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DANGEROUS PURSUITS V. DR. PANGLOSS & ASSOCIATES

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Apologetics is an ancient art, but even its most venerable practitioners cannot redeem what is beyond redemption. The merger mania of the 1980s is a case in point.

In *Dangerous Pursuits*,[1] as in the richly documented reportage which our critics dismiss as "popular," the objective was to lay bare the nature of the merger and acquisition game—to assess its impact on the U.S. economy, and to suggest some implications for public policy. The issues we raised far transcend the sweep of the antitrust laws.

First, the proof of the pudding is in the eating. The dimensions of the "M&A" disaster in the 1980s require little adumbration: the record volume of failed deals, the erosion of credit worthiness of deal-making firms,[2] and the large number of defaults and bankruptcies directly attributable to the corporate deal mania—all of this beginning well before the current recession.

Thus, defaults on corporate debt, the bulk of which was issued to finance deals, have climbed at an unprecedented rate in recent years, rising from $5 billion in 1988, to $11.5 billion in 1989, and reaching a record of $15 billion by 1990.[3] The default volume on junk bonds—the fake wampum of the 1980s—has soared from $11.8 billion in 1989, to $24.6 billion in 1990.[4] In deal-intensive fields, default rates on debt are higher yet: 46.7% on casino junk, 24.2% on airline junk, and 20.8% on retailing junk.[5]

Similarly, corporate bankruptcies (which Thomas Carlyle once called "the great bottomless gulf into which all Falsehoods . . . do sink"[6])

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1. W. ADAMS & J. BROCK, DANGEROUS PURSUITS: MERGERS AND ACQUISITIONS IN THE AGE OF WALL STREET (1989).

2. *See* Blumenthal, *Quality of Credit Dropped Sharply in '90, S&P Says*, Wall St. J., Jan. 8, 1991, at C21, col. 1.

3. Hylton, *Corporate Bond Default up Sharply in '89*, N.Y. Times, Jan. 11, 1990, at D1, col. 3.

4. *Junk-Bond Defaults Soar*, Wall St. J., Jan. 9, 1991, at C17, col. 6.

5. Mitchell, *Junk-Bond Defaults Expected to Multiply*, Wall St. J., Jan. 2, 1991, at B6, col. 4.

6. T. CARLYLE, THE FRENCH REVOLUTION 54 (Modern Library ed. 1934).

skyrocketed more than 420% between 1986 and 1989, from $12.7 billion to $66.6 billion.[7] Ten of the twenty-seven largest corporate bankruptcies in U.S. history occurred during the 1989-90 period,[8] as firms found themselves increasingly incapable of carrying the enormous debt loads they took on in the M&A game of the 1980s.[9] A partial list of bankrupt and near bankrupt corporate deals now includes retailers such as Campeau Corporation (including its Bloomingdale's, Burdines, Lazarus, and Jordan Marsh subsidiaries),[10] Bonwit Teller and B. Altman,[11] Garfinckel's,[12] Carter Hawley Hale (including its Broadway, Emporium, and Weinstocks subsidiaries),[13] Macy's,[14] Ames Department Stores,[15] Hills Department

