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# Why Do Bad Antitrust Decisions Sometimes Make Good Law? The *Alcoa* and *Brown Shoe* Examples

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# WHY DO BAD ANTITRUST DECISIONS SOMETIMES MAKE GOOD LAW? THE ALCOA AND *BROWN SHOE* EXAMPLES

C. Paul Rogers III\*

## TABLE OF CONTENTS

I. INTRODUCTION .....	97
II. HISTORICAL OVERVIEW OF ANTITRUST PRECEDENT .....	98
III. TO OVERRULE OR NOT .....	100
IV. <i>BROWN SHOE</i> .....	103
V. <i>ALCOA</i> .....	114
VI. <i>ALCOA</i> AND <i>BROWN SHOE</i> CONSIDERED TOGETHER .....	125
VII. CONCLUSION .....	126

## I. INTRODUCTION

JUSTICE Oliver Wendell Holmes famously wrote in his dissent in an important early antitrust case, *Northern Securities Co. v. United States*, that “[g]reat cases like hard cases make bad law.”<sup>1</sup> Holmes went on to explain that great cases are so-called “not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feel-

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1. 193 U.S. 197, 400 (1904) (Holmes, J., dissenting). Of course, Holmes was no friend of the Sherman Act in general, writing that it was “a humbug based on economic ignorance and incompetence.” Letter from Oliver W. Holmes, Jr. to Sir Frederick Pollock (Apr. 23, 1910), in *HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874–1932* 163, 163 (Mark DeWolfe Howe ed., 2d ed. 1961) (1941). See also Alfred S. Neely, “A humbug based on economic ignorance and incompetence”—*Antitrust in the Eyes of Justice Holmes*, 1993 *UTAH L. REV.* 1; Spencer Weber Waller, *Oliver Wendell Holmes, Jr.: The Judging Years: The Antitrust Philosophy of Justice Holmes*, 18 *S. ILL. U. L.J.* 283 (1994).

ings and distorts the judgment.”<sup>2</sup> He went on to say that those cases exert “a kind of hydraulic pressure which makes what . . . was clear [appear] doubtful, and before which even well settled principles of law will bend.”<sup>3</sup> He appears to have been correct some of the time<sup>4</sup> but not necessarily most of the time.<sup>5</sup>

This essay, however, considers a converse but related question: Do bad antitrust decisions, as based on their facts, sometimes make good law? That is, do wrongly decided antitrust cases, when considered on their merits, sometimes have a lasting impact on the law even though the decision by most accounts should simply be overruled? At first glance, our system of stare decisis, in which correct decisions have precedential value and wrong decisions are simply overruled, would seem to not tolerate such a result.

The question is germane because some old-dog antitrust decisions, much maligned and probably wrongly decided even way back when, maintain significant currency in contemporary antitrust parlance. These cases are oft-cited and relied on now, even given their very shaky pedigree. They are cases that initially seem ripe for overruling but, for reasons I will explore, probably never will be. Thus, the question is, are bad antitrust cases actually responsible for making good law? If so, why do cases in such disrepute on their merits have such staying power, particularly when so much early antitrust precedent is simply ignored today? Two cases, *United States v. Aluminum Co. of America (Alcoa)*<sup>6</sup> and *Brown Shoe Co. v. United States*,<sup>7</sup> stand out as examples of this phenomenon.

## II. HISTORICAL OVERVIEW OF ANTITRUST PRECEDENT

Historically, the Supreme Court has defined and shaped antitrust law much as it has constitutional law. Congress likely intended for the Court

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2. *N. Sec. Co.*, 193 U.S. at 400.

3. *Id.* at 401.

4. In *Northern Securities*, Holmes argued that the majority was in error in applying the Sherman Act literally to all restraints of trade that affected interstate commerce. He asserted vigorously that, as a matter of common sense and given the Act's common law heritage, the act was intended to prohibit only “unreasonable” restraints of trade. *Id.* at 400–11. *Northern Securities* was by all accounts a “great” case since it involved a merger between two major competing railroads involving railroad barons J.P. Morgan, Edward Harriman, and J.J. Hill. In 1911, in the equally great case involving the Rockefeller oil empire, Holmes's view prevailed and the Court adopted “the rule of reason.” *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

Holmes also famously dissented in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 409–13 (1911), a case in which the Court ruled that resale price maintenance violated the Sherman Act because of its impact on dealers and others down the product distribution chain. Holmes argued forcefully that competition would be better served by allowing manufacturers to control the price of their products downstream. In 2007, ninety-six years later, the majority of the Court finally agreed with Holmes and overruled *Dr. Miles*. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007).

5. See, e.g., LACKLAND H. BLOOM, JR., DO GREAT CASES MAKE BAD LAW? (2014) (arguing that often the Supreme Court has considered great cases in constitutional law and issued lasting, landmark opinions).

6. 148 F.2d 416 (2d Cir. 1945).

7. 370 U.S. 294 (1962).

to have this principal role given the language of the Sherman Act, which prohibits “conspirac[ies] . . . in restraint of trade” and monopolization without further guidance or definitions.<sup>8</sup> Thus, as with the question of what constitutes free speech under the First Amendment, the Court has had to try to provide content to the Sherman Act’s broad-based language over the past, at this writing, 117 years.

At best, the Court’s antitrust track record is uneven.<sup>9</sup> Certainly, its view of the law has evolved and changed as economic learning and understanding of what type of business conduct is truly anticompetitive has advanced. That is as it should be. But as the Court’s view of what conduct runs afoul of the Sherman Act and the Clayton Act—passed in 1914 to provide more content and specificity to the law—has progressed, one result is that some earlier decisions, which are clearly wrong by today’s economic reckoning, lie fallow, ignored but not overruled.<sup>10</sup> They are just out there in the judicial ether.

Of course, there are other significant problems with antitrust precedent. Apart from considerations of the likely economic impact of conduct, individual judicial predilections have far too often colored decision-making and, dating back to the *Standard Oil* decision in 1911, personnel changes in the Court have frequently resulted in dramatic reversals of antitrust policy. In *Standard Oil*, Chief Justice Edward White, who was elevated from his position as Associate Justice in December 1910, found himself in the majority in urging the adoption of the rule of reason.<sup>11</sup> He had dissented in two earlier cases, arguing that the Court was using an analysis that was too rigid and urging the adoption of a more flexible approach.<sup>12</sup>

The transition from the Warren Court to the Burger Court caused an equal antitrust sea change. There, the disagreement stemmed from what the fundamental antitrust goal should be. After a period of dramatic expansion of what constituted an antitrust offense, the government suddenly could and did lose cases under the Burger Court. The Warren Court’s populist view that antitrust should also strive to protect small business was quickly jettisoned and replaced by an increasing reliance on efficiency considerations.

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8. 15 U.S.C.S §1 (2017).

9. For a particularly critical view, see William L. Reynolds & Spencer Weber Waller, *Legal Process and the Past of Antitrust*, 48 SMU L. REV. 1811, 1813 (1995) (characterizing the Supreme Court as enjoying “a few shining successes and a greater number of dismal failures.”).

10. See, e.g., *United States v. Von’s Grocery Co.*, 384 U.S. 270 (1966); *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933); see also Joshua Wright, Comment, *Von’s Grocery and the Concentration-Price Relationship in Grocery Retail*, 48 UCLA L. REV. 743, 746–47 (2001) (arguing that “*Von’s Grocery* is no longer capable of any intelligible contribution to antitrust doctrine” and analyzing “the risks of allowing outdated and weak precedent from the 1960s . . . to remain valid law”).

11. *Standard Oil Co. v. United States*, 221 U.S. 1, 100 (1911).

12. *United States v. Trans-Mo. Freight Ass’n*, 166 U.S. 290, 343–74 (1897); *United States v. Joint Traffic Ass’n*, 171 U.S. 505, 578 (1898).

Paralleling that shift was the rise in prominence of the Chicago School of Economics and its somewhat revisionist history of congressional intent.<sup>13</sup> But the Chicago School's emphasis on market behavior rather than market structure did find judicial receptivity,<sup>14</sup> as did its argument that one could not have its antitrust cake and eat it too; that is, antitrust law could not, in any sensible, rational way, protect competition, spurred by innovation and efficiency, while providing refuge for small, often inefficient businesses.<sup>15</sup> Thus came the demise of locally owned dry goods stores and the rise of Walmart to small-town America, providing enhanced goods and services at big-city reduced prices to those living in rural and semirural America.

### III. TO OVERRULE OR NOT

While the Supreme Court historically has been disinclined to overrule its earlier antitrust decisions, no matter how awful, in more recent years it has bit the bullet and overhauled vertical restraints doctrine, replacing the *per se* rule with the rule of reason across the board.<sup>16</sup> The modern Court favors the rule of reason, another drastic change from a Warren Court that favored the predictability of the *per se* rule, even taken to extremes.<sup>17</sup> Of course, reliance on the rule of reason does provide flexibility for a court seeking to assess the competitive consequences of marketplace conduct.

But what about these old cases that the Court has not overruled, but arguably should?<sup>18</sup> Part of the answer must be that it is one thing to denounce the *per se* rule as applied to a class of restraints, such as resale price maintenance, and replace it with the rule of reason (or vice versa

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13. See, e.g., Christopher Grady, *Original Intent and the Sherman Antitrust Act: A Re-examination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359 (1993).

14. Of course, that receptivity was enhanced significantly by the appointment of leading Chicago School proponents like Richard Posner and Frank Easterbrook to the federal judiciary.

15. Often those inefficiencies derive from the lack of purchasing volume, which retards the ability of smaller companies to secure the volume supplier discounts offered to larger companies.

16. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007); *State Oil Co. v. Khan*, 522 U.S. 3, 7–10 (1997); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

17. *United States v. Topco Assocs.*, 405 U.S. 596, 609–10 (1972) (“Whether or not we would decide this case the same way under the rule of reason used by the District Court is irrelevant to the issue before us. The fact is that courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules.”) (footnote omitted).

18. Of course, lower courts face difficulties when the Supreme Court does not overrule earlier precedent that it subsequently disagrees with. There is authority that where the Court adopts a new standard without overruling the previous discarded standard, the lower courts “must apply the new standard and reach the result dictated under that new standard” since “‘results reached under the old standard’ are no longer ‘binding precedent.’” *United States v. Anthem, Inc.*, 855 F.3d 345, 376–77 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (quoting BRYAN A. GARNER ET. AL., *THE LAW OF JUDICIAL PRECEDENT* 31 (2016)).

for that matter) but it is quite another to overrule cases in which the rule is simply misapplied to the facts of the case.<sup>19</sup> In other words, per se rules are easy fodder to overrule. A per se rule traditionally has meant that the conduct is unlawful, no ifs, ands, or buts. It does not create a rebuttable presumption and is, or used to be, a bright-line rule that dispensed with the necessity of defining relevant markets or assessing market power. If the Court determines that a particular class of conduct previously considered per se unlawful may have competitive merit or may sometimes enhance efficiencies, it is relatively simple to overrule the conflicting precedent and discard the per se rule, replacing it with the rule of reason or today even the so-called quick look rule of reason.<sup>20</sup>

The bulk of antitrust analysis is much more fluid than the per se rule permits. For example, the rule of reason requires a balancing of procompetitive and anticompetitive effects and can often seem like comparing apples to oranges. Section 2 analysis involves a relevant market definition and then a determination of whether a dominant firm has engaged in exclusionary conduct. The former requires an economic assessment of consumer demand both with respect to products or services and geography. The Supreme Court has arguably gotten the relevant market assessment wrong on a number of occasions,<sup>21</sup> but its misapplication of economic theory does not give rise to overruling in later cases with different facts.

