BYU Law Review

Volume 1975 | Issue 3 Article 7

10-1-1975

Antitrust Law--The Clayton Act--"Engaged in Commerce" Requirement of Section 7--United States v. American Building Maintenance Industries

CASE NOTES

ANTITRUST LAW—THE CLAYTON ACT—"ENGAGED IN COMMERCE" REQUIREMENT OF SECTION 7—*United States v. American Building Maintenance Industries*, 422 U.S. 271 (1975).

American Building Maintenance Industries (American), a nationwide corporation supplying ten percent of the janitorial services in southern California,[1] acquired the stock of both the J. E. Benton Management Corporation and the Benton Maintenance Company and merged the latter company into a wholly owned subsidiary of American. At the time, the two Benton companies (Benton) taken together were the fourth largest supplier of janitorial services in southern California, with approximately seven percent of the total sales. In the course of its operations, Benton performed janitorial and maintenance service for several customers who were engaged in interstate commerce. All of Benton's contracts were performed within California, however, and almost all of its supplies were purchased from local distributors.[2] Benton did not advertise nationally and made only limited use of interstate communication systems.[3]

The United States brought a civil antitrust suit against American, alleging that the acquisition and merger of Benton might substantially lessen competition in the sale of janitorial services in southern California[4] and thereby constitute a violation of section 7 of the Clayton Act.[5] The district court granted American's motion for summary judgment, holding that the Benton

1. American was the largest supplier of janitorial services in southern California. In that area alone, American's janitorial service revenues for 1969 were $10.9 million. Brief for Appellant at 4, United States v. American Bldg. Maintenance Indus., 422 U.S. 271 (1975) [hereinafter cited as Brief for Appellant].

2. Between January 1, 1969, and February 28, 1970, Benton's direct purchases in interstate commerce amounted to less than $140.00. 422 U.S. at 274 n.4.

3. Between January 1969 and June 1970, Benton mailed less than 200 letters across state lines. 422 U.S. at 274 n.3. Between January 1969 and June 1970, Benton paid Pacific Telephone and Telegraph $18,260.45 for telephone services. Only $19.78 represented charges for out-of-state calls related to business. Appendix at 213, United States v. American Bldg. Maintenance Indus., 422 U.S. 271 (1975) [hereinafter cited as Appendix].

4. The Government asserted in the complaint that the action of American may substantially lessen competition for the following reasons: (1) Actual and potential competition between American and Benton has been eliminated. (2) Benton has been eliminated as a substantial factor in competition. (3) American has increased in relative size to such a point that its advantage over its competitors threatens to be decisive. (4) Concentration in the sale of janitorial services has increased to the detriment of actual and potential competition. Appendix at 8.

5. 15 U.S.C. § 18 (1970).

companies were not engaged in commerce and that therefore the court lacked jurisdiction under section 7.[6] On direct appeal, the Supreme Court affirmed, holding (1) that the "engaged in commerce" requirement of section 7 means directly engaged in the flow of interstate commerce and is not satisfied by an intrastate corporation whose activities substantially affect interstate commerce, and (2) that under the facts of the instant case, Benton was not engaged in the flow of interstate commerce. Three justices dissented,[7] arguing that the "engaged in commerce" test should be held to extend to all corporations whose activities substantially affect interstate commerce.

I. BACKGROUND

The Clayton Act was one of several statutes[8] enacted under the commerce clause of the Constitution[9] to arrest the threat of increasing monopolization and concentrated control of industry.[10] The jurisdictional test of each of these antitrust statutes is set forth in slightly different language, resulting in differing interpretations of the extent of the commerce power used by Congress in enacting each statute.

A. The Sherman Antitrust Act

The Sherman Act,[11] enacted in 1890, was the first of the antitrust statutes; it prohibits all combinations in the form of trusts and conspiracies "in restraint of trade or commerce among the several States." In *United States v. E. C. Knight,*[12] the first decision of the Supreme Court interpreting the Sherman Act, the Court weakened the Act by concluding that manufacturing was not commerce and hence beyond the power of Congress to regu-

6. The district court's decision is unreported.

7. 422 U.S. at 286 (dissent of Douglas & Brennan, JJ.). *Id.* at 287 (dissent of Blackmun, J.).

8. Sherman Antitrust Act, 15 U.S.C.A. §§ 1-3 (Supp. I, 1975), 15 U.S.C. §§ 4-7 (1970); Wilson Tariff Act, 15 U.S.C. §§ 8-11 (1970); Federal Trade Commission Act, 15 U.S.C. §§ 41-44, 47-48, 51-58 (1970), 15 U.S.C.A. §§ 45-46, 49-50 (Supp. I, 1975); Clayton Act, 15 U.S.C. §§ 12-27, 44 (1970); Robinson-Patman Price Discrimination Act, 15 U.S.C. §§ 13, 13a-b, 21a (1970); Robinson-Patman Act, 15 U.S.C. § 13c (1970).

