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SOME IMPLICATIONS OF THE SUPREME COURT'S ANTIMERGER DECISIONS*

by

Charles F. Phillips, Jr.**

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

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

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

* The comments and suggestions of Professor Robert E. R. Huntley, Washington and Lee University School of Law are acknowledged with appreciation. The analysis and conclusions, however, are the sole responsibility of the author.

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


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

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

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

Brown Shoe Co. v. United States. In 1956 the Brown Shoe Company,
the fourth largest shoe manufacturer in the country (producing about four per cent of the total), acquired the G. R. Kinney Company, the largest family-style shoe store chain with over 400 stores in more than 270 cities (accounting for nearly 1.2 per cent of national retail shoe sales). Brown also owned a number of retail outlets, while Kinney was the country's twelfth largest shoe manufacturer. The merger, then, was both horizontal and vertical.12

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

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

12 See Note, 37 St. John's L. Rev. 147 (1962); Note, 44 Syracuse L. Rev. 97 (1962); Note, 17 Sw. L.J. 286 (1963); Note, 37 Tul. L. Rev. 109 (1962); Note, 10 Vill. L. Rev. 734 (1965).
13 A vertical merger is an economic arrangement between companies in a supplier-customer relationship. Absorption of a company in the same general product line is termed a horizontal merger.
15 Id. at 320.
16 Id. at 322, n.38:
[Wi]hether the consolidation was to take place in an industry that was fragmented rather than concentrated, that had seen a recent trend toward domination by a few leaders or had remained fairly consistent in its distribution of market shares among the participating companies, that had experienced easy access to markets by suppliers and easy access to suppliers by buyers or had witnessed foreclosure of business, that had witnessed the ready entry of new competition or the erection of barriers to prospective entrants, all were aspects, varying in importance with the merger under consideration, which would properly be taken into account.
17 Relevant markets are the areas of effective competition and are determined by reference to product and geographic markets (lines of commerce and sections of the country).
18 370 U.S. 294, at 326.
latter markets were considered large enough to include both downtown shops and suburban shopping centers, which provide keen competition with one another, and yet the markets were considered small enough to exclude stores further away which provide little competition.

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

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

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

With respect to the probable effect of the merger on competition, the Court held that the relevant product market was “commercial banking,”\(^\text{id.}\)

\(^{18}\) Id. at 294.
\(^{19}\) Id. at 310, 311. The Court noted, however, that in vertical integration cases, market shares “will seldom be determinative” and, unless either very large or very small, concentration “cannot itself be decisive.” Id. at 328, 329.
\(^{20}\) Id. at 332.
\(^{21}\) Id. at 344.
\(^{22}\) Id. at 345.
\(^{25}\) The cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term ‘commercial banking’ . . .
\(^{26}\) composes a distinct line of commerce. Some commercial banking products or services are so distinctive that they are entirely free of effective competition from products
while the relevant geographic market was the four-county Philadelphia metropolitan area in which the two banks were permitted by state law to operate branches, and from which the major portion of their business originated. Within this market, Philadelphia National Bank and Girard were respectively the second and third largest of forty-two commercial banks. The merger, if consummated, would have made the resulting bank the largest in the area with at least thirty per cent of the banking business and would have increased the market share of the two largest banks from forty-four to fifty-nine percent. The Court noted that the existing size of both Philadelphia National Bank and Girard was in part the result of mergers, that there was a definite trend toward concentration in commercial banking in the Philadelphia area, and that entry into the banking industry "is far from easy." But the crux of the decision concerned the market share percentages. After stating that Congress' motivation for enacting the 1950 amendment was "a rising tide of economic concentration," the Court said:

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

United States v. First Nat'l Bank & Trust Co. A 1961 merger of two Lexington, Kentucky, banks was challenged by the Department of Justice under sections 1 and 2 of the Sherman Act. In 1964, the Supreme Court
held that the merger violated section 1, reversing a lower court decision.\footnote{United States v. First Nat'l Bank & Trust Co., 208 F. Supp. 417 (E.D. Ky. 1962), rev'd, 376 U.S. 665 (1964).} The Court found that the merger resulted in one bank's controlling over fifty per cent of the assets and deposits, and over ninety per cent of the trust business in the relevant market. (The product market was "commercial banking"; the geographic market was Fayette County.) While no "predatory" purpose in the merger was found, the Court concluded that "significant competition" would be eliminated. In the words of Justice Douglas:

