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SOME IMPLICATIONS OF THE SUPREME COURT'S ANTIMERGER DECISIONS*

by

*Charles F. Phillips, Jr.***

IN 1950 Congress enacted the Celler-Kefauver Amendment to section 7 of the Clayton Act[1] and thereby initiated a new era in antitrust policy. Enforced by both the Antitrust Division of the Justice Department and by the Federal Trade Commission,[2] section 7 provides in relevant part:

> That 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.

Under the 1950 amendment, the federal enforcement agencies have issued 203 complaints[3] of which 154 have been terminated. Only eleven antimerger decisions, however, have been handed down by the Supreme Court since 1950—ten under section 7[4] and one under section 1 of the Sherman Act.[5] These eleven decisions indicate the direction that antimerger policy is taking. It is the purpose of this Article to discuss these decisions and to draw from them implications for the future of antimerger policy.

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[1] 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958). On the background of the amendment see MARTIN, MERGERS AND THE CLAYTON ACT 221-310 (1959); Handler & Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629, 652-75 (1961); Phillips & Hall, *Economic and Legal Aspects of Merger Litigation 1951-1962*, 10 HOUSTON BUS. REV. 5, 5-9 (1963); Note, 52 COLUM. L. REV. 766 (1952).

[2] See S. REP. No. 1175, 81st Cong., 2d Sess. 3 (1950).

[3] 1951-1967 TRADE REG. REP. (March 31, 1967).

[4] Federal Trade Comm'n v. Procter & Gamble Co., 87 Sup. Ct. 1224 (1967), *reversing* 358 F.2d 74 (6th Cir. 1966); United States v. Pabst Brewing Co., 384 U.S. 546 (1966); United States v. Von's Grocery Co., 384 U.S. 270 (1966); Federal Trade Comm'n v. Consolidated Foods Corp., 380 U.S. 592 (1965); United States v. Continental Can Co., 378 U.S. 441 (1964); United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964); United States v. Aluminum Co. of America, 377 U.S. 271 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

Three cases are currently on appeal before the Supreme Court: United States v. Continental Oil Co., 364 F.2d 516 (10th Cir. 1966), *affirming* 237 F. Supp. 294 (W.D. Okla. 1964), *appeal docketed*, 35 U.S.L. WEEK 3072 (U.S. Aug. 16, 1966) (No. 450); United States v. Marshall & Ilsley Bank Stock Corp., 255 F. Supp. 273 (E.D. Wis. 1966), *appeal docketed*, 35 U.S.L. WEEK 3271 (U.S. Jan. 30, 1967) (No. 1017); United States v. Penn-Olin Chem. Co., 386 U.S. 906 (1967).

[5] United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964). The case was subsequently dismissed under the Bank Merger Act Amendment of 1966, 80 Stat. 7 (1966). Section 1 of the Sherman Act, 15 U.S.C. § 1 (1958) provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

I. THE SUPREME COURT'S DECISIONS

Several facts, at the outset, are worth noting about the Supreme Court's antimerger decisions. First, the enforcement agencies have a perfect record before the Court—ten decisions have held that the challenged merger violated the antitrust laws,[6] while the eleventh decision involved a remand of a lower court's dismissal.[7] Second, in ten of the eleven decisions[8] the Supreme Court reversed lower court decisions. Third, the Court itself has been divided, as evidenced by the fact that only four of the eleven decisions were unanimous,[9] and that even in these four decisions nine concurring opinions were written.[10]

As background, the eleven decisions of the Supreme Court are briefly summarized below. No attempt has been made to analyze each case in detail. Rather, the emphasis is upon the basis for the Court's decision in each case.

Brown Shoe Co. v. United States.[11] In 1956 the Brown Shoe Company,

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[6] Federal Trade Comm'n v. Procter & Gamble Co., 87 Sup. Ct. 1224 (1967); United States v. Pabst Brewing Co., 384 U.S. 546 (1966); United States v. Von's Grocery Co., 384 U.S. 270 (1966); Federal Trade Comm'n v. Consolidated Foods Corp., 380 U.S. 592 (1965); United States v. Continental Can Co., 378 U.S. 441 (1964); United States v. Aluminum Co. of America, 377 U.S. 271 (1964); United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

In addition to its eleven decisions noted above, the Court has taken the following action in ten other cases: United States v. Jos. Schlitz Brewing Co., 253 F. Supp. 129 (N.D. Cal.), *aff'd per curiam*, 385 U.S. 37 (1966); United States v. National Steel Corp., 383 U.S. 905 (1966) (referred to a lower court for consideration of a settlement agreement, Feb. 27, 1967); United States v. Aluminum Co. of America, 247 F. Supp. 308 (E.D. Mo. 1964), *aff'd per curiam*, 382 U.S. 12 (1965); United States v. Kennecott Copper Corp., 231 F. Supp. 95 (S.D.N.Y. 1964), *aff'd per curiam*, 381 U.S. 414 (1965); United States v. FMC Corp., 84 Sup. Ct. 4, *affirming* 321 F.2d 534 (1963) (denial of preliminary injunction); United States v. Koppers Co., 202 F. Supp. 437 (W.D. Pa. 1962), *appeal dismissed*, 371 U.S. 856 (1962); Crown Zellerbach Corp. v. Federal Trade Comm'n, 296 F.2d 800 (9th Cir. 1961), *cert. denied*, 370 U.S. 937 (1962); United States v. Diebold, Inc., 197 F. Supp. 902 (S.D. Ohio 1961), *rev'd and remanded per curiam*, 369 U.S. 654 (1962); United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd mem.*, 365 U.S. 567 (1961), *rehearing denied*, 365 U.S. 809 (1961); United States v. Maryland & Virginia Milk Producers Ass'n, 362 U.S. 458 (1960), *affirming* 168 F. Supp. 880 (D.D.C. 1959).

The Supreme Court also has ordered new hearings on the proposed consent decree in Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967), and has held that bank mergers, under the Bank Merger Act of 1966, are subject to antitrust prosecution. United States v. First City Nat'l Bank, 87 Sup. Ct. 1088 (1967); United States v. Provident Nat'l Bank (decided with United States v. First City Nat'l Bank *supra*).

[7] United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964).

[8] Federal Trade Comm'n v. Procter & Gamble Co., 87 Sup. Ct. 1224 (1967); United States v. Pabst Brewing Co., 384 U.S. 546 (1966); United States v. Von's Grocery Co., 384 U.S. 270 (1966); Federal Trade Comm'n v. Consolidated Foods Corp., 380 U.S. 592 (1965); United States v. Continental Can Co., 378 U.S. 441 (1964); United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964); United States v. Aluminum Co. of America, 377 U.S. 271 (1964); United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

[9] Federal Trade Comm'n v. Procter & Gamble Co., 87 Sup. Ct. 1224 (1967); United States v. Pabst Brewing Co., 384 U.S. 546 (1966); Federal Trade Comm'n v. Consolidated Foods Corp., 380 U.S. 592 (1965); Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[10] Federal Trade Comm'n v. Procter & Gamble Co., *supra* note 9 (Harlan, J., concurring); United States v. Pabst Brewing Co., *supra* note 9 (Douglas, Fortas, Harlan, White, JJ., concurring); Federal Trade Comm'n v. Consolidated Foods Corp., *supra* note 9 (Harlan and Stewart, JJ., concurring); Brown Shoe Co. v. United States, *supra* note 9 (Clark and Harlan, JJ., concurring).

[11] 370 U.S. 294 (1962). See Adams & Dirlam, *Brown Shoe: In Step With Antitrust*, 1963 WASH. U.L.Q. 158; Barnes, *The Primacy of Competition and the Brown Shoe Decision*, 51 GEO. L.J. 706 (1963); *Implications of Brown Shoe for Merger Law and Enforcement*, 8 ANTITRUST BULL. 225 (1963); Krasnow, *Implications of Brown Shoe Co. v. United States on the Law of Mergers*, 23 FED. B.J. 225 (1963); Martin, *The Brown Shoe Case and the New Antimerger Policy*,

the fourth largest shoe manufacturer in the country (producing about four per cent of the total), acquired the G. R. Kinney Company, the largest family-style shoe store chain with over 400 stores in more than 270 cities (accounting for nearly 1.2 per cent of national retail shoe sales). Brown also owned a number of retail outlets, while Kinney was the country's twelfth largest shoe manufacturer. The merger, then, was both horizontal and vertical.[12]

After reviewing the legislative history of the 1950 amendment, Chief Justice Warren concluded: "Throughout the recorded discussion may be found examples of Congress' fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose."[13] He emphasized, however, that it was the protection of competition, not specific competitors, that Congress sought and that each merger had to be viewed in the context of its particular industry.[14] And, with respect to the latter point, he noted that while market share is the "primary index" of market power, "only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anti-competitive effect of the merger."[15]

To examine a particular market structure, the Court shapes a "relevant market" composed of a product market and a geographic area of the country. In *Brown Shoe* the Court found that the product markets were the same for both the horizontal and vertical aspects: men's, women's and children's shoes.[16] These lines of commerce "are recognized by the public; each line is manufactured in separate plants; each has characteristics peculiar to itself rendering it generally non-competitive with the other, and each is, of course, directed toward a distinct class of customers."[17] It found that the geographic market for the vertical aspects of the case was the nation as a whole, while the geographic markets for the horizontal aspects were cities with a population of 10,000 or more and their immediate surrounding areas in which both Brown and Kinney sold shoes. The

53 AM. ECON. REV. 340 (1963); Rahl, *Current Antitrust Developments in the Merger Field*, 8 ANTITRUST BULL. 493 (1963); Rogers & Litvack, *Brown Shoe: The Guidance of a Footnote*, 1963 WASH. U.L.Q. 192. See also Note, 27 ALBANY L. REV. 54 (1963); Note, 31 FORDHAM L. REV. 161 (1962); Note, 37 ST. JOHN'S L. REV. 147 (1962); Note, 17 SW. L.J. 286 (1963); Note, 14 SYRACUSE L. REV. 97 (1962); Note, 37 TUL. L. REV. 109 (1962); Note, 10 VILL. L. REV. 734 (1965).