9. "Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

10. *See, e.g.*, D. MARTIN, MERGERS AND THE CLAYTON ACT 43-46 (1959) [hereinafter cited as MARTIN].

11. Sherman Antitrust Act, 15 U.S.C.A. §§ 1-3 (Supp. I, 1975), 15 U.S.C. §§ 4-7 (1970).

12. 156 U.S. 1 (1895).

late.[13] Signs of a revival began four years later,[14] and in *Standard Oil Co. v. United States*[15] the Court overruled the holding in *Knight* that manufacturing is beyond the reach of Congress.[16] The Supreme Court has since expanded its interpretation of the commerce provision of the Sherman Act pursuant to the notion that "Congress [in passing the Sherman Act] wanted to go to the utmost extent of its Constitutional power. . . ."[17] In *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*,[18] for example, the Court held that the Sherman Act extends to intrastate transactions which substantially affect interstate commerce.[19] In a few cases, the courts have denied Sherman Act jurisdiction over activities[20] that Congress could possibly reach under the commerce clause. But it is generally assumed that the Sherman Act extends to the limit of congressional power under the commerce clause.[21]

B. Section 5 of the Federal Trade Commission Act

Enacted at the same time as the Clayton Act, section 5 of the

13. *Id.* at 16, 17 (In the *E.C. Knight* case, the Court reviewed American Sugar Refining Company's acquisition of almost complete control of the manufacture of refined sugar within the United States.).

14. *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899) (A combination of iron pipe manufacturers was held to restrain interstate commerce. *Knight* was distinguished as a combination in which the parties had not agreed about the future disposition of the manufactured products.). *See also* Loewe v. Lawlor, 208 U.S. 274 (1908); Swift & Co. v. United States, 196 U.S. 375 (1905).

15. 221 U.S. 1 (1911).

16. *Id.* at 68, 69. The interpretation in *Knight* had "been so necessarily and expressly decided to be unsound as to cause the contentions to be plainly foreclosed and to require no express notice." *Id.*

17. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 558 (1944). *Accord,* United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945); United States v. Finis P. Ernest, Inc., 509 F.2d 1256 (7th Cir. 1975); Gough v. Rossmoor Corp., 487 F.2d 373 (9th Cir. 1973); Lehrman v. Gulf Oil Corp., 464 F.2d 26 (5th Cir. 1972), *cert. denied,* 409 U.S. 1077 (1972). *But see* Hospital Bldg. Co. v. Trustee of Rex Hosp., 511 F.2d 678 (4th Cir. 1975), *cert. granted,* 96 S. Ct. 33 (1975) (No. 74-1452); Evanston Cab Co. v. City of Chicago, 325 F.2d 907 (7th Cir. 1963), *cert. denied,* 377 U.S. 943 (1964).

For a discussion of different interpretations of the commerce provision of the Sherman Act see Kallis, *Local Conduct and the Sherman Act,* 1959 DUKE L.J. 236; Note, *Portrait of the Sherman Act as a Commerce Clause Statute,* 49 N.Y.U.L. REV. 323 (1974).

18. 334 U.S. 219 (1948).

19. *Id.* at 232-35.

20. *See* United States v. Oregon State Medical Soc'y, 343 U.S. 326 (1952) (medical practice); Riggall v. Washington County Medical Soc'y, 249 F.2d 266 (8th Cir. 1957), *cert. denied,* 355 U.S. 954 (1958) (medical practice); Hospital Bldg. Co. v. Trustees of Rex Hosp., 511 F.2d 678 (4th Cir. 1975), *cert. granted,* 96 S. Ct. 33 (1975) (No. 74-1452) (hospital health care services); Kallen v. Nexus Corp., 353 F. Supp. 33 (N.D. Ill. 1973) (bar review course); United States v. Yellow Cab Co., 332 U.S. 218 (1947) (taxicab services); Evanston Cab Co. v. City of Chicago, 325 F.2d 907 (7th Cir. 1963), *cert. denied,* 377 U.S. 943 (1964) (taxicab services).