7. Lowenstein, *Goldman Sets Funds for Firms in Distress*, Wall St. J., Apr. 16, 1990, at C1, col. 2.

8. Winter & O'Boyle, *Bankruptcy-Law Filings by Firms Spurt*, Wall St. J., Apr. 6, 1990, at A2, col. 2.

9. *See generally* Farrell & Nathans, *The Bills Are Coming Due*, BUS. WK., Sept. 11, 1989, at 84 (companies with "ravenous" debt payments are in dire financial straits); Hector, *Junk's Bad Times Are Just Starting*, FORTUNE, June 4, 1990, at 81 (predicting the junk-bond market credit squeeze will lead to more bankruptcies for medium and large size companies); Light, Friedman & Meehan, *All That Leverage Comes Home to Roost*, BUS. WK., Sept. 10, 1990, at 76 (enormous interest payments forcing companies into default or restructuring); Light & Nathans, *Junk-Bond Time Bombs Could Go Off*, BUS. WK., Apr. 9, 1990, at 68 ("as interest payments balloon more companies may crack under the strain"); Zweig & Stix, *Tick, Tick, Tick*, FORBES, Aug. 6, 1990, at 78 (the inability of companies to meet junk-bond interest payments is leading to their financial insolvency); Bleakly, *Many Firms Find Debt They Piled On in the 1980s Is a Cruel Taskmaster*, Wall St. J., Oct. 9, 1990, at A1, col. 6 ("financial screws are tightening on many heavily indebted companies"); *Mounting Losses Are Watershed Event for Era of Junk-Bonds*, Wall St. J., Sept. 18, 1989, at A1, col. 6 (even junk-bond guru Michael Milken urges firms to deleverage as junk-bond defaults rise).

10. *See* Loomis, *The Biggest Looniest Deal Ever*, FORTUNE, June 18, 1990, at 48.

11. *See* Potts, *Paying the Price in Retail Industry: High-Profile Chains for Sale May Return to Merchants*, Wash. Post, Oct. 8, 1989, at H1, col. 4.

12. *See* Andrews, *First Altman's, Now Garfinckel's*, N.Y. Times, June 28, 1990, at D1, col. 3.

13. *See* Stevenson, *Carter Hawley Hale, West Coast Retailer, Files for Bankruptcy*, N.Y Times, Feb. 12, 1991, at D1, col. 6.

14. *See* Kleinfield, *Stemming the Losses: Trying for a Leaner Macy's*, N.Y. Times, Mar. 18, 1990, § 3, at 5, col. 1.

15. *See* Pereira & Trachtenberg, *Ames Seeks Protection Under Chapter 11 After Retailer's Talks with Lenders Stall*, Wall St. J., Apr. 27, 1990, at A3, col. 2.

Stores,[16] Southland (Seven-11)[17] and Circle K[18] convenience stores; Supermarkets General;[19] Interco (producer of Converse tennis shoes and Lane and Broyhill furniture);[20] Continental,[21] Eastern,[22] TWA,[23] and Braniff[24] airlines; Heileman Brewing (the nation's third largest brewer)[25] and Vintner's International Company (Paul Masson and Taylor wines);[26] Unisys (the merged Sperry and Burroughs computer firms);[27] textile firms West Point-Pepperell[28] and J.P. Stevens;[29] Jim Walter Corp.,[30] National Gypsum,[31] and U.S. Gypsum;[32] Insilco (maker of Rolodex office

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16. *See* Putka, *Hills to Close 28 of 214 Stores, Take a Charge*, Wall St. J., Jan. 3, 1991, at C8, col. 3.

17. *See* Helliker, *Southland Files for Protection Under Chapter 11*, Wall St. J., Oct. 25, 1990, at A6, col. 4.

18. *See* Nazario, *Circle K Squares Off with Its Creditors*, Wall St. J., May 17, 1990, at A6, col. 1.

19. *See* Norris, *An Ailing Buyout Tries a Buyback*, N.Y. Times, Nov. 26, 1990, at D4, col. 1.

20. *See* Schwadel & Anders, *Backlash Against '80s Debt Binge Seen in Interco's Chapter 11 Filing Lawsuit*, Wall St. J., Jan. 28, 1991, at B5, col. 2.

21. *See* O'Brian, *Debt-Burdened Continental Air, Citing Rising Fuel Costs, Files Under Chapter 11*, Wall St. J., Dec. 4, 1990, at A3, col. 1.

22. *See* Salpukas, *Eastern Airlines Is Shutting Down and Plans To Liquidate Its Assets*, N.Y. Times, Jan. 19, 1991, at L1, col. 1.

23. *See* Salpukas, *Icahn on TWA Woe, "We're at Crossroads"*, N.Y. Times, Feb. 10, 1990, at A33, col. 4.

24. *See* Gellene, *Braniff Cancels All Flights, Lays Off Most Workers*, L.A. Times, Nov. 8, 1989, at D2, col. 1.