[12] A vertical merger is an economic arrangement between companies in a supplier-customer relationship. Absorption of a company in the same general product line is termed a horizontal merger.

[13] Brown Shoe Co. v. United States, 370 U.S. 294, 316 (1962).

[14] *Id.* at 320.

[15] *Id.* at 322, n.38:

> [W]hether the consolidation was to take place in an industry that was fragmented rather than concentrated, that had seen a recent trend toward domination by a few leaders or had remained fairly consistent in its distribution of market shares among the participating companies, that had experienced easy access to markets by suppliers and easy access to suppliers by buyers or had witnessed foreclosure of business, that had witnessed the ready entry of new competition or the erection of barriers to prospective entrants, all were aspects, varying in importance with the merger under consideration, which would properly be taken into account.

[16] Relevant markets are the areas of effective competition and are determined by reference to product and geographic markets (lines of commerce and sections of the country).

[17] 370 U.S. 294, at 326.

latter markets were considered large enough to include both downtown shops and suburban shopping centers, which provide keen competition with one another, and yet the markets were considered small enough to exclude stores further away which provide little competition.[18]

In reaching its decision concerning the probable adverse competitive impact of the merger, the Court stressed the following factors: first, Brown's past policy of forcing its own brand of shoes upon its retail outlets—a policy that would foreclose competitors from a substantial share of an otherwise fragmented market;[19] second, the trend toward vertical integration and concentration through mergers in the shoe industry;[20] and, third, the fact that vertical integration, which may result in economies of scale, may at the same time make it more difficult for independents to compete.[21] Further, in a significant footnote, the Court stressed its preference for growth by internal expansion rather than by merger:

> A company's history of expansion through mergers presents a different economic picture than a history of expansion through unilateral growth. Internal expansion is more likely to be the result of increased demand for the company's products and is more likely to provide increased investment in plants, more jobs and greater output. Conversely, expansion through merger is more likely to reduce available consumer choice while providing no increase in industry capacity, job or output. It was for these reasons, among others, Congress expressed its disapproval of successive acquisitions.[22]

United States v. Philadelphia Nat'l Bank.[23] In 1961 the Department of Justice filed suit challenging the proposed merger of the Philadelphia National Bank and the Girard Trust Corn Exchange Bank under both section 1 of the Sherman Act and section 7 of the Clayton Act. Two questions were at issue: Were bank mergers subject to the provisions of the Clayton Act? Did the proposed merger violate the antitrust laws? The district court answered the former question in the negative, but then went on to argue that even if bank mergers were subject to section 7, the merger would not violate that section.[24] The Supreme Court reversed both findings.

With respect to the probable effect of the merger on competition, the Court held that the relevant product market was "commercial banking,"[25]

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[18] *Id.* at 294.

[19] *Id.* at 330, 331. The Court noted, however, that in vertical integration cases, market shares "will seldom be determinative" and, unless either very large or very small, concentration "cannot itself be decisive." *Id.* at 328, 329.

[20] *Id.* at 332.

[21] *Id.* at 344.

[22] *Id.* at 345.

[23] 374 U.S. 321 (1963). Ellis, *Antitrust, Bank Mergers and the P.M.B. Decision*, 81 BANKING L.J. 303 (1964). See also series of articles from NAT'L BANKING REV., reprinted in STUDIES IN BANKING COMPETITION AND THE BANKING STRUCTURES 3-96 (1966); Note, 47 MARQ. L. REV. 289 (1963); Note, 62 MICH. L. REV. 990 (1964); Note, 25 U. PITT. L. REV. 563 (1964).

[24] The district court further reasoned that if the merger would not violate the Clayton Act, it could not violate the stricter Sherman Act. United States v. Philadelphia Nat'l Bank, 201 F. Supp. 348 (E.D. Pa. 1962), *rev'd*, 374 U.S. 321 (1962).

[25] [T]he cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term 'commercial banking' . . . composes a distinct line of commerce. Some commercial banking products or services are so distinctive that they are entirely free of effective competition from products

while the relevant geographic market was the four-county Philadelphia metropolitan area in which the two banks were permitted by state law to operate branches, and from which the major portion of their business originated.[26] Within this market, Philadelphia National Bank and Girard were respectively the second and third largest of forty-two commercial banks. The merger, if consummated, would have made the resulting bank the largest in the area with at least thirty per cent of the banking business and would have increased the market share of the two largest banks from forty-four to fifty-nine percent. The Court noted that the existing size of both Philadelphia National Bank and Girard was in part the result of mergers, that there was a definite trend toward concentration in commercial banking in the Philadelphia area, and that entry into the banking industry "is far from easy."[27] But the crux of the decision concerned the market share percentages. After stating that Congress' motivation for enacting the 1950 amendment was "a rising tide of economic concentration," the Court said:

> This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[28]

United States v. First Nat'l Bank & Trust Co.[29] A 1961 merger of two Lexington, Kentucky, banks was challenged by the Department of Justice under sections 1 and 2 of the Sherman Act. In 1964, the Supreme Court

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> or services of other financial institutions; the checking account is in this category. Others enjoy such cost advantages as to be insulated within a broad range from substitutes furnished by other institutions. For example, commercial banks compete with small-loan companies in the personal-loan market; but the small-loan companies' rates are invariably much higher than the banks', in part, it seems, because the companies' working capital consists in substantial part of bank loans. Finally, there are banking facilities which, although in terms of cost and price they are freely competitive with the facilities provided by other financial institutions, nevertheless enjoy a settled consumer preference, insulating them, to a marked degree, from competition; this seems to be the case with savings deposits. In sum, it is clear that commercial banking is a market 'sufficiently inclusive to be meaningful in terms of trade realities.'

United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 355-57 (1963). (Citations omitted.)

[26] *Id.* at 359-60. "The factor of inconvenience localizes banking competition as effectively as high transportation costs in other industries." *Ibid.* At the same time, the Court recognized that this market was not delineated with perfect accuracy. Large borrowers and depositors, for instance, are not confined to their local communities in carrying out banking business. "But that in banking the relevant geographical market is a function of each separate customer's economic scale means simply that a workable compromise must be found." *Id.* at 361.

[27] *Id.* at 367.

[28] *Id.* at 364-65. The Court also rejected the three affirmative justifications advanced by the defendants. The fact that the merger would permit the two banks to follow their customers to the suburbs and retain their business had no merit in view of the available alternative to the merger route—the opening of new branches. The fact that the merger would enable the resulting bank to offer very large loans, thereby competing more effectively with the New York banks, could not justify the merger. And the fact that the proposed merger might have social and economic benefits to the community served (such as stimulating the area's economic development) could not save the merger.

