, directed to give weight to "the interests of carrier employees affected." More precisely, the statute directs the

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278 TNEC REPORT at 3.
279 Id. at 7.
280 There are of course many statutes designed to protect employees against certain evils—discrimination based on race, age, union activity and the like. We are also seeing some government activity involving the question of jobs. These incidents, however, reflect a breakdown of free competition. Such was the predicted result if we failed to reverse the trend toward economic concentration.
283 S. DeGrazia, supra note 113, at 68.
285 Id.
287 Id. § 5(2)(a).
Commission, as a condition of its approval, to "... require a fair and equitable arrangement to protect the interests of the railroad employees affected." 290

In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment. ... 291

In its original form, the proposed Transportation Act merely provided that in approving a common carrier merger, the Commission must consider "the interest of the carrier employees affected." 292 During debates on the bill, however, Congressman Harrington offered an amendment which would prohibit Commission approval of any merger which resulted in a displacement of employees:

Provided, however, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees. 293

The stated purpose of this amendment was to protect the railroad worker against unemployment or any impairment of employment rights as a result of consolidations. 294 Eighty per cent of the savings effected by railroad consolidations and mergers was said to come out of the pockets of workers. 295 Congressman Geyer argued:

Consolidations and big mergers of railroads are of benefit only to the already over-rich big bankers and security holders, and certainly can never be of benefit to railroad employees. Consolidations and mergers will mean abandonment of terminals, shops, and tracks; not only will the employees lose their jobs, but businessmen will lose their patronage, communities will be deprived of railroad service. ... 296

The Harrington amendment was approved; 297 however, the Senate bill did not contain a similar provision. In conference, the amendment was compromised, and the present wording of the employee statutory protection provision was approved. 298 Based on this statutory protection, the Commission withheld approval of a merger agreement between the Great Northern Railway Company and the Northern Pacific Railway Company. One reason given was that the merger would result in the termination of 5,200 employees. 299

290 Id. § 5(2)(f).
291 Id.
293 84 Cong. Rec. 9,882 (1939).
294 Id. (remarks of Congressman Harrington).
295 Id. at 9,883.
296 Id. at 9,884 (remarks of Congressman Geyer).
297 Id. at 9,887.
299 Motion to Affirm by ICC at 4, Northern Lines Merger Cases, 396 U.S. 491 (1970).
Efforts to merge the Great Northern and the Northern Pacific date back to the year 1893. After the first efforts failed, a second attempt at consolidation was made through the formation of a holding company—the Northern Securities Company. In striking down this combination as a violation of the Sherman Antitrust Act, the Supreme Court held:

'The mere existence of such a combination and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected.'

Justice Harlan, writing for the Court, declared that "[i]f such combination be not destroyed . . . the entire commerce of [an] immense territory . . . will be at the mercy of a single holding corporation, organized in a State distant from the people of that territory."

The merger of the two railroad lines was finally approved by the Commission and the Supreme Court, but only after the employees had received "guarantees and job assurances for the rest of their working lives." In approving this merger Chief Justice Burger observed for the Court that all employee objections had been eliminated. Later, it was held in Norfolk & Western Railway Co. v. Nemitz, an employee class action, that the fair and equitable arrangement to protect the interest of employees approved by the Commission cannot subsequently be reduced by a postmerger collective agreement between the railroad and union. One of the principal purposes of the statute " . . . was to provide mandatory protection for the interests of employees affected by railroad consolidation."

This special employee protection provided by Congress to railroad employees affected by mergers was necessary because the protection afforded by free competition was eliminated. Persons employed in other segments of the economy are protected by the congressional proscription against corporate mergers. For this protection to be meaningful, however, it appears reasonable to conclude that employees have standing under section four of the Clayton Act to challenge illegal corporate mergers.

A rather absurd conclusion results from a denial of standing to employees

300 Pearsall v. The Great Northern Ry., 161 U.S. 646 (1896).
301 Northern Securities Co. v. United States, 193 U.S. 197 (1904).
302 Id. at 327.
303 Id. at 327-28.
304 Motion to Affirm by ICC at 7, Northern Lines Merger Cases, 396 U.S. 491 (1970).
306 404 U.S. 37 (1971). This is a significant extension of employee protection, since the statute provides:
49 U.S.C. § 5(2)(f) (1970). The majority of the Court in a four-three decision, ruled that this statutory language authorized only a pre-merger collective agreement which supplies the minimum measure of fairness. Norfolk & Western R. Co. v. Nemitz, supra at 43.
displaced or injured by reason of an illegal merger. Protection would be extended to employees affected by a merger authorized by Congress, but would be denied to employees adversely affected by a merger prohibited by Congress.