21. *See* cases cited note 17 *supra.*

Federal Trade Commission Act[22] prohibits "unfair methods of competition in commerce." In 1935, Congress considered amending secton 5 to read "unfair methods of competition . . . in or affecting commerce"[23] because the Federal Trade Commission had found "numerous unfair methods of competition and numerous deceptive acts and practices which, although done in intrastate commerce, seriously affect honest competitors engaged in interstate commerce."[24] The bill died in the Senate.[25]

The Supreme Court in *FTC v. Bunte Brothers, Inc.*[26] refused to judicially expand the commerce requirement of section 5 and held intrastate activities affecting interstate commerce beyond the reach of the legislation.[27] Although *Bunte Brothers* has never been judicially overruled, it has been eroded by broader interpretations of "in commerce."[28] Recently, Congress overruled *Bunte Brothers* by replacing "in commerce" with "in or affecting commerce" in sections 5, 6, and 12 of the Federal Trade Commission Act.[29] The express purpose of these amendments was to make the reach of this Act coextensive with congressional power under the commerce clause.[30]

C. *Section 2(a) of the Robinson-Patman Act*

Section 2(a) of the Robinson-Patman Act,[31] an amendment

22. 15 U.S.C. § 45(a) (1970). For a review of the legislative history of the Federal Trade Commission Act see G. HENDERSON, THE FEDERAL TRADE COMMISSION ch. I (1924); Baker & Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition*, 7 VILL. L. REV. 517, 520-43 (1962).

23. S. REP. No. 46, 74th Cong., 1st Sess. 2 (1935).

24. *Id.* at 1.

25. 80 CONG. REC. 2424 (1936). The bill apparently never was reconsidered. Earlier it had been argued that "Congress had gone as far as it had any lawful right to go when it undertook to regulate commerce and to deal with unfair practices in commerce." 79 CONG. REC. 1843 (1935) (remarks of Senator Austin).

26. 312 U.S. 349 (1941) (Candy manufacturers in Illinois who used an "unfair method of competition" were outside the reach of section 5 because their sales, which affected interstate commerce, were wholly intrastate.).

27. *Id.* at 355.

28. *See, e.g.*, FTC v. Cement Institute, 333 U.S. 683 (1948); Safeway Stores, Inc. v. FTC, 366 F.2d 795 (9th Cir. 1966), *cert. denied*, 386 U.S. 932 (1967); Morton's Inc. v. FTC, 286 F.2d 158 (1st Cir. 1961); Holland Furnance Co. v. FTC, 269 F.2d 203 (7th Cir. 1959), *cert. denied*, 361 U.S. 932 (1960).

29. 15 U.S.C.A. §§ 45, 46(a)-(b), 52 (Supp. I, 1975), *amending* 15 U.S.C. §§ 45, 46(a)-(b), 52 (1970).

30. H.R. REP. No. 93-1107, 93d Cong., 2d Sess. 29-31 (1974).

31. 15 U.S.C. § 13(a) (1970), *amending* 15 U.S.C. § 13(a) (1964). For a history of the enactment of the Robinson-Patman Act see E. KINTNER, A ROBINSON-PATMAN PRIMER 6-16 (1970); F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 3-23, 559-620 (1962) [hereinafter cited as ROWE]; Note, *The Commerce Requirement of the Robinson-Patman Act*, 22 HASTINGS L.J. 1245, 1255-58 (1971).

to the Clayton Act, prohibits persons "engaged in commerce, in the course of such commerce," from discriminating in price between different purchasers "where either or any of the purchasers involved . . . are in commerce."[32] As originally passed by the House, Congressman Patman's version also provided that "[i]t shall also be unlawful for any person, whether in commerce or not, either directly or indirectly, to discriminate in price between different purchasers."[33] This broader language was stricken before final enactment because "the preceding language [the present section 2(a)] already covers all discriminations, both interstate and intrastate, that lie within the limits of Federal authority."[34]

The "engaged in commerce" requirement of section 2(a) is of less importance than the same language in section 7 of the Clayton Act. In section 2(a) litigation, the focus has been on whether the transactions giving rise to an alleged discrimination are "in commerce."[35] Obviously, if the sale is "in commerce," the seller is "engaged in commerce."[36] The cases have therefore ignored the "engaged in commerce" requirement and turned on whether one of the transactions giving rise to the allegedly discriminatory sale "cross[ed] a state line."[37] Recently, in *Gulf Oil Corp. v. Copp Paving Co.*,[38] the Supreme Court discussed the jurisdictional reach of section 2(a). The Court reversed a broad interpretation given to the section by the Ninth Circuit Court of Appeals[39] and

32. The statute provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce . . . .

15 U.S.C. § 13(a) (1970).

33. H.R. REP. No. 2951, 74th Cong., 2d Sess. 6 (1936).

34. *Id.*

It has been argued that congressional doubt about the constitutionality of the language of the bill after A.L.A. Schlechter Poultry Corp. v. United States, 295 U.S. 495 (1935), led to the deletion of the language. Note, *The Commerce Requirement of the Robinson-Patman Act*, 22 HASTINGS L.J. 1245, 1256 (1971). *But see* 86 HARV. L. REV. 765, 769-72 (1973).

35. *See, e.g.*, Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200 (1974); Food Basket, Inc. v. Albertson's, Inc., 383 F.2d 785, 787 (10th Cir. 1967); Willard Dairy Corp. v. Nat'l Dairy Prods. Corp., 309 F.2d 943, 946 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963).