[29] 376 U.S. 665 (1964). See Note, *Merger Litigation Under the Sherman Act—Choice or Echo,* 18 Sw. L.J. 712 (1964).

held that the merger violated section 1, reversing a lower court decision.[30] The Court found that the merger resulted in one bank's controlling over fifty per cent of the assets and deposits, and over ninety per cent of the trust business in the relevant market. (The product market was "commercial banking"; the geographic market was Fayette County.) While no "predatory" purpose in the merger was found, the Court concluded that "significant competition" would be eliminated. In the words of Justice Douglas:

> There is testimony in the record from three of the four remaining banks that the consolidation will seriously affect their ability to compete effectively over the years; that the 'image' of 'bigness' is a powerful attraction to customers, an advantage that increases progressively with disparity in size; and that the multiplicity of extra services in the trust field which the new company could offer tends to foreclose competition there.[31]

In reaching its decision, the Court referred to a series of railroad cases decided in the early 1900's.[32] These cases established the proposition that if merging companies are major competitors in a relevant market, the elimination of significant competition between them, by merger, itself constitutes a violation of section 1. Here, the two banks in question had a very large share of the relevant market.[33] The Court also distinguished the present case from its 1948 *Columbia Steel* decision,[34] in which it relaxed the stringent standards of the railroad cases, by holding that the latter decision should be confined to its specific facts.[35]

United States v. El Paso Natural Gas Co.[36] In 1959 El Paso Natural Company, at that time the sole out-of-state supplier of natural gas in California, acquired Pacific Northwest Pipeline Corp., a distributor of natural gas for resale in Washington, Oregon, Idaho, Utah, and Colorado. The district court, in dismissing the section 7 suit brought by the Department of Justice, held that since the two companies were not in competition prior to the merger, there was no state or area or section of the country in which the stock acquisition and merger could have had a reasonable probability of substantially lessening competition or of creating a monopoly in the sale or transportation of natural gas for distribution or use.[37]

The Supreme Court, in reversing the lower court, noted that when the Federal Power Commission grants authorization to a company to construct facilities to serve a particular market, it withdraws that market from competition. However, rivalry continues to exist due to expanding needs for additional gas.[38] At the time of the merger, Pacific Northwest,

[30] United States v. First Nat'l Bank & Trust Co., 208 F. Supp. 457 (E.D. Ky. 1962), *rev'd*, 376 U.S. 665 (1964).

[31] United States v. First Nat'l Bank & Trust Co., 376 U.S. 665, 669 (1964).

[32] United States v. Southern Pac., 359 U.S. 214 (1922); United States v. Reading Co., 253 U.S. 26 (1920); United States v. Union Pac. Ry., 226 U.S. 61 (1912); Northern Sec. Co. v. United States, 193 U.S. 197 (1904).

[33] United States v. First Nat'l Bank & Trust Co., 376 U.S. 665, 672 (1964).

[34] United States v. Columbia Steel Co., 334 U.S. 495 (1948).

[35] United States v. First Nat'l Bank & Trust Co., 376 U.S. 665, 672 (1964).

[36] United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964).

[37] *Ibid.*

[38] *Id.* at 660.

although smaller and newer than El Paso Natural Gas, was the only other important interstate pipeline company west of the Rocky Mountains. It was, moreover, trying to break into the California market. Although Pacific's success could not be predicted, Justice Douglas noted that "unsuccessful bidders are no less competitors than the successful ones."[39]

United States v. Aluminum Co. of America.[40] The acquisition of an aluminum and copper conductor (wire and cable) producer, Rome Cable, by an integrated aluminum producer, Alcoa, was challenged under section 7 of the Clayton Act by the Department of Justice in 1960. Since Rome Cable produced both aluminum and copper conductor (but primarily copper), while Alcoa produced only aluminum conductor, the heart of the case involved the definition of the relevant product market.

The Supreme Court found that the relevant product market was aluminum conductor (bare and insulated).[41] In 1958 Alcoa had 27.8 per cent and Rome Cable 1.3 per cent of this market.[42] The latter's relatively small market share was not decisive, as the Court stressed its concern about the oligopolistic[43] nature of the aluminum industry with the greater likelihood that parallel policies of mutual advantage, not competition, would emerge. The Court concluded that such a tendency might be thwarted by the presence of small but significant competitors.[44]

Rome Cable, held the Court, was just such a small but significant competitor. It ranked ninth among all manufacturers of aluminum conductor and fourth among independents. And, in an industry where at least a dozen companies account for less than one per cent of production, the removal of a company with 1.3 per cent of the market would eliminate a significant competitor. The Court found that Rome Cable was an "aggressive competitor" and a "pioneer" in aluminum insulation.[45] The effectiveness of its marketing organization was attested to by the fact that, after the acquisition, Alcoa made Rome Cable the distributor of its entire conductor line. Concluded Justice Douglas: "Preservation of Rome, rather

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[39] *Id.* at 661-62. See also Abramson, *Private Competition and Public Regulation*, 1 NAT'L BANKING REV. 101-05 (1963); Hale & Hale, *Competition or Control VI: Application of Antitrust Laws to Regulated Industries*, 111 U. PA. L. REV. 46 (1964); Stokes, *Few Irreverent Comments About Antitrust, Agency Regulation, and Primary Jurisdiction*, 33 GEO. WASH. L. REV. 529 (1964); Note, *Regulated Industries and the Antitrust Laws: Substantive and Procedural Coordination*, 58 COLUM. L. REV. 673 (1958).

[40] 377 U.S. 271 (1964).

[41] Both types [aluminum and copper] are used for the purpose of conducting electricity and are sold to the same customers, electric utilities. While the copper conductor does compete with aluminum conductor, each has developed distinctive end uses—aluminum as an overhead conductor and copper for underground and indoor wiring, application in which aluminum's brittleness and larger size render it impractical. And . . . the price differential further sets them apart.

Id. at 277. The Court also found that insulated aluminum conductor and bare aluminum conductor were relevant submarkets.

[42] With respect to the submarkets, Alcoa's share of insulated aluminum conductor was 11.6 per cent and Rome Cable's share was 4.7 per cent in 1958; Alcoa's share of bare aluminum conductor was 32.5 per cent and Rome Cable's share was 0.3 per cent in 1958. *Id.* at 273-74.

[43] LEFTWICH, THE PRICE SYSTEM AND RESOURCE ALLOCATION 233 (rev. ed. 1961). "[Oligopolistic competition is found in] market situations in which there are few enough sellers of a particular product for the activities of one to be of importance to the others."

[44] 377 U.S. at 280.

[45] *Id.* at 281.

than its absorption by one of the giants, will keep it 'as an important competitive factor,' . . . Rome seems to us the prototype of the small independent that Congress aimed to preserve by § 7."[46]

United States v. Continental Can Co.[47] In 1956 the nation's second largest producer of metal containers, Continental Can Company, acquired the country's third largest producer of glass containers, Hazel-Atlas Glass Company. Seven years later, a lower court ruled that the acquisition did not violate section 7, holding that since there was no evidence of active competition between metal and glass containers or between specific lines of either company, there was no adverse effect upon competition. In short, the acquisition was conglomerate.[48]

The Supreme Court's reversal rested almost entirely upon the determination of the relevant product market. The Court noted that "it must recognize meaningful competition where it is found" and that section 7 protects both inter-industry and intra-industry competition.[49] It then concluded that "the inter-industry competition between glass and metal containers is sufficient to warrant treating as a relevant product market the combined glass and metal container industries and all end uses for which they compete."[50]

In judging the competitive impact of the merger, the Court found that in 1958 Continental Can produced thirty-three per cent of all metal containers sold in the country, while Hazel-Atlas accounted for 9.6 per cent of the glass containers shipped. The combined glass-and-metal container market was highly concentrated, with six firms accounting for 70.1 per cent of the business. The merger increased Continental Can's share of the combined market from 21.9 per cent to twenty-five per cent and reduced the number of significant competitors who might threaten its position from five to four. "The resulting percentage of the combined firms approaches that held presumptively bad in *United States v. Philadelphia National Bank*, . . . and is almost the same as that involved in *United States v. Aluminum Co. of America*, . . . The incremental addition to the acquiring firm's share is considerably larger than in *Aluminum Co.*"[51]

The Court refused to accept Continental Can's argument that, whatever the amount of inter-industry competition generally, the types of containers produced by the two companies were for the most part not

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[46] *Ibid.*

[47] 378 U.S. 441 (1964).

[48] United States v. Continental Can Co., 217 F. Supp. 761 (S.D.N.Y. 1963), *rev'd*, 378 U.S. 441, 449 (1964). Conglomerate mergers can best be defined as all mergers neither horizontal nor vertical. See note 12 *supra*. See also note 82 *infra*.

[49] 378 U.S. at 449.

[50] *Id.* at 457.

> There may be some end uses for which glass and metal do not and could not compete, but complete inter-industry competitive overlap need not be shown. We would not be true to the purpose of the Clayton Act's line of commerce concept as a framework within which to measure the effect of mergers on competition were we to hold that the existence of noncompetitive segments within a proposed market area precludes its being treated as a line of commerce.

[51] *Id.* at 461.

in competition. The Court noted that (a) since there was significant inter-industry competition between some of each company's products prior to the merger, the acquisition foreclosed actual competition; (b) since Continental Can had engaged in "vigorous and imaginative promotional activities" to overcome consumer preference for glass in other end uses, the merger foreclosed potential competition; and (c) the merger might trigger "other mergers by companies seeking the same competitive advantages sought by Continental in this case."[52]

United States v. Penn-Olin Chem. Co.[53] Penn-Olin Chemical, a joint venture of Pennsalt Chemicals Corp. and Olin Mathieson Corp., was created in 1960 to operate a plant for the production and sale of sodium chlorate in the southeastern part of the United States. Prior to the formation of Penn-Olin, Olin Mathieson had never produced sodium chlorate for sale in any market, while Pennsalt had manufactured the product in its west coast plant but had never been a substantial supplier to the southeastern market. In 1961 the Department of Justice brought a suit seeking to dissolve the joint venture as violative of both section 7 of the Clayton Act and section 1 of the Sherman Act.