There is testimony in the record from three of the four remaining banks that the consolidation will seriously affect their ability to compete effectively over the years; that the 'image' of 'bigness' is a powerful attraction to customers, an advantage that increases progressively with disparity in size; and that the multiplicity of extra services in the trust field which the new company could offer tends to foreclose competition there.\footnote{Id. at 660.}

In reaching its decision, the Court referred to a series of railroad cases decided in the early 1900's.\footnote{Id. at 660.} These cases established the proposition that if merging companies are major competitors in a relevant market, the elimination of significant competition between them, by merger, itself constitutes a violation of section 1. Here, the two banks in question had a very large share of the relevant market.\footnote{United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964).} The Court also distinguished the present case from its 1948 \textit{Columbia Steel} decision,\footnote{United States v. First Nat'l Bank & Trust Co., 376 U.S. 665, 669 (1964).} in which it relaxed the stringent standards of the railroad cases, by holding that the latter decision should be confined to its specific facts.\footnote{Id. at 660.}

\textit{United States v. El Paso Natural Gas Co.}\footnote{United States v. First Nat'l Bank & Trust Co., 376 U.S. 665, 669 (1964).} In 1959 El Paso Natural Company, at that time the sole out-of-state supplier of natural gas in California, acquired Pacific Northwest Pipeline Corp., a distributor of natural gas for resale in Washington, Oregon, Idaho, Utah, and Colorado. The district court, in dismissing the section 7 suit brought by the Department of Justice, held that since the two companies were not in competition prior to the merger, there was no state or area or section of the country in which the stock acquisition and merger could have had a reasonable probability of substantially lessening competition or of creating a monopoly in the sale or transportation of natural gas for distribution or use.\footnote{Id. at 660.}

The Supreme Court, in reversing the lower court, noted that when the Federal Power Commission grants authorization to a company to construct facilities to serve a particular market, it withdraws that market from competition. However, rivalry continues to exist due to expanding needs for additional gas.\footnote{Ibid.} At the time of the merger, Pacific Northwest,
although smaller and newer than El Paso Natural Gas, was the only other important interstate pipeline company west of the Rocky Mountains. It was, moreover, trying to break into the California market. Although Pacific’s success could not be predicted, Justice Douglas noted that “unsuccessful bidders are no less competitors than the successful ones.”

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

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

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

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

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

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

43 Lefwich, The Price System and Resource Allocation 233 (rev. ed. 1961). “[Oligopolistic competition is found in] market situations in which there are few enough sellers of a particular product for the activities of one to be of importance to the others.”

44 377 U.S. at 280.

45 Id. at 281.
than its absorption by one of the giants, will keep it 'as an important competitive factor,'... Rome seems to us the prototype of the small independent that Congress aimed to preserve by § 7. \(^{46}\)

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

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

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

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

\(^{46}\) Ibid.

\(^{47}\) 378 U.S. 441 (1964).


\(^{49}\) 378 U.S. at 449.

\(^{50}\) Id. at 457.

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

\(^{51}\) Id. at 461.
in competition. The Court noted that (a) since there was significant inter-
industry competition between some of each company's products prior to
the merger, the acquisition foreclosed actual competition; (b) since Con-
tinental Can had engaged in "vigorous and imaginative promotional activi-
ties" to overcome consumer preference for glass in other end uses, the
merger foreclosed potential competition; and (c) the merger might trigger
"other mergers by companies seeking the same competitive advantages
sought by Continental in this case."35

United States v. Penn-Olin Chem. Co.33 Penn-Olin Chemical, a joint
venture of Pennsalt Chemicals Corp. and Olin Mathieson Corp., was
created in 1960 to operate a plant for the production and sale of sodium
chlorate in the southeastern part of the United States. Prior to the for-
timation of Penn-Olin, Olin Mathieson had never produced sodium chlorate
for sale in any market, while Pennsalt had manufactured the product in
its west coast plant but had never been a substantial supplier to the south-
eastern market. In 1961 the Department of Justice brought a suit seeking
to dissolve the joint venture as violative of both section 7 of the Clayton
Act and section 1 of the Sherman Act.