36. ROWE 78, 79.

37. Littlejohn v. Shell Oil Co., 483 F.2d 1140, 1144 (5th Cir. 1973) (en banc), *cert. denied*, 414 U.S. 1116 (1973); Belliston v. Texaco, Inc., 455 F.2d 175, 178 (10th Cir. 1972), *cert. denied*, 408 U.S. 928 (1972); Hiram Walker, Inc. v. A & S Tropical, Inc., 407 F.2d 4, 9 (5th Cir. 1969), *cert. denied*, 396 U.S. 901 (1969).

38. 419 U.S. 186 (1974).

39. The Ninth Circuit had stated:

agreed that at least one of the transactions which resulted in discrimination must actually "cross a state line."[40]

D. Section 7 of the Clayton Act

The original section 7 of the Clayton Act[41] was intended to "prohibit and make unlawful certain trade practices which . . . are not covered by . . . existing antitrust acts and . . . to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation."[42] The stimulants for enactment were a widespread belief that the Sherman Act had been weakened by the Court[43] in *Standard Oil v. United States*[44] and *United States v. American Tobacco Co.*[45] and the rising fear of increasing acquisitions and consolidations.[46] "Commerce," as defined in the original Clayton Act,[47] was considered to be at least equal to the scope of "commerce" under the Sherman Act.[48]

> We see no reason why sales which are "in commerce" because of their nexus with an instrumentality of interstate commerce must also satisfy a state-line test of "in commerce." To be sure, the statutory language of the Clayton and Robinson-Patman Acts is not as broad and flexible as that of the Sherman Act. Nevertheless, the fact that these acts were intended to supplement the purpose and effect of the Sherman Act supports a uniform interpretation of the "in commerce" requirement present in all three acts.

In re Western Liquid Asphalt Cases, 487 F.2d 202, 206 (9th Cir. 1973), *rev'd sub nom.* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974).

40. 419 U.S. at 200 (quoting Hiram Walker, Inc. v. A & S Tropical, Inc., 407 F.2d 4, 9 (5th Cir. 1969), *cert. denied*, 396 U.S. 901 (1969)).

41. The original section 7 provided in pertinent part:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly in any line of commerce.

Clayton Act § 7, ch. 323, § 7, 38 Stat. 731 (1914), *as amended*, 15 U.S.C. § 18 (1970).

42. S. REP. No. 698, 63d Cong., 2d Sess. 1 (1914). Section 7 was intended to eliminate the aggregation of economic power by stock purchase "so far as it is possible to do so." H.R. REP. No. 627, 63d Cong., 2d Sess. 17 (1914).

43. Levy, *The Clayton Act—An Imperfect Supplement to the Sherman Law*, 3 VA. L. REV. 411, 414-17 (1916).

44. 221 U.S. 1 (1911).

45. 221 U.S. 106 (1911).

46. United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 581 (S.D.N.Y. 1958). A total of 3,238 acquisitions and consolidations were recorded between 1895 and 1905. NELSON, MERGER MOVEMENTS IN AMERICAN INDUSTRY, 1895-1956 (1959) (quoted in S. OPPENHEIM & G. WESTON, FEDERAL ANTITRUST LAWS 318 (3d ed. 1968)).

47. " 'Commerce', as used herein, means trade or commerce among the several States and with foreign nations . . . ." 15 U.S.C. § 12 (1970).

48. *See* H.R. REP. No. 627, 63d Cong., 2d Sess. 6, 7 (1914).

In 1950, section 7 of the Clayton Act was amended to reach acquisitions that had not previously been covered by the Act.[49] The amendment, however, continued to employ the original "engaged in commerce" jurisdictional test.[50] Prior to 1950, efforts had been made to broaden the jurisdictional test,[51] but these efforts were unsuccessful. In 1958, hearings were held on two bills[52] that would have broadened the "engaged in commerce" requirement of section 7 by making it applicable when "either the acquiring corporation" or the acquired corporation "is engaged in commerce."[53] Neither bill was enacted.

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49. For a review of the legislative history of the amendment see MARTIN 221-53; Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 233-38 (1960); Handler & Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629, 652-74 (1961); Note, *Section 7 of the Clayton Act; A Legislative History*, 52 COLUM. L. REV. 766 (1952); Comment, *The Amendment to Section 7 of the Clayton Act*, 46 NW. U.L. REV. 444 (1951).

There were three principal reasons for the amendment. (1) The Court had construed the statute to apply only to acquisitions by stock purchase and had exempted asset acquisitions. Arrow-Hart & Hegeman Electric Co. v. FTC, 291 U.S. 587 (1934); FTC v. Western Meat Co., 272 U.S. 554 (1926). (2) It was assumed that § 7 did not apply to vertical mergers. H.R. REP. No. 1191, 81st Cong., 1st Sess. 11 (1949). (3) Some feared that the use of the Sherman Act test in § 7 cases would result in the proscription of small business mergers. S. REP. No. 1775, 81st Cong., 2d Sess. 4 (1950).