A lower court held that although Pennsalt and Olin Mathieson had for many years considered going into the southeastern market individually, each had concluded that it could not enter the market profitably alone. The court thus found that since there was no evidence that *both* companies would have gone into the market, there was no probability of a substantial lessening of competition.[54] Moreover, noted the court, the joint venture had not prevented entry: after the formation of Penn-Olin, Pittsburgh Plate Glass had announced that it would also build a plant in the southeast.

The Supreme Court, in vacating and remanding the decision, held that the lower court should have made a finding as to the reasonable probability that, if either of the companies had built a plant independently, the other would have remained "at the edge of the market, continually threatening to enter." Continued the Court: "Just as a merger eliminates actual competition, this joint venture may well foreclose any *prospect* of competition between Olin and Pennsalt in the relevant sodium chlorate market. The difference, of course, is that the merger's foreclosure is present while the joint venture's is prospective."[55]

Referring to its holding in *El Paso,* that potential competition is as relevant a consideration as actual competition, the Court noted: "The existence of an aggressive, well-equipped and well-financed corporation

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[52] *Id.* at 461-66.

[53] 378 U.S. 158 (1964). See Backman, *Joint Ventures and the Antitrust Laws,* 40 N.Y.U.L. REV. 651 (1965); Berghoff, *Antitrust Aspects of Joint Ventures,* 9 ANTITRUST BULL. 303 (1960); Dixon, *Joint Ventures: What Is Their Impact on Competition?,* 7 ANTITRUST BULL. 397 (1962); Tractenberg, *Joint Ventures on the Domestic Front: A Study in Uncertainty,* 8 ANTITRUST BULL. 797 (1963). See also Note, 37 N.Y.U.L. REV. 712 (1962); Note, 14 STAN. L. REV. 777 (1962); Note, 39 U. DET. L.J. 223 (1961); Note, 9 VILL. L. REV. 94 (1963).

[54] United States v. Penn-Olin Chem. Co., 217 F. Supp. 110 (D. Del. 1963), *vacated and remanded,* 378 U.S. 158 (1964). Since the joint venture did not violate the Clayton Act, the court held that it could not violate the more stringent standard imposed by the Sherman Act.

[55] 378 U.S. at 173-74. (Emphasis added.)

engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated."[56] The lower court should have made a finding, therefore, as to the probability that one of the companies would have entered the market while the other would have remained a significant *potential* competitor.[57]

Federal Trade Comm'n v. Consolidated Foods Corp.[58] Consolidated Foods, a large food processor, wholesaler, and retailer, purchased Gentry, a producer of dehydrated onions and garlic, in 1951. Eleven years later, the FTC ruled that the merger violated section 7 since it gave Consolidated Foods the "power to extort or simply attract reciprocal purchases from suppliers" and, thereby, "to foreclose competition from a substantial share of the market for dehydrated onion and garlic."[59] The FTC's decision was reversed by the court of appeals in 1964, largely on the grounds that ten years of post-acquisition experience served to show that Gentry had not appreciably expanded its volume of sales despite the buying power of Consolidated Foods behind it.[60]

The Supreme Court, in reversing the lower court, held that reciprocity "results in 'an irrelevant and alien factor' . . . intruding into the choice among competing products, creating at the least 'a priority on the business at equal prices.' . . . Reciprocity in trading as a result of an acquisition violates § 7, if the probability of a lessening of competition is shown."[61]

The Court found that the FTC's ruling was supported by evidence that Consolidated Foods tried repeatedly to exercise reciprocity with some success. Gentry, despite offering an inferior product and operating in a rapidly expanding market, was able to increase its share of the onion market by seven per cent and to hold its losses in the garlic market to twelve per cent.[62] It noted that since 1950 the relevant markets had been highly concentrated, with two firms accounting for nearly ninety per

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[56] *Id.* at 174.

[57] *Ibid.* The district court, on remand, again dismissed the suit, finding that there was no reasonable probability of either firm's independent entry. 246 F. Supp. 917 (D. Del. 1965). The Government appealed for the second time and jurisdiction was noted on February 13, 1967. 386 U.S. 906 (1967).

[58] 380 U.S. 594 (1965). See Amer, *Realistic Reciprocity*, 40 HARV. BUS. REV. 116 (1962); Asper, *Reciprocity, Purchasing Power and Competition*, 48 MINN. L. REV. 523 (1964); Dean, *Economic Aspects of Reciprocity, Competition and Mergers*, 8 ANTITRUST BULL. 843 (1963); Donnem, *The Conglomerate Merger and Reciprocity*, 8 ANTITRUST BULL. 283 (1963); Goldstein, *Reciprocity—Antitrust Violation by Natural Reaction*, 32 GEO. WASH. L. REV. 832 (1964); Handler, *Emerging Antitrust Issues: Reciprocity, Diversification and Joint Ventures*, 49 VA. L. REV. 433, 433-40 (1963); Handler, *Recent Antitrust Developments—1965*, 40 N.Y.U.L. REV. 823, 837-44 (1965); Harvith, *Reciprocity and the Federal Antitrust Laws*, 40 WASH. L. REV. 133 (1965); Krash, *The Legality of Reciprocity Under Section 7 of the Clayton Act*, 9 ANTITRUST BULL. 93 (1964); Marsha, *The Conglomerate Merger and Reciprocity—Condemned by Conjecture?*, 9 ANTITRUST BULL. 201 (1964); Comment, *Reciprocal Dealing and the Antitrust Laws*, 77 HARV. L. REV. 873 (1964). See also Note, 39 NOTRE DAME LAWYER 185 (1964); Note, 20 SW. L.J. 192 (1966); Note, 49 VA. L. REV. 852 (1963).

[59] *In re* Consolidated Foods Corp., 54 F.T.C. 1900 (1958).

[60] Consolidated Foods Corp. v. Federal Trade Comm'n, 329 F.2d 623 (7th Cir. 1964), *rev'd*, 380 U.S. 592 (1965).

[61] Federal Trade Comm'n v. Consolidated Foods Corp., 380 U.S. 592 (1965).

[62] Significantly, it was the same post-acquisition date which led the court of appeals to reverse the FTC's decision.

cent of both product lines. Further, by strengthening the market power of the two majors, future entry by others was discouraged.

United States v. Von's Grocery Co.[63] In 1960 Von's Grocery, the third largest Los Angeles grocery chain, acquired Shopping Bag Food Stores, the sixth largest. The Supreme Court ruled that the merger violated section 7 in 1966.

The Court found that both companies were highly successful, expanding, and aggressive chains in the relevant market—the retail grocery market in Los Angeles. The merger created the second largest grocery chain in the area (behind Safeway), with sales equal to 7.5 per cent of the area's $2.5 billion grocery sales. The area, moreover, was characterized by a long and continuous trend toward fewer individually-owned competitors. Thus, between 1950 and 1961 the number of single store owners declined from 5,365 to 3,818; by 1963, three years after the merger, there had been a further decline to 3,590. During roughly the same period, 1953 to 1962, the number of chains with more than two stores increased from ninety-six to one hundred fifty. Finally, from 1949 to 1958, nine of the top twenty firms acquired one hundred twenty-six stores from their smaller competitors. "These facts alone," wrote Justice Black for the majority, "are enough to cause us to conclude contrary to the District Court that the Von's-Shopping Bag merger did violate § 7."[64] And, after noting that the basic purpose of the 1950 amendment "was to prevent economic concentration in the American economy by keeping a large number of small competitors in business,"[65] he concluded:

> It is enough for us that Congress feared that a market marked at the same time by both a continuous decline in the number of small businesses and a large number of mergers would, slowly but inevitably, gravitate from a market of many small competitors to one dominated by one or a few giants, and competition would thereby be destroyed.[66]

United States v. Pabst Brewing Co.[67] In 1958 Pabst Brewing Company, the nation's tenth largest brewer, acquired the Blatz Brewing Company, the eighteenth largest—a merger which resulted in the fifth largest brewer with 4.49 per cent of the industry's total sales and the third largest brewer with 5.83 per cent of the market three years thereafter. The Department of Justice's 1959 suit challenging the merger under section 7 was dismissed by a lower court in 1964, holding that the Government failed to prove its claimed relevant geographic market (either Wisconsin or the three-state area of Wisconsin, Michigan and Illinois) and to show that the probable effect of the merger was to lessen competition in the beer

[63] 384 U.S. 270 (1966). See Bison, *The Von's Merger Case—Antitrust in Reverse*, 55 GEO. L.J. 201 (1966); Handler, *Some Misadventures in Antitrust Policymaking—Nineteenth Annual Review*, 76 YALE L.J. 92, 101-09 (1966); Note, *Horizontal Grocery Chain Merger Invalidated Under Clayton Act, Section 7*, 20 Sw. L.J. 420 (1966); Turner, "The Merits of Antimerger Policy," speech before the Los Angeles Town Hall Forum, March 7, 1967, reprinted in 5 TRADE REG. REP., ¶ 50165 (1967).