C. The Administrative Procedure Act: An Analogy?

At least since Associated Industries v. Ickes, when Jerome Frank made prominent the phrase, "Private attorney generals," there has developed a presumption in favor of standing of persons seeking to challenge governmental action. The Supreme Court has greatly liberalized its position on standing to allow courts to examine the merits involved in legitimate cases. As noted in California Transport v. Trucking Unlimited: "The right of access to the courts is indeed but one aspect of the right of petition."

Where the action of a governmental agency is the subject sought to be reviewed, there remains only a slight difference in what a person seeking review must show. In Data Processing Service v. Camp standing of the petitioner was tested on the basis of the Administrative Procedure Act, which grants standing to a person "... aggrieved by agency action within the meaning of a relevant statute." To satisfy the standing requirements, one need not show that he has a "legal interest," for this goes to the merits of the case, the question of standing is "... whether the interest sought to be protected ... is arguably within the zone of interests to be protected ... by the statute ... in question.

Justice Brennan, concurring in the result and dissenting, in both Data Processing and Barlow v. Collins disagreed that it should be necessary for the petitioner to prove that he fell within the zone of interests to be protected by the relevant statute. According to Justice Brennan, it is enough if the plaintiff "... '... alleges that the challenged action has caused him injury in fact.' It was believed that consideration of the zone of interest would require a court to consider the merits of the case at a preliminary stage. This, feared Justice Brennan, would limit the number of persons who would be allowed to seek review.

Actually, Justice Douglas and the majority of the Court sought the same expansive reading for standing. As the Court stated in Barlow: "[J]udicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated." The Court opined that "... unless members of the protected class may have judicial review the statutory objectives might not be realized.

308 134 F.2d 694 (2d Cir. 1943).
311 Id. at 510.
315 Id.
316 397 U.S. 159, 167 (1970) (concurring in result and dissenting opinion).
317 Id. at 168.
318 Id. at 166.
319 Id. at 167.
In *Office of Communication of the United Church of Christ v. F.C.C.*, Judge Burger observed that "... courts have resolved questions of standing as they arose. ..." Petitioners, in this case, had sought standing as members of the listening public; however, standing had generally been denied unless a person could show some economic injury or electrical interference. This did not, however, mean that these were "... the exclusive grounds for standing." At the time, "... such persons might well be the only ones sufficiently interested to contest a Commission action."

It was argued that the agency could effectively represent the interest of the listener without the aid or participation of the listener who seeks to fulfill the role of private attorney general. To this argument, Judge Burger replied:

... one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it.

A strong presumption in favor of judicial review of administrative action has developed; nonreviewability is an exception which must be clearly demonstrated. If the presumption and its underlying rationale were applied in antitrust cases, a private plaintiff would have standing if he alleged that the challenged conduct caused him injury in fact, and if he fell within the zone of interests to be protected by the relevant statute. An employee displaced by a corporate merger proscribed by the antitrust laws could, under the liberalized philosophy, satisfy the standing requirements.

About the only difference between the two situations is that the defendant in one case is a government agency and in the other a private corporation. In *Data Processing*, the statute upon which standing was determined was section 702 of the Federal Administrative Procedure Act, which provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." The Court does not, however, require that standing to review agency action be predicated solely upon this statute. Whether a statutory right or Constitutional guarantee is involved, the central question is whether the complainant arguably falls within the zone of interests to be protected. Under the antitrust laws, the standing provisions that must be relied upon by a private plaintiff are sections four and 16 of the Clayton Act:

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320 359 F.2d 994 (D.C. Cir. 1966).
321 Id. at 1000. Before Judge Burger became Chief Justice of the Supreme Court, he had manifested support in liberalizing standing requirements. See Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964).
323 Id. at 1000-01.
324 Id. at 1001.
325 Id. at 1003-04.
Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor... and shall recover threefold the damages by him sustained...