50. 15 U.S.C. § 18 (1970), *amending* ch. 323, § 7, 38 Stat. 731, 732 (1914). Section 7 provides in pertinent part:

> No corporation *engaged in commerce* shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation *engaged also in commerce,* where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Id. (emphasis added).

51. One such effort can be found in H.R. 2357, 79th Cong., 1st Sess. (1945), which reads, in part, as follows:

> Whenever the consummation of any plan, undertaking or agreement by or on behalf of any corporation *engaged in or affecting commerce or engaged in manufacturing or processing for distribution in commerce or by or on behalf of any of its subsidiaries so engaged,* to acquire the whole or any part of the stock or other share capital or the whole or any part of the assets other than inventories of any other corporation likewise engaged would involve property to the value of more than $ . . . . . ., no such plan, undertaking, or agreement by or on behalf of any corporation subject to the jurisdiction of the Federal Trade Commission under sections 7 or 11 of the Clayton Act, as amended, shall be consummated, effectuated, and completed except upon and after compliance with the following requirements: . . . .

Another such effort can be found in H.R. 1240, 81st Cong., 1st Sess. (1949).

These bills directly resulted from the Temporary National Economic Committee report suggesting premerger review by the FTC. Note, *Section 7 of the Clayton Act: A Legislative History*, 52 COLUM. L. REV. 766 n.3 (1945).

52. S. 198, 85th Cong., 1st Sess. (1957); S. 722, 85th Cong., 1st Sess. (1957).

53. *Hearings on S. 198, S. 721, S. 722, and S. 349 Before the Subcomm. on Antitrust*

The reach of section 7 has been subject to varying interpretations by judicial and administrative tribunals. In *Transamerica Corp. v. Board of Governors,*[54] the Third Circuit concluded that "[w]e find nothing in the legislative history . . . to indicate that Congress did not intend by Section 7 to exercise its power under the commerce clause of the Constitution to the fullest extent."[55] The Federal Trade Commission has taken a narrower view. In *Foremost Dairies, Inc.*,[56] the Commissioner held that a dairy that sold all of its products intrastate was not "engaged in commerce" although it had purchased items shipped interstate to a wholesaler's warehouse.[57]

The Supreme Court had never directly interpreted the "engaged in commerce" reach of section 7 prior to deciding the instant case, although there were intimations in *Gulf Oil Corp. v. Copp Paving Co.* that the Court would narrowly construe it.[58] Interestingly, the suggestion in *Gulf* of a narrow construction was ignored by the courts in subsequent decisions.[59] For example, after quoting extensively from the *Gulf* opinion, a federal district court in *Gasperi v. Cinemette Corp. of America*[60] concluded that "[t]he Supreme Court has thus declared as possibly coming within the protection of the Clayton Act not only activities 'in commerce' but also activities having a substantial effect on commerce."[61]

II. INSTANT CASE

In holding that the "engaged in commerce" language of section 7 does not encompass intrastate activities that substantially affect interstate commerce, the Court relied on the narrow construction given section 5 of the Federal Trade Commission Act in

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and Monopoly of the Senate Comm. on the Judiciary, 85th Cong., 2d Sess. 518 (1958).

54. 206 F.2d 163 (3d Cir.), *cert. denied,* 346 U.S. 901 (1953).

55. *Id.* at 166 (dictum).

56. 60 F.T.C. 944 (1962).

57. *Id.* at 1090.

58. 419 U.S. 186, 202 (1974).

> This argument [expanding the Clayton Act coexistent with the commerce clause power] from the history and practical purposes of the Clayton Act is neither without force nor at least a measure of support. But whether it would justify radical expansion of the Clayton Act's scope beyond that which the statutory language defines—expansion, moreover, by judicial decision rather than amendatory legislation—is doubtful.

Id. (footnote omitted).

59. *See* Gasperi v. Cinemette Corp. of America, 391 F. Supp. 826, 830 (W.D. Pa. 1975); United States v. M.P.M., Inc., 1975-1 Trade Cas. ¶ 66,233, ¶ 66,238 (D. Colo. 1975).

60. 391 F. Supp. 826 (W.D. Pa. 1975).

61. *Id.* at 830.