25. *See* Charlier, *Brewer Heileman, A Bond Unit, Files Under Chapter 11, Seeks a Quick Exit*, Wall St. J., Jan. 25, 1991, at A4, col. 5.

26. *See* Fisher, *A Troubled Winery Where Debt Is Aging*, N.Y. Times, May 12, 1990, at A31, col. 4.

27. *See* Carroll, *Unisys Faces Some Dire Industry Straits*, Wall St. J., Oct. 4, 1990, at A9, col. 1.

28. *See* Christie & Johnson, *West Point-Pepperell Winds Up in Limbo*, Wall St. J., Feb. 21, 1990, at A8, col. 1.

29. *See* Anders, *JPS Textile to Restructure Its Debt Load*, Wall St. J., Dec. 24, 1990, at A30, col. 4. For an analysis of the debilitating effect of deal mania on textiles generally, see Konrad, Greising & Peterson, *The Textile Industry Is Looking Threadbare*, BUS. WK., Sept. 16, 1991, at 114.

30. *See* Hilder & Smith, *Kohlberg Kravis Sells into Rough Waters with Hillsborough Unit Chapter 11 Filing*, Wall St. J., Dec. 29, 1989, at C1, col. 3.

31. *See* Blumenthal, *National Gypsum and Parent Seek Chapter 11 Status*, Wall St. J., Oct. 30, 1990, at A12, col. 2.

32. *See* Greising, *USG's Remodeling May Mean Gutting the House*, BUS. WK., Jan. 21,

supplies);[33] Fruehauf[34] and Leaseway[35] trucking operations; Revco Drug Stores;[36] Ingersoll[37] and Harcourt Brace[38] publishers; the LTV-Republic Steel consolidation;[39] First Executive Insurance Co.;[40] and the very kingpin of junk bonds and corporate deals during the 1980s, the Drexel Burnham Lambert[41] investment house.

Such financial erosion is hardly a felicitous index of a "lean and mean" corporate economy.

Second, no amount of apologetics can repeal the iron law of opportunity cost. A decade and nearly a trillion dollars spent on corporate deals,[42] is a decade and nearly a trillion dollars *not* directly spent on new plants, new products, new production technologies, and new research and development. The brute reality is that while corporate America was spending billions shuffling paper ownership shares on the floor of the New York Stock Exchange, its toughest foreign competitors were pouring billions directly into their industrial bases,[43] and thus enhancing their already daunting competitive advantage in world markets.

Dangerous Pursuits documents the fact that, by 1986, America was spending more on corporate deals ($204 billion) than it was on net new

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1991, at 54.

33. *See* Hayes, *Insilco Declares Bankruptcy*, N.Y. Times, Jan. 14, 1991, at D1, col. 3.

34. *See* White, *Highway Wreck: Fruehauf, Overloaded with Buy-Out Debt, Faces Dismemberment*, Wall St. J., Mar. 29, 1989, at A1, col. 6.

35. *See* Schiller, *Leaseway May Set a Standard for Ailing LBOs*, BUS. WK., Nov. 27, 1989, at 81.

36. *See* Stricharchuk, *Revco's Leveraged Buyout Comes Apart*, Wall St. J., June 14, 1988, at A1, col. 1.

37. *See* Reilly, *Deadline Squeeze: Ralph Ingersoll Finds Newspapers Are Fun, Junk Bonds Are Not*, Wall St. J., Mar. 26, 1990, at A1, col. 1.

38. *See* Wayne, *Can Harcourt Brace Survive Its Debt?*, N.Y. Times, Apr. 15, 1990, § 3, at 1, col. 2.

39. *See* Hicks, *A Steel Strategy Backfires*, N.Y. Times, July 18, 1986, at D1, col. 3. At the time of the merger in 1983, LTV boasted that its acquisition of Republic would "significantly improve the efficiency of our steel operations," would "create a stronger steel operation than either [firm could] accomplish as a stand-alone company," and would be "a landmark in the annals of America's basic industries as they strive to compete in the modern world marketplace." THE LTV CORPORATION, ANNUAL REPORT 1983, at 2 (1984).