A lower court held that although Pennsalt and Olin Mathieson had for
many years considered going into the southeastern market individually,
each had concluded that it could not enter the market profitably alone.
The court thus found that since there was no evidence that both companies
would have gone into the market, there was no probability of a substantial
lessening of competition.44 Moreover, noted the court, the joint venture had
not prevented entry: after the formation of Penn-Olin, Pittsburgh Plate
Glass had announced that it would also build a plant in the southeast.

The Supreme Court, in vacating and remanding the decision, held that
the lower court should have made a finding as to the reasonable prob-
ability that, if either of the companies had built a plant independently,
the other would have remained "at the edge of the market, continually
threatening to enter." Continued the Court: "Just as a merger eliminates
actual competition, this joint venture may well foreclose any prospect
of competition between Olin and Pennsalt in the relevant sodium chlorate
market. The difference, of course, is that the merger's foreclosure is present
while the joint venture's is prospective."45

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

33 Id. at 461-66.
manded, 378 U.S. 158 (1964). Since the joint venture did not violate the Clayton Act, the court
held that it could not violate the more stringent standard imposed by the Sherman Act.
35 378 U.S. at 173-74. (Emphasis added.)
engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated.\textsuperscript{67} The lower court should have made a finding, therefore, as to the probability that one of the companies would have entered the market while the other would have remained a significant potential competitor.\textsuperscript{57}

\textit{Federal Trade Comm'n v. Consolidated Foods Corp.}\textsuperscript{68} Consolidated Foods, a large food processor, wholesaler, and retailer, purchased Gentry, a producer of dehydrated onions and garlic, in 1951. Eleven years later, the FTC ruled that the merger violated section 7 since it gave Consolidated Foods the "power to extort or simply attract reciprocal purchases from suppliers" and, thereby, "to foreclose competition from a substantial share of the market for dehydrated onion and garlic."\textsuperscript{69} The FTC's decision was reversed by the court of appeals in 1964, largely on the grounds that ten years of post-acquisition experience served to show that Gentry had not appreciably expanded its volume of sales despite the buying power of Consolidated Foods behind it.\textsuperscript{70}

The Supreme Court, in reversing the lower court, held that reciprocity "results in 'an irrelevant and alien factor' . . . intruding into the choice among competing products, creating at the least 'a priority on the business at equal prices.' . . . Reciprocity in trading as a result of an acquisition violates § 7, if the probability of a lessening of competition is shown."\textsuperscript{71}

The Court found that the FTC's ruling was supported by evidence that Consolidated Foods tried repeatedly to exercise reciprocity with some success. Gentry, despite offering an inferior product and operating in a rapidly expanding market, was able to increase its share of the onion market by seven per cent and to hold its losses in the garlic market to twelve per cent.\textsuperscript{72} It noted that since 1950 the relevant markets had been highly concentrated, with two firms accounting for nearly ninety per

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\textsuperscript{66} Id. at 174.

\textsuperscript{67} Ibid. The district court, on remand, again dismissed the suit, finding that there was no reasonable probability of either firm's independent entry. 246 F. Supp. 917 (D. Del. 1965). The Government appealed for the second time and jurisdiction was noted on February 13, 1967. 386 U.S. 906 (1967).


\textsuperscript{69} \textit{In re Consolidated Foods Corp.}, 54 F.T.C. 1900 (1958).

\textsuperscript{70} Consolidated Foods Corp. v. Federal Trade Comm'n, 329 F.2d 623 (7th Cir. 1964), rev'd, 380 U.S. 592 (1965).


\textsuperscript{72} Significantly, it was the same post-acquisition date which led the court of appeals to reverse the FTC's decision.
The percentage of both product lines. Further, by strengthening the market power of the two majors, future entry by others was discouraged.

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

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

And, after noting that the basic purpose of the 1950 amendment “was to prevent economic concentration in the American economy by keeping a large number of small competitors in business,” he concluded:

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

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

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65 Id. at 275.