Any person... shall be entitled to sue for and have injunctive relief... against threatened loss or damage by a violation of the antitrust laws...

There is a similarity between these two standing provisions and the standing provisions of the Administrative Procedure Act. Each is worded in general, rather than specific terms, and each has causal connection language. Section 702 of the Administrative Procedure Act grants standing to a person aggrieved by agency action; section four of the Clayton Act gives standing to a person injured in his business or property; and under section 16, standing is granted to any person threatened with a loss. To identify the person who would have standing, at least under section 702, the key is to determine if the person falls within the zone of interest sought to be protected. Under the antitrust laws, the same approach is used to identify the person injured in his business or property—Does the person fall within the zone of interests sought to be protected by the antitrust laws?

To satisfy the causal connection requirement, a person relying on section 702 of the Administrative Procedure Act must show that he is adversely affected or aggrieved by agency action. Under sections four and 16 of the Clayton Act, the person must show that he is injured by reason of anything forbidden in the antitrust laws. Standing was, at the lower court level, denied to the plaintiff in Barlow because the governmental officials had "... not taken any action which directly invade[d] any legally protected interest of the plaintiffs." It was enough that the plaintiffs fell within the zone of interests and that they alleged that they suffered injury in fact.

As indicated previously, the only real difference is with the person being sued—a government official or a private corporation. The critical question is how much weight will be given to this difference. To liberalize standing in suits against the government without following the same philosophy in private antitrust suits would be to give the private corporate defendant an advantage not enjoyed by the government. This would be a strange phenomenon if allowed to exist, since private organizations have, principally through mergers, attained power that exceeds that of our political subdivisions of government.

In a practical sense, it makes little difference whether the lives of men are controlled by economic power or by political power. One can be just as beneficial or just as obnoxious as the other. The Temporary National Economic Committee concluded that "[i]f the political structure is designed to preserve the free-

330 Id. § 26.
333 Id.
334 TNEC REPORT at 5-6. States are prohibited by the Constitution from entering into any agreement or compact with another state or foreign government. U.S. Const. art. I, § 10. Private corporations, created by states, have, however, grown so large that they frequently enter into international cartel arrangements. TNEC REPORT at 8.
335 General Motors, with assets in excess of $18 billion and sales in excess of $28 billion (for the year 1971), employs about one out of every 100 U.S. civilian workers. FORTUNE, May, 1972 at 187-90.
dom of the individual, the economic structure must not be permitted to destroy it." Little difference can exist or be allowed to exist between the respective functions of government and private economic organizations:

Governments are instituted among men to serve men; men were not created to serve government. It is not the function of government nor of those to whom the duties and responsibilities of government are temporarily entrusted to direct and command the activities and the lives of men. It is the sole function of government to produce and preserve that order which will permit men to enjoy to the utmost that free will with which they were endowed by an all-wise Creator.

If, however, the political organization which we call government is called into existence by men for the benefit of the entire community, a principle which as Americans we must all acknowledge, it is equally true that the economic organizations, called into existence by men to meet their material needs, are likewise justified only to the degree in which they serve the entire community.337

A basic reason for the antitrust laws, including the private remedies provided by Congress, was to stop business organizations from destroying the freedom of the individual. Employment is one of the most basic freedoms held by men; employment is life itself. In Gilchrist v. Bierring,338 the court noted:

The right to earn a living is among the greatest of human rights and, when lawfully pursued, cannot be denied. It is the common right of every citizen to engage in any honest employment he may choose, subject only to such reasonable regulations as are necessary for the public good.339

"[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment. . . .340 If the government is not allowed to destroy the right of employment, business organizations must not be allowed to destroy it.341 For protection against arbitrary governmental action, the Court has created a presumption in favor of standing to seek judicial review.342 For employees injured by business organizations engaged in antitrust violations, Congress has provided a private remedy in the form of treble damages and injunctive relief.