As to the second Section 2 prong, the Supreme Court has recognized that “the means of illicit exclusion, like the means of legitimate competition, are myriad.”<sup>22</sup> While the Court may theoretically overrule prior determinations of what constitutes exclusionary conduct, it has not chosen to do so. It has rather, in recent years, tended to reduce the “myriad” possibilities by deciding that certain conduct, such as price squeezes,<sup>23</sup> is not exclusionary and by providing a test for predatory pricing.<sup>24</sup> Non-price-related exclusionary conduct, however, remains a work in progress,

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19. That is, of course, what appellate courts typically do when reversing lower court decisions, but that is distinct from overruling prior precedent that an appellate court now determines was wrongly decided. The prior precedent is, by definition, a different case with different facts.

20. It turns out sometimes the quick look is not so quick. *See* Cal. Dentists Ass’n v. FTC, 526 U.S. 756, 770 (1999); *Cont’l Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 511 (4th Cir. 2002) (quick look “too quick”); *see also* Polygram Holding, Inc. v. FTC, 416 F.3d 29, 34–37 (D.C. Cir. 2005); *Law v. NCAA*, 134 F.3d 1010, 1020 (10th Cir. 1998); *Chi. Prof’l Sports Ltd. P’ship v. NBA*, 961 F.2d 667, 674 (7th Cir. 1992).

21. *See, e.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *United States v. Von’s Grocery Co.*, 384 U.S. 270 (1966); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957); *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416 (2d Cir. 1945).

22. *Verizon Commc’ns, Inc. v. Law Offices of Curtis Trinko, LLP*, 540 U.S. 398, 414 (2004) (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (per curiam)).

23. *Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc.*, 555 U.S. 438, 442 (2009).

24. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222–24 (1993); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007).

clouded with uncertainty.<sup>25</sup>

Further, Section 2 cases in particular involve dueling economists, opining directly opposing views on everything from the appropriate relevant market to the competitive impact of targeted big firm conduct. Those disagreements among experts tend to further complicate already complex cases as juries and judges must sort out fact from fiction. It would seemingly take a Supreme Court decision that was based on a totally implausible economic theory to qualify for overruling in a later monopolization case.<sup>26</sup>

Section 7 of the Clayton Act, the antimerger provision, has produced a lot of Supreme Court precedent, most of it dated and much of it highly suspect relics from a different antitrust age. As one leading commentator observed over thirty years ago, “Merger enforcement in the United States has often been erratic and always controversial.”<sup>27</sup> But the prospects for the Court to overrule earlier precedent seem slim to none for a number of reasons: First, the Supreme Court has not decided a merger case on the merits in over forty years, in stark contrast to earlier years when it sometimes had multiple merger cases in a term.<sup>28</sup> Second, even if the Court granted certiorari in a merger case and used the “new learning,”<sup>29</sup> Section 7’s statutory language and the two-pronged analytical approach for assessing the competitive impact of mergers make overruling earlier cases problematical.

The operative statutory language is that a merger is unlawful where its effect “may be substantially to lessen competition, or to tend to create a monopoly.”<sup>30</sup> That is, the government does not have to prove an actual lessening of competition to block a merger, only its likelihood. Thus, each case boils down to a judgment call or prediction about the future competitive impact of the merger. The Court might in hindsight disagree with one or more of its earlier decisions, but since each new case requires a similar judicial assessment of the future, it is simply unnecessary to overrule those prior decisions. Only if the Court wished to employ a new legal standard, such as it has in the vertical restraints area, would it require the overruling of earlier bad merger decisions. Instead, a plethora of them

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25. See, e.g., C. Paul Rogers III, *The Incredible Shrinking Antitrust Law and the Antitrust Gap*, 52 U. LOUISVILLE L. REV. 67, 80–95 (2013).

26. As will be discussed, *Alcoa* might be an example.

27. Robert Pitofsky, *Foreword* to THOMAS W. BRUNNER, THOMAS G. KRATTENMAKER, ROBERT A. SKITOL & ANN ADAMS WEBSTER, *MERGERS IN THE NEW ANTI-TRUST ERA* v, v (1985).

28. The Hart-Scott-Rodino Antitrust Improvements Act, passed in 1976, and the issuance of Merger Guidelines, first by the Justice Department and now jointly by the DOJ and the FTC, have had the effect of largely shifting merger enforcement to the enforcement agencies prior to consummation of proposed mergers. See generally C. Paul Rogers III, *A Concise History of Corporate Mergers and the Antitrust Laws of the United States*, 24 NAT’ L. SCH. INDIA REV. 10, 21 (2013).

29. See, e.g., INDUSTRIAL CONCENTRATION: THE NEW LEARNING (Harvey J. Goldschmid et. al eds., 1974).

30. Clayton Antitrust Act of 1914, 15 U.S.C. § 18 (2017).

remain on the books, to be continually avoided and ignored.<sup>31</sup>

#### IV. BROWN SHOE

Modern merger jurisprudence certainly begins with the 1962 *Brown Shoe* decision, one of the most maligned antitrust decisions in history. It is there that the Court seemingly spoke out of both sides of its mouth when it held that the Clayton Act was to protect “competition, not competitors” but in the next sentence stated “[b]ut we cannot fail to recognize Congress’ desire to promote competition through the protection of viable, small, locally owned businesses.”<sup>32</sup> It went on to hold as a basis for finding a Section 7 violation that retail shoe outlets that became integrated through their acquisition by Brown as a shoe manufacturer had a competitive advantage over unintegrated outlets. The Court found that the cost savings in distribution enabled the integrated retailers to sell shoes at cheaper prices than unintegrated retail outlets.<sup>33</sup> The fact that consumers would have to pay higher prices for shoes in order to protect the unintegrated shoe retailers seems to never have occurred to the Court.

Thus, the *Brown Shoe* Court in effect held that efficiency gains were not only not procompetitive, but were, in fact, anticompetitive. In fact, in the upside-down world of the Warren Court, Brown’s defense counsel had apparently felt compelled to argue that the vertical integration would not result in any cost savings or consumer benefit.<sup>34</sup> The Court did not buy it, instead, to the defendants chagrin, using efficiency gains as an anti-trust sword rather than the potential shield that they should be.

It is fair to say that *Brown Shoe* represents the epoch of antitrust populism.<sup>35</sup> It is certainly the poster child for the proposition that antitrust law cannot have the dual goals of promoting consumer welfare and protecting competitors. In addition, today it is quite unlikely that the government would take a second glance at the merger given the market shares involved and the then highly competitive nature of the shoe industry. So, the obvious question is, what is it about the case that endures?

To quickly recapture the facts, the case involved the 1956 merger of the Brown Shoe Company and G.R. Kinney Co. Prior to the acquisition, Brown Shoe was the fourth largest U.S. shoe manufacturer, but it con-

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31. See, e.g., *United States v. Phillipsburg Nat’l Bank & Trust Co.*, 399 U.S. 350 (1970); *United States v. Third Nat’l Bank in Nashville*, 390 U.S. 171 (1968); *United States v. First City Nat’l Bank of Hous.*, 386 U.S. 361 (1967); *United States v. Von’s Grocery Co.*, 384 U.S. 270 (1966); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); *United States v. Cont’l Can Co.*, 378 U.S. 441 (1964); *United States v. Aluminum Co. of Am. (Rome Cable)*, 377 U.S. 271 (1964).

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

33. *Id.* at 343–44.

34. Harlan M. Blake & William K. Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 456–57 (1965).

35. Robert A. Skitol & Kenneth W. Vorrasi, *The Remarkable 50-Year Legacy of Brown Shoe Co. v. United States*, ANTITRUST, Spring 2012, at 47, 48–49.

trolled only 4% of the market.<sup>36</sup> Kinney was even smaller, with only 0.5%, but it operated the largest U.S. family-style shoe store chain.<sup>37</sup> However, it accounted for only 1.2% of all U.S. retail shoe sales.<sup>38</sup> Brown Shoe operated its own retail shoe stores that competed with Kinney in some locales. The acquisition gave Brown Shoe 7.2% of all U.S. retail shoe stores and 2.3% of all U.S. shoe outlets.<sup>39</sup>

The Department of Justice (DOJ) challenged the entire merger because of (a) the foreclosure of Brown Shoe's manufacturing rivals from access to Kinney's retail stores; (b) the combining of the two companies at the manufacturing level; and (c) the combining of the two companies' retail outlets. After trial, the district court dismissed the horizontal effects case at the manufacturing level<sup>40</sup> but found that the horizontal effects in retailing and the vertical effects of the foreclosure of Brown Shoe's manufacturing rivals from Kinney's retail outlets violated Section 7 and ordered total divestiture.<sup>41</sup> The Supreme Court, in an opinion written by Chief Justice Warren, affirmed the findings of illegality and divestiture.<sup>42</sup>

The Chief Justice began his long opinion with an extended analysis of the legislative history of the 1950 amendments to Section 7,<sup>43</sup> which he said were prompted by the desire to check a "rising tide of economic concentration" in the United States and "the desirability of retaining 'local control' over industry" as well as "the protection of small businesses."<sup>44</sup> According to the Court, the "keystone" to stopping that rising tide was Congress's grant of judicial "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."<sup>45</sup>

Although the Court's reading of congressional history provides the judiciary with seemingly sweeping powers to enjoin mergers, it did strike some balance, noting that some mergers may be procompetitive.<sup>46</sup> It gave as an example a merger between two small companies to enable the new firm to compete more effectively with larger firms dominating the relevant market.<sup>47</sup> In oft-cited language, the Court emphasized that "as a whole, the legislative history illuminates congressional concern with the

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36. *Brown Shoe*, 370 U.S. at 302-03.

37. *Id.* at 303.

38. *Id.* at 298, 303.

39. *Id.* at 345.

40. The government did not appeal.

41. *Brown Shoe*, 370 U.S. at 304.

42. *Id.* at 346. Justice Clark wrote a concurring opinion. *Id.* at 355 (Clark, J., concurring). Justice Harlan dissented in part and concurred in part in a separate opinion. *Id.* at 357 (Harlan, J., dissenting in part, concurring in part). Justices Frankfurter and White did not take part in the decision. *Id.* at 346 (majority opinion).