[64] United States v. Von's Grocery Co., 384 U.S. 270, 274 (1966).

[65] *Id.* at 275.

[66] *Id.* at 278.

[67] 384 U.S. 546 (1966).

industry in the continental United States.[68] The Supreme Court, on appeal, reversed and remanded the case.

With respect to the geographic market, the Court said that the law merely requires the Government to prove that a merger "has a substantial anticompetitive effect somewhere in the United States—'in *any* section' of the United States. This phrase does not call for the delineation of a 'section of the country' by metes and bounds as a surveyor would lay off a plot of ground."[69]

With respect to the probable competitive impact of the merger on competition, the Court pointed out that the merger took place in an industry marked by a steady trend toward economic concentration. The number of breweries operating in the country declined from 714 in 1934 to 229 in 1961, while the total number of different competitors selling beer decreased from 206 in 1957 to 162 in 1961. At the same time, the Court noted, the leading brewers have been increasing their share of the industry's sales.[70] Finally, the Court rejected Pabst's argument that the trend toward concentration in the beer industry was not shown to be via mergers. "We hold," argued the Court, "that a trend toward concentration in an industry, whatever its cause, is a highly relevant factor in deciding how substantial the anti-competitive effect of a merger may be."[71]

Federal Trade Comm'n v. Procter & Gamble Co.[72] In 1957 the Federal Trade Commission filed a complaint charging that the acquisition by Procter & Gamble Company of all the assets of the Clorox Chemical Company violated section 7 of the Clayton Act. After hearings were held to determine the impact of the merger upon the liquid household bleach market, the Commission ordered divestiture by Procter & Gamble of the Clorox assets.[73] Reversing the Commission's decision, the United States Court of Appeals for the Sixth Circuit held that there was no probability of a substantial lessening of competition.[74] The Supreme Court granted certiorari and reinstated the Commission's divestiture order.[75]

The Court's opinion emphasized Procter's size in comparison with the other companies in the liquid bleach industry. At the time of the merger Clorox held a commanding sales lead, outpacing its nearest competitor, Purex, in national sales. Clorox accounted for 48.8 per cent of the national market; Purex, 15.7 per cent; and the next four firms, fifteen per cent. Thus, the market was markedly oligopolistic, with a great void be-

[68] United States v. Pabst Brewing Co., 233 F. Supp. 475 (E.D. Wis. 1964), *rev'd and remanded,* 384 U.S. 546 (1966).

[69] 384 U.S. at 549.

[70] *Id.* at 550.

[71] *Id.* at 552. "Congress, in passing § 7 and in amending it with the Celler-Kefauver Anti-Merger Amendment, was concerned with arresting concentration in American economy, whatever its cause, in its incipiency."

[72] Federal Trade Comm'n v. Procter & Gamble Co., 87 Sup. Ct. 1224 (1967).

[73] Procter & Gamble Co., TRADE REG. REP. ¶ 16673 (1963-1965 Transfer Binder).

[74] Procter & Gamble Co. v. Federal Trade Comm'n, 358 F.2d 74 (6th Cir. 1966), *rev'd,* 87 Sup. Ct. 1224 (1967).

[75] Federal Trade Comm'n v. Procter & Gamble Co., 87 Sup. Ct. 1224 (1967), *reversing* 358 F.2d 74 (6th Cir. 1966).

tween the market leaders and nearly two hundred small, regional producers. Moreover, characterizing liquid bleach as a high-turnover consumer product, the Court pointed to widespread use of media advertising in the bleach market and in Procter's other product lines.[76] As there was no physical differentiation between bleach lines, the disparity of size, asset position, and advertising potential, was used to support a finding that Procter crystalized entry barriers to new firms and hindered free price movements by existing firms. "It is probable that Procter would become the price leader and that oligopoly would become more rigid."[77]

Turning from size considerations, the Court invalidated the merger on another ground: the elimination of Procter as a potential competitor in the liquid bleach industry. Taking its cue from the language of *Penn-Olin,* the Court viewed Procter as the most likely entrant and held that its elimination from the edge of the market lessened competitive force within the industry.[78]

Procter & Gamble can be viewed as the Court's application of its restrictive standards for horizontal and vertical mergers to conglomerate acquisitions. Notwithstanding its post-merger size, Procter had no apparent inclination to use its asset position to engage in predatory pricing; nor had Procter engaged in such pricing tactics in its independent history before the combination.[79]

II. SOME IMPLICATIONS

The Supreme Court's decisions obviously project a strict antimerger policy and a preference for internal growth. Moreover, under the standards enumerated by the Court, it would seem possible to invalidate almost any merger challenged by the enforcement agencies. In the case of horizontal mergers, a strict antimerger policy seems fully justified because significant economies can generally be obtained by internal growth.[80] In the case of vertical and conglomerate mergers, however, a strict antimerger policy is more likely to conflict with efficiency goals. A vertical merger may extend market power from one production stage to another, but it cannot create market power. Further, internal expansion is more difficult since the firm is entering a new market.[81] A conglomerate merger does not increase the market position of the merged firms, so that the traditional objection to such a merger rests upon absolute size, *i.e.,* the size of a conglomerate firm gives it the power to inflict competitive injury upon rivals.[82]

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[76] 87 Sup. Ct. at 1230.

[77] *Ibid.*

[78] *Id.* at 1231.

[79] 358 F.2d at 81-82.

[80] Turner, *Conglomerate Mergers and Section 7 of the Clayton Act,* 78 HARV. L. REV. 1313, 1320-21 (1965). "[A] firm with growth or expansion opportunities in its own field, that is already exerting competitive pressures, is likely to resort to internal expansion if the merger route to growth is closed."

[81] See Dean & Gustus, *Vertical Integration and Section 7,* 40 N.Y.U.L. REV. 672 (1965); Singer, *Vertical Integration and Economic Growth,* 50 A.B.A.J. 555 (1964).

[82] As Adams has defined conglomerate power: "This means that a firm's operations are so widely diversified that its survival no longer depends on success in any given product market or any given

For the above reasons, among others, the 1950 amendment contains a competitive test—"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." Concluded Handler and Robinson after a careful analysis of the 1950 amendment:

> The courts, in the final analysis, must set the permissible limits of mergers on an individual basis within the statutory framework. They are given no license to apply their own social and economic predilections as to whether growth by merger is good or bad for the economy. Their mandate is to interdict those acquisitions, and only those acquisitions, the effect of which 'may be substantially to lessen competition, or to tend to create a monopoly.'[83]

In developing and applying its diverse standards the Court has indicated its willingness to protect small competitors, even at the expense of economic efficiency, by equating a probable lessening of competition with a possible injury to a competitor, rather than to a possible injury to competition.[84] Also, the Court has placed increased emphasis upon market shares and concentration data in an effort to find "a more rigid, easily definable rule concerning probable lessening of competition or tendency to monopoly, one which can be applied without burdensome economic analysis."[85] As a consequence the philosophical foundation of a strict anti-merger policy has been destroyed and the discretionary power of the enforcement agencies has been considerably broadened.

The Protection of Competitors In its *Brown Shoe* decision, the Court outlined criteria for testing the competitive effects of a merger and, thereby, indicated its preference for a market power standard. By that standard, a merger is illegal if it increases the ability of the resulting firm to control the price or output of a product in a specified market area. But having established these criteria, the Court promptly proceeded to ignore them. To quote from the decision:

> The retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers. . . . Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot

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geographical area. Its absolute size, its sheer bigness, is so impressive that it can discipline or destroy its more specialized competitors." Quoted in 8 ANTITRUST BULL. 304 (1963). See also Edwards, *Conglomerate Bigness as a Source of Power*, in BUSINESS CONCENTRATION AND PRICE POLICY 331 (1955); Stocking, *Comment, id.* at 352; Blair, *The Conglomerate Merger in Economics and Law*, 46 GEO. L.J. 672 (1958); Hart, *Emerging Paradoxes in Antitrust*, 30 A.B.A. ANTITRUST SECTION 80, 82 (1966). Adelman has argued, however, that size should not be equated with either monopoly power or market control. He concludes that when courts use size as a guide "competition—pure, workable, effective, or whatever—has vanished, replaced by protectionism." Adelman, *The Antimerger Act, 1950-60*, 51 AM. ECON. REV., May 1961, No. 2, pp. 236, 243.

[83] Handler & Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629, 679 (1961).