Bunte Brothers.[62] Since both statutes have "in commerce" requirements, were enacted by the 63d Congress, and were designed to protect competition, the Court concluded that both should be similarly construed.[63] It reasoned that the broader construction would "give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law."[64]

The government argued that the legislative history and purpose of the Clayton Act indicated that its reach should be coextensive with the commerce clause power. In rejecting that view, the Court distinguished the language of the Sherman Act from that of the Clayton Act. The Court reasoned that the prohibitions against any "restraint of trade or commerce among the several States"[65] in the Sherman Act directly concerned impacts on interstate commerce and that therefore the Act reaches intrastate activities having a substantial effect on interstate commerce. The precise "in commerce" language of section 7, on the other hand, was interpreted by the Court to require that the activities actually be in interstate commerce.[66] But more importantly, the Court concluded that the reenactment of section 7 in 1950 with the same "in commerce" test was an expression of congressional approval of the more limited reach. Since Congress must have been aware of the *Bunte Brothers* decision, the retention of the original language was an indication that Congress did not intend to exercise its full power under the commerce clause.[67] The Court focused on the apparent lack of express legislative intent to broaden the jurisdictional reach[68] but failed or refused to consider the broad purpose behind the original enactment of the entire section.

Mr. Justice Douglas, joined in his dissent by Mr. Justice Brennan, argued that there was no evidence to indicate that Congress intended to limit the jurisdictional reach of the Clayton Act to something less than that of the Sherman Act.[69] He incorpo-

62. United States v. American Bldg. Maintenance Indus., 422 U.S. 271, 276-77 (1975).

63. *Id.* at 277.

64. *Id.* at 276-77 (quoting FTC v. Bunte Bros., 312 U.S. 349, 354-55 (1941)).

65. 15 U.S.C.A. § 1 (Supp. I, 1975).

66. 422 U.S. at 278.

67. *Id.* at 277-83.

68. The Court's response to the absence of express congressional action to broaden § 7 is probably best represented in the opinion by the language quoted from *Bunte Bros.* that "[a]n inroad upon local conditions and local standards of such far-reaching import as is involved here, *ought to await a clearer mandate from Congress.*" *Id.* at 276-77 (emphasis added).

69. *Id.* at 287.

rated his dissenting arguments in *Gulf* by reference.[70] There he had argued that the Clayton Act definition of commerce, "trade or commerce among the several states,"[71] had been held by the Court to embrace "all commerce save that 'which is confined to a single State *and does not affect other States.*' "[72] Mr. Justice Blackmun argued in his separate dissenting opinion that the purpose of the Clayton Act was to supplement the Sherman Act and that therefore section 7 should similarly be considered an exercise of the full commerce clause power by Congress.[73] Both dissenting opinions focused on the broader purpose underlying section 7. Both concluded that the jurisdictional reach of section 7 should be identical to that of the Sherman Act.[74]

III. ANALYSIS

A. The Purpose Underlying Section 7 of the Clayton Act

By focusing on the broad purpose underlying the original enactment, the Court could have justified a broad interpretation of the jurisdistional reach of section 7. Since section 7 was designed to supplement the Sherman Act and arrest potential Sherman Act violations "in their incipiency and before consummation"[75] and since "the objective was to prevent accretions of power which 'are individually so minute as to make it difficult to use the Sherman Act test against them,' "[76] it could be argued that the reach of section 7 should parallel that of the Sherman Act. "A fundamental purpose of amending § 7 was to arrest the trend toward concentration, the tendency to monopoly, before the consumer's alternatives disappeared through merger . . . ."[77] Argua-

70. *Id.* at 286.

71. 15 U.S.C. § 12 (1970).

72. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 205-06 (1974) (dissenting opinion) (quoting Second Employers' Liability Cases, 223 U.S. 1, 46-47 (1912)).

73. 422 U.S. at 287.

74. *Id.* at 287.

75. S. REP. No. 698, 63d Cong., 2d Sess. 1 (1914).

76. United States v. Aluminum Co. of America, 377 U.S. 271, 280 (1964) (quoting S. REP. No. 1775, 81st Cong., 2d Sess. 5 (1950).

77. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 367 (1963). For further indications of the spirit in which the courts have interpreted congressional intent in the enactment of § 7, see United States v. Von's Grocery Co., 384 U.S. 270, 275 (1966) ("Congress, viewing mergers as a continuous, pervasive threat to small business, passed § 7 of the Clayton Act . . . ."); United States v. Aluminum Co. of America, 377 U.S. 271, 281 (1964) ("Rome [company being acquired by Alcoa] seems to us the prototype of the small independent that Congress aimed to preserve by § 7."); United States v. Continental Can Co., 378 U.S. 441, 461 (1964) ("The case falls squarely within the principle that where there has been a 'history of tendency toward concentration in the industry' tendencies toward further concentration 'are to be curbed in their incipiency.' "); United

bly, congressional intent can best be effectuated by extending section 7 to reach acquisitions of intrastate corporations where there is a substantial effect on interstate commerce.[78]

The reliance of the Court on the narrow construction it had earlier given section 5 of the Federal Trade Commission Act appears ill-founded. Congress, by broadening the reach of section 5 recently, clearly indicated that the narrow construction given section 5 in *Bunte Brothers* was not in harmony with congressional intent.[79] Section 5, like the Sherman Act, now makes full use of congressional power under the commerce clause.