43. See Celler-Kefauver Antimerger Act of 1950, Pub. L. No. 81-899, 64 Stat. 1125 (codified as amended at 15 U.S.C. § 18).

44. *Brown Shoe*, 370 U.S. at 315-16.

45. *Id.* at 317.

46. *Id.* at 319.

47. The Court also noted that a merger between a financially healthy company and a failing one could be considered procompetitive. *Id.*

protection of *competition*, not *competitors*, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition.”<sup>48</sup> It went on to note, however, that “Congress used the words ‘*may*’ to indicate that its concern was with probabilities, not certainties.”<sup>49</sup> But only “[m]ergers with a probable anticompetitive effect,” not those with “ephemeral possibilities,” were to be proscribed.<sup>50</sup>

The Court provided some guidance about how it intended to accomplish its mission by observing that “Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry.”<sup>51</sup> Then, in its famous footnote 38, the Court noted that market share statistics of the industry leaders and of the merging parties “are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger.”<sup>52</sup>

In first tackling the vertical aspect of the merger arising from Brown, the manufacturer, acquiring Kinney, the retailer, the Court noted that defining the relevant product and geographic market is a “necessary predicate” to finding a violation.<sup>53</sup> It held that the “reasonable interchangeability of use or the cross-elasticity of demand between the product itself and [its] substitutes” constitutes “[t]he outer boundaries of a product market.”<sup>54</sup> The Court went on to say that “within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.”<sup>55</sup> According to the Court, men’s, women’s, and children’s shoes constituted three distinct product markets since each was recognized by the public, each line was manufactured in separate plants, and each had unique characteristics directed toward a distinct class of customers.<sup>56</sup>

In considering whether the vertical portion of the merger created a “probable” anticompetitive effect, the Court first focused on “the size of the share of the market foreclosed.”<sup>57</sup> It concluded that since Brown was the fourth largest shoe manufacturer and Kinney was the largest independent chain of family shoe stores in the country, “in this industry, no merger between a manufacturer and an independent retailer could in-

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48. *Id.* at 320.

49. *Id.* at 323.

50. *Id.*

51. *Id.* at 321–22.

52. *Id.* 322 n.38.

53. *Id.* at 324 (quoting *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957)).

54. *Id.* at 325.

55. *Id.*

56. The Court rejected further bifurcation of the product market by rejecting the defendant’s assertion that medium-priced shoes should be differentiated from low-priced shoes as “unrealistic.” *Id.* at 326.

57. *Id.* at 328.

volve a larger potential market foreclosure.”<sup>58</sup> In so holding, the Court emphasized that Brown sold about 25 million pairs of shoes during the year of the merger with assets of \$72 million while Kinney sold eight million pairs of shoes and had assets of about \$18 million.<sup>59</sup> The Court either forgot or decided to ignore the fact that Brown had all of 4% of U.S. shoe production while Kinney sold about 1.2% of U.S. retail shoe sales.

The *Brown Shoe* Court was also worried about “the trend toward concentration in the industry” since the district court “found a tendency of the acquiring manufacturers to become increasingly important sources of supply for their acquired outlets.”<sup>60</sup> That meant “the foreclosure of independent manufacturers from markets otherwise open to them.”<sup>61</sup> Brown Shoe’s argument that the shoe industry was “dynamically competitive” and composed of large numbers of manufacturers and retailers thus fell on deaf ears.<sup>62</sup>

Thus, as noted earlier, the Court cared not a whit about efficiency gains or cost savings through integration, which could produce lower prices for consumers. It was, rather, focused on keeping small, unintegrated sellers in the fray, no matter the downstream costs of doing so. Further, its concern about the trend toward concentration seems, with fifty-five years of hindsight, misplaced given how resolutely unconcentrated the shoe industry was then. The Court rather seems to have circled back on itself and considered “ephemeral possibilities” as a basis for finding illegality.

The Court next turned to the horizontal effect side of the case stemming from the merger of the Brown and Kinney retail shoe outlets. It stayed with the three lines of commerce or product markets but diverged from the nation as a whole geographic market it had employed in the vertical part of the case. Instead, the Court focused on submarkets consisting of “those cities with a population exceeding 10,000 and their environs in which both Brown and Kinney retailed shoes through their own outlets.”<sup>63</sup> The market shares varied considerably among the various groups of cities considered, but the Court chose to focus on the 118 cities where the combined shares exceeded 5% for at least one line of commerce.<sup>64</sup> The Court expressed concern about a slippery slope that might result from approval of the merger since it might require it to approve future acquisitions with similar market shares. If so, then “[t]he oligopoly

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58. *Id.* at 331–32.

59. *Id.* at 331.

60. *Id.* at 332.

61. *Id.*

62. *Id.* at 333.

63. *Id.* at 339.

64. The Court noted that “[i]n 47 cities, their share exceeded 5% in all three lines.” *Id.* at 343. In its opinion the Court also identified certain groups of cities in which the market share for one line of commerce was particularly high. For example, the Court noted that “in 32 separate cities . . . the combined share of Brown and Kinney sales of women’s shoes . . . exceeded 20%” while “[i]n 31 cities . . . the combined share of children’s shoes sales exceeded 20%,” with 6 of those cities exceeding 40%. *Id.* at 342–43.

Congress sought to avoid would then be furthered.”<sup>65</sup>

It was here that the Court went into its oft-criticized double-speak, favoring competition over competitors but actually basing its reasoning on “the protection of viable, small, locally owned businesses.”<sup>66</sup> It went so far as to note “that occasional higher costs and prices might result from the maintenance of fragmented industries and markets.”<sup>67</sup> It also took its admonition to arrest potentially anticompetitive mergers “in their incipency” seriously, particularly when “tendencies [toward concentration] are being accelerated through giant steps striding across a hundred cities at a time.”<sup>68</sup> In support of this sweeping statement, the Court pointed to the fact that Brown was now the second largest shoe retailer, with about 1,600 retail outlets that accounted for all of 7.2% of the nation’s retail shoe stores and 2.3% of the country’s retail shoe outlets.<sup>69</sup>

Of course, today those numbers would draw only brief, passing attention from the enforcement agencies. Those few cities in which the combined market shares were significant might be subject to partial divestiture or, today, when mergers are viewed prospectively and not retrospectively, to a conditional approval subject to the sale of stores in those communities. Although the *Brown Shoe* Court ordered total divestiture, it did arguably set the stage for partial or limited divestiture in its footnote 65, where it noted that an overlap of only a small portion of the merging parties businesses would not immunize the acquisition from Section 7 but might well impact the equitable relief decreed.<sup>70</sup>

Reaction to the *Brown Shoe* decision was predictably strong and negative and was generally directed at the Court’s populist approach to Section 7 at the expense of lower prices and efficiency gains.<sup>71</sup> For the most part, the criticism has continued unabated.<sup>72</sup> One commentator noted

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65. *Id.* at 344.

66. *Id.* at 344.

67. *Id.*

68. *Id.* at 346. The Court initially used “incipiency” in the context of its review of the legislative history surrounding the passage of the 1950 Celler-Kefauver Amendments to Section 7. In doing so, it arguably accurately reflected Congress’s conception of “competition” to refer to situations in which a large number of small businesses competed. Further, the legislative history makes it clear that Congress wanted a merger statute that allowed for more aggressive enforcement. See HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 210 (2005); see also Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 234 (1960).

69. *Brown Shoe*, 370 U.S. at 345–46. The difference in the two percentages accounts for the fact that shoes were sold at retail through department stores and other retail outlets that were not just shoe stores.

70. *Id.* at 337 n.65. See William F. Rogers & Sanford M. Litvack, *Brown Shoe: The Guidance of a Footnote*, 1963 WASH. U. L.Q. 192 (1963).

71. See, e.g., Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363 (1965). The decision did have its early supporters. See, e.g., Milton Handler, *Fifteenth Annual Review of Antitrust Developments*, 17 REC. N.Y.C. B. ASS’N 411, 433 (1962) (asserting that the Court rebuffed the government’s “efforts to convert Section 7 into a *per se* statute” by adopting a functional, contextual approach).

72. See, e.g., ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 210–16 (1978) (asserting that *Brown Shoe* “has considerable claim to the title” of “worst antitrust essay ever written”); John L. Peterman, *The Brown Shoe Case*, 18 J.L. &

that the decision appears to recognize only two legitimate reasons for merger at all: to permit acquisition of a failing company and to allow two small firms to seek efficiencies that would enable them to better compete with dominant firms.<sup>73</sup> Perhaps most telling is the assertion that the opinion shows that the Court could not distinguish between competition and monopolization.<sup>74</sup> Of course, no small part of the criticism is that the decision unleashed the Warren Court on merger cases of every stripe—horizontal, vertical, and so-called conglomerate—leading to Justice Stewart’s famous comment in his dissent in *Von’s Grocery* that “[t]he sole consistency” he could find in Section 7 litigation is that “the Government always wins.”<sup>75</sup>

The government’s merger win streak came to an abrupt halt in 1974 in the *General Dynamics* case.<sup>76</sup> The opinion was written by none other than Justice Stewart, who now commanded a majority thanks to four Burger Court appointees and the loss of three Warren Court justices.<sup>77</sup> With its new majority, the Court upheld the lower court’s dismissal of the government’s challenge of a merger in the coal industry even though it held the government’s evidence of market share statistics and industry concentration was sufficient to condemn the merger under *Brown Shoe* and its 1960s progeny.<sup>78</sup> But those statistics, the Court noted, were based on the acquired party’s past coal production and did not necessarily equate to its present and future ability to compete for the long-term contracts due to its lack of uncommitted reserves. Thus, the Court found that there was insufficient evidence to establish any probable anticompetitive effect.<sup>79</sup>

*General Dynamics* is widely thought to be a watershed in Section 7 jurisprudence as the Court transitioned its earlier populist conception of competition to one that was truer to a consumer welfare paradigm.<sup>80</sup> Then, the 1982 Department of Justice Guidelines, promulgated under Assistant Attorney General William Baxter, seemed to depart sharply from

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ECON. 81, 143 (1975) (noting that the evidence accepted by the Court against *Brown* was “extraordinarily weak” and “bordered on fiction,” particularly as it related to the “extent of retail competition between *Brown* and *Kinney*, and the trend toward increasing concentration”).

73. See STEPHEN F. ROSS, PRINCIPLES OF ANTITRUST LAW 326 (1993) (citing *Brown Shoe*, 370 U.S. at 346).

74. See RICHARD A. POSNER, ANTITRUST LAW 124 (2d ed. 2001) (“One has no sense that the Court had any notion of how a nonmonopolistic merger might affect competition.”); Peterman, *supra* note 72, at 143–44.

75. *United States v. Von’s Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

76. *United States v. Gen. Dynamics Corp.*, 415 U.S. 486 (1974). The DOJ also lost two banking merger cases that term, making it clear that the worm had turned. See *United States v. Marine Bancorp.*, 418 U.S. 602 (1974); *United States v. Conn. Nat’l Bank*, 418 U.S. 656 (1974).