[84] See Adelman, *supra* note 82; von Kalinowski, *Section 7 and Competitive Effects*, 48 VA. L. REV. 827 (1962).

[85] Rill, *The Trend Toward Social Competition Under Section 7 of the Clayton Act*, 54 GEO. L.J. 891, 898 (1966). A similar conclusion, according to Markham, applies to the FTC. Markham, *The Federal Trade Commission's Use of Economics*, 64 COLUM. L. REV. 405 (1964).

> fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.[86]

Two comments are pertinent. First, despite its insistence that it is "competition, not competitors, which the Act protects," the Court is citing potential economies of integration as a factor invalidating the merger.[87] Put another way, market structure and not competition becomes the relevant test. Second, while there is little support for the proposition that Congress recognized the possible conflict between the achievement of efficiency and the preservation of fragmented markets, and resolved the conflict in favor of decentralization,[88] there are strong arguments against using cost savings as a basis for holding mergers illegal under the antitrust laws.

Indeed, there is a national interest in having the most efficient and economical resource allocation, and in some cases there is every reason to believe that resource allocation is most efficient when assets or management are channelled in new directions through merger. Overzealous application of rigid standards of legality ostensibly to protect small business units may, in the long run, cause their demise in certain industry situations. When the capital market is swept bare by a collective fear of antitrust prosecutions, assets and production potential of small, marginal businesses may be left to wither on the vine instead of being absorbed and used within healthy firms. At any rate, the apparent fear that the small business unit, like the buffalo, may vanish from the American scene if not protected within well-defined preserves simply does not find support under current conditions.[89]

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

[87] "No matter how many times you read it, the passage states: Although mergers are not rendered unlawful by the mere fact that small independent stores may be adversely affected, we must recognize that mergers are unlawful when small independent stores may be adversely affected." Bork & Bowman, *The Crisis in Antitrust*, FORTUNE, December 1963, pp. 138, 197. But see Dirlam, *The Celler-Kefauver Act: A Review of Enforcement Policy*, in ADMINISTERED PRICES: A COMPENDIUM ON PUBLIC POLICY, Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U.S. Senate, 88th Cong., 1st Sess., 125 (1963).

[88] Handler & Robinson, *supra* note 83. But see Blake & Jones, *In Defense of Antitrust*, FORTUNE, August 1964, p. 176.

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> First, there is the enormous social interest in progress and efficiency, which has represented one of the primary bases for the policy of promoting competition as it has in fact evolved. Second, to forbid mergers that would or might produce substantial efficiencies would narrow substantially the category of acceptable mergers, thereby drastically weakening the market for capital assets and seriously depreciating the price that entrepreneurs could get for their businesses when they wish to liquidate. . . . Third, the protection that this policy would afford to small business, except in the short run, is at best highly conjectural and probably negligible. There is no doubt that in most instances, certainly when efficiencies from integration are substantial, the same adverse consequences to small business will sooner or later be visited through internal expansion by large firms. . . .
>
> Finally, . . . the fact is that no threat, not even a mild one, appears to exist. There is *some* evidence that the concentration of assets in the hands of the largest business firms has risen somewhat over the past several decades. But there is little or no indication that any relative decline in the opportunities for small businesses has occurred.

Turner *supra* note 80, at 1326, 1327. See also Day, *Conglomerate Mergers and "The Curse of Bigness,"* 42 N.C.L. REV. 511, 566 (1964). As Adelman has argued:

> Horizontal and vertical integration will often serve to limit monopoly or destroy

Potential injury to smaller rivals, of course, was not the only basis for the Court's *Brown Shoe* decision. The Court's protectionist policy, however, has grown stronger in subsequent decisions. In *Alcoa*, where concentration would hardly have been affected by the merger, the Court held that Rome Cable was an "aggressive" small independent which Congress wished to preserve. And in *Von's Grocery*, where the combined sales of the two companies were 7.5 per cent of the Los Angeles retail grocery market, the Court stressed its concern over "a continuous decline in the number of small busineses," and made little analysis of competition in the relevant market.[90]

Interrelated with the protection of smaller competitors is the Court's tendency to find a probable lessening of competition whenever there is a possibility of injury to a competitor. To quote Markham:

> There are persuasive economic reasons for associating a healthy climate for small business with effective competition throughout the economy. But there is a fundamental difference between preserving opportunities for small business generally and preserving and protecting particular small businesses in the markets they presently occupy. The courts, including the Supreme Court, have gone a long way toward accepting the rule of 'injury to competitors' and rejecting the necessity of an economic analysis of effects on competition.[91]

Market Shares and Concentration Data Increasingly in antimerger decisions the Court has stressed market shares and concentration data.[92] The position of the Court was well summarized in *Continental Can*: "Where a merger is of such a size as to be inherently suspect, elaborate proof of market structure, market behavior and probable anti-competitive effects may be dispensed with in view of § 7's design to prevent undue concentration."[93] While market shares may be the "primary indicia of market power," they cannot serve as a proxy for all the determinants of competitive behavior.[94] Further, when is a merger "of such a size as to be inherently suspect"? In establishing a "thirty per cent ceiling" rule on market shares in *Philadelphia Nat'l Bank* (a ceiling subsequently reduced in *Continental Can* and *Pabst*), the Court cited tests proposed by

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> it. For example, vertical integration may be the response to a supplier's monopoly: by making instead of buying, one by-passes the toll gate. A similar tactic may end a buying monopoly. Diversification may serve a similar purpose: if there are monopoly profits being earned in a product which a firm can easily add to its line, it will probably enter the field in order to share them.

Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 27, 47 (1949).

[90] This emphasis is criticized in the dissent by Justice Stewart, joined by Justice Harlan. United States v. Von's Grocery Co., 384 U.S. 270 (1966). See also 20 Sw. L.J. 420 (1966).

[91] Markham, *supra* note 85, at 411. Backman, *supra* note 53, at 669 has argued that a similar confusion arose in the Court's *Penn-Olin* decision since the Court failed to distinguish between potential competition and a potential competitor. See also Hale & Hale, *Potential Competition Under Section 7: The Supreme Court's Crystal Ball*, 1964 SUP. CT. REV. 171.

[92] Berghoff, *The Size Barrier in Merger Law—Or Antitrust by the Numbers*, 27 OHIO ST. L.J. 76 (1966).

[93] United States v. Continental Can Co., 378 U.S. 441, 458 (1964).

[94] MASON, ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM 400 (1957). See also Miller, *Measures of Monopoly Power and Concentration: Their Economic Significance*, in BUSINESS CONCENTRATION AND PRICE POLICY 134-35 (1955); NELSON, CONCENTRATION IN THE MANUFACTURING INDUSTRIES OF THE UNITED STATES 3-4 (1962).

Kaysen and Turner, Stigler, Markham, and Bok,[95] and pointed out that the merger would fail each one. To date, however, the Court has not specified "the smallest market share which would still be considered to threaten undue concentration."[96]

Supporters of the Court's position with respect to market shares argue that (a) there is a general correlation between concentration and competition,[97] (b) economic theory is inadequate to permit a detailed case-by-case analysis of the probable competitive consequences of a merger,[98] (c) a detailed factual inquiry would largely destroy the effectiveness of section 7, due to "limited enforcement resources" and the "wide variety of fact situations"[99] and (d) the importance of past mergers in creating present oligopolistic industries suggests that should error be made, it should be in the direction of more, rather than less, restrictions on external growth.[100]

Concerning mergers which may substantially lessen competition, section 7 imposes a competitive test, not a market share standard. If antimerger policy is to seek atomistic or fragmented markets, and a defensible argument can be made for such a policy, then the competitive test should be explicitly eliminated.[101] Moreover, it seems somewhat inconsistent to "doubt that economic evidence can usefully go very far in specific cases, as a matter of proof" while, at the same time, having "considerable confidence in . . . economic postulates about structure and competition."[102] But more importantly, the vagueness of the relevant market concept in antimerger law leaves concentration data with little meaning.[103]

The Relevant Market In *Brown Shoe* and *Philadelphia Nat'l Bank,* the Court established the proposition that there are markets-within-markets and that the narrowest reasonable market is the relevant one.[104] This asser-

[95] KAYSEN & TURNER, ANTITRUST POLICY (1959); Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 HARV. L. REV. 226 (1960); Markham, *Merger Policy Under the New Section 7: A Six-Year Appraisal,* 74 HARV. L. REV. 226 (1960). Kaysen & Turner and Stigler suggest a 20 per cent market-share percentage as the test of prima facie unlawfulness; Markham a 25 per cent market-share; and Bok a 7 or 8 per cent increase in market concentration.

[96] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 364 (1963).

[97] See Turner, *supra* note 80, at 1315-16.

[98] See Bok, *supra* note 95, at 349; Edwards, *Tests of Probable Effect Under the Clayton Act,* 9 ANTITRUST BULL. 369, 377 (1964).