The Court's reliance on the restricted reading of section 2(a) of the Robinson-Patman Act in *Gulf* also seems inapposite. The policy of the Robinson-Patman Act of preventing price discrimination has actually been considered at variance with other antitrust statutes aimed at promoting competition.[80] Further, the general "engaged in commerce" requirement of the Robinson-Patman Act is unnecessary in defining that Act's jurisdictional scope because one of the allegedly discriminating sales must "cross a state line."[81] It could be contended, therefore, that section 7 of the Clayton Act, rather than being construed narrowly as is section 2(a) of the Robinson-Patman Act, an arguably dissimilar statute, should be construed as broadly as the Sherman

States v. Penn-Olin Chem. Co., 378 U.S. 158, 170 (1964) ("[W]e are but expounding a national policy enunciated by the Congress to preserve and promote a free competitive economy."); Brown Shoe Co. v. United States, 370 U.S. 294, 346 (1962) ("We cannot avoid the mandate of Congress that tendencies toward concentration in industry are to be curbed in their incipiency, particularly when those tendencies are being accelerated through giant steps striding across a hundred cities at a time.").

78. Further support for extending the reach of § 7 can be found by examining the congressional intent underlying the other antitrust statutes. This canon of statutory construction is designated statutes *in pari materia*. *See* C. SANDS, STATUTES & STATUTORY CONSTRUCTION § 51.02 (4th ed. 1973).

Mr. Justice Frankfurter, dissenting in *FTC v. Motion Picture Advertising Serv. Co.*, wrote:

> I am not unaware that the policies directed at maintaining effective competition, as expressed in the Sherman Law, the Clayton Act, as amended by the Robinson-Patman Act, and the Federal Trade Commission Act, are difficult to formulate . . . . It is also incumbent upon us to seek to rationalize the four statutes directed toward a common end and make of them, to the extent that what Congress has written permits, a harmonious body of law.

344 U.S. 392, 405-06 (1953).

79. *See* note 30 *supra*.

80. Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1327-50 (1948); Burns, *The Anti-trust Laws and the Regulation of Price Competition*, 4 LAW AND CONTEMP. PROB. 301 (1937). *But see* Standard Oil Co. v. FTC, 340 US. 231, 249 (1951).

81. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200 (1974).

Act and section 5 of the Federal Trade Commission Act.[82]

There are intimations in the opinion that the Court felt the narrow construction of section 7 was necessary to protect small business by eliminating actions against de minimus mergers.[83] But section 7 is by its language limited to those acquisitions in any section of the country that have the potential to lessen competition or to create a monopoly.[84] Since small business mergers would not be able to generate the required "substantial" anticompetitive effect, there is no need to protect them at the threshold jurisdictional stage.[85] On the other hand, a narrow construction of section 7, as is given in the instant case, may very well operate to injure small businesses by permitting accretions of monopolistic or anticompetitive power.[86]

Under the rule of the instant case, there can be no violation of section 7 as long as the acquired corporation is engaged solely in intrastate commerce. Perhaps the strongest argument in favor of extending the reach of section 7 is to close this loophole. American, for example, made 54 acquisitions between 1961 and 1973, including five janitorial service companies in the Los Angeles area.[87] American has also indicated an intention to accelerate this acquisition program.[88] This is precisely the type of gradual monopolization of an industry that section 7 was enacted to prevent. But as long as these future acquisitions are of intrastate corporations, American will not be within the reach of section 7 as construed by the Court in the instant case.[89] Congress must now consider amending section 7 as it did section 5 of the Federal Trade Commission Act.

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82. Generally, the reach of statutes enacted under the commerce clause has been found to be coextensive with full congressional power. Note, *Portrait of the Sherman Act as a Commerce Clause Statute*, 49 N.Y.U.L. REV. 323, 324-25 (1974).

83. 422 U.S. at 276-77 (1975).

84. 15 U.S.C. § 18 (1970) ("where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.").

85. There was concern at the time of the amendment of § 7 in 1950 that the reading of the Sherman Act test into § 7 was preventing mergers by small businesses. This was partly remedied by the deletion from the original § 7 of the word *community* as well as the wording requiring the corporations to be in competition. The purpose was to proscribe only those mergers which would potentially have a significant impact. S. REP. No. 1775, 81st Cong., 2d Sess. 4, 7 (1950); H.R. REP. No. 1191, 81st Cong., 1st Sess. 6-8 (1949).

86. *See generally* United States v. Von's Grocery Co., 384 U.S. 270, 274-75 (1966); United States v. Aluminum Co. of America, 377 U.S. 271, 281 (1964).

87. Brief for Appellant at 4-5.

88. *Id.* at 5.