77. In the interim since the *Von’s Grocery* decision, Warren Burger had become Chief Justice and Justices Blackmun, Powell, and Rehnquist had joined the Court. See, e.g., C. Paul Rogers III, *Perspectives on Corporate Mergers and the Antitrust Laws*, 12 LOY. U. L.J. 301, 306–07 (1981).

78. *General Dynamics*, 415 U.S. at 494 n.6.

79. *Id.* at 501, 503–04.

80. *Skitol & Vorrasi*, *supra* note 35, at 50.

*Brown Shoe* by focusing on the pure economic effect of mergers rather than “viewing [them] as a threat to the societal fabric” as part of some more generalized reckoning.<sup>81</sup> The guidelines, on one level at least, evince a further break from *Brown Shoe* by excluding industry trends toward concentration as a relevant factor in merger reviews.<sup>82</sup>

Today most Warren Court merger cases, although not overruled, are simply ignored by the government enforcement agencies and the federal courts.<sup>83</sup> But not *Brown Shoe*, which has, if anything, experienced a resurrection. Thus, how is it that a much maligned decision that sought to protect small competitors even at the expense of higher prices, was un-receptive to lowering costs, and hit upon a 5% relevant market share as the lynchpin for illegality has become center stage again?

It turns out that the internally contradictory nature of the *Brown Shoe* decision is both a blessing and a curse. It has allowed courts in the post-*General Dynamics* era to ignore *Brown Shoe*'s populist notions while still focusing on its analytical construct. In fact, the *General Dynamics* Court, the antithesis of *Brown Shoe* in philosophy and result, actually relied on it to support its position that market share statistics, while the primary indicia of market power, must be considered in the context of the market's “structure, history and probable future” to truly assess the probable anticompetitive effect of the merger.<sup>84</sup> In doing so, it elevated a *Brown Shoe* footnote to a central analytical principle for ascertaining likely competitive effect.<sup>85</sup>

*Brown Shoe* has, of course, the benefit of being the Supreme Court's first merger decision after the Celler-Kefauver Amendments “modernized” Section 7 by expanding it to include asset acquisitions and by making it clear that the statute applied not only to mergers between competitors but also to vertical and conglomerate acquisitions.<sup>86</sup> And, in

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81. Donald I. Baker & William Blumenthal, *The 1982 Guidelines and Preexisting Law*, 71 CALIF. L. REV. 311, 317–18 (1983).

82. William F. Baxter, *Responding to the Reaction: The Draftman's View*, 71 CALIF. L. REV. 618, 630 (1983) (“An industry trend toward concentration is not a factor that will be considered, even though it has been used in the past.”).

83. HOVENKAMP, *supra* note 68, at 208.

84. *General Dynamics*, 415 U.S. at 498 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 322 n.38 (1962)).

85. Skitol & Vorrasi, *supra* note 35, at 50. The 1984 DOJ Merger Guidelines also reflect the *Brown Shoe*, as expanded by *General Dynamics*, consideration of changing market conditions as a factor in interpreting market concentration and market share data. U.S. DEPT. OF JUSTICE, MERGER GUIDELINES § 3.21 (1984) (“[R]ecent or on-going changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance.”).

86. Celler-Kefauver Antimerger Act of 1950, Pub. L. No. 81-899, 64 Stat. 1125 (codified as amended at 15 U.S.C. § 18). The amendments were long in the works. According to *Brown Shoe*, sixteen bills to amend Section 7 were introduced from 1943 to 1949, with full public hearings being held in three different sessions. 370 U.S. at 311–12. The Supreme Court's decision in *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948), finally prompted Congress to act. There, the Court upheld an acquisition by U.S. Steel, the largest steel producer in the country, of Consolidated Steel, the second largest steel fabricator in the Western U.S. The government had had to challenge the merger under the Sherman Act, which requires showing of an actual, as opposed to probable, anticompetitive impact,

contrast to the criticism of the Court's solicitude to the protection of small competitors, the standards it set for defining the relevant market to measure competitive impact have, although sometimes challenged, stood the test of time.

As noted, the Court held that definition of the relevant market was "a necessary predicate" to determining the likely competitive impact of a merger.<sup>87</sup> Since *Brown Shoe* is the starting place, it is often cited for the mere proposition that defining the relevant market is the necessary first step in merger analysis.<sup>88</sup> Courts have rebuffed government assertions that it is not necessary. For example, in *FTC v. Whole Foods Market, Inc.* the D.C. Circuit rejected the government's claim that a relevant market definition was just a "means to an end—to enable some measurement of market power—not an end in itself" by citing *Brown Shoe*'s famous footnote 38 and reiterating that defining the relevant market and considering it in context provides the appropriate setting for evaluating the likely anticompetitive effect of the merger.<sup>89</sup>

In addition, the 2010 Merger Guidelines were criticized for downplaying or even marginalizing the role of market definition in merger analysis,<sup>90</sup> which prompted the Acting Attorney General to declare in an August 2011 address that that was not the case.<sup>91</sup> The court in *United States v. H&R Block, Inc.*, decided about a year after the new Guidelines were issued, opined in a footnote that "[a]s a matter of applied economics, evaluation of unilateral effects does not require a market definition in the traditional sense" but noted that as "a legal matter . . . a market definition may be required by Section 7."<sup>92</sup> It then observed that it was not aware of any Section 7 case in which a court had dispensed with it.<sup>93</sup>

Of course, the *Brown Shoe* Court also articulated the "reasonable interchangeability" standard for ascertaining "[t]he outer boundaries of a product market."<sup>94</sup> That standard is frequently cited by lower courts as the general or basic rule for defining a relevant product market.<sup>95</sup> In ad-

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because the acquisition was through the purchase of assets rather than stock, meaning that Section 7 of the Clayton Act did not apply.

87. *Brown Shoe*, 370 U.S. at 324 (quoting *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957)).

88. See, e.g., *FTC v. Advocate Health Care Network*, 841 F.3d 460, 464 (7th Cir. 2016); *FTC v. Swedish Match N. Am.*, 131 F. Supp. 2d 151, 156 (D.D.C. 2000).

89. *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1036 (D.C. Cir. 2008) ("Inexplicably, the FTC now asserts a market definition is not necessary in a § 7 case . . .").

90. See, e.g., James A. Keyte & Kenneth B. Schwartz, "Tally-Ho!": *UPP and the 2010 Horizontal Merger Guidelines*, 77 ANTITRUST L.J. 587, 588–94, 597–98, 600–04 (2011).

91. Sharis A. Pozen, Acting Assistant Att'y Gen., Antitrust Div. U.S. Dep't of Justice, *Developments at the Antitrust Division and the 2010 Horizontal Merger Guidelines—One Year Later* 17, 19–23 (Nov. 17, 2011) (transcript available at [www.justice.gov/atr/public/speeches/277488.pdf](http://www.justice.gov/atr/public/speeches/277488.pdf) [<https://perma.cc/K9WA-A86T>]).

92. 833 F. Supp. 2d 36, 84 n.35 (D.D.C. 2011) (quoting PHILLIP E. AREEDA & HERBERT HOVENKAMP ANTITRUST LAW 66 (3d ed. 2007) (citing *Brown Shoe*, 370 U.S. at 324)).

93. *Id.*

94. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

95. See, e.g., *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 117–18 (D.D.C. 2016) (reasonable interchangeability "the basic rule."); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 34 (D.D.C.

dition, *Brown Shoe*'s observation that Section 7 requires consideration of "probabilities, not certainties,"<sup>96</sup> when assessing competitive impact is oft-cited as a bedrock principle,<sup>97</sup> as is its language that relevant market definition requires "a pragmatic, factual approach . . . and not a formal, legalistic one."<sup>98</sup> Similarly, *Brown Shoe*'s requirement that the relevant geographic market must "'correspond to the commercial realities' of the industry" under consideration and must "be economically significant" has been influential.<sup>99</sup>

*Brown Shoe* also spoke of the potential for the existence of submarkets within a broader market that could constitute product markets.<sup>100</sup> Federal courts have taken the possibility of the existence of submarkets to heart, even though the "submarket" terminology emanating from *Brown Shoe* is confusing at best and potentially misleading.<sup>101</sup> For example, it is not entirely clear whether the *Brown Shoe* Court considered that men's, women's, and children's shoes were appropriate submarkets of the general shoe market or whether the Court considered each to be its own product market, especially since the Court declined to further delineate the market by price or quality.<sup>102</sup> As one court has stated, "[t]he term 'submarket' is somewhat of a misnomer, since the 'submarket' analysis simply clarifies whether two products are in fact 'reasonable' substitutes and are therefore part of the same market."<sup>103</sup>

However, although maligned, submarkets were brought back to the forefront by the so-called Unilateral Effects doctrine first identified in the 1992 DOJ-FTC Horizontal Merger Guidelines.<sup>104</sup> Those guidelines con-

2015) (reasonable interchangeability "the general rule"); *H & R Block*, 833 F. Supp. 2d at 50 (general rule); *FTC v. Swedish Match N. Am.*, 131 F. Supp. 2d 151, 157 (D.D.C. 2000) (general rule); see also *FTC v. Lundbeck, Inc.*, 650 F.3d 1236, 1240 (8th Cir. 2011).

96. *Brown Shoe*, 370 U.S. at 323.

97. See, e.g., *FTC v. Advocate Health Care Network*, 841 F.3d 460, 467 (7th Cir. 2016); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337 (3d Cir. 2016); *Saint Alphonsus Med. Ctr.—Nampa Inc. v. Saint Luke's Health Sys.*, 778 F.3d 775, 783 (9th Cir. 2015).

98. *Brown Shoe*, 370 U.S. at 336. See, e.g., *Advocate Health Care Network*, 841 F.3d at 468; *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 193 (D.D.C. 2017); *Allen v. Dairy Farmers of Am., Inc.*, 748 F. Supp. 2d 323, 338 (D. Vt. 2010); *HTI Heath Servs. v. Quorum Health Grp.*, 960 F. Supp. 1104, 1114–15 (S.D. Miss. 1997).

99. *Brown Shoe*, 370 U.S. 336–37 (footnote omitted). See, e.g., *Penn State Hershey Med. Ctr.*, 838 F.3d at 338; *Mich. Div.—Monument Builders of N. Am. v. Mich. Cemetary Ass'n*, 524 F.3d 726, 733 (6th Cir. 2008); *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 292 (9th Cir. 1979); *Anthem, Inc.*, 236 F. Supp. 3d at 202; *Sysco Corp.*, 113 F. Supp. 3d at 48; *In re Pool Prods. Distrib'n Mkt. Antitrust Litig.*, 940 F. Supp. 2d 367, 377 (E.D. La. 2013).

100. *Brown Shoe*, 370 U.S. at 325.