Following the principles, if not the holdings, developed in Data Processing and Barlow, one could offer a reasonable argument to support a presumption in favor of employee standing under the antitrust laws.343 Although these precise

336 TNEC REPORT at 5.
337 Id.
338 234 Iowa 899, 14 N.W.2d 724 (1944).
339 Id. at 909, 14 N.W.2d at 732. Labor is, in fact, more important than capital and deserves greater protection. Maintenance Employees v. United States, 366 U.S. 169, 186 (1961) (dissenting opinion).
341 See note 336 and accompanying text, supra.
343 Application in private cases of the holdings of Data Processing and Barlow has been generally rejected by courts. Solien v. Miscellaneous Drivers & Helpers U., Loc. No. 610, 440 F.2d 124 (8th Cir.), cert. denied, 403 U.S. 905 (1971); Collegian v. Activities Club of New
holdings may not apply to private cases, the judicial philosophy expressed should be relevant, particularly in a factual setting involving the private enforcement of the antitrust laws. The only generalization about standing which is necessary is that there must be a case or controversy, a constitutional limitation on courts; any other generalization on the subject is "largely worthless as such."  

IV. Conclusion

The issue of standing of employees to challenge illegal corporate mergers under the antitrust laws boils down to one simple question: Will employees be granted standing under sections four and 16 of the Clayton Act? Present judicial and legislative authority tends to support an affirmative answer. The question as stated, however, suggests that the issue is not yet fully resolved. Furthermore, the question suggests the existence of unresolved policy issues.

Standing to challenge an illegal merger may be denied to employees because of the heavy burden which treble damages would impose on the corporation. To be sure, there could be a heavy burden. For example, if two large corporations merge and consolidate their facilities, treble damages paid to thousands of displaced workers could be colossal. In response to the policy consideration, it should first be stated that the granting of standing would not automatically result in a treble damage recovery. Standing insures to the employees only a right to have a court consider the merits of the case.

An obvious, although important, fact is that before any liability for treble damages arises, the court must find the corporate merger to be illegal under the antitrust laws. Once this is discovered, the corporation becomes the wrongdoer and must then bear the risk of its own wrong. As the Supreme Court stated in *FTC v. Colgate-Palmolive Co.*: "... [O]ne who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." The deterrent force of treble damages was the reason that Congress expressed such strong favor for the private antitrust suit. "Any man throughout the United States, hundreds and thousands, can bring suit ..., and thus the offender will begin to open his eyes because you are threatening to take money out of his pocket."

To allow the wrongdoer to escape the risk of a treble damage claim filed by the thousands of workers displaced by a corporate merger would be to eliminate the only deterrent force provided by Congress for enforcement of the Clayton Act

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445 For one who believes in legislative supremacy and opposes judicial activism, it is difficult to accept judicial policy considerations in the application of statutory rights. Thomas, *Statutory Construction When Legislation is Viewed As A Legal Institution*, 3 Harv. J. Legis. 191 (1966); Thomas, *Conglomerate Merger Syndrome—A Comparison: Congressional Policy With Enforcement Policy*, supra note 16, at 483-506. Nevertheless, a pragmatist will not ignore the involvement of policy in judicial decisions. What a statute means is what a judge says it means.


448 Id. at 393.

449 51 Cong. Rec. 16,275 (1914) (remarks of Congressman Webb).
proscriptions—in which corporate mergers are included. The corporate wrong-doer would thus be allowed to deprive a man of his job, or eliminate thousands of jobs, and thereby profit from its illegal act at the personal expense of the workingman. Financial savings secured by a corporation through mergers and consolidations come in the form of a reduction in salaries, pension payments, and other employee benefits.

For a court to deny the right of legal redress to employees displaced by mergers is to impose the penalty on these persons for a wrong committed by the employer-corporation. As observed by the Temporary National Economic Committee, when you take away the job of a man, you take away his life. The pain is no less whether the job is lost because of the corporation’s illegal act, or because the court, for some nebulous policy reason, denies the employee access to the courts.

Without making any attempt to identify the cases, one can state as a conclusion, without any fear of contradiction, that courts have been making extraordinary strides in the area of civil rights. Positive and humanistic action has been taken by courts in cases involving legislative reapportionment, housing, welfare, racial discrimination, and criminal procedure. Civil rights and civil liberties may, however, have little meaning if the economic rights of people can be destroyed by the corporation in defiance of the antitrust laws. When Congress was seeking ways to stop corporate mergers and the trend toward economic concentration, it was observed that “[p]olitical freedom cannot survive if economic freedom is lost.” We cannot long allow a system to exist that permits corporations to grow strong while the people grow weak.