66 Id. at 278.

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

With respect to the geographic market, the Court said that the law merely requires the Government to prove that a merger "has a substantial anticompetitive effect somewhere in the United States—'in any section' of the United States. This phrase does not call for the delineation of a 'section of the country' by metes and bounds as a surveyor would lay off a plot of ground." 68

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

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

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

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69 384 U.S. at 549.
70 Id. at 550.
71 Id. at 552. "Congress, in passing § 7 and in amending it with the Celler-Kefauver Anti-Merger Amendment, was concerned with arresting concentration in American economy, whatever its cause, in its incipiency."
tween the market leaders and nearly two hundred small, regional producers. Moreover, characterizing liquid bleach as a high-turnover consumer product, the Court pointed to widespread use of media advertising in the bleach market and in Procter's other product lines. As there was no physical differentiation between bleach lines, the disparity of size, asset position, and advertising potential, was used to support a finding that Procter crystalized entry barriers to new firms and hindered free price movements by existing firms. "It is probable that Procter would become the price leader and that oligopoly would become more rigid."

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

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

II. SOME IMPLICATIONS

The Supreme Court's decisions obviously project a strict antimerger policy and a preference for internal growth. Moreover, under the standards enumerated by the Court, it would seem possible to invalidate almost any merger challenged by the enforcement agencies. In the case of horizontal mergers, a strict antimerger policy seems fully justified because significant economies can generally be obtained by internal growth.

In the case of vertical and conglomerate mergers, however, a strict antimerger policy is more likely to conflict with efficiency goals. A vertical merger may extend market power from one production stage to another, but it cannot create market power. Further, internal expansion is more difficult since the firm is entering a new market. A conglomerate merger does not increase the market position of the merged firms, so that the traditional objection to such a merger rests upon absolute size, i.e., the size of a conglomerate firm gives it the power to inflict competitive injury upon rivals.

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76 87 Sup. Ct. at 1230.
77 Ibid.
78 Id. at 1231.
79 358 F.2d at 81-82.
80 Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1320-21 (1965). "[A] firm with growth or expansion opportunities in its own field, that is already exerting competitive pressures, is likely to resort to internal expansion if the merger route to growth is closed."
81 See Dean & Gustus, Vertical Integration and Section 7, 40 N.Y.U.L. Rev. 672 (1965); Singer, Vertical Integration and Economic Growth, 50 A.B.A.J. 555 (1964).
82 As Adams has defined conglomerate power: "This means that a firm's operations are so widely diversified that its survival no longer depends on success in any given product market or any given
For the above reasons, among others, the 1950 amendment contains a competitive test—"where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Concluded Handler and Robinson after a careful analysis of the 1950 amendment:

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

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

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

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

geographical area. Its absolute size, its sheer bigness, is so impressive that it can discipline or destroy its more specialized competitors." Quoted in 8 ANTITRUST BULL. 304 (1963). See also Edwards, Conglomerate Bigness as a Source of Power, in BUSINESS CONCENTRATION AND PRICE POLICY 331 (1955); Stocking, Comment, id. at 312; Blair, The Conglomerate Merger in Economics and Law, 46 GEO. L.J. 672 (1958); Hart, Emerging Paradoxes in Antitrust, 30 A.B.A. ANTITRUST SECTION 80, 82 (1966). Adelman has argued, however, that size should not be equated with either monopoly power or market control. He concludes that when courts use size as a guide "competition—pure, workable, effective, or whatever—has vanished, replaced by protectionism." Adelman, The Anti-merger Act, 1950-60, 51 AM. ECON. REV., May 1961, No. 2, pp. 236, 243.


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

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

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

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

87 "No matter how many times you read it, the passage states: Although mergers are not rendered unlawful by the mere fact that small independent stores may be adversely affected, we must recognize that mergers are unlawful when small independent stores may be adversely affected." Bork & Bowman, The Crisis in Antitrust, FORTUNE, December 1963, pp. 138, 197. But see Dirlam, The Celler-Kefauver Act: A Review of Enforcement Policy, in ADMINISTERED PRICES: A COMPRENDUM ON PUBLIC POLICY, Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U.S. Senate, 88th Cong., 1st Sess., 125 (1963).
89 First, there is the enormous social interest in progress and efficiency, which has represented one of the primary bases for the policy of promoting competition as it has in fact evolved. Second, to forbid mergers that would or might produce substantial efficiencies would narrow substantially the category of acceptable mergers, thereby drastically weakening the market for capital assets and seriously depreciating the price that entrepreneurs could get for their businesses when they wish to liquidate. . . . Third, the protection that this policy would afford to small business, except in the short run, is at best highly conjectural and probably negligible. There is no doubt that in most instances, certainly when efficiencies from integration are substantial, the same adverse consequences to small business will sooner or later be visited through internal expansion by large firms. . . .