101. See IIB PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTRITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 533, at 251 (3d ed. 2007) ("Courts sometimes describe the closest substitutes as a 'submarket' within a larger 'market' of less-close substitutes. Although degrees of constraint do in fact vary, the 'market' for antitrust purposes is the *one* relevant to the particular legal issue at hand.") (citations omitted).

102. The Court also declined to separate children's shoes by gender or by age, e.g., infants' shoes, since the market percentages were about the same. *Brown Shoe*, 370 U.S. at 326–28.

103. *Geneva Pharms. Tech. Corp. v. Barr Labs, Inc.*, 386 F.3d 485, 496 (2d Cir. 2004).

104. See *Skitol & Vorrasi*, *supra* note 35, at 50.

tained a new section titled “Lessening of Competition through Unilateral Effects,” which suggests the prospect of government challenges between “close” competitors within markets for differentiated products solely because the closeness would enable the merged firm to raise prices on one of the merging products without the need to show an anticompetitive impact on the entire market.<sup>105</sup> As a result, unilateral effects cases abound, with courts struggling to determine whether close substitutes in fact are a definable submarket.<sup>106</sup>

To its credit, the *Brown Shoe* Court did more than assert that submarkets may exist and delineated “practical indicia” as an analytical guide.<sup>107</sup> But the criteria created problems for the lower courts because they appear open-ended with no guidance as to how they are to be weighted.<sup>108</sup> Fairly early on, the Ninth Circuit described them as “practical aids . . . rather than with the view that their presence or absence would dispose, in talismanic fashion, of the submarket issue.”<sup>109</sup> Indeed, courts have found that submarkets exist even if only some of the indicia are present.<sup>110</sup>

But the larger point is that *Brown Shoe*’s practical indicia have had a profound impact on the submarket analyses in many merger cases. For example, in *FTC v. Swedish Match North America, Inc.*, the FTC sought to enjoin a merger between two leading loose leaf tobacco manufacturers despite the competition presented from moist snuff tobacco manufacturers.<sup>111</sup> The district court held that although there was some overlapping

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105. U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 2.2 (1992), [www.justice.gov/atr/public/guidelines/hmg.pdf](http://www.justice.gov/atr/public/guidelines/hmg.pdf) [<https://perma.cc/FLX2-97EC>].

106. See, e.g., *Promedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 568–70 (6th Cir. 2014); *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1039 (D.C. Cir. 2008); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 717–19 (D.C. Cir. 2001); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 61–70 (D.D.C. 2015); *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 68 (D.D.C. 2009); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1117–18 (N.D. Cal. 2004); *FTC v. Swedish Match N. Am.*, 131 F. Supp. 2d 151, 168–69 (D.D.C. 2000); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 45 (D.D.C. 1998); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1074, 1083 (D.D.C. 1997); *New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321, 360–61 (S.D.N.Y. 1995); *United States v. Interstate Bakeries Corp.*, 1996-1 Trade Cas. § 71,271 (N.D. Ill. 1995); *United States v. Kimberly-Clark Corp.*, 1996-1 Trade Cas. § 71,405 (N.D. Tex. 1995).

107. *Brown Shoe*, 370 U.S. at 325 (“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.”) (citing BETTY BOCK, *MERGERS AND MARKETS: A GUIDE TO ECONOMIC ANALYSIS OF CASE LAW* 25–35 (1960)).

108. LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 556 (2d ed. 2006) (“*Brown Shoe* failed to establish a workable rule for weighing the various factors that determine a merger’s legality. That left merger analysis open-ended—and allowed the Court to give determinative weight to any of the listed factors.”); ROSS, *supra* note 73, at 338 (“[T]he open-textured nature of the analysis requires judges to apply these standards with particular care.”).

109. *Int’l Tel. & Tel. Corp. v. Gen. Tel. & Elecs. Corp.*, 518 F.2d 913, 932 (9th Cir. 1975).

110. See, e.g., *Beatrice Foods Co. v. FTC*, 540 F.2d 303, 308–09 (7th Cir. 1976) (finding submarket based on industry recognition, peculiar characteristics of the product, and differences in production methods and prices).

111. 131 F. Supp. 2d 151 (D.D.C. 2000).

consumer usage of the products, “the weight of the evidence read in light of Brown Shoe’s indicia convinces the Court that loose leaf chewing tobacco constitutes a distinct relevant product market.”<sup>112</sup> More recently, the court in *FTC v. Sysco Corp.*, in blocking a merger between the top two food service companies, undertook a detailed analysis of the *Brown Shoe* factors in determining that broadline food service was not functionally interchangeable with broadline foodservice distribution.<sup>113</sup> Other courts have similarly applied the *Brown Shoe* indicia to conclude whether a submarket either existed or not.<sup>114</sup>

Thus it is that one of the most denounced antitrust decisions from the most derided antitrust era has come to be a foundational case in its field. The reasons are several. *Brown Shoe*’s timing as the first post-Cellar-Kefauver Amendments merger decision certainly is one. As noted, those amendments were significant and reflected a congressional intent to “plug the loophole” exempting asset acquisitions and expand the reach of Section 7 to cover any merger which might have an anticompetitive impact. As a result, the *Brown Shoe* Court’s lengthy and detailed description of the act’s legislative history was important in and of itself. Further, many believe that the Court’s reading of that legislative history was pretty accurate and reflected Congress’s concern more for the continuing viability of small businesses that were being “gobbled up” by larger companies than for lower prices.<sup>115</sup>

Faced with new legislation, the Court’s articulation of the standards for assessing the relevant product and geographic markets were intended to provide guidance and have done so. One can take issue with the Court’s *application* of those standards to the facts before it and even with the standards as being too open-ended, but it is difficult for lower courts to ignore the fundamental approach set forth by the Court in interpreting a significantly revised statute for the first time.

Third, the multifaceted and bipolar nature of the opinion means that lower courts can pick and choose to a significant degree from the earlier precedent. Thus, modern courts have elected to ignore *Brown Shoe*’s

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112. *Id.* at 165.

113. 113 F. Supp. 3d 1, 27–33 (D.D.C. 2015).

114. *See, e.g.,* Polypore Int’l, Inc. v. FTC, 686 F.3d 1208, 1216–18 (11th Cir. 2012) (deep cycle batteries one market); *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1037–38 (D.C. Cir. 2008) (premium, natural, and organic supermarkets (PNOS) a distinct submarket from supermarkets in general); *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 995–99 (11th Cir. 1993) (Danforth brand anchors excluded from market for generic lightweight anchors because of higher price); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218, (D.C. Cir. 1986); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 51–60 (D.D.C. 2011); *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 39–44 (D.D.C. 2009); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 46–48 (D.D.C. 1998); *cf. United States v. Gillette Co.*, 828 F. Supp. 78, 82 (D.D.C. 1993) (holding that *Brown Shoe* “is distinguishable” in refusing to hold that premium fountain pens in the \$50 to \$400 range constituted a distinct submarket).

115. *See supra* text accompanying note 65; *see also, e.g.,* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 550 (4th ed. 2011).

populist notion about protecting small businesses while utilizing its approach to relevant market definition. As a result, it is likely that a court today would come to the same relevant market determinations as did the *Brown Shoe* Court but find no violation of Section 7 nonetheless. This is because the *Brown Shoe* Court had a different view about likely competitive impact than a court or the government enforcement agencies would likely have today. That different view stems from a fundamental change in merger ideology. A combined market share of 7.2% (or 2.3% if all retail shoe outlets were included) would draw a yawn from today's DOJ or Federal Trade Commission (FTC). Consumer welfare in terms of lower prices, higher quality, and a recognition that large firms are more efficient and innovative have replaced earlier concerns about the viability of small businesses and market trends toward concentration, no matter how small an impact a merger has. Further, merger created efficiencies, while not necessarily embraced, are at least not considered a negative.<sup>116</sup>

So, if *Brown Shoe* was a bad antitrust decision, it still certainly made some good, or at least lasting, law. Of course, one can argue whether it was truly a bad decision or simply a product of the Supreme Court's pretty accurate attempt to follow Congressional intent. In any event, the decision certainly fit within the Warren Court's antitrust mainstream, with or without the Cellar-Kefauver amendments. But, at a minimum, *Brown Shoe* is a case that persists as a foundational antitrust decision even though it embodies values that have fundamentally shifted.<sup>117</sup>

## V. ALCOA

Just as merger law begins with *Brown Shoe*, Judge Learned Hand's opinion in *United States v. Aluminum Company of America (Alcoa)*<sup>118</sup> is the start of the "modern" law of monopolization under Section 2 of the Sherman Act. And like *Brown Shoe*, *Alcoa* is much maligned for its faulty reasoning and outcome. But, also like *Brown Shoe*, *Alcoa* has had staying power, and although the law of monopolization has moved on, it is unlikely to ever be overruled.

*Alcoa* ranks among the big five, along with *Standard Oil*,<sup>119</sup> *U.S.*

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116. Some modern courts have referred to *Brown Shoe*, however, when expressing skepticism about proffered efficiency defenses. *See, e.g.*, *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 347–48 (3d Cir. 2016) (quoting *Brown Shoe*'s statement that "occasional higher costs and prices might result from the maintenance of fragmented industries and markets" to support its skepticism about efficiency arguments); *Saint Alphonsus Med. Ctr.—Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 788–89 (9th Cir. 2015) (same).

117. *But see, e.g.*, *United States v. Anthem, Inc.* 855 F.3d 345, 376–77 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (criticizing majority for following *Brown Shoe* in refusing efficiency defense and arguing that circuit court should follow "the modern approach taken by the Supreme Court and by this Court").

118. 148 F.2d 416 (2d Cir. 1945).

119. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

*Steel*,<sup>120</sup> *AT&T*,<sup>121</sup> and *Microsoft*,<sup>122</sup> in government antitrust challenges that captured the public's attention.<sup>123</sup> It was the largest antitrust case in a generation and involved a New Deal challenge to Alcoa's monopoly of the ever expanding aluminum industry.<sup>124</sup> In the late 1800s and early 1900s, Alcoa, originally the Pittsburgh Reduction Company, acquired patents that made possible the extraction of the metal alumina, aluminum in its oxide state, from bauxite ore. Those processes made the production of aluminum on a large scale commercially practical, and for all intents and purposes, Alcoa had a monopoly on that technology and on the manufacture of "virgin" aluminum ingot until 1909 when the last patent expired.<sup>125</sup>

Alcoa, however, managed to maintain its domination of the domestic aluminum ingot market thereafter by entering into restrictive covenants in which power companies agreed not to sell or let power to any competing aluminum ingot manufacturers<sup>126</sup> and by orchestrating international cartels to keep foreign ingot out or to fix prices of any ingot that was imported. These practices brought a government challenge and a subsequent consent decree, which was entered into in 1912.<sup>127</sup>

The consent decree was relatively modest in its impact, and Alcoa continued to dominate the aluminum ingot industry. It was subject to a prolonged Federal Trade Commission antitrust investigation in the 1920s, but no litigation resulted. In 1937, the Antitrust Division, influenced by President Roosevelt's renewed interest in market competition as a cure for the Great Depression after the National Industrial Recovery Act had floundered and then been declared unconstitutional, again challenged Alcoa as having unlawfully maintained its monopoly over the aluminum ingot market.<sup>128</sup>

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120. *United States v. U.S. Steel Corp.*, 251 U.S. 417 (1920).