40. *See* Stein, *Sunk By Junk*, BARRON'S, Apr. 1, 1991, at 8.

41. *See* Siconolfi, Power, Cohen & Guenther, *Wall Street Era Ends As Drexel Burnham Decides to Liquidate*, Wall St. J., Feb. 14, 1990, at A1, col. 6.

42. *See* Adams & Brock, *Merger Mania Makes Economy Its Victim; Wall St.—Not Main—Benefits from Buyouts*, L.A. Times, May 1, 1988, at D3, col. 1.

43. *See* Nickerson, *A Figure Clouds US-Japan Talks*, Boston Globe, June 26, 1990, § 1, at 2, col. 1 (Japan spent $549 billion to upgrade and modernize industries in 1989).

private investment ($81 billion) and R&D ($56 billion) *combined.*[44] In light of that fact, the less than impressive statistics of comparative U.S.-Japan economic performance recently compiled by the National Science Foundation and reproduced in Table 1, should hardly be surprising. Moreover, the fact that Japanese firms spent 150% more on factories, equipment, and research in 1990 than they did in 1985, while the comparable growth figure for U.S. firms was only 23%, further demonstrates the opportunity cost exacted by deal mania.[45] So too is the fact that Japanese firms are now out-investing U.S. companies by an estimated $250 billion per year, and at a rate of two-to-one on a per-capita basis (even though the U.S. economy is 40% larger than Japan's).[46]

Comparative Economic Performance
United States and Japan
1975-1986

	U.S.	Japan
Growth in manufacturing output per worker:	+26%	+68%
Growth in world export share of high-technology products:	-2.1%	+67%
Growth in company-funded R&D relative to GNP:	+30%	+73%
Growth in share of U.S. patents issued:	-17%	+111%

Table 1[47]

44. W. ADAMS & J. BROCK, *supra* note 1, at 123.

45. *See* Rapoport, *Japan's Capital Spending Spree*, FORTUNE, Apr. 9, 1990, at 91.

46. *See id.*; *see also* Sanger, *Japan Keeps Up the Big Spending To Maintain Its Industrial Might*, N.Y. Times, Apr. 11, 1990, at A1, col. 3.

47. Figures taken from NAT'L SCIENCE FOUND., SCIENCE AND TECHNOLOGY RESOURCES OF JAPAN: A COMPARISON WITH THE UNITED STATES 34, 56, 62-63 (1988).

One concrete example of the opportunity cost associated with the M&A game is the conglomerate acquisition fad of the 1960s and 1970s. Firms such as ITT, Gulf & Western, and General Mills made hundreds of acquisitions of operations in wildly unrelated fields. They brashly sailed forth under the banner of "synergy"—i.e., "two plus two equals five"—only to founder on the reefs of conventional arithmetic. To what avail? What have these brave new conglomerates done in recent years? They have deconglomerated, divesting scores of their previously-acquired operations![48] In other words, the conglomerate acquisitions made in the 1960s failed in the 1970s, and were unceremoniously unloaded in the 1980s, returning the acquisitors back to where they were twenty years earlier. Meanwhile, of course, their leading competitors elsewhere in the world have concentrated on forging ahead into the 1990s.[49]

Likewise, the major oil companies spent billions of dollars not only acquiring each other, but also purchasing copper mines, mail-order houses, semiconductor producers, satellite televisions operations, meatpackers, and suppliers of office equipment—billions in acquisitions that did not locate one new drop of oil reserves.[50]

Big Oil had to struggle to extricate itself from these disastrous forays into conglomerate expansionism. *Forbes* points out that, flush with cash in the 1970s,

> oil companies handled the money badly, overpaying for fashionable diversification and overdosing on overhead. Mobil and Exxon and Chevron, Standard Oil and Atlantic Richfield wasted much of the fruits of the now vanished prosperity in buying into businesses their managements knew nothing about. Intoxicated with profits, they became victims of hubris.[51]

They dissipated their stockholders' funds "in overpriced and badly conceived diversification."[52] By the 1980s, alas, ARCO had disposed of its ill-fated acquisition of Anaconda Minerals, absorbing a $785 million write-down.[53] Mobil Oil had finally found a buyer for its perennially money-losing albatross, the ill-fated Montgomery Ward retailing subsidiary.[54] Exxon had written off hundreds of millions of dollars of

48. *See generally* Toy, *Splitting Up*, BUS. WK., July 1, 1985, at 50 (discussing scaling down of conglomerates formed in the 1960s and 1970s).