Finally, . . . the fact is that no threat, not even a mild one, appears to exist. There is some evidence that the concentration of assets in the hands of the largest business firms has risen somewhat over the past several decades. But there is little or no indication that any relative decline in the opportunities for small businesses has occurred. Turner supra note 80, at 1326, 1327. See also Day, Conglomerate Mergers and "The Curse of Business," 42 N.C.L. REV. 111, 166 (1964). As Adelman has argued:

Horizontal and vertical integration will often serve to limit monopoly or destroy
Potential injury to smaller rivals, of course, was not the only basis for the Court's *Brown Shoe* decision. The Court's protectionist policy, however, has grown stronger in subsequent decisions. In *Alcoa*, where concentration would hardly have been affected by the merger, the Court held that Rome Cable was an "aggressive" small independent which Congress wished to preserve. And in *Von's Grocery*, where the combined sales of the two companies were 7.5 per cent of the Los Angeles retail grocery market, the Court stressed its concern over "a continuous decline in the number of small businesses," and made little analysis of competition in the relevant market.\(^9\)

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

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

**Market Shares and Concentration Data** Increasingly in antimerger decisions the Court has stressed market shares and concentration data.\(^92\) The position of the Court was well summarized in *Continental Can*:

"Where a merger is of such a size as to be inherently suspect, elaborate proof of market structure, market behavior and probable anti-competitive effects may be dispensed with in view of § 7's design to prevent undue concentration."\(^93\) While market shares may be the "primary indicia of market power," they cannot serve as a proxy for all the determinants of competitive behavior.\(^94\) Further, when is a merger "of such a size as to be inherently suspect"? In establishing a "thirty per cent ceiling" rule on market shares in *Philadelphia Nat'l Bank* (a ceiling subsequently reduced in *Continental Can* and *Pabst*), the Court cited tests proposed by

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\(^8\) It. For example, vertical integration may be the response to a supplier's monopoly: by making instead of buying, one by-passes the toll gate. A similar tactic may end a buying monopoly. Diversification may serve a similar purpose: if there are monopoly profits being earned in a product which a firm can easily add to its line, it will probably enter the field in order to share them.


\(^10\) Markham, *supra* note 81, at 411. Backman, *supra* note 53, at 669 has argued that a similar confusion arose in the Court's *Penn-Olin* decision since the Court failed to distinguish between potential competition and a potential competitor. See also Hale & Hale, *Potential Competition Under Section 7: The Supreme Court's Crystal Ball*, 1964 Sup. Ct. Rev. 171.


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

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

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

But more importantly, the vagueness of the relevant market concept in antimerger law leaves concentration data with little meaning.

The Relevant Market  In *Brown Shoe* and *Philadelphia Nat'l Bank*, the Court established the proposition that there are markets-within-markets and that the narrowest reasonable market is the relevant one. This asserv-
tion is not very helpful, since it avoids the problem of specifying the supply and demand relationships between the merging firms. Thus, in Continental Can, the Court's market share data of a combined glass and metal container market is seriously deficient and confusing, for "percentage shares of an amalgamated glass and can container market must be taken more lightly than comparable percentages of either a glass container market or a can container market." Such a conclusion follows from the fact that inter-industry competition is much weaker than intra-industry rivalry. Moreover, the Court's refusal to include plastic containers, which certainly compete with glass and metal containers, remains a mystery. And in Alcoa, the Court ignored the careful economic analysis of the lower court with respect to the relevant product market and simply lumped bare and insulated aluminum cable into an "aluminum conductor" market.

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

Market shares of arbitrarily defined product and geographic markets

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

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

Turner, supra note 80, at 1374 n.79.