121. *United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983), and *amended sub nom. United States v. W. Elec. Co.*, 714 F. Supp. 1 (D.D.C. 1988), *aff'd in part, rev'd in part sub nom. United States v. W. Elec. Co.*, 900 F.2d 283 (D.C. Cir. 1990), and *modified sub nom. United States v. W. Elec. Co.*, 890 F. Supp. 1 (D.D.C. 1995), *vacated*, 84 F. 3d 1452 (D.C. Cir. 1996).

122. *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (per curiam).

123. *Brown Shoe* arguably did not have the same level of public notoriety.

124. The Antitrust Division of the Justice Department was created in 1933, but for its first few years did relatively little to enforce the antitrust laws. Thurman Arnold's appointment as head of the division changed all of that and began a period of aggressive enforcement (although the case against Alcoa was brought by Robert Jackson just before Arnold took office). For an account of Arnold's impact as the head of the Antitrust Division, see SPENCER WEBER WALLER, *THURMAN ARNOLD: A BIOGRAPHY* 78–110 (2005).

125. The full history of Alcoa is told in CHARLES C. CARR, *ALCOA: AN AMERICAN ENTERPRISE* (1952).

126. It apparently took a large amount of electrical energy to extract aluminum from alumina. *Alcoa*, 148 F.2d 416, 422 (2d Cir. 1945).

127. *United States v. Aluminum Co. of Am.*, Equity No. 159 (W.D. Pa. 1912), *reprinted in DECREEs AND JUDGMENTS IN FEDERAL ANTI-TRUST CASES, JULY 2, 1890 – JANUARY 1, 1918*, at 341–50 (1918), *abstract reprinted in ANTITRUST CONSENT DECREES 1906-1966*, at 217–18 (1968).

128. *United States v. Aluminum Co. of Am.*, 44 F. Supp. 97 (S.D.N.Y. 1941).

The trial began on June 1, 1938, and lasted for over two years, until August 14, 1940. The trial judge then immediately issued an oral and then written opinion dismissing all charges and exonerating the defendants in every way.<sup>129</sup>

The government appealed directly to the Supreme Court, as then permitted by the Expediting Act.<sup>130</sup> The Court, however, lacked a quorum of six justices to hear the case because at least four justices had previously helped prosecute the case for the government.<sup>131</sup> Congress finally resolved the quandary when it passed a statute designating the Second Circuit as the court of last resort to consider the government's appeal.<sup>132</sup>

On March 12, 1945, the Second Circuit reversed the district court almost entirely and found Alcoa liable for monopolization of the aluminum ingot market.<sup>133</sup> In a detailed, wide-ranging opinion, Judge Hand crafted landmark precedent for determining (1) what constitutes monopoly power, (2) what kind of conduct by a monopolist makes it guilty of "monopolization" under the statute, and (3) when anticompetitive conduct outside of the United States violates the Sherman Act.

Overall, the case greatly expanded the antitrust law in several ways. Its adoption of the "effects" test gives rise to so-called extraterritorial jurisdiction for any anticompetitive conduct abroad that impacts U.S. commerce.<sup>134</sup> Further, the opinion's standard for measuring whether conduct by a monopolist is exclusionary gave monopolists little wiggle room to compete in the marketplace and thus expanded Section 2 of the Sherman Act significantly.<sup>135</sup> In addition, Judge Hand's finding that monopolistic intent is not a separate element of Section 2, since "no monopolist monopolizes unconscious of what he is doing," also had the effect of broadening the statute's reach by eliminating intent as a separate requirement.<sup>136</sup>

Although Judge Hand got much right in *Alcoa*, he also missed the mark more than once, with the result that *Alcoa* is a mixed bag. On the plus side, Judge Hand's characterization of a 90% market share as a likely monopoly, a 60% share as doubtful, and 33% as not a monopoly has become a foundation of Section 2 jurisprudence. The effects test created

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129. *Id.*

130. 15 U.S.C.S. § 29 (1944).

131. The Court was down to eight members at the time, leaving just four justices to hear the case. Spencer Weber Waller, *The Story of Alcoa: The Enduring Questions of Market Power, Conduct, and Remedy in Monopolization Cases*, in *ANTITRUST STORIES* 121, 129 (Eleanor M. Fox & Daniel A. Crane eds., 2007).

132. 15 U.S.C. § 29 (1944).

133. *Alcoa*, 148 F.2d 416.

134. See, e.g., C. PAUL ROGERS III, STEPHEN CALKINS, MARK R. PATTERSON & WILLIAM R. ANDERSEN, *ANTITRUST LAW: POLICY AND PRACTICE* 1055-58 (4th ed. 2008).

135. One commentator has noted the irony of Judge Hand becoming an antitrust expansionist since earlier in his career he had little interest in judicial enforcement of the Sherman Act. Waller, *supra* note 131, at 129-30. See also GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 206-09 (1994).

136. *Alcoa*, 148 F.2d at 432.

controversy both here and abroad but it too has stood the test of time,<sup>137</sup> and it is now the fundamental jurisdictional tool used to combat international price-fixing and bid-rigging cartels.<sup>138</sup>

The negatives, however, are equally significant. Most believe that Judge Hand badly missed the mark in his definition of the relevant product market and, more crucially, in his characterization of what constitutes exclusionary conduct by a firm found to be dominant.

Judge Hand narrowly defined the product market as limited to virgin aluminum ingot, excluding so-called scrap or secondary ingot.<sup>139</sup> He included in that definition virgin ingot that Alcoa used for its own fabrication purposes as well as that which it sold to third parties. In doing so, he reasoned that all virgin ingot produced could impact demand and so should be included in the relevant market.<sup>140</sup> That certainly makes sense, but he then veered off course by excluding secondary, i.e., scrap, ingot from the relevant market while acknowledging that, for most purposes, it competed with virgin ingot on an almost equal basis and in fact probably set a ceiling on the price of the virgin variety.<sup>141</sup>

That meant that Alcoa controlled over 90% of the market; if Judge Hand had included secondary ingot, Alcoa's market share would have been about 64% while if he had included secondary ingot and excluded virgin ingot Alcoa fabricated itself, its market share would have hovered around 33%.<sup>142</sup> In other words, the exclusion of secondary ingot was essential to determining that Alcoa was a monopolist.

Judge Hand's reason for excluding scrap ingot related to the fact that he viewed the amount of scrap on the market as within Alcoa's control since it dominated the production of virgin ingot. Accordingly, Alcoa could forecast, whether accurately or not, the amount of scrap ingot that would be on the market in future years and adjust its production of virgin accordingly. Thus, "[t]he competition of 'secondary' must therefore be disregarded, as soon as we consider the position of 'Alcoa' over a period of years; it was as much within 'Alcoa's' control as was the production of the 'virgin' from which it had been derived."<sup>143</sup>

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137. See e.g., *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); see also C. Paul Rogers III, *A Comment on the Extraterritorial Application of American Law in the 1990s*, in *FESTSCHRIFT FÜR BERNHARD GROSSFELD ZUM 65. Geburtstag* 901 (Ulrich Hubner & Werner F. Ebke eds., 1999); C. Paul Rogers III, *Still Running Against the Wind: Comment on Antitrust Jurisdiction and Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 50 J. AIR L. & COM. 931 (1985).

138. See, e.g., *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 6–7 (1st Cir. 1997).

139. Judge Hand had previous experience narrowly defining a relevant market. See *United States v. Corn Prods. Ref. Co.*, 234 F. 964 (S.D.N.Y. 1916).

140. *Alcoa*, 148 F.2d at 424.

141. *Id.*

142. Judge Hand acknowledged that it was "doubtful whether sixty or sixty-four percent would be enough" to constitute a monopoly. *Id.*

143. *Id.* at 425.

But Judge Hand seems to have gotten the scrap ingot issue exactly wrong. First, the ability of Alcoa to actually forecast with any degree of accuracy the amount of scrap ingot on the market ten or fifteen years down the road was highly problematical considering all the variables that would have to be accounted for.<sup>144</sup> If, however, Alcoa could somehow reasonably project the future supply of scrap ingot, that suggests that scrap does in fact compete and thus should be in the relevant market, not excluded from it.<sup>145</sup>

Judge Hand also refused to consider whether foreign produced ingot beyond that already imported should be included in the relevant market. He seemingly made the case for including foreign ingot sold elsewhere by assuming that it did in fact place a ceiling on the prices Alcoa could charge domestically, even though it was the sole American ingot producer. However, he noted that tariffs and transportation costs put foreign producers at a disadvantage, leaving Alcoa free to raise prices within those limiting factors.<sup>146</sup>

Of course, some foreign ingot was coming into the United States; it apparently made up about 10% of the market. This suggests that foreign ingot was sold profitably in the United States and that the ceiling on Alcoa's prices to keep more foreign production out may have been quite significant.<sup>147</sup> Further, Judge Hand failed to consider that foreign producers may have had cost advantages, such as lower labor costs, that may have offset the tariff and transportation disadvantage.

Additionally, Judge Hand failed to consider whether substitute metals should be included within the relevant market or parts of it. As Alcoa had successfully expanded the uses for aluminum to products previously made from other metals, it would stand to reason that aluminum ingot competed with those metals for some end uses.<sup>148</sup>

There is evidence that the Supreme Court did not know what to make of Judge Hand's relevant market analysis. In *United States v. E.I. du Pont de Nemours & Co.*, the so-called *Cellophane* case, the Court defined the relevant product market quite broadly to include all flexible wrapping products, refusing to limit the market to cellophane even though it was much more expensive, had superior physical qualities, and was heavily favored by some end users.<sup>149</sup> The Court noted that Judge Hand "refused to consider the close competition offered by 'secondary' (used) aluminum" because of Alcoa's ability to regulate the scrap version by reason of its control of virgin ingot.<sup>150</sup> As a result, the Court noted that *Alcoa* was "not particularly helpful" to the market definition issue before it.<sup>151</sup> Sub-

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144. *See id.*

145. HOVENKAMP, *supra* note 115, at 136.

146. *Alcoa*, 148 F.2d at 426.

147. HOVENKAMP, *supra* note 115, at 119.

148. Waller, *supra* note 131, at 131 n.28.

149. 351 U.S. 377, 391-92 (1956).

150. *Id.* at 395 n.23.