49. *See* W. ADAMS & J. BROCK, *supra* note 1, at 96-99.

50. *Id.* at 20.

51. Mack, *It's Time to Take Risks*, FORBES, Oct. 6, 1986, at 126, 127.

52. *Id.*

53. *Oil Investment Continues*, MINING J., May 10, 1985, at 338.

54. Trachtenberg, *41st Annual Report on American Industry*, FORBES, Jan. 9, 1989, at

failed investments in Reliance Electric—dubbed by *Fortune* "Exxon's $600 Million Mistake"[55]—and in office equipment systems.[56] Standard Oil (Indiana) had spun off Cyprus Mines, a copper producer.[57] And Schlumberger had sold Fairchild Semiconductor, absorbing a $200 million write-off in this failed conglomerate acquisition.[58]

The law of opportunity cost is a stern taskmaster. Its consequences cannot be circumvented by cosmeticizing ill-advised escapades.

Third, no amount of quibbling or prestidigitation can gainsay the record number of mega-mergers consummated during the 1980s, their dollar value,[59] and their deleterious impact on concentration in such fields as oil, steel, airlines,[60] video entertainment (motion pictures, broadcast and cable television), food production and processing, and grocery and department store retailing.[61] That this increase in concentration not only appears to have been at variance with the intent of the Celler-Kefauver Act,[62] but that it has had predictably negative consequences is amply

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188 (discussing company's management-led leveraged buy-back).

55. Beman, *Exxon's $600-Million Mistake*, FORTUNE, Oct. 19, 1981, at 68, 68.

56. Powell, *Exxon: A Drive to Disaster in the Office*, BUS. WK., June 3, 1985, at 94.

57. Williams, *Big Oil Starts Thinking Smaller*, N.Y. Times, Mar. 17, 1985, § 3, at 1, col. 2.

58. *See* W. ADAMS & J. BROCK, *supra* note 1, at 98-99.

59. Between 1980 and 1988, the number of mergers and acquisitions rose from 1565 to 3487, the value of corporate deals skyrocketed from $33 billion to $227 billion, and the number of deals valued in excess of one billion dollars leapt from 3 to 42. *Id.* at 12.

60. *See id.* at 99-106.

61. *Id.* at 21-24.

62. The House Report recommending enactment of the Celler-Kefauver amendment to Section 7 clearly stated that

> [a]cquisitions of stock or assets have a cumulative effect, and control of the market sufficient to constitute a violation of the Sherman Act may be achieved not in a single acquisition but as the result of a series of acquisitions. The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize. . . . Thus, it would be unnecessary for the Government . . . to show that as a result of a merger the acquiring firm had already obtained such a degree of control that it possessed the power to destroy or exclude competitors or fix prices.

H.R. REP. NO. 1191, 81st Cong., 1st Sess. 8 (1949).

The Senate Report categorically declared that "the purpose of the proposed bill . . . is to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions" and that "a requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints." S. REP. NO. 1775, 81st Cong., 2d Sess. 3, 6 (1950).

documented, both generally,[63] as well as in airlines,[64] video entertainment,[65] food processing and grocery retailing,[66] steel,[67] petroleum,[68] and automobiles.[69] Also documented are the anticompetitive

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Refusing to engage in judicial legislation and adhering strictly to original legislative intent, the Supreme Court has found it

> apparent that a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was [amended Section 7's] provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure the [government] and the courts the power to brake this force at its outset and before it gathered momentum.

Brown Shoe Co. v. United States, 370 U.S. 294, 317-18 (1962).