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

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

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

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


"If the Supreme Court adheres to its position in the Pabst case, there will be no need to define geographic markets in merger litigation." Hale & Hale, Delineating the Geographic Market: A Problem in Merger Cases, 61 Nw. U. L. Rev. 538, 533 (1966).
are meaningless. As Justice Fortas wrote in his concurring opinion in Pabst:

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

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

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

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

115 Turner, supra note 80, at 1319.
116 In Von's Grocery, for example, the Court simply ignored the lower court's findings that (a) while the number of "single" stores had declined, the number of "multiple" stores had increased from 856 to 918 between 1950 and 1963; (b) entry into the industry, particularly for anyone with experience, was relatively easy; and (c) the shift to multiple stores was a response to consumer demand and to competition being offered by cooperatives and discount houses. See United States v. Von's Grocery Co., 384 U.S. 270 (1966).
117 Commissioner Reilly of the FTC apparently disagrees:

Contrary to the expressions of some, the case approach and the decisions of the Supreme Court provide considerable guidance as to both the kinds of mergers that are illegal and the way in which the agencies should organize anti-merger enforce-
ing a failing firm or two firms too small to compete in an industry domi-
nated by giants would presumably be legal. But these possible defenses remain dicta, since they have yet to be subjected to detailed judicial in-
vestigation. This factor, combined with the Court's seeming willingness to stop any merger seriously challenged by the Justice Department or the FTC, indicates that the criteria used by the enforcement agencies in choosing which mergers to challenge have become highly relevant.

The basic problem is that too little is known about the decision-making process employed by either the Department of Justice or the FTC. An analysis of the complaints filed by the two agencies under section 7 suggests certain criteria, but such an analysis fails to indicate the criteria that resulted in a decision not to prosecute certain mergers. And, since it is likely that under the broad criteria enumerated by the Court the enforcement agencies could challenge more mergers than in fact they do (for budgetary reasons, among others), "an increasingly large amount of merger policy is being determined at the administrative level of govern-
ment." As two commentators have put it: "The failure to formulate and communicate policies may not only thwart policy review, both inside and outside the department, but it prevents the business community from following guidelines." The Antitrust Division is developing rules and guidelines for a number of antitrust problems, including mergers, but has given no indication when they will be promulgated. The Federal Trade Commission appears to be taking a different approach. In *Permanente Cement Co.*, the Commission delayed ruling on a vertical acquisition pending a trade regulation rule proceeding instituted to study and consider the problem of vertical integration in the cement industry. Such procedures should aid the

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120 Rahl, supra note 102, at 329.
121 It is not being implied that section 7 is standardless. Rather, it is being argued that the criteria are so broad that almost any merger could be held to violate the Clayton Act. See Dirlam, *Recent Developments in the Anti-Merger Policy: A Diversity of Standards*, 9 ANTITRUST BULL. 381 (1964).
123 Address by M. A. Wright, President of the United States Chamber of Commerce, before the San Francisco Chamber of Commerce, Sept. 8, 1966.
present problem of predictability, but they also raise numerous questions. For example: "Promulgation of numerous rules with a pattern of sufficient intricacy to cover the immense variety in merger situations, without adequate policy delineation, has all the hazards that beset another Greek, Daedalus, who built a beautiful labyrinth for a king, and then could not find his own way out of it."  

III. CONCLUSIONS

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

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

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

By using . . . terms in § 7 which look not merely to the actual present effect...
of a merger but instead to its effect upon future competition, Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency before that trend developed to the point that a market was left in the grip of a few big companies. Thus, where concentration is gaining momentum in a market, we must be alert to carry out Congress' intent to protect competition against ever increasing concentration through mergers.\textsuperscript{120}

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

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

\textsuperscript{120} United States v. Von's Grocery Co., 384 U.S. 270, 275-77 (1966). (Footnotes and citation omitted.)

\textsuperscript{131} The Court's concern with small business is not new in antitrust history. Said Judge Hand, for instance, in a 1945 decision: "Throughout the history of [the antitrust statutes] . . . it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." United States v. Aluminum Co. of America, 148 F.2d 416, 429 (2d Cir. 1945).

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