151. *Id.*

sequent Supreme Court decisions simply ignored *Alcoa* when determining the relevant product market, even when drawing the market narrowly.<sup>152</sup>

Having concluded that Alcoa was indeed a monopolist, Judge Hand went on to consider whether it had acted in a manner that brought it within Section 2's prohibition against monopolization. But first, he set the stage by engaging in a lengthy political, economic, moral, and social discourse about the antitrust laws in which he concluded that they "prefer[ed] a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few."<sup>153</sup> Thus, he concluded, "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."<sup>154</sup>

Thus, since monopolies were undesirable, Hand saw little room for monopolists to compete in the market without running afoul of the forbidden monopolization language of Section 2. He suggested that a monopolist might have had its power "thrust upon it" or might have achieved dominance "merely by virtue of his superior skill, foresight and industry" and therefore might be given some latitude.<sup>155</sup> Otherwise, however, Hand saw little space for a monopolist seeking to maintain its dominance to maneuver in the marketplace.<sup>156</sup> In fact, it is quite telling that most contemporary commentators understood *Alcoa* to hold that the possession of monopoly power alone was a violation of Section 2.<sup>157</sup>

That reading of *Alcoa* is understandable given both Judge Hand's general approach and the specifics of his finding that the defendant had engaged in monopolistic conduct. Previous Section 2 case law had required some almost morally repugnant conduct, acts that could be considered predatory against competitors, or an independent Section 1 offense to

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152. See, e.g., *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *Int'l Boxing Club of N.Y., Inc. v. United States*, 358 U.S. 242 (1959). But see *Allen-Myland, Inc. v. IBM Corp.*, 33 F.3d 194, 202–03 (3d Cir. 1994) (finding the *Alcoa* Court's analysis in excluding secondary ingot "persuasive" in supporting its exclusion of IBM leased computers from the relevant market).

153. *Alcoa*, 148 F.2d 416, 427 (1945).

154. *Id.* at 429.

155. *Id.* at 429–30.

156. "[I]ts [a monopolist's] mere existence might be thought not to constitute an exercise of that power. That distinction is nevertheless purely formal; it would be valid only so long as the monopoly remained wholly inert; it would disappear as soon as the monopoly began to operate . . ." *Id.* at 428.

157. See, e.g., Walter Adams, *The Sherman Act and Its Enforcement*, 14 U. PITT. L. REV. 319, 329–30 (1953); Walter Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 IND. L.J. 1, 6 (1951); Eugene V. Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567, 577 (1947); Robert W. Harbeson, *A New Phase of the Antitrust Law*, 45 MICH. L. REV. 977, 986 (1947); Dudley L. Miller, Note, *Enforcement of Section 2 of the Sherman Act*, 54 YALE L.J. 860, 861 (1945).

find a violation.<sup>158</sup> But Judge Hand went so far as to appear to shift the burden to the defendant, once proved a monopolist, to prove that it had not abused its power.<sup>159</sup> He then focused on the fact that Alcoa had anticipated increases in demand for ingot and concluded that “[n]othing compelled it to keep doubling and redoubling its capacity before others entered the field. . . . [W]e can think of no more effective exclusion than progressively to embrace each new opportunity as it opened . . . .”<sup>160</sup>

Although Judge Hand had, earlier in his opinion, observed that “[t]he successful competitor . . . must not be turned upon when he wins,” he did not really mean it.<sup>161</sup> He arguably tipped his hand when he observed that Alcoa in 1940 was anything but “the passive beneficiary of a monopoly, following upon an involuntary elimination of competitors by automatically operative economic forces.”<sup>162</sup> If taken literally to mean that a monopolist must show its dominant market position was passive to avoid liability, Section 2 comes very close to becoming a no conduct statute.

At a minimum, Judge Hand asserted that a monopolist cannot aggressively compete for new business in the marketplace and take advantage, in his words, of “a great organization, having the advantage of experience, trade connections and the elite of personnel.”<sup>163</sup> Instead, it must defer to smaller rivals rather than seek new business or run the risk of violating Section 2. Thus, one could scarcely adopt a standard more hostile to firms with dominant economic power. The message is that the more successful a firm is, the greater its antitrust risk, at least if it has market power.

*Alcoa’s* approach to determining an exclusionary conduct standard had a profound effect on the law for decades. Initially the Supreme Court enthusiastically endorsed the *Alcoa* opinion, quoting several paragraphs from it in *American Tobacco Co. v. United States*,<sup>164</sup> a criminal conspiracy to monopolize case. In a statement largely ignored today, the Court held that “[n]either proof of exertion of the power to exclude nor proof of actual exclusion of existing or potential competitors is essential to sustain a charge of monopolization under the Sherman Act.”<sup>165</sup> Two years later, the Court in *Schine Chain Theatres, Inc. v. United States*, another case

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158. See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). Compare *United States v. Int’l Harvester Co.*, 274 U.S. 693 (1927), with *United States v. U. S. Steel Corp.*, 251 U.S. 417 (1920). See AREEDA & HOVENKAMP, *supra* note 101, ¶ 614, at 34.

159. In the context of holding that the government did not have the burden of proof to establish Alcoa’s profit for virgin ingot, Judge Hand said in part, “Having proved that ‘Alcoa’ had a monopoly of the domestic ingot market, the plaintiff had gone far enough; if it was an excuse, that ‘Alcoa’ had not abused its power, it lay upon ‘Alcoa’ to prove that it had not.” *Alcoa*, 148 F.2d at 427.

160. *Id.* at 431.

161. *Id.* at 430.

162. *Id.*

163. *Id.* at 431.

164. 328 U.S. 781, 813–14 (1946).

165. *Id.* at 810. At a minimum, this language suggests that one does not have to show that a monopolist used its monopoly power to exclude rivals or the actual exclusion of competitors from a monopolist’s exclusionary conduct.

ignored today, read *Alcoa* as holding that “[t]he mere existence of the power to monopolize, together with the purpose or intent to do so, constitutes an evil at which the Act is aimed.”<sup>166</sup> It is hard to imagine language which comes closer to a no conduct Section 2.

The same year, in *United States v. Griffith*, the Supreme Court made it clear that a monopolist does not have to commit a separate Section 1 violation to engage in exclusionary conduct.<sup>167</sup> In addition, the Court relied heavily on *Alcoa* when it stated that “[i]t follows *a fortiori* that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful.”<sup>168</sup> Thus, the Court recognized that Section 2 outlawed monopoly maintenance, even by a firm that achieved market domination on the merits.

In *United States v. United Shoe Machinery Corp.*, another influential Section 2 case even though on the district court level, Judge Wyzanski characterized *Alcoa* as holding “that one who has acquired an overwhelming share of the market ‘monopolizes’ whenever he does business, apparently even if there is no showing that his business involves any exclusionary practice.”<sup>169</sup>

Subsequently, in *United States v. Grinnell Corp.*, the Supreme Court, while not directly citing *Alcoa*, certainly extrapolated from it when it defined exclusionary conduct as “the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”<sup>170</sup> That language, which derives from *Alcoa*, has become the standard definition.<sup>171</sup> Of course, its application has dramatically shifted as the Court’s attitude about monopolies has likewise undergone a major overhaul.

That change was certainly fueled by the ascent of the Chicago School in the 1970s whose adherents took umbrage at the idea imbedded in *Alcoa* that successful competitors could be turned upon when they succeed even at the cost of higher prices and the shoring up of less efficient firms.<sup>172</sup> For example, Richard Posner described *Alcoa*’s “theory of monopolization [as] a bad one because it encourages inefficient conduct”<sup>173</sup> while Robert Bork called the decision “a thoroughly perverse judicial tour de force” for much the same reasons.<sup>174</sup>

166. 334 U.S. 110, 130 (1948).

167. 334 U.S. 100, 106–07 (1948).

168. *Id.* at 107.

169. 110 F. Supp. 295, 342 (D.C. Mass. 1953) (citation omitted). Judge Wyzanski went on to note that the doctrine was “softened” by Judge Hand’s recognition that a defendant could avoid liability if it showed that its dominance was due solely to superior skill or products, economic or technical efficiencies, or natural advantages. *Id.*

170. 384 U.S. 563, 570–71 (1966).

171. *See, e.g.*, *Eastman Kodak Co. v. Image Techn. Servs., Inc.*, 504 U.S. 451, 483 (1992) (citing *Grinnell* and *Alcoa* for definition of exclusionary conduct).

172. *See, e.g.*, Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 *Nw. U. L. REV.* 281, 286 (1956).

173. POSNER, *supra* note 74, at 262.

174. BORK, *supra* note 72, at 170.

One of the first judicial breaks from *Alcoa* occurred in *Berkey Photo, Inc. v. Eastman Kodak Co.*<sup>175</sup> where the plaintiff alleged that Kodak, as a monopolist in the sale of “amateur conventional still cameras” and camera film, had an obligation to competitors when it sought to introduce a new Instamatic camera to the market.<sup>176</sup> That obligation was to predisclose the new product in time for competitors to also enter the market with copies of the new product. Plaintiffs had argued that *Alcoa* supported its position because although *Alcoa* had argued that it “positively assisted competitors,” Judge Hand could “find no instance of its helping prospective ingot manufacturers.”<sup>177</sup>

The Second Circuit, however, forcefully held that Kodak had no duty to share its innovations with competitors.<sup>178</sup> Kodak, even though a monopolist, was entitled to the lead time in the market that a new product produces. According to the court, “a monopolist is permitted, and indeed encouraged, by § 2 to compete aggressively on the merits.”<sup>179</sup> Whatever successes it may have had from invention and innovation, the court held, could not create antitrust liability.<sup>180</sup> Thus, unlike *Alcoa*, the Second Circuit recognized that there were no special limits or constraints on a monopolist’s ability to compete.<sup>181</sup>

The Seventh Circuit subsequently reaffirmed the break with *Alcoa* in no uncertain terms. In *Olympic Equipment Leasing Co. v. Western Union Telegraph Co.*, Judge Posner noted that since in *Alcoa* the defendant was condemned for expanding capacity to meet new industry demand, it presumably could have charged higher prices free from antitrust scrutiny if it had chosen to keep demand down to a level that it could supply without increasing its capacity.<sup>182</sup> Judge Posner then noted the shift in antitrust policy “from the protection of competition as a process of rivalry to the protection of competition as a means of promoting economic efficiency.”<sup>183</sup>

In 1990, the Ninth Circuit characterized *Alcoa* as standing for the proposition that a monopolist could be held liable for being efficient and noted that the notion “has been questioned by just about everyone who has taken a close look at it.”<sup>184</sup>

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175. 603 F.2d 263 (2d Cir. 1979).

176. *Id.* at 267–68.

177. *Alcoa*, 148 F.2d 416, 431 (2d Cir. 1945).

178. *Berkey Photo, Inc.*, 603 F.2d at 285.

179. *Id.* at 280. *Accord*, *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 535, 544 (9th Cir. 1983); *MCI Commc’ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1107–08 (7th Cir. 1983).

180. *Berkey Photo, Inc.*, 603 F.2d at 281.