As President Roosevelt once observed: “Industrial efficiency does not have to mean industrial empire building.” The object for halting mergers and other devices tending toward economic concentration was to remove the things that kept private enterprise “... from furnishing jobs or income or opportunity for one-third of the population.” President Roosevelt believed that “[n]o people, least of all a democratic people, will be content to go without work or to accept some standard of living which obviously and woefully falls short of their capacity to produce.”

With the antitrust laws vigorously enforced, Congress was seeking to free the common men from an oppressive sense of helplessness created by their domination by the economic power concentrated in the hands of a few. Unless this power could be diffused among the many, it was feared there would come a day when the power would be transferred to the public and its democratically responsible government. Ignoring these deep congressional convictions, there are

351 TNEC REPORT at 6.
352 Id. at 7.
353 Id. at 13. The remark was made by Roosevelt in an address to Congress, April 29, 1938, in which there was an urgent call for a halt in economic concentration.
354 Id. at 15.
355 Id.
356 Id.
theorists that deny all relief to employees and, for that matter, to all other private plaintiffs who seek to challenge corporate mergers.\footnote{357} There is no merit in the suggestion that employees should be denied the right to challenge corporate mergers. Nevertheless, the antitrust laws have been on the books since 1890, and the issue still remains unresolved.\footnote{358} Individual employees have, as indicated earlier, been granted standing; however, employees as a class have not pursued any recourse in the courts for a redress of their grievances. In searching for an answer to explain this inaction, one is left only to speculate. It does appear to be settled, however, that the inaction cannot affect a right of employees to seek the relief.\footnote{359}

Granting standing to employees will create reliable private attorney generals to insure a swift and vigorous enforcement of the antitrust laws. Because these individuals will be motivated by their loss of jobs, and not by any economic policy that favors a relatively calm and rational approach, corporate mergers are likely to come to a halt. This, of course, was the clearly enunciated congressional purpose behind the laws. Congress was seeking blind obedience to the antitrust laws; and to insure this obedience and to avoid the calm and rational approach toward enforcement, Congress placed primary reliance on the persons injured.\footnote{360}

As an example of a policy approach, the unchecked growth of conglomerates has not resulted from any lack of statutory standards or any judicially conceived exemption. They have grown out of a lack of enforcement or as part of a consciously conceived plan that comes from a calm and rational approach.\footnote{361} Conglomerates were allowed to grow into industrial multinational empires even in light of the clear statements that the conglomerate merger "...is one of the most detrimental movements to a free enterprise economy."\footnote{362} Supported by an economic philosophy in favor of eliminating or spreading market risk, conglomerates have also been strongly criticized for the same reasons: "The justification of private profit is private risk. We cannot safely make America safe for the businessman who does not want to take the burden and risks of being a businessman."\footnote{363}

\footnote{357} Professors Kaysen and Turner urge a denial of standing to all private persons seeking to challenge corporate mergers. Believing that the standards of § 7 are too vague and uncertain, they state: "It is unfair for private plaintiffs to collect treble damages for conduct the illegality of which cannot be readily determined in advance." C. KAYSEN & D. TURNER, supra note 47, at 257. Although their assumption was perhaps accurate in 1959, much of the uncertainty in the statute has been removed by the increased experience and understanding of the Supreme Court.

\footnote{358} Most recently, the Tenth Circuit ruled that discharged employees do not have standing to challenge a corporate merger through a class action. Reibert v. Atlantic Richfield Co., Civil No. 72-1283 (10th Cir., Jan. 8, 1973). See Mans v. Sunray DX Oil Co., Civil No. 71-1410 (10th Cir., filed July 26, 1971); Joebe v. Amerada Petroleum Co., Civil No. 72-1341 (10th Cir., filed May 10, 1972).


\footnote{360} The most effective check placed on the Attorney General, according to Congressman Webb, was the private suit seeking treble damages and injunctive relief. 51 CONG. REC. 16,274 (1914).

\footnote{361} Turner, Conglomerate Mergers and Section 7 of the Clayton Act, supra note 19, at 1313.

\footnote{362} 95 CONG. REC. 11497 (1949) (remarks of Mr. Boggs).

\footnote{363} TNEC REPORT at 15 (statement by President Roosevelt).