[99] Turner, *supra* note 80, at 1318-19: "With a wide variety of fact situations, the precedential value of particular decisions—their value as guides to the legality of other mergers—would be limited. Inevitably, the number of mergers with substantial anticompetitive effects would tend to increase."

[100] "[T]he social cost of error from being too easy in merger policy is more serious and less easily reversed than from being too strict." Heflebower, *Corporate Mergers: Policy and Economic Analysis,* 77 Q.J. OF ECON. 537, 558 (1963).

[101] Phillips, *Mergers and Competition: The Turn of the Screw,* THE WHARTON REPORT, Fall 1965, p. 7. See Rill, *supra* note 85, for a discussion of the theory of social competition.

[102] Rahl, *Anti-Merger Law in Search of a Policy,* 11 ANTITRUST BULL. 325, 346 (1966). As Markham, *supra* note 85, at 404, has argued: "Since the law does not define what constitutes a substantial lessening of competition or a tendency to create a monopoly and since the content of both of these tests is essentially and ultimately economic, their application falls logically within the competence of the economist." See also Bock, *The Relativity of Economic Evidence in Merger Cases—Emerging Decisions Force the Issues,* 63 MICH. L. REV. 1355 (1965).

[103] Hall & Phillips, *Antimerger Criteria: Power, Concentration, Foreclosure and Size,* 9 VILL. L. REV. 211, 218 (1964).

[104] The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself

tion is not very helpful, since it avoids the problem of specifying the supply and demand relationships between the merging firms. Thus, in *Continental Can,* the Court's market share data of a combined glass and metal container market is seriously deficient and confusing, for "percentage shares of an amalgamated glass and can container market must be taken more lightly than comparable percentages of either a glass container market or a can container market."[105] Such a conclusion follows from the fact that inter-industry competition is much weaker than intra-industry rivalry. Moreover, the Court's refusal to include plastic containers, which certainly compete with glass and metal containers, remains a mystery.[106] And in *Alcoa,* the Court ignored the careful economic analysis of the lower court with respect to the relevant product market and simply lumped bare and insulated aluminum cable into an "aluminum conductor" market.[107]

Similar problems arise with respect to the relevant geographic market. Any appropriate section of the country may be considered a geographic submarket. But Congress' approach to the definition of the relevant market requires a degree of economic awareness. To quote again from *Brown Shoe*: "The geographic market selected must, therefore, both 'correspond to the commercial realities' of the industry and be economically significant."[108] Despite this reasoning, *Pabst* seems to suggest that the enforcement agencies are free to adopt almost any geographic market they wish.[109]

Market shares of arbitrarily defined product and geographic markets

> and substitutes for it. However, within the broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. . . . The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors.

Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962). (Footnotes and citation omitted.)

[105] Turner, *supra* note 80, at 1374 n.79.

[106] Reasoned the majority:

> Nor are we concerned by the suggestion that if the product market is to be defined in these terms it must include plastic, paper, foil and any other materials competing for the same business. That there may be a broader product market made up of metal, glass and other competing containers does not necessarily negative the existence of sub-markets of cans, glass, plastic or cans and glass together, for 'within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.'

United States v. Continental Can Co., 378 U.S. 441, 457-58 (1964). (Citation omitted.)

Justice Harlan, joined by Justice Stewart, dissented, saying in part:

> It [the Court] chooses . . . to invent a line of commerce the existence of which no one, not even the Government, has imagined; for which businessmen and economists will look in vain; a line of commerce which sprang into existence only when the merger took place and will cease to exist when the merger is undone.

Id. at 476-77. See also MASSEL, COMPETITION AND MONOPOLY 236-78 (1962); Mann & Lewyn, *The Relevant Market Under Section 7 of the Clayton Act: Two New Cases—Two Different Views,* 47 VA. L. REV. 1014 (1961); Schlade, *Proposed Objective Relevant Product Market Criteria Under Section 2 of the Sherman Act and Section 7 of the Clayton Act,* 35 U. CINC. L. REV. 376 (1966); Shapiro & Kareken, *Lines of Commerce, Standards of Illegality, and Section 7 Predictability,* 40 N.Y.U.L. REV. 628 (1965); Comment, *1964 Developments in the Application of Section Seven of the Clayton Act to Horizontal Acquisitions,* 33 FORDHAM L. REV. 274 (1964); Note, *Definition of a Line of Commerce Under Section 7 of the Clayton Act,* 60 NW. U.L. REV. 114 (1965).

[107] See dissenting opinion of Justice Stewart, joined by Justices Harlan and Goldberg, in United States v. Aluminum Co. of America, 377 U.S. 271, 280-87 (1964).

[108] Brown Shoe Co. v. United States, 370 U.S. 294, 336-37 (1962).

[109] "If the Supreme Court adheres to its position in the *Pabst* case, there will be no need to define geographic markets in merger litigation." Hale & Hale, *Delineating the Geographic Market: A Problem in Merger Cases,* 61 NW. U.L. REV. 538, 553 (1966).

are meaningless. As Justice Fortas wrote in his concurring opinion in *Pabst*:

> In some situations, arithmetic as to the merging companies' aggregate volume of sales of the commodity involved may be impressive. Sometimes, the resulting size of the conjoined companies is great. But unless it can be shown that the effect may be 'substantially to lessen competition or tend to create a monopoly' in a specific section of the country, courts are not authorized to condemn the acquisition. . . . Unless both the product and geographical market are carefully defined, neither analysis nor result in antitrust is likely to be of acceptable quality.[110]

The growing emphasis upon concentration data destroys the basic foundation of a strict antimerger policy. Relative size of firms becomes an evil in itself.[111] Moreover, the subjectivity and arbitrariness of antimerger standards are significantly increased. It is now "possible to gerrymander the boundaries of the broad market involved so as to insure the desired result."[112] In short, antimerger policy loses predictability.[113]

It is not being suggested that section 7 cases should become "dumping grounds for masses of economic data" that are "superfluous," or that it is necessary "to launch a minute scrutiny of unimportant market indicia."[114] Should this occur, it would surely be true that "the number of mergers with substantial anticompetitive effects would tend to increase."[115] Rather, it is being argued that since concentration is not an adequate proxy for all the determinants of competitive behavior, the competitive test requires—in addition to market shares of carefully defined relevant markets —an economic analysis of such factors as economies of scale, barriers to entry, and supply and demand functions.[116] It is significant that the Supreme Court, in nine of the eleven decisions, reversed lower court decisions that were based on more complete economic analysis than used by the Court.

Administrative Discretionary Power The Supreme Court, in its antimerger decisions, has failed to establish criteria for separating the lawful from the unlawful.[117] In *Brown Shoe,* it was noted that a merger involv-

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[110] United States v. Pabst Brewing Co., 384 U.S. 546, 562 (1966). See also concurring opinions of Justice White, Justice Douglas, and Justice Harlan, joined by Justice Stewart. *Ibid.*

[111] Comment, *Clayton Section 7: A Critical Appraisal of the Supreme Court's Antitrust-Anti-Bigness Complex in Merger Litigation Since the Brown Shoe Case,* 11 WAYNE L. REV. 739 (1965).

[112] Note, *The ABC's of Clayton 7: Amendment of 1950; Brown Shoe; The Court and Current Complexities,* 10 VILL. L. REV. 734, 804 (1965). See also Bond, *Development of the "Relevant Market" Concept in Clayton Act Litigation,* 15 MERCER L. REV. 358 (1964).

[113] Shapiro & Kareken, *supra* note 106, at 649. But see Celler, *The Celler-Kefauver Act and the Quest for Market Certainty,* 50 A.B.A.J. 559 (1964).

[114] See Pillsbury Mills, Inc., 3 TRADE REG. REP. ¶ 29277, at 37623 n.2 (Dec. 16, 1960).

[115] Turner, *supra* note 80, at 1319.

[116] In *Von's Grocery,* for example, the Court simply ignored the lower court's findings that (a) while the number of "single" stores had declined, the number of "multiple" stores had increased from 856 to 958 between 1950 and 1963; (b) entry into the industry, particularly for anyone with experience, was relatively easy; and (c) the shift to multiple stores was a response to consumer demand and to competition being offered by cooperatives and discount houses. See United States v. Von's Grocery Co., 384 U.S. 270 (1965).