89. If an intrastate corporation such as Benton, however, were to purchase American, that acquisition would be within reach under the second paragraph of § 7 which provides in pertinent part that "[n]o corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . of one or more corporations engaged in commerce . . . ." 15 U.S.C. § 18 (1970).

B. Statutory Construction and Judicial Restraint

The major difficulty with using the preceding arguments to support a broad interpretation of the reach of section 7 is that it substitutes an interpretation of congressional intent for the express language of the statute.[90] The broad interpretation would require the Court to read "engaged in commerce" as "engaged in or affecting commerce." There is no clear support in the legislative history for this broader reading.[91] The best argument for expansion that can be made is that Congress intended with the Clayton Act to supplement the Sherman Act, and therefore section 7, like the Sherman Act, should be considered a full exercise of congressional power under the commerce clause.[92] Had this been its intent in enacting section 7, however, Congress could have readily manifested it by duplicating the exact wording of the commerce provision of the Sherman Act and expressly extending the reach of the statute to corporations that in any way restrained "trade or commerce among the several States." Instead, Congress chose to limit the supplememtary legislation to those corporations "engaged in commerce." No consideration was given to broadening the jurisdictional reach of section 7 at the time of the 1950 amendment.[93] Further, in 1958, bills introduced in Congress to extend the reach of section 7 were defeated.[94] With such an unclear legislative history, the canons of statutory construction generally applied by the Supreme Court support the narrower interpretation given section 7 in the instant case.[95] As Mr. Justice Frankfurter once wrote, "[a]n omission at the time of enactment, whether careless or calculated, cannot be judicially supplied however much later wisdom may recommend the inclusion."[96]

Also, extending the reach of section 7 may constitute a judicial usurpation of the legislative function of Congress. The

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90. For this same argument in the context of § 2(a) of the Robinson-Patman Act see 86 HARV. L. REV. 765, 769 (1973).

91. *Cf.* Handler, *Quantitative Substantiality and the Celler-Kefauver Act—A Look at the Record,* 7 MERCER L. REV. 279, 287 (1956) ("The best that can be said about this legislative history is that it is obscure, ambiguous and inconclusive.").

92. This view was taken by the Third Circuit Court of Appeals in *Transamerica Corp. v. Board of Governors,* 206 F.2d 163, 166 (3d Cir.), *cert. denied,* 346 U.S. 901 (1953) (dictum).

93. *See* notes 49 & 50 and accompanying text *supra.*

94. *See* notes 53 & 54 and accompanying text *supra.*

95. *See generally* 86 HARV. L. REV. 765, 772 & n.36 (1973) (citing Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 527 (1947) [hereinafter cited as *Reflections*]).

96. *Reflections* 534.

proper function of the Court in the instant case was to determine whether American and the Benton corporations were within the reach of the statute as written by Congress and not whether they were within the reach of the statute as it should have been written.[97] Granted, the statute as interpreted by the Court does not reach acquisitions of intrastate corporations even where the activities of those corporations affect interstate commerce. A strong argument can be made that this loophole diminishes the procompetitive and antimonopolistic force of the Clayton Act and should be closed. However, this argument assumes that industrial concentration is increasing and that acquisitions of intrastate corporations by interstate corporations contribute significantly to that concentration. On these subjects, economists are in substantial disagreement.[98] Congress, not the courts, is better equipped to properly resolve this complex factual disagreement and determine the proper reach of section 7.[99]

IV. CONCLUSION

A strong argument exists for the broader reading of section 7. But the argument should be made to Congress. The Supreme Court, in refusing to adopt a broad reading of section 5 of the Federal Trade Commission Act in *Bunte Brothers*, argued that the express language of the statute should be adhered to unless the purpose of the act would thereby be defeated.[100] Such an argument applies with full force in the instant case. Congress did not clearly manifest an intention to use its full power under the commerce clause when it enacted and amended section 7. The Court correctly limited the reach of section 7 to the explicit language of the statute.

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97. The role of the Supreme Court in reviewing legislation is beyond the scope of this case note. Suffice it to say that even the most activist of judges agrees that the role of the Court is to interpret the law and not to make policy choices for society. *See generally* Christie, *A Model of Judicial Review of Legislation,* 48 S. CAL. L. REV. 1306, 1342-46 (1975).

98. For a compilation of the varying views, see S. OPPENHEIM & G. WESTON, FEDERAL ANTITRUST LAWS 317-22 (3d ed. 1968).

99. The contrary conclusion is not compelled by the argument that Congress has already resolved the question with its amendment of § 5 of the Federal Trade Commission Act. Section 5 is concerned only with deceptive acts and practices by manufacturers. It would be assuming too much to conclude that Congress, with its extension of § 5, passed judgment on the advisability or wisdom of permitting interstate corporations to acquire intrastate businesses free from scrutiny under § 7 of the Clayton Act.

100. 312 U.S. 349, 350-52 (1941).