The challenge of reconciling Reagan merger policy with original intent and judicial precedent we leave to our critics.

63. See the numerous studies in CONCENTRATION AND PRICE (L. Weiss ed. 1989).

64. *See, e.g.*, U.S. GENERAL ACCOUNTING OFFICE, AIRLINE COMPETITION: FARE AND SERVICE CHANGES AT ST. LOUIS SINCE THE TWA-OZARK MERGER (1988); U.S GENERAL ACCOUNTING OFFICE, AIRLINE COMPETITION: HIGHER FARES AND REDUCED COMPETITION AT CONCENTRATED AIRPORTS (1990); U.S. GENERAL ACCOUNTING OFFICE, AIRLINE COMPETITION: INDUSTRY OPERATING AND MARKETING PRACTICES LIMIT MARKET ENTRY (1990).

65. *See, e.g.*, *Cable TV Consumer Protection Act of 1989: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 2d Sess. (1990); *In re* Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd. 4962 (1990); Litman, *The Motion Picture Entertainment Industry*, in THE STRUCTURE OF AMERICAN INDUSTRY 183 (W. Adams ed. 1990). *See generally* Adams & Brock, *Vertical Integration, Monopoly Power, and Antitrust Policy: A Case Study of Video Entertainment*, 36 WAYNE L. REV. 51 (1989), and the extensive evidence and sources cited therein.

66. *See, e.g.*, *Mergers and Concentration: The Food Industries, Hearing Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 36-55, 60-67, 84-109 (1988) (testimony of Profs. Willard F. Mueller, Bruce W. Marion, and Ronald W. Cotterill); J. CONNOR, R. ROGERS, B. MARION & W. MUELLER, THE FOOD MANUFACTURING INDUSTRIES: STRUCTURE, STRATEGIES, PERFORMANCE, AND POLICIES (1985); R. COTTERILL, MERGERS AND CONCENTRATION IN FOOD RETAILING: IMPLICATIONS FOR PERFORMANCE AND MERGER POLICY (Food Marketing Policy Center, University of Connecticut, Research Report No. 2, Jan. 1989).

67. *See, e.g.*, Adams & Mueller, *The Steel Industry*, in THE STRUCTURE OF AMERICAN INDUSTRY, *supra* note 65, at 72.

68. *See, e.g.*, J. BLAIR, THE CONTROL OF OIL (1976).

69. *See, e.g.*, Adams & Brock, *The Automobile Industry*, in THE STRUCTURE OF AMERICAN INDUSTRY, *supra* note 65, at 101; Adams & Brock, *The Antitrust Vision and Its Revisionist Critics*, 35 N.Y.L. SCH. L. REV. 939 (1990).

consequences of "joint ventures," or quasi-mergers, in automobiles, oil, and airlines.[70]

Fourth, the parallel between the corporate deal mania of the 1980s and that of the 1920s is incontrovertible.[71] While we would be loath to argue—and, indeed, never did argue—that the merger movement of the 1920s was the *sole* cause of the Great Depression,[72] it is a well-documented fact that the explosion of debt fueled by the corporate deals of the 1920s significantly weakened the American economy and rendered it more vulnerable to the eventual economic downturn. Moreover, as we pointed out in *Dangerous Pursuits*, once the economic downturn started, the devastating effects of excessive leverage were exacerbated, as failures cascaded from one operating division to another within the holding company pyramids that had been thrown together in helter-skelter fashion. Financial failure in one division reverberated to consume other divisions, and this contributed to the quick collapse of the jerry-built holding company structure.[73]

According to the findings of a study published in 1933 for the Twentieth Century Fund, debt loads rose 172% in the industrial sector of the U.S. economy, 181% in the public utility sector, and 389% in the financial sector, over the period 1914-1929.[74] An important factor contributing to this escalation of corporate debt was a particularly virulent type of deal, the pyramiding of holding company structures, which enabled promoters to leverage their control over vast reaches of the economy. The

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70. *See* Adams & Brock, *Joint Ventures, Antitrust, and Transnational Cartelization*, 11 NW. J. INT'L L. & BUS. 433 (1991), and the evidence and sources cited therein.