[117] Commissioner Reilly of the FTC apparently disagrees:

> Contrary to the expressions of some, the case approach and the decisions of the Supreme Court provide considerable guidance as to both the kinds of mergers that are illegal and the way in which the agencies should organize anti-merger enforce-

ing a failing firm or two firms too small to compete in an industry dominated by giants would presumably be legal.[118] But these possible defenses remain dicta, since they have yet to be subjected to detailed judicial investigation.[119] This factor, combined with the Court's seeming willingness to stop any merger seriously challenged by the Justice Department or the FTC,[120] indicates that the criteria used by the enforcement agencies in choosing which mergers to challenge have become highly relevant.[121]

The basic problem is that too little is known about the decision-making process employed by either the Department of Justice or the FTC. An analysis of the complaints filed by the two agencies under section 7 suggests certain criteria,[122] but such an analysis fails to indicate the criteria that resulted in a decision *not* to prosecute certain mergers. And, since it is likely that under the broad criteria enumerated by the Court the enforcement agencies could challenge more mergers than in fact they do (for budgetary reasons, among others), "an increasingly large amount of merger policy is being determined at the administrative level of government."[123] As two commentators have put it: "The failure to formulate and communicate policies may not only thwart policy review, both inside and outside the department, but it prevents the business community from following guidelines."[124]

The Antitrust Division is developing rules and guidelines for a number of antitrust problems, including mergers, but has given no indication when they will be promulgated.[125] The Federal Trade Commission appears to be taking a different approach. In *Permanente Cement Co.* the Commission delayed ruling on a vertical acquisition pending a trade regulation rule proceeding instituted to study and consider the problem of vertical integration in the cement industry.[126] Such procedures should aid the

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> ment. Certainly in view of the Supreme Court's decision in the *Von's* case, there can be little misunderstanding as to the kinds of horizontal mergers that are likely to be illegal.

Reilly, *Conglomerate Mergers—An Argument for Action,* 61 Nw. U.L. Rev. 522, 536 (1966). See also Hurley, *Merger Policy and the Celler-Kefauver Act,* 8 St. Louis U.L.J. 379 (1964).

[118] Brown Shoe Co. v. United States, 370 U.S. 294, 319 (1962).

[119] Connor, *Section 7 of the Clayton Act: The Failing Company "Myth,"* 49 Geo. L.J. 84 (1960); Hale & Hale, *Failing Firms and the Merger Provisions of the Antitrust Laws,* 52 Ky. L.J. 597 (1964); Weiley, *The "Failing Company,"* 41 B.U.L. Rev. (1961); Comment, *Federal Antitrust Law—Mergers—An Updating of the "Failing Company" Doctrine in the Amended Section 7 Setting,* 61 Mich. L. Rev. 566 (1963); Note, *Horizontal Mergers and the "Failing Firm" Defense Under Section 7 of the Clayton Act: A Caveat,* 45 Va. L. Rev. 421 (1959).

[120] Rahl, *supra* note 102, at 329.

[121] It is not being implied that section 7 is standardless. Rather, it is being argued that the criteria are so broad that almost any merger could be held to violate the Clayton Act. See Dirlam, *Recent Developments in the Anti-Merger Policy: A Diversity of Standards,* 9 Antitrust Bull. 381 (1964).

[122] See Bock, Mergers and Markets: An Economic Analysis of the First Fifteen Years Under the Merger Act of 1950 (1966).

[123] Address by M. A. Wright, President of the United States Chamber of Commerce, before the San Francisco Chamber of Commerce, Sept. 8, 1966.

[124] Lewyn & Mann, *Some Thoughts on Policy and Enforcement of Section 7 of the Clayton Act,* 50 A.B.A.J. 154, 157 (1964).

[125] BNA, Proposed Merger Guidelines (panel discussion, Federal Bar Association, 1965) at 2-3.

[126] Permanente Cement Co., 3 Trade Reg. Rep. (1963-1965 Transfer Binder) ¶ 16885 at 21924-25. See FTC, Economic Report on Mergers and Vertical Integration in the Cement Industry (1966). The FTC's guidelines for the cement and food-distribution industries were announced early in 1967. See 1 Trade Reg. Rep. ¶ 4500 (1967). Briefly, with respect to the

present problem of predictability, but they also raise numerous questions. For example: "Promulgation of numerous rules with a pattern of sufficient intricacy to cover the immense variety in merger situations, without adequate policy delineation, has all the hazards that beset another Greek, Daedalus, who built a beautiful labyrinth for a king, and then could not find his own way out of it."[127]

III. CONCLUSIONS

Under the diversity of standards developed by the Supreme Court in its first eleven antimerger decisions, public policy toward mergers is bound to be strict and to have an important influence on the future industrial structure of the country. Emphasis upon both actual and potential competition, market foreclosure, concentration and market shares, size, and reciprocity, indicates that few mergers in which one or both of the parties are large relative to some market will pass judicial scrutiny. "There is now little doubt that in Section 7 of the Clayton Act the presumption seems clearly against growth through merger, and a heavy burden of proof rests on companies which wish to grow by merger, especially if the industry structure is of the oligopoly variety."[128]

Yet, a review of the Court's decisions suggests a disturbing trend, one which tends to destroy the basic foundation of a strict antimerger policy. This trend involves a switch from a market power standard, as stated in *Brown Shoe*, to a market structure standard, with particular emphasis on concentration. A relatively simple model has been adopted by the Court which equates the effectiveness of competition with the numbr of viable competitors. Consequently, any merger which threatens to diminish the number of viable competitors and/or which is part of an industry trend should be prohibited. Unconcentrated market structures are regarded as desirable regardless of behavior or performance.[129]

The Court's philosophy is perhaps best summarized in the following quotation from *Von's Grocery*:

> By using . . . terms in § 7 which look not merely to the actual present effect

cement industry, the Commission announced that it will challenge every future acquisition by a cement producer of any "substantial" ready-mixed concrete company. ("Substantial" was defined as any concrete concern ranking among the four largest in any market or any that regularly purchases 50,000 barrels or more of cement annually.) Further, the guidelines require all portland cement makers to file a notification sixty days before any merger or acquisition involving a ready-mixed concrete company.

For a discussion of the FTC's approach, see two articles by Commissioner Elman: *The Need for Certainty and Predictability in the Application of the Merger Law*, 40 N.Y.U.L. REV. 613 (1965), and *Rulemaking Procedures in the FTC's Enforcement of the Merger Law*, 78 HARV. L. REV. 385 (1964). But see Burrus & Savarese, *Institutional Decision-Making and the Problem of Fairness in FTC Antitrust Enforcement*, 53 GEO. L.J. 656 (1965).

[127] Rahl, *supra* note 102, at 332. The basic problem, according to Rahl, "is not lack of rules of law, but lack of a guiding policy for the law. Promulgation of a rule to carry out an undefined policy is risky. . . . Moreover, when a given antitrust policy is reasonably well-defined, there is not much need for very many specific rules. Given the policy, the courts will usually do rather well in applying it." *Id.* at 331-32.

[128] Lanzillotti, *Market Structure and Antitrust Vulnerability*, 8 ANTITRUST BULL. 853, 857 (1963).

[129] Handler & Robinson, *The Supreme Court vs. Corporate Mergers*, FORTUNE, Jan. 1965, p. 176.

> of a merger but instead to its effect upon future competition, Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency before that trend developed to the point that a market was left in the grip of a few big companies. Thus, where concentration is gaining momentum in a market, we must be alert to carry out Congress' intent to protect competition against ever increasing concentration through mergers.[130]

Given this interpretation, the Court must necessarily be strict toward the elimination of smaller competitors, since it seeks to prevent large-number markets, in which it believes competition to be strong, from becoming small-number markets, in which it believes oligopolistic patterns of behavior to emerge.[131] Injury to competitors, moreover, becomes equated with injury to competition. Further, the Court's model does not require either a careful delineation of the relevant market or an analysis of the probable effect of the merger on competition.

These conclusions raise a number of questions concerning the future of antimerger policy. The Court's model is static, not dynamic, since it seeks to preserve present market structures without a careful analysis of the probable effects of a merger on competition. It may not, in the long run, even protect small businesses and may decrease business incentives. Particularly with respect to vertical and conglomerate mergers, the model may prevent the achievement of efficiency. And, finally, the strictness of the model, resulting in a corresponding increase in the discretionary powers of the enforcement agencies, raises concern about the agencies' decision-making processes. But of even more importance, the invention of over-simplified rules and relevant markets, at the expense of careful analysis to see that they correspond with economic realities, cannot serve the cause of those who, like the present author, believe in a strong procompetitive policy.[132] For it is, in the final analysis, the criteria employed by the Court which determine both the guidelines for business decisions and the future course of antimerger policy.

[130] United States v. Von's Grocery Co., 384 U.S. 270, 275-77 (1966). (Footnotes and citation omitted.)

[131] The Court's concern with small business is not new in antitrust history. Said Judge Hand, for instance, in a 1945 decision: "Throughout the history of [the antitrust statutes] . . . it has been constantly assumed that one of their purposes 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." United States v. Aluminum Co. of America, 148 F.2d 416, 429 (2d Cir. 1945).

[132] "Inevitably, simple, arbitrary tests disregard too many highly significant factors and become sweeping absolutes of universal application with highly questionable validity." Bison, *The Von's Merger Case—Antitrust in Reverse,* 55 GEO. L.J. 201 (1966).