181. *See, e.g.*, Saul P. Morgenstern, Jennifer B. Patterson & Terri A. Mazur, *Antitrust Jurisprudence in the Second Circuit*, 85 *FORDHAM L. REV.* 111, 117 (2016).

182. 797 F.2d 370, 375 (7th Cir. 1986). Presumably, Judge Posner meant that *Alcoa* could have constrained itself from developing new uses for aluminum but charged higher prices as a monopolist for existing demand.

183. *Id.*

184. *United States v. Syufy Enters.*, 903 F.2d 659, 668 (9th Cir. 1990).

In recent years the Supreme Court has also distanced itself from *Alcoa's* view of monopolies as inherently bad, as well as its take on exclusionary conduct. In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, Justice Scalia, writing for the Court, quoted the “willful acquisition or maintenance” language of exclusionary conduct from *Grinnell*, which is derived from *Alcoa*.<sup>185</sup> However, he went on to immediately depart from *Alcoa's* “big is inherently bad” philosophy by describing the possession of monopoly power and the charging of monopoly prices as not only legal but vital to the free market system. In the Court’s current view, the opportunity to charge monopoly prices attracts “business acumen” and induces innovation and economic growth.<sup>186</sup>

Thus, *Trinko* represents a total about-face from *Alcoa*. The Court now views monopolies as desirable, not inherently evil. Although the language of what constitutes exclusionary conduct remains the same, its application to the conduct of a monopolist could hardly differ more. The *Trinko* Court went on to hold that generally monopolists have no obligation “to share the source of their advantage” with rivals and, in fact, can normally refuse to deal with them at all.<sup>187</sup> Thus, in the *Trinko* Court’s view, *Alcoa's* increasing its production capacity to meet the new demand that it had created would be considered crucial to the competitive process. Forcing *Alcoa* to step aside to allow competitors to reap the rewards of its efforts to spur economic growth would be considered anathema to it.

More recently, in *Pacific Bell Telephone Co. v. LinkLine Communications, Inc.*, the Supreme Court distanced itself more directly from *Alcoa* in rejecting a price squeeze claim.<sup>188</sup> The *Alcoa* court had ruled that *Alcoa's* use of its monopoly power in the upstream aluminum ingot market to squeeze profits of downstream aluminum sheet fabricators was unlawful.<sup>189</sup> The *LinkLine* Court did not try to distinguish *Alcoa* but dismissed it, stating “[g]iven developments in economic theory and antitrust jurisprudence since *Alcoa*, we find our recent decisions in *Trinko* and *Brooke Group* more pertinent to the question before us.”<sup>190</sup>

But those rejections of *Alcoa's* economic rationale and reasoning are not likely its death knell. Judge Hand’s opinion was so expansive that

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185. 540 U.S. 398, 407 (2004).

186. *Id.*

187. *Id.* at 407–08. The exception, which was recognized in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985), occurs when there is no business justification for the refusal other than to harm a competitor. *Trinko* regarded even this as “at or near the outer boundary of § 2 liability.” *Trinko*, 540 U.S. at 409.

188. 555 U.S. 438, 442 (2009). The plaintiff had alleged that the vertically integrated defendant was setting a high wholesale price to provide access to digital subscriber line (DSL) providers to telephone lines while charging a low retail price for its own DSL service. *Id.* at 443–44.

189. *Alcoa*, 148 F.2d 416, 436–38 (2d Cir. 1945).

190. *LinkLine*, 555 U.S. at 452 n.3. *Alcoa* had been the foundation of a number of unsuccessful price squeeze claims over the years in the circuit courts. See, e.g., *Schor v. Abbott Labs.*, 457 F.3d 608 (7th Cir. 2006); *Covad Commc’ns Co. v. Bell Atl. Corp.*, 398 F.3d 666 (D.C. Cir. 2005); *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 108 (2d Cir. 2002); *Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990).

there is almost always something there for every litigant. One can certainly argue that the opinion is rife with inconsistencies and thus can be used to support just about any position.<sup>191</sup> For example, Judge Hand notes that the law should not turn upon the successful competitor when he wins while at the same time asserting that the Sherman Act favors small competitors to large ones.<sup>192</sup> But, in his defense, he was likely attempting to fine tune the law of monopolization and describe, in the context of his view of the evils of dominant economic power, just when the law should turn on the successful competitor or, stated another way, what kind of conduct a monopolist could engage in.

His recognition that some monopolists may have had their power “thrust upon” them or that they may have obtained power through “superior skill, foresight and industry” has, not surprisingly but somewhat ironically, given Section 2 defendants something to hang their hats on.<sup>193</sup> That is, the case that most expands the reach of Section 2 and most constrains the competitive zeal of monopolists also provides ready defenses to claims brought under the section.<sup>194</sup>

As noted, in his far-reaching opinion Judge Hand also famously opined on the question of the requisite intent, holding, “We disregard any question of ‘intent.’”<sup>195</sup> What he apparently meant was that “specific” intent is not required for a Section 2 offense since “no monopolist monopolizes unconscious of what he is doing.”<sup>196</sup> Thus, here Judge Hand advances the ball and simplifies the analysis. He holds that Section 2 does not require a finding of intent separate and apart from the focus on the monopolist’s conduct. That ruling continues to be a foundational part of Section 2 analysis.<sup>197</sup>

Similarly, Judge Hand’s characterization of the market share necessary for a firm to be considered a monopolist continues to have contemporary influence, although courts recognize that factors other than market share are often relevant.<sup>198</sup> That is, Judge Hand’s statement that “it is doubtful whether . . . sixty-four percent would be enough” to establish monopoly

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191. See, e.g., SULLIVAN & GRIMES, *supra* note 108, at 114 (“The apparently contradictory dicta in Judge Hand’s opinion left a somewhat muddled rule of that case for determining what constitutes improper conduct.”); ROSS, *supra* note 73, at 27.

192. *Alcoa*, 148 F.2d at 427, 430.

193. *Id.* at 429–30.

194. See, e.g., *Elec. Inspectors, Inc. v. Vill. of E. Hills*, 320 F.3d 110, 127 (2d Cir. 2002); *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 547–48 (9th Cir. 1991); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413, 1431 (6th Cir. 1990); *Telex Corp. v. IBM Corp.*, 510 F.2d 894, 926–27 (10th Cir. 1975).

195. *Alcoa*, 148 F.2d at 431.

196. *Id.* at 432.

197. See, e.g., *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985); *McWane, Inc. v. FTC*, 783 F.3d 814, 840 (11th Cir. 2015); *Cascade Health Sols. v. PeaceHealth*, 502 F.3d 895, 904 n.3 (9th Cir. 2007); *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (per curiam) (“Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist’s conduct.”).

198. See, e.g., *Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917, 935 (6th Cir. 2005).

power<sup>199</sup> is generally regarded as a starting point but not dispositive of the question, as there is a recognition that in certain circumstances a firm with below 50% of the market could have the power to drive rivals from the market.<sup>200</sup>

Thus, *Alcoa*'s contemporary influence extends to the breadth of Section 2 analysis and, of course, includes the extraterritorial jurisdictional effects test Judge Hand articulated apart from Section 2. It is a case that is not going away anytime soon in spite of the fact that the good judge bollixed the relevant market definition and sought to handcuff the ability of monopolists to compete.

## VI. *ALCOA* AND *BROWN SHOE* CONSIDERED TOGETHER

*Alcoa* and *Brown Shoe* are both seriously flawed decisions, probably when decided and certainly when viewed through the prism of modern antitrust law. Both reflect the discarded view that market power, without more, is inherently bad for the marketplace. Both represent an aggressive expansionist view of antitrust. Both, at a minimum, view efficiency gains with suspicion. Both embrace a definition of competition that seeks to protect the viability of small competitors; the decisions are thus, concomitantly, little concerned with the associated higher prices, increased costs, and consumer harm. Both contain significant internal inconsistencies. Both would be decided differently today because the slight increase in *Brown Shoe*'s market share would not trigger any enforcement agency interest, and *Alcoa*'s conduct would not be deemed exclusionary under current standards.

Yet both, despite their flaws, set forth antitrust doctrine that remains influential today. If we label them bad decisions because they were wrongly decided, they have indeed made good law, albeit for different reasons. *Brown Shoe*'s flaw was not in setting a legal standard for merger review but rather in the application of that standard to the facts before it (and its attempt to protect both competition and small competitors). That legal standard has persevered even though merger enforcement looks very different today, both philosophically and practically.

As a result of *Alcoa*'s internal inconsistencies, it has always been difficult to parse out how much competitive latitude Judge Hand believed monopolists should have. But *Alcoa* also set a legal standard for ascertaining exclusionary conduct that remains through its subsequent adoption in *Grinnell*, although the meaning and application of that standard has shifted dramatically as the Supreme Court's view of monopoly power has changed. As in *Brown Shoe*, Judge Hand's application of the standard to the facts before him were questionable then and today reflect an outmoded view of the constraints on monopolists to aggressively compete.

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199. *Alcoa*, 148 F.2d at 424.

200. See SULLIVAN & GRIMES, *supra* note 108, at 107 (asserting that, in general, a firm with 60% of the market should be considered a monopolist).

So bad antitrust decisions can and do make good law. They do so by crafting legal principles or standards that form the analytic basis for the assessment of marketplace conduct. But the devil, as they say, is in the details. In antitrust law, economic thinking (and most would agree economic sophistication) has evolved, and thus the application of general legal standards to competitive marketplace behavior is viewed through different economic lenses. That changes outcomes. Cases that previously ran afoul of the Sherman or Clayton Acts don't necessarily do so anymore as more focus on consumer welfare as the sole antitrust goal has, in fact, constricted the antitrust laws.

But what accounts for the staying power of *Brown Shoe* and *Alcoa* when other bad antitrust decisions, though not overruled, are pretty much ignored and forgotten? It does have a lot to do with timing. It is no surprise that both cases are considered the first modern decisions in their areas. As noted, *Brown Shoe* was the first case to reach the Supreme Court after the 1950 Celler-Kefauver Anti-merger Act of 1950, which significantly amended Section 7 of the Clayton Act, while *Alcoa* was the first major Section 2 case brought by the government in a generation and was one of the first major antitrust cases brought by the relatively new Antitrust Division of the Justice Department. Thus, both had gaps to fill when they reached the court of last resort and jurists wrote both opinions to do just that by articulating broad legal standards for future application.

## VII. CONCLUSION

Thus, general legal principles articulated in bad decisions can, and sometimes do, remain as legal constructs moving forward in spite of wrong outcomes. Those bad decisions, far from being overruled, continue to have life even though when one deconstructs those decisions they remain bad decisions, then and now, based on their facts. They are, in fact, saved from oblivion by their articulation of general legal rules or principles. The fact that both the *Brown Shoe* and *Alcoa* courts blew it in the application of those principles has not diminished their influence down the road, in spite of withering criticism and a fundamental shift in antitrust policy.