71. Our critics conspicuously refrain from mentioning the other lesson of history discussed in our Santayana Curse chapter, namely the failed policies implemented during the 1950s and 1960s by West European nations encouraging corporate mergers and consolidations in order to create "national champions"—firms like British Steel, British Leyland, and CII-Bull, whose failures have been legion. In the light of their struggle to cast corporate consolidation as beneficial, this omission was wise. *See* Adams & Brock, *The Bigness Mystique and the Merger Policy Debate: An International Perspective*, 9 NW. J. INT'L L. & BUS. 1 (1988).

72. In *Dangerous Pursuits*, we stated that "while the Great Depression was the product of a variety of forces, it is indisputable that the deal-mania of the twenties was central among them." W. ADAMS & J. BROCK, *supra* note 1, at 138.

73. *See id.* at 138-39, and sources cited therein. It is notable that the same phenomenon is beginning to be replicated in the 1990s. In the case of Frank Lorenzo's highly-leveraged airline holding company, for example, the recent collapse of one division (Eastern Airlines) inflicted huge losses on another division (Continental Airlines), and played a major role in precipitating the collapse of the latter firm. *See* Bradsher, *Continental Loss Totals $2.25 Billion*, N.Y. Times, Mar. 22, 1991, at D1, col. 6.

74. THE INTERNAL DEBTS OF THE UNITED STATES 10-11 (E. Clark ed. 1933) (published for the Twentieth Century Fund).

Twentieth Century Fund's conclusion concerning the ultimate consequences of this earlier strain of corporate deal-mania merits quotation:

> The far-flung holding company systems had a mushroom growth during the decade before the stock exchange collapse in 1929. Their development had been lavishly lauded because of the proclaimed economies in management, which were promised through consolidation and coordination, through system planning, and through centralized financing. . . . The basic weakness in the financial structures was the overpayment for the properties and the excessive fixed charges which resulted from the combinations. The purchases were largely made under competitive bidding between holding company groups. The prices paid were not only high enough to induce the local owners of the properties to sell, but also to out-bid other competitive groups.
>
> Even under normal circumstances, the holding company systems would probably have found themselves in difficulty to support the extravagant financial structures which were erected. . . . But with the financial collapse of 1929, the situation was rapidly changed.[75]

The similarities to today, we trust, require no elaboration.[76]

Finally, there is the question of public policy. Our critics contend that corporate deal merchants would be unable to pass muster under the merger "guidelines" proposed in *Dangerous Pursuits*. They bemoan the fact that putative acquisitors would be unable to make an affirmative showing that their mega-deals are likely to promote production efficiency, innovation

75. *Id.* at 157. In addition to the extensive sources cited in W. ADAMS & J. BROCK, *supra* note 1, at 132-39, see J. BONBRIGHT & G. MEANS, THE HOLDING COMPANY: ITS PUBLIC SIGNIFICANCE AND ITS REGULATION (1932).

76. Professor F.M. Scherer provides the following figures, comparing corporate debt loads in 1988 with those of 1929:

Corporate Debt Relative to Total U.S. Corporate Capital

	1929	1988
Manufacturing Sector:	15%	39%
Mining Sector:	15%	49%
Retailing Sector:	23%	50%
Public Utilities:	42%	N/A

Corporate Time Horizons: Hearings Before the Joint Economic Comm., 101st Cong., 1st Sess. 49 (1990).

Scherer points out that "the degree of leverage built into manufacturing, mining, and retailing corporation capital structures [in 1988] was much higher than it was in 1929. It approaches the leveraging of 1929's public utilities sector, which was a key locus of subsequent financial failure!" *Id.* (statement of F.M. Scherer).

efficiency, and international competitiveness—i.e., the ostensible purpose for consummating such transactions. If this be so, it is a damning indictment of the M&A game of the 1980s. If this be so, not even a modern Hercules can succeed in cleaning the Augean stables which are the legacy of a lost decade.