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ANTIMERGER CRITERIA: POWER, CONCENTRATION, FORECLOSURE AND SIZE*

GEORGE R. HALL† AND CHARLES F. PHILLIPS, JR.††

THE "NEW" MERGER POLICY is now thirteen years old and, like human adolescents, active, strong, and willing to "rush in where angels fear to tread." Its past accomplishments and future potential are impressive. While the ghost of Senator Sherman may sit at the board meetings of most large corporations, the shadowy figures of Congressman Celler and the late Senator Kefauver sit much nearer the head of the table.¹ As Markham has summarized: "The most important recent anti-trust development from the viewpoint of managerial decision making is the tightening up of the prohibition against corporate mergers and acquisitions."²

The current importance of the Celler-Kefauver Act³ calls for an appraisal of present antimerger doctrine and its future development. The courts have applied a market power standard to test the legality of horizontal consolidations. More recently, however, market power has been equated with market concentration. This development has vital implications for the future impact of merger policy. Perhaps of even more importance is how the doctrines developed for horizontal mergers among industrial firms are to be extended to non-horizontal mergers and mergers in the regulated industries.⁴ The present state of merger policy will be reviewed first, and then possible future developments will be considered.

* The comments and suggestions of Professors M. A. Adelman and Almarian Phillips are acknowledged with appreciation. The analysis and conclusions, however, are the sole responsibility of the authors.

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1. Markham, *Antitrust Trends and New Constraints*, 41 HARV. BUS. REV. No. 3, p. 84 (1963).

2. *Id.* at 85.

3. 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

4. The term "regulated industries" will refer to those firms which are subject to commission regulation or other direct control by public officials over entrepreneurial decisions.

I.

MARKET POWER AND CONCENTRATION

Measured by courtroom results the Celler-Kefauver Act has been notably successful.⁵ Since passage of the amendment, 128 cases have been brought by the two enforcement agencies and 71 have been decided (see Appendix I). In these latter cases, complete divestiture was obtained in 29 cases, partial divestiture in 23 cases, and 19 cases were either dropped or decided against the government (see Appendix II).

The relevant test, however, is not the number of cases won, but whether an economically meaningful standard has been developed to separate desirable from undesirable mergers. Students of merger policy are divided on this issue. On the one hand, some commentators generally support the present policy, while others feel that it is too permissive.⁶ On the other hand, others fear that current doctrines hamper adjustments in the organization of industry necessary to achieve efficiency.⁷ Our position is that the standard applied up to, but not including *Brown Shoe v. United States*⁸ and *United States v. Philadelphia Nat'l Bank*,⁹ provided a meaningful method of distinguishing between potentially harmful and harmless consolidations. Recent decisions, however, indicate a shift to a policy with a much weaker economic rationale.

The revised section 7 forbids any merger where "the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly."¹⁰ The courts and the Federal Trade Commission have made it clear that they take seriously the supposed increase in concentration which motivated the passage of the Celler-Kefauver Act and that all mergers will receive suspicious scrutiny.¹¹ In so doing

5. For a review of judicial decisions under the amendment, see BOCK, *Mergers and Markets: A Guide to Economic Analysis of Case Law* (1962); Dirlam, *The Celler-Kefauver Act: A Review of Enforcement Policy*, in *ADMINISTERED PRICES: A COMPENDIUM ON PUBLIC POLICY* (1963); Phillips & Hall, *Economic and Legal Aspects of Merger Litigation, 1951-1962*, 10 HOUSTON BUS. REV. 1 (1963).

6. Dirlam, *The Celler-Kefauver Act: A Review of Enforcement Policy*, in *ADMINISTERED PRICES: A COMPENDIUM ON PUBLIC POLICY* 108, 130-31 (1963); Houghton, *Mergers, Superconcentration, and the Public Interest*, in *ADMINISTERED PRICES: A COMPENDIUM ON PUBLIC POLICY* 152-65 (1963); Heflebower, *Corporate Mergers: Policy and Economic Analysis*, 77 Q.J. ECON. 537 (1963); Martin, *The Brown Shoe Case and the New Antimerger Policy*, 53 AM. ECON. REV. 340, 356-58 (1963).

7. Adelman, *The Antimerger Act, 1950-60*, 51 AM. ECON. REV. 236 (May, 1961, No. 2; separately paginated); von Kalinowski, *Section 7 and Competitive Effects*, 48 VA. L. REV. 827 (1962).

8. 370 U.S. 294, 82 S.Ct. 1502 (1962).

9. 374 U.S. 321, 83 S.Ct. 1715 (1963).

10. 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

11. See Handler & Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629, 651-74 (1961). There have been few statistical studies undertaken to indicate the effect of post-war mergers on concentration

a market power standard has been developed. Any merger which increases the power of a firm in the relevant market is illegal. Therefore, the meaning of "market power" and "relevant market" must be considered.

A. Market Power

Consider market power first. The phrase itself came into anti-trust jargon with the Sherman Act victories in the 1940's and early 1950's in such cases as *Alcoa*,¹² *American Tobacco*,¹³ and *Du Pont* (Cellophane).¹⁴ These cases established that the essence of monopolization is the ability of a firm to control prices or other economic variables.¹⁵ Yet, even under the "new" Sherman Act, market power has never been the sole factor in determining legality; the manner in which power was obtained and used have been the major considerations.¹⁶ The courts, in making an increase in market power sufficient to strike down a merger *regardless* of intent or performance, have thus increased the significance of market power far beyond that which it had prior to the Celler-Kefauver Act.¹⁷

Judge Weinfeld's decision in *United States v. Bethlehem Steel Corp.*¹⁸ is the source of the "new" antimerger doctrine. In his view:

There may be a substantial lessening of competition or tendency to monopoly when a merger substantially increases concentration, eliminates a substantial factor in competition, eliminates a substantial source of supply, or results in the establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete.¹⁹

Note what the *Bethlehem* test did not do. (1) It did not make all mergers illegal; some "substantial" effect is needed. Further, it

and competition. See ADELMAN, AN ECONOMIC ANALYSIS OF THE CURRENT WAVE OF MERGERS, (Am. Management A. 114 Financial Management Series 82 (1957)).

12. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

13. *Am. Tobacco Co. v. United States*, 328 U.S. 781, 66 S.Ct. 1125 (1946).

14. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 76 S.Ct. 994 (1956).

15. KAYSAN & TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 44-141 (1959).

16. *Cole v. Hughes Tool Co.*, 215 F.2d 924 (10th Cir. 1954); *Hughes Tool Co. v. Ford*, 114 F. Supp. 525 (E.D. Okla. 1953); *Hughes Tool Co. v. Cole*, 113 F. Supp. 527 (W.D. Okla. 1953); *Hughes Tool Co. v. Conaghan*, 113 F. Supp. 519 (W.D. Okla. 1953); *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953).

17. Dirlam holds that even under the Celler-Kefauver Act, market power has not been the sole test, but performance and intent also have played roles. As discussed below, we believe that he has confused the measurement of power with its possible justification. But even if his view is accepted, Dirlam points out that the stress in section 7 litigation on power has been much greater than under the Sherman Act. Dirlam, *The Celler-Kefauver Act: A Review of Enforcement Policy*, in ADMINISTERED PRICES: A COMPENDIUM ON PUBLIC POLICY 100-02, 131 (1963).

18. 168 F. Supp. 576 (S.D.N.Y. 1958).

19. *Id.* at 603.

did not specify whether "substantial" is a quantitative or qualitative term. (2) The test did not permit any justification of a merger which might have a significant impact upon market structure. No "intent" or "performance" defense was allowed. (3) The test did not base illegality solely on the change in the number and size of firms; it covered several aspects of the buyer-seller relationship.

All three points have been subject to judicial modification since *Bethlehem* and will be discussed in turn.

1. The "Substantiality" of Mergers

It is frequently overlooked that only a small percentage of all industrial mergers are challenged. From 1951 to 1962, the FTC had knowledge of 5,848 acquisitions among manufacturing and mining companies alone, yet only 476 of these acquisitions were challenged under section 7.²⁰ Thus, nearly ninety-two per cent of all industrial mergers during this period were implicitly approved by the two enforcement agencies. Moreover, the courts have emphasized that only "anticompetitive" mergers were proscribed by the Celler-Kefauver Act.

This position has economic justification, for a ban on all growth by acquisition would involve significant social costs.²¹ Under certain conditions, mergers can promote efficiency and competition. In an industry in which demand is inelastic and either static or declining, and in which the present firms have not obtained optimum size, mergers may be the only way to obtain efficiency without loss of the social value of the assets involved. In concentrated industries with high barriers to entry, mergers also may be the only way in which the risk of entry can be lowered sufficiently to make entry attractive, to change the existing inter-firm organization and, hopefully, to increase rivalistic behavior.

Conversely, in a growing economy with wide markets, few firms will be limited by the extent of the market.²² Such a situation makes it relatively easy to advocate a "hard" posture towards mergers without concern for economic efficiency. A merger ban does not prevent changes in scale and, *ceteris paribus*, since it adds to capacity without decreasing the number of decision making units, internal growth is more likely to increase rivalistic behavior than is the same growth through merger.²³

20. Phillips & Hall, *Economic and Legal Aspects of Merger Litigation, 1951-1962*, 10 HOUSTON BUS. REV. 4 (1963).

21. KAYSEN & TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* 127-36 (1959); MARTIN, *MERGERS AND THE CLAYTON ACT* 320-26 (1959).

22. For empirical evidence relating to this point, see BAIN, *BARRIERS TO NEW COMPETITION* 53-113 (1956).

23. KAYSEN & TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* 135 (1959); Sigler, *Monopoly and Oligopoly by Merger*, 50 AM. ECON. REV. 23 (1960).

The courts and the FTC have used this line of reasoning on occasion. More often, however, they have argued that Congress desired to limit concentration because of the social advantages of a decentralized economy. Nevertheless, both congressional debates and judicial decisions have asserted that some mergers may not only be permissible, but socially desirable. In *Brown Shoe*, for instance, the Supreme Court noted that a merger involving a failing firm or two firms too small to compete in an industry dominated by giants would presumably be legal.²⁴ More recent cases have stressed the failing firm defense and have merely touched on the possibility of a merger of small members of an industry increasing competition.²⁵ In any event, these possible defenses remain dicta and have yet to be subjected to careful judicial investigation.²⁶

Most mergers challenged have involved horizontal consolidations where at least one firm was large both in absolute size and relative to some market, as shown in Appendix III. The probability that a horizontal merger involving such firms will increase market power is high. Thus, they present an obvious target for attack. The relevant issue, however, is whether antimerger policy should prevent only those acquisitions which appear likely to increase a firm's ability to control prices or other aspects of market power, or whether the ban on mergers should be expanded. Dirlam, for one, advocates going beyond market power by applying the Celler-Kefauver Act to "giantism."²⁷ Further, what of mergers in areas where public policy has accepted some market power as desirable or unavoidable, that is, the regulated industries? We shall return to these issues later.

2. The Justification of Mergers

The essential feature of the "new" Clayton Act is that consolidations which increase market power are in effect per se illegal. The

See also *Brown Shoe Co. v. United States*, 370 U.S. 294, 82 S.Ct. 1502 (1962), where the Court argued:

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, jobs or output. *Id.* at 345 n.72, 82 S.Ct. at 1534 n.72.

24. *Brown Shoe Co. v. United States*, 370 U.S. 294, 331, 82 S.Ct. 1502, 1527 (1962).

25. *United States v. Philadelphia Nat'l Bank*, 83 S.Ct. 1715, 1746, n.46 (1963).

26. Connor, *Section 7 of the Clayton Act: The Failing Company "Myth"*, 49 *Geo. L.J.* 84-99 (1960); Comment, *An Updating of the "Failing Company" Doctrine in the Amended Section 7 Setting*, 61 *MICH. L. REV.* 566 (1963).

27. Dirlam, *The Celler-Kefauver Act: A Review of Enforcement Policy*, in *ADMINISTERED PRICES: A COMPENDIUM ON PUBLIC POLICY* 104-06 (1963).

treatment of mergers in *United States v. Columbia Steel*²⁸ has been reversed; the intent of a merger or the possible beneficial results of a union are irrelevant. This point need not be belabored, but it should be emphasized that the prohibition of a defense based on intent or performance can be justified in either of two ways. One might hold that few mergers which would increase market power also would be likely to have a procompetitive impact and that a per se rule simply shortens and simplifies the judicial process. Or, one might hold that regardless of economic performance an unconcentrated market structure is a social good.

Until *Philadelphia Nat'l Bank* it was not absolutely certain which of these two positions the courts held. *Brown Shoe* appeared to endorse enthusiastically the latter position, but contained a reference to the possible relevance of "countervailing competitive, economic, or social advantages."²⁹ Yet, such advantages are patently in conflict with the main argument of the case that increases in market power are illegal even if a price in the form of inefficiency has to be paid.³⁰ *Philadelphia Nat'l Bank* apparently removed all doubts by laying down the rule that the only justification of an otherwise illegal structural change is the "failing firm" defense.³¹

3. Concentration and Illegality

How are the effects of a merger on the market power of firms to be determined? In most cases, the courts and the Commission have examined a variety of factors including some or all of the following: concentration, the market position of the firms, the effect of the elimination of a viable independent firm on competition, the history of mergers, the conditions of entry, vertical integration, the role of small business, and sources of price and non-price rivalry.³² Concentration has always held a dominant position among these factors, but most decisions have considered more than just this aspect of competition.

To illustrate: the FTC's opinion in *Pillsbury*³³ and the district court's opinion in *Philadelphia Nat'l Bank* both contain arguments that a broad examination of the entire structure of an industry is necessary to evaluate the probable impact of a merger. In the latter, Judge Clary quoted from *Am. Crystal Sugar v. Cuban Am. Sugar Co.*³⁴

28. *United States v. Columbia Steel Co.*, 334 U.S. 495, 68 S.Ct. 1107 (1948).

29. *Brown Shoe Co. v. United States*, 370 U.S. 294, 334, 82 S.Ct. 1502, 1528 (1962).

30. Dirlam, *The Celler-Kefauver Act: A Review of Enforcement Policy*, in *ADMINISTERED PRICES: A COMPENDIUM ON PUBLIC POLICY* 121 (1963).

31. *United States v. Philadelphia Nat'l Bank*, 83 S.Ct. 1715, 1746 n.46 (1963).

32. Phillips & Hall, *Economic and Legal Aspects of Merger Litigation, 1951-1962*, 10 *HOUSTON BUS. REV.* 35-45 (1963).

33. *Pillsbury Mills, Inc.*, 57 F.T.C. 1274 (1960).

34. *Am. Crystal Sugar Co. v. Cuban Am. Sugar Co.*, 259 F.2d 524 (2d Cir. 1958).

to the effect that the proper test was one of "qualitative substantiality" and stated: "The 'qualitative substantiality' test, in contradistinction to 'quantitative substantiality,' requires an appraisal of all the relevant factors, not merely a determination of the aggregate share of the market. . . ." ³⁵ He went on to propose the following questions:

- (1) How much of an increase in concentration will be brought about by the merger?
- (2) Will the increase in concentration give the merged bank the power to control the price and supply of banking services?
- (3) Will the merger eliminate a substantial competitor from the market?
- (4) What is the competitive situation among commercial banks in the relevant market today?
- (5) What will probably be the competitive situation after the merger?
- (6) What is the probability of a new commercial bank coming into existence in the four-county area?
- (7) What is the history of defendants with respect to prior mergers? ³⁶

This series of tests (but not the answers) put the district court's approach in the mainstream of previous section 7 decisions. Even in *Brown Shoe*, where concentration was the prime interest, the Supreme Court examined most of these factors. But the Supreme Court broke new ground in its *Philadelphia Nat'l Bank* decision when all of these factors were reduced to one: concentration. Mr. Justice Brennan held:

. . . intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anti-competitive 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. See *United States v. Koppers Co.*, 202 F. Supp. 437 (D.C.W.D. Pa. 1962). ³⁷

In short, "quantitative substantiality" (in Judge Clary's sense) is the legal test. ³⁸

Mr. Justice Brennan did not specify a precise percentage as the "magic number." He noted the tests proposed by Kaysen and Turner, Stigler, Markham and Bok, and pointed out that the thirty per cent of

35. *United States v. Philadelphia Nat'l Bank*, 201 F. Supp. 348, 365 (F.D. Pa. 1962).

36. *Ibid.*

37. *United States v. Philadelphia Nat'l Bank*, 83 S.Ct. 1715, 1741 (1963).

38. "Quantitative substantiality" is a phrase taken from the doctrine developed for § 3 of the Clayton Act. Judge Clary used the term with reference to percentages, while in § 3 cases it refers to absolute amounts. Mr. Justice Brennan, in *Philadelphia Nat'l Bank*, also used the term in Judge Clary's sense.

the market which would be controlled by the merged bank would fail each test.³⁹ He concluded: "Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat."⁴⁰

The rule that concentration alone is sufficient to declare a merger illegal should be distinguished from the rule that only the impact on the *structure* of markets is relevant. Some commentators have equated the two propositions and have asserted that a consideration of any features of a market—other than concentration—opens the door to an intent or performance test.⁴¹ Such an argument confuses measurement and justification. The issue is whether concentration is an adequate proxy for all the determinants of competitive behavior. If it were, the tasks of economists would be much simpler, but the history of industrial organization studies indicates that it is not.⁴² More importantly, the vagueness of the concept of a market in merger law leaves concentration data with little meaning. The *Philadelphia Nat'l Bank* decision, which in effect makes any significant increase in "concentration" illegal, destroys the basic foundation of a strict merger policy. No longer is concentration a means of determining whether firms are likely to have the ability to control variables which should be determined outside the firm; relative size of firms now becomes an evil in itself.

B. *Relevant Markets*

The determination of the "relevant market" has always been the intellectual Achilles' heel of section 7 doctrine. Imprecision was at least tolerable as long as concentration data was merely *one* measure of the impact of a merger. Despite the outcries of economists and lawyers over the vagueness of market definition doctrine, it could be assumed that serious measurement errors would be revealed by examination of other structural features. But if concentration should become the sole consideration, the state of market definition doctrine will be crucial both for trial tactics and the intellectual foundation of anti-merger policy.

39. *United States v. Philadelphia Nat'l Bank*, 83 S.Ct. 1715, 1742, n.41 (1963).

40. *Ibid.* The authors are not implying that the Supreme Court's *Brown Shoe* and *Philadelphia Nat'l Bank* decisions are inconsistent. The market structures and market shares in each case were quite different. The concern is with the growing emphasis on concentration data in determining market power.

41. Dirlam, *The Celler-Kefauver Act: A Review of Enforcement Policy*, in *ADMINISTERED PRICES: A COMPENDIUM ON PUBLIC POLICY* 110-12 (1963).

42. Miller, *Measures of Monopoly Power and Concentration: Their Economic Significance*, in *BUSINESS CONCENTRATION AND PRICE POLICY* 134-35 (1955); NELSON, *CONCENTRATION IN THE MANUFACTURING INDUSTRIES OF THE UNITED STATES* 3-4 (1962); Carson & Horovitz, *Concentration Ratios and Competition*, 1 *NAT. BANKING REV.* 105-10 (1963).

It might seem that emphasis on concentration data would lead to more judicial effort to perfect and specify precise market definition techniques. In fact, it is likely that exactly the opposite will take place. In every case there are "special" or "peculiar" conditions and, therefore, some "degrees of freedom" are necessary to allow courts to perform their function. As the number of variables examined declines, the maintenance of flexibility with respect to the specification of the market gains judicial appeal. It is probable that many of the considerations formerly considered under the rubric of "market power" now will be subsumed under the heading of "market definition."

The strategy of the participants in a trial, nevertheless, will remain unchanged. On the one hand, the defense either will attempt to obtain a definition of the market which establishes such narrow boundaries that the consolidating firms will be in separate markets, or will propose a relevant market so broad that the increase in concentration will be *de minimis*. The government, on the other hand, will attempt to obtain a "middle-sized" market so that the resulting concentration will fail to pass the test. Thus, the court will be in a position to pick and choose among several options. The *Brown Shoe* and *Philadelphia Nat'l Bank* decisions have established that there are markets-within-markets and that the narrowest reasonable market is the relevant one.⁴³ That this situation is an intellectual monstrosity does not prevent it from being judicially useful by providing almost unlimited authority to the courts in choosing a market.

If a market is to be determined on economic grounds, then it is the unit which encompasses the supply and demand function.⁴⁴ To assert that there are markets-within-markets avoids, rather than solves, the problem of specifying what the demand and supply relationships are between the merging firms. Of course, one can deny the validity of supply and demand functions in small number markets and move to a cross-elasticity of demand procedure. While cross-elasticities are impossible to estimate empirically, a reasonable approximation might be an "overlap" type of analysis such as has been proposed by

43. The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within the broad market, well-defined submarkets may exist which, in themselves, constitute product markets for anti-trust 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. (Footnotes and citation omitted.) *Brown Shoe Co. v. United States*, 370 U.S. 294, 325-26, 82 S.Ct. 1502, 1523-24 (1962).

44. Adelman, *The Antimerger Act, 1950-60*, 51 AM. ECON. REV. 236 (May, 1961, No. 2; separately paginated). See also Mann & Lewyn, *The Relevant Market Under Section 7 of the Clayton Act: Two New Cases—Two Different Views*, 47 VA. L. REV. 1014 (1961); MASSER, COMPETITION AND MONOPOLY 271-74 (1962).

Mrs. Keyes.⁴⁵ An investigation of the number of common customers supplied by the merging firms would be required. Yet, this approach also begs the question for, among other reasons, the issue remains of specifying how much overlap is "too much."⁴⁶

While the markets-within-markets concept has little economic justification, it does provide the necessary flexibility so that the courts can consider many of the factors previously examined under the "qualitative substantiality" test of market power. The general rule is that the market selected should be the smallest which is reasonable. But unless the courts are willing to declare any merger illegal where one customer might be a potential buyer from either firm, the issue of how small is the smallest reasonable market will always have to be decided. Therefore, the supposed precision, ease, and logic of the concentration test of legality turn out to be illusionary.

II.

MARKET POWER, FORECLOSURE, AND SIZE

Few horizontal mergers involving large industrial firms are likely to be the subject of FTC or court proceedings in the near future. The market power standard and the current role of concentration data mean that most mergers involving firms with a substantial share of any recognizable market will be stopped in the offices of corporate counsel.⁴⁷ The significant cases in the next decade will involve non-horizontal acquisitions in the unregulated sector and mergers in the regulated sector.⁴⁸

45. Keyes, *The Bethlehem-Youngstown Case and the Market-Share Criterion*, 51 AM. ECON. REV. 643 (1961). One might object that a merger of two firms with identical customers, but insignificant market shares would pose no competitive issue. If the product were homogeneous, this is correct; product differentiation lessens the relevance of the objection. In any event, from a public policy standpoint, such mergers are unimportant regardless of the criterion of legality simply because budgetary constraints on the enforcement agencies mean they are unlikely to be challenged. See Phillips & Hall, *Economic and Legal Aspects of Merger Litigation, 1951-1962*, 10 HOUSTON BUS. REV. 62-65 (1963).

46. The Supreme Court is conscious of this problem as evidenced by the following quote:

We recognize that the area in which appellees have their offices does not delineate with perfect accuracy an appropriate "section of the country" in which to appraise the effect of the merger upon competition. Large borrowers and large depositors, the record shows, may find it practical to do a large part of their banking business outside their home community; very small borrowers and depositors may, as a practical matter, be confined to bank offices in their immediate neighborhood; and customers of intermediate size, it would appear, deal with banks within an area intermediate between these extremes. *United States v. Philadelphia Nat'l Bank*, 83 S.Ct. 1715, 1739-40 (1963).

47. Rowe, *Mergers and the Law: New Directions for the Sixties*, 47 A.B.A.J. 1074, 1077 (1961).

48. As Appendix III shows, about three-quarters of all merger cases to date have involved horizontal acquisitions. Only thirty-two cases have had vertical or conglomerate features, and only two joint ventures have been challenged. Moreover, all but twenty-two cases have involved the traditional antitrust areas of manufacturing, mining, and distribution. The regulated industries, such as utilities, transportation, and finance, have been the subject of only ten suits.

A. *Vertical Mergers*

Consider vertical mergers first. Vertical integration by itself cannot *create* market power.⁴⁹ It can *extend* market power from one industry to another, and it may re-enforce monopoly positions by increasing the size of investment needed for effective entry or providing leverage ability.⁵⁰ To demonstrate such potential results is obviously harder than to show the size effects of a vertical acquisition. Further, the conditions necessary for vertical integration to increase market power make it unlikely that the *Bethlehem* tests, for instance, would result in striking down many mergers. Nor is the approach of *Philadelphia Nat'l Bank* likely to reach many vertical mergers, for how is concentration to be measured across market divisions?⁵¹

The courts have avoided these issues by switching from a market power criterion to a "market foreclosure" test.⁵² The standards of section 3 of the Clayton Act have been transferred to section 7.⁵³ The rule is that any vertical merger which forecloses a "substantial" customer or supplier is illegal.⁵⁴ *United States v. E. I. duPont Nemours & Co.*⁵⁵ can be cited as the forerunner of this approach, but as few mergers involve such giants, *Brown Shoe* is more relevant. The vertical aspects of this case involved a combination of four per cent of the shoe manufacturing industry with one and one-half per cent of the retail shoe market. The merger was declared illegal on the basis that small independent manufacturers would be deprived of access to Kinney's business.⁵⁶

Adelman interpreted *Brown Shoe* as holding that a competitive advantage gained through any cost savings as a result of vertical

49. DIRLAM & KAHN, FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTI-TRUST POLICY 146-50 (1954); KAYSER & TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 132 (1959); Adelman, *The Antimerger Act, 1950-60*, 51 AM. ECON. REV. 236, 239 (May, 1961, No. 2; separately paginated).

50. KAYSER & TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 132 (1959).

51. In *Brown Shoe*, the Supreme Court stated 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." 370 U.S. 294, 322 n.38, 82 S.Ct. 1502, 1522 n.38 (1962). Especially is this true in vertical integration cases, since market shares "will seldom be determinative" and, unless either very large or very small, concentration "cannot itself be decisive." *Id.* at 328, 82 S.Ct. at 1525.

52. Supporters of a market foreclosure test include Dirlam, *The Celler-Kefauver Act: A Review of Enforcement Policy*, in ADMINISTERED PRICES: A COMPENDIUM ON PUBLIC POLICY 125 (1963); KAYSER & TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 132-33 (1959); Martin, *The Brown Shoe Case and the New Antimerger Policy*, 53 AM. ECON. REV. 353 (1963).

53. *Standard Oil of California v. United States*, 337 U.S. 293, 69 S.Ct. 1051 (1949).

54. *Brown Shoe Co. v. United States*, 370 U.S. 294, 328, 82 S.Ct. 1502, 1525 (1962).

55. 353 U.S. 586, 77 S.Ct. 872 (1957).

56. *Brown Shoe Co. v. United States*, 370 U.S. 294, 328-34, 82 S.Ct. 1502, 1525-29 (1962).

integration is illegal.⁵⁷ Dirlam disagreed, asserting that the cost savings aspects of the merger were of little importance in either the district court or Supreme Court decisions. He argued that:

The *Brown Shoe* opinions . . . cannot be cited to show that economics of integration are illegal. Foreclosures from a substantial market as a consequence of a vertical acquisition serves to demonstrate illegality; this is the holding of *Brown Shoe*. The doctrine may be "protectionist" in the sense that it protects the right of small manufacturers to compete for Kinney's business; it scarcely seems to exclude low-cost producers from a market.⁵⁸

Dirlam's distinction between "protection" of a market and "protection" from low cost producers is unpersuasive. Shoe manufacturing and shoe retailing are both highly competitive, and the ability of a vertical merger to extend or enhance monopoly in such market structures is practically nil. Any merger involves foreclosure in the trivial sense that there is one less buyer or seller. But, if there is competition, the only way that a buyer would find himself unable to find a seller, or conversely, a seller a buyer, is if integration so lessened the costs of production and distribution that a general movement throughout the industry to vertical integration resulted. Then, and only then, would a non-integrated firm be unable to find another dealer. Therefore, the protection of the share of the market represented by Kinney's purchases amounts to protecting the high cost (non-integrated) firm from the advantages accruing to an integrated producer.

The confusion about the protectionist aspects of the current policy towards vertical mergers stems partly from confusion about the rationale for a strict antimerger policy. Unlike a horizontal merger, a vertical acquisition cannot create market power. Further, the customary vertical distinctions between "industries" are constantly fluctuating in a dynamic economy. The divisions between industries are the result of the differences between the cost of intra-firm transfers and market transactions.⁵⁹ The constant concern of management with "make or buy" decisions indicates the dynamic character of this relationship. Thus, a strict antimerger policy is likely to conflict more with efficiency goals when applied to vertical mergers than when applied to horizontal acquisitions.

57. Adelman: *The Antimerger Act, 1950-60*, 51 AM. ECON. REV. 236, 240-41 (May, 1961, No. 2; separately paginated). See also Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 27 (1949); Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1, 21-22 (1959).

58. Dirlam, *The Celler-Kefauver Act: A Review of Enforcement Policy*, in ADMINISTERED PRICES: A COMPENDIUM ON PUBLIC POLICY 125 (1963). See also Rahl, *Current Antitrust Developments in the Merger Field*, 8 ANTITRUST BULL. 493, 505-15 (1963).

59. Coase, *The Nature of the Firm*, ECONOMICA 389 (1937); Adelman, *Concept and Statistical Measurement of Vertical Integration*, in BUSINESS CONCENTRATION AND PRICE POLICY 281-321 (1955).

It might be argued that, as with horizontal mergers, efficiency considerations should be irrelevant. Yet, note that in a merger such as the proposed Brown-Kinney union, both market power and concentration would have remained unchanged (despite the Court's lengthy attempt to envision an increase in concentration from the consolidation).⁶⁰ To the extent that there were cost savings to be realized, the sole gain from allowing only internal expansion was the prevention of "foreclosure." The stress on the supposed advantages of protecting the markets of small business, therefore, covers up the real effect of the current treatment of vertical mergers. Unlike the case for horizontal mergers, where absolute size is irrelevant and where only the size of the firm in relation to the market is examined, the market foreclosure test makes relative size unimportant and absolute size the deciding factor.

B. *Conglomerate Mergers*

Conglomerate mergers are another area certain to receive considerable attention from antitrust authorities in future years. However, the criteria by which such mergers can be challenged under section 7 are elusive. A truly conglomerate merger is by definition one in which the firms share no common supply or demand curves. Since such a merger could have no effect on competition, concentration, or foreclosure, any objection would have to center on absolute size.⁶¹ The traditional case against conglomerate firms is that their size gives them the power to inflict competitive injury upon rivals.⁶² Yet, absolute size cannot be equated with either market power or market control. As Adelman has argued:

In the antitrust dictionary, "powerful" has no necessary connection with monopoly power or market control or even market share. It means "vast financial reserves," "overwhelming economic

60. This statement is subject to the qualification that Brown owned a few retail outlets and Kinney is the country's twelfth largest shoe manufacturer. The increase in concentration, however, would have been insignificant.

61. A conglomerate merger does not result in the elimination of a competitor but merely substitutes the competition of the acquiring company for that of the acquired company in the lines of commerce in which the acquired company was formerly engaged. Thus, such a merger does not in itself result in any increase in industry or product market concentration and the shares of the acquiring and acquired companies in their respective product markets are the same as they were before. *United States v. Continental Can Co.*, 217 F. Supp. 761, 786 (S.D.N.Y. 1963).

62. Adams defines conglomerate power as follows: "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 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 Bicks, *Conglomerates and Diversification Under Section 7 of the Clayton Act*, 2 ANTITRUST BULL. 175 (1956); Blair, *The Conglomerate Merger in Economics and Law*, 46 GEO. L.J. 672 (1958); Edwards, *Conglomerate Bigness as a Source of Power*, in BUSINESS CONCENTRATION AND PRICE POLICY 331 (1955); Stocking, *Comment*, *Id.* at 352.

strength," "colossal corporate resources," or some other pompous polysyllabic combination meaning one four-letter word: size. And "drastic competitive injury" means simply loss of business. So a merger is illegal if (1) it involves a big company and (2) small business concerns afterward lose sales. Competition—pure, workable, effective, or whatever—has vanished, replaced by protectionism. Some small companies might have been losing business because they were inefficient or ill-adapted to new market conditions. Moreover, where firms are numerous, many must by chance alone be in difficulties as of any one moment. To blame their troubles, real or fancied, on the acquisition by the large company is clearly fallacious, *post hoc ergo propter hoc*.⁶³

The debate over absolute size is relevant for truly conglomerate mergers, but most mergers classified as conglomerate involve the union of two companies whose products are physically different or which perform different functions, yet which are related in some manner due to common demand or supply elements (the use of idle capacity, better utilization of salesmen, the investment of surplus capital funds). There is little consensus among the enforcement agencies and the courts about the appropriate standards for such quasi-conglomerate mergers. In two complaints it was charged that the acquiring firms' financial resources would enable, or had enabled, the companies to increase the acquired firms' market shares at the expense of smaller producers.⁶⁴ A market foreclosure test has been used in three cases. In *Consolidated Foods*, the FTC held that Consolidated's acquisition of Gentry would create an anticompetitive effect inherent in the corporate structure, namely, reciprocity.⁶⁵ In *United States v. Continental Can*⁶⁶ the district court rejected this criterion. Market foreclosure was cited in the complaint issued against General Dynamics.⁶⁷ In two other complaints, involving General Motors, both absolute size and market foreclosure were alleged.⁶⁸

63. Adelman, *The Antimerger Act, 1950-60*, 51 AM. ECON. REV. 236, 243 (May, 1961, No. 2; separately paginated).

64. The Procter & Gamble Co., F.T.C. Docket 6901, complaint filed September 30, 1957; General Foods Corp., 1963 TRADE REG. REP. (Trade Cas.) ¶ 16612.

65. By purchasing Gentry, Consolidated would be able to "reap a profit from sales in one product area, dehydrated onion and garlic, on the sheer strength of its buying power in other markets and not on the basis of a better product or price." Consolidated Foods Corp., F.T.C. Docket 7000, 1962 TRADE REG. REP. (Trade Cas.) ¶ 16182 at 20973. See Donnem, *The Conglomerate Merger and Reciprocity*, 8 ANTITRUST BULL. 283 (1963).

66. *United States v. Continental Can Co.*, 217 F. Supp. 761 (S.D.N.Y. 1963), appeal docketed, 32 U.S.L. WEEK 3078 (U.S. Aug. 13, 1963) (No. 367).

67. *United States v. General Dynamics Corp.*, 62 Civ. 3686, complaint filed on November 8, 1962.

68. *United States v. General Motors Corp. (Euclid Road Machinery)*, complaint filed October 16, 1959; *United States v. General Motors Corp. (locomotive manufacturing)*, Civ. 63C80, complaint filed January 14, 1963. *United States v. FMC Corp.* was voluntarily dismissed by the government on October 23, 1963. *Scott Paper*

The FTC used a different approach in deciding the *Procter & Gamble*⁶⁹ case. The acquisition was regarded as a "product extension" merger; the criterion was the same as for horizontal acquisitions. Thus, while Procter & Gamble did not produce a liquid bleach prior to its acquisition of Clorox, it distributed many household items with marketing characteristics similar to bleach. The crux of the decision, as the Commission emphasized, concerned the advantages accruing to Procter & Gamble from integrating the marketing of Clorox with its other products. The decision was that the economies resulting from the merger were not due to increased social efficiency, but were due to the impact of the acquisition on the structure of the market. The Commission found, among other things, that the merger would change the nature of advertising and, therefore, would raise the barriers to entry into the liquid bleach industry.

Some might quarrel with the Commission's analysis of advertising. It is clear, however, that the decision centered on the heart of the matter, that is, the impact of the merger on market power. Moreover, this approach should be applied to all quasi-conglomerate mergers. To illustrate: the issue in *Continental Can* is neither absolute size nor market foreclosure. The relevant question is the degree to which combining two substitute products will increase the market power of the resulting firm. The point is that for quasi-conglomerate mergers the criterion should be market power—the same as used in horizontal acquisitions. To treat such mergers in any other fashion would severely limit the usefulness of section 7 by turning it into a weapon for protecting inefficient competitors.

C. Joint Ventures

A third area which remains to be explored is joint ventures. Only two such mergers have been challenged: *United States v. Cities Service Co.*,⁷⁰ which was terminated by consent decree, and *United States v. Penn-Olin Chemical Co.*,⁷¹ which was held by a district court not to violate section 7. In the latter case, the government charged that

involved both conglomerate and vertical acquisitions. *Scott Paper Co.*, 57 F.T.C. 1415 (1960). The latter case was remanded to the FTC for additional market share evidence, 301 F.2d 579 (3d Cir. 1962). In *Foremost Dairies, Inc.*, 1962 TRADE REG. REP. (Trade Cas.) ¶ 15877, at 20676-86, a distinction was made between horizontal, vertical, conglomerate, and market extension mergers. The latter was defined "as the acquisition of a corporation engaged in the dairy business but in a geographical location where respondent was not so engaged prior to the acquisition." Such a merger should be "treated in the same manner as the conglomerates and . . . the same tests must be applied to determine whether they violate Section 7."

69. *The Procter & Gamble Co.*, 1963 TRADE REG. REP. (Trade Cas.) ¶ 16673 at 21558.

70. 1963 TRADE REG. REP. (Trade Cas.) ¶ 70799.

71. *United States v. Penn-Olin Chem. Co.*, 217 F. Supp. 110 (D. Del. 1963).

formation of Penn-Olin by the Olin Mathieson and the Pennsalt Chemicals corporations had the probability of reducing *potential* competition between the two parties in the production of sodium chlorate and *actual* competition in the production of non-chlorates.

With respect to sodium chlorate, the government contended that both companies could have competed with each other in the production of the product and that the antitrust laws require the two companies to meet competitive challenges "on individual terms or not at all. They may compete or not as they please. But the option to compete or combine is forbidden."⁷² Judge Steel found this position "novel and far reaching,"⁷³ but rejected it nonetheless, holding that there was no evidence that in the absence of the joint venture the two companies would have built individual plants in the relevant market. Nor are joint ventures illegal per se. And, even though Penn-Olin might gain some competitive advantages through reciprocal agreements, the court could find no evidence that the joint venture would ultimately dominate the sodium chlorate market.

With respect to non-chlorates, a slightly different situation was presented. Both Olin and Pennsalt produce and sell a number of non-chlorates in direct competition with each other. The government argued that the two companies would have the opportunity to make anticompetitive agreements when they met to handle the affairs of the joint venture. Judge Steel acknowledged this possibility, but refused "to equate opportunity for wrongdoing with likelihood of its occurrence. . . ."⁷⁴

Penn-Olin seems to say that when joint ventures are at issue, some showing of market power is required. Like *Continental Can*, but unlike *Consolidated Foods*, this decision appears to reject the market foreclosure test for non-horizontal mergers and to adopt the stricter tests applied to horizontal acquisitions.

D. *The Regulated Industries*

Mergers of firms regulated by public authority present another area where the relevance of current doctrine is an issue. Applying the Celler-Kefauver Act to such mergers raises two problems: the coverage of the act and the criterion for legal behavior. As to the first, the courts have made it clear that any exemption is to be narrowly construed. This conclusion is the import of *United States v. Maryland &*

72. *Id.* at 123-24 n.16.

73. *Id.* at 123.

74. *Id.* at 134. Common country club membership, in the author's opinion, would seem an adequate substitute for the formation of a joint venture to fix prices.

Virginia Milk Producers Ass'n,⁷⁵ *United States v. El Paso Natural Gas*,⁷⁶ and the *Philadelphia Nat'l Bank* case. Indeed, the decision in the latter case construed the "exemption" so narrowly that Mr. Justice Harlan's dissent began: "I suspect that no one will be more surprised than the Government to find that the Clayton Act has carried the day for its case in this Court."⁷⁷

The Supreme Court's *Philadelphia Nat'l Bank* decision also brushed aside the regulated aspects of banking with the statement that:

Concededly, PNB and Girard are healthy and strong; they are not undercapitalized or overloaned; they have no management problems; the Philadelphia area is not overbanked; runious competition is not in the offing. Section 7 does not mandate cutthroat competition in the banking industry, and does not exclude defenses based on dangers to liquidity or solvency, if to avert them a merger is necessary. It does require, however, that the forces of competition be allowed to operate within the broad framework of governmental regulation of the industry. The fact that banking is a highly regulated industry critical to the Nation's welfare makes the play of competition not less important but more so.⁷⁸

With this view, it was easy for the Court to hold that the case presented only a "straightforward problem of application" of the *Brown Shoe* doctrine to the particular facts.⁷⁹ As noted before, however, *Brown Shoe* was extended, for concentration became the sole test of market power. Thus concentration is the heart of the problem. However, is the significance of increases in concentration necessarily the same in regulated and nonregulated industries?

To the extent that regulation is economically motivated, it represents a judgment either that antitrust goals should be subordinated to other goals in a given industry, or that antitrust goals are better achieved by direct control over managerial decisions.⁸⁰ The mere existence of regulation results in the development of a relationship among the firms, and between the firms and the regulating agency, such that firm behavior and the influence of the industry's structure on that behavior is often different from competitive industries. The implication should not be drawn that the existence of regulation properly removes firms from all antitrust liability. Far from it, there has been

75. *United States v. Maryland & Virginia Milk Producers Ass'n*, 167 F. Supp. 799 (D.D.C. 1958), *aff'd*, 362 U.S. 458, 80 S.Ct. 847 (1960).

76. *United States v. El Paso Natural Gas Co.*, 1962 TRADE CAS. 70571 (D. Utah 1962), *appeal docketed*, 31 U.S.L. WEEK 3306 (U.S. Mar. 19, 1963) (No. 944, 1962 Term; renumbered No. 94, 1963 Term).

77. 83 S.Ct. 1715, 1746 (1963).

78. *Ibid.*

79. *Id.* at 1737.

80. KAYSEN & TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 41 (1959).

too little concern with applying antitrust law to regulated firms. The point is that regulation precludes direct application of the doctrines developed for non-regulated industries.

Banking, because of *Philadelphia Nat'l Bank* and several pending bank merger suits,⁸¹ provides an apt illustration. The clearing house and correspondent bank relationships, the control over interest rates paid on deposits, the control of the money supply, these, and many other complex interrelationships fostered to achieve the monetary goals of a stable payments mechanism with full employment and growth, lead to a relationship between the structure of banking markets and the behavior of banks which is different from that presupposed by the antitrust laws.⁸² A deconcentrated market composed of small banks is not necessarily more competitive in behavior or results than a concentrated one. Nor is it clear that maximizing rivalry is the most desirable social policy in banking; at least there is a traditional view that it is not.⁸³

Admittedly, Mr. Justice Brennan was aware of these considerations, as shown by the passage quoted above. He also included in a footnote a dictum that the social seriousness of bank failure might mean that the "failing firm" defense of *International Shoe v. FTC* is more important for bank mergers.⁸⁴ If one thinks about this dictum, however, it becomes apparent that it violates the basic logic of the *Brown Shoe* rule which was supposedly applied: the rule that unconcentrated market structures are desirable *regardless of performance*. The dictum points out that performance is the key test of mergers in the regulated industries. Therefore, by applying the concentration test to industries where a performance test is more relevant, the courts face a dilemma. If they ignore everything but concentration, they ignore the single most important aspect of the regulated industries—the regulation itself. If they examine performance in the regulated industries, then future cases will not represent a "straightforward"

81. *United States v. Bank Stock Corp.*, Civ. No. 61-C-54; *United States v. Continental Illinois Bank & Trust Co.*, Civ. No. 61-C-1441; *United States v. Manufacturers Trust Co.*, Civ. No. 61-C-3194; *United States v. The Valley Nat'l Bank*, Civ. No. 4550 Phx.; *United States v. Crocker-Anglo Nat'l Bank*, Civ. No. 41808. One bank merger case is on appeal to the Supreme Court under § 1 of the Sherman Act; *United States v. First Nat'l Bank & Trust Co.*, 208 F. Supp. 457 (E.D. Ky. 1962), *appeal docketed*, 31 U.S.L. WEEK 3172 (U.S. Nov. 13, 1962) (No. 590, 1962 Term; renumbered No. 36, 1963 Term).

82. MEYER, PECK, STENASON & ZWICK, *THE ECONOMICS OF COMPETITION IN THE TRANSPORTATION INDUSTRIES* (1959); PHILLIPS, *MARKET STRUCTURE, ORGANIZATION AND PERFORMANCE* (1962); Abramson, *Private Competition and Public Regulation*, 1 NAT. BANKING REV. 101-05 (1963); see also Note, *Regulated Industries and the Antitrust Laws: Substantive and Procedural Coordination*, 58 COLUM. L. REV. 673 (1958).

83. A practical result of this view is that not one bank failed in 1962.

84. *United States v. Philadelphia Nat'l Bank*, 83 S.Ct. 1715, 1746, n.46 (1963), citing *International Shoe Co. v. FTC*, 280 U.S. 291, 299-303, 50 S.Ct. 89, 91-93 (1929).

application of previous doctrine, but will require the development of a new set of standards.⁸⁵

The latter avenue should be the route chosen. Other things being equal, the public interest is best served if expansion in all industries occurs by internal growth. But in the regulated industries, there is a high probability that other things are not equal. The mere existence of regulation would seem to require, at a minimum, an examination of the degree to which maximizing the number of decision-making units in a regulated industry assists the achievement of desired performance goals.

III.

CONCLUSION

Thirteen years of Celler-Kefauver Act litigation has resulted in the development of a strict policy towards horizontal acquisitions. Any consolidation which is likely to lead to the creation of, or to an increase in, market power will be declared illegal. Such a ban on horizontal mergers conflicts with the attainment of efficiency only if there are substantial economies of scale and considerable cost disadvantages to being less than optimum size. Given the structure of most industries, it is doubtful that economies of scale pose any substantial problem to restructuring industries by internal growth. Moreover, the importance of past mergers in creating the market situations which pose antitrust problems today suggests that should error be made, it should be in the direction of more rather than less restriction on external growth.⁸⁶

The growing emphasis upon concentration data in horizontal cases, however, is objectionable. Concentration and competition cannot be regarded as mirror images; such an equation is empirically dubious. Further, the current state of the art of market definition means that the subjectivity and arbitrariness of merger standards are significantly increased. Much of the appeal of a market power standard disappears when concentration is regarded as synonymous with the ability to control variables which should be exogenous to the firm.

Few important horizontal mergers are likely to reach the courts in the near future. The relevant question currently posed for antimerger policy concerns the standards developed to date for judging the legality of nonhorizontal mergers and mergers among regulated firms.

85. We are not implying that the merger of Philadelphia National Bank and Girard Trust should have been approved. This issue is beyond the scope of this present paper. Our point is that the test which was used by the Supreme Court is not useful for the regulated industries.

86. BUTTERS, LINTNER & CARY, *EFFECTS OF TAXATION: CORPORATE MERGERS* (1951); WESTON, *THE ROLE OF MERGERS IN THE GROWTH OF LARGE FIRMS* (1953); Markham, *Survey of the Evidence and Findings on Mergers*, in *BUSINESS CONCENTRATION AND PRICE POLICY* 141-82 (1955).

For vertical and conglomerate mergers, as well as joint ventures, the issue is whether a market foreclosure or absolute size test will replace the market power criterion. Should this occur, a not unlikely eventuality, merger policy will conflict with the goal of efficiency much more in the future than in the past. The adoption of either test would do what the courts have insisted they would not do—use the Celler-Kefauver Act to protect competitors rather than competition.

For mergers of regulated firms, the issue is whether they will be treated as though they involved nonregulated companies. If they are, and this would appear to be the conclusion of *Philadelphia Nat'l Bank*, then antimerger policy will further complicate the almost insurmountable task of bringing economic rationality to bear on regulatory policy.

The analysis of this article indicates that economists have not yet developed clear-cut and conclusive criteria by which the courts can determine the legality of challenged mergers.⁸⁷ Perhaps such criteria can never be developed. But the ends cannot justify the means; proper criteria are just as important as the results of court decisions. It is, after all, the doctrine applied and not the results which determine the future course of antimerger policy. For what consolidation it may bring, the foregoing analysis also demonstrates that students of anti-merger policy need not fear technological unemployment.

87. As Heflebower puts it: "Faced with inconclusive theory and paltry evidence by which to predict the effects of a merger, the courts must decide which way to err." *Corporate Mergers: Policy and Economic Analysis*, 77 Q.J. Econ. 538 (1963). However, the authors disagree with Bok's conclusion: "There is undoubtedly a point in human understanding where information can be said to bear upon a situation without being understood well enough to assist in predicting the course of future events. We have argued that much of the relevant economic theory has reached this point and that to use such doctrine in attempting elaborate predictions under section 7 will cause confusion rather than enlightenment." Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 349 (1960).

APPENDIX I
STATUS OF MERGER LITIGATION
(January 1, 1951-February 1, 1964)

	Cases Initiated By		Total Cases
	FTC	Justice Department	
Cases Filed	52	76	128
Cases Terminated:			
Consent Order or Decree.....	17	21	38
Commission* or Court Decision.....	14	11	25
Voluntary Withdrawal	1	7	8
Total	32	39	71
Cases Pending (February 1, 1964).....	20 ^b	37 ^c	57

- ^a Only full Commission decisions are considered here. Three Commission decisions were subsequently upheld by the courts (*Crown Zellerbach*, *Reynolds Metals*, and *Spalding*).
 - ^b Includes two Commission decisions (*Foremost Dairies* and *Pillsbury Mills*) which have been appealed to the courts, and two decisions (*Erie Sand* and *Scott Paper*) which have been remanded to the Commission.
 - ^c Includes four cases (*Aluminum Co. of America—Rome Cable*, *Continental Can—Hazel-Atlas*, *El Paso Natural Gas*, and *Penn-Olin Chemical*) which have been appealed to the Supreme Court.
- Source: TRADE REG. REP., 1951-1964.

APPENDIX II
RESULTS OF MERGER LITIGATION
(January 1, 1951-February 1, 1964)

	Cases Initiated By		Total Cases
	FTC	Justice Department	
Cases Terminated:			
Complete Divestiture	11	18	29 ^b
Partial Divestiture	12	11	23 ^c
Divestiture Denied*	9	10	19 ^d
Total	32	39	71

- ^a Includes cases voluntarily dismissed.
 - ^b FTC cases: *American Cement*, *Automatic Canteen*, *Consolidated Foods*, *Crown Zellerbach*, *Gulf Oil*, *High Voltage*, *Leslie Salt*, *National Sugar*, *Procter & Gamble*, *Reynolds Metals*, *Spalding*; Justice Department cases: *American Radiator*, *Anheuser-Busch* (Miami Brewery), *Bethlehem*, *Brown Shoe*, *Calumet Nat. Bank*, *Cities Service*, *Diebold*, *FMC*, *Gamble-Skogmo*, *Kaiser Aluminum* (Kawneer), *Koppers*, *Maryland & Virginia Milk*, *Minute Maid*, *Parents Magazine*, *Philadelphia Nat. Bank*, *Republic Corp.*, *Standard Oil* (Ohio), *Stauffer Chemical*.
 - ^c FTC cases: *Continental Baking*, *Diamond Crystal Salt*, *Farm Journal*, *Hooker Chemical*, *Luria Bros.*, *Martin-Marietta*, *Minnesota Mining*, *National Dairy*, *Scovill Mfg.*, *Simpson Timber*, *Union Carbide*; *Vendo*; Justice Department cases: *First-america*, *General Shoe*, *Hertz*, *Hilton*, *Lucky Lager Brewing*, *Maremont Automotive*, *National Alfalfa*, *National Homes*, *Owens-Illinois Glass*, *Ryder System*, *Suburban Gas*.
 - ^d FTC cases: *Brillo Mfg.*, *Crane*, *Dresser*, *International Paper*, *Kaiser Industries*, *Kaiser Steel*, *National Lead*, *Union Bag & Paper*, *Warner*; Justice Department cases: *Bliss & Laughlin*, *Columbia Pictures*, *Cunningham Drug*, *General Cable*, *Jerrold*, *Lever Bros.*, *Ling-Temco*, *MCA*, *Schenley*, *United Artists*.
- Source: TRADE REG. REP., 1951-1964.

APPENDIX III
ANTIMERGER CASES CLASSIFIED BY TYPE OF MERGER, SIZE OF
ACQUIRING FIRM, AND MARKET SHARE
ACCORDING TO COMPLAINT
(January 1, 1951-February 1, 1964)

	Number	Total
I. Type of Acquisition		
Horizontal	94	
Vertical	12	
Horizontal and Vertical.....	11	
Conglomerate	8	
Joint Venture	2	
Vertical and Conglomerate.....	1	
Total	—	128
II. Size of Acquiring Company by Assets		
A. Industrial		
100 largest	32	
101-200 largest	18	
201-300 largest	10	
301-400 largest	5	
401-500 largest	4	
Below 500 largest.....	19	
Unclassified	4	
Total	92	
B. Merchandising		
25 largest	2	
26-50 largest	3	
Below 50 largest.....	6	
Total	11	
C. Commercial Banking		
25 largest	4	
Below 25 largest.....	1	
Total	5	
D. Not Classified		
	20	
Grand Total.....	—	128
III. Standing of Acquiring Firm in Market According to Complaint		
First	54	
Second	18	
Third	8	
Fourth	1	
Fifth	4	
Ninth	3	
Standing not given.....	40	
"Dominate"	4	
"Among largest"	25	
"Major producer"	10	
No mention of standing.....	1	
Total	—	128

Source: Complaints issued by the Department of Justice and Federal Trade Commission, January 1, 1951-February 1, 1964; asset data from *The Fortune Directory*, (Time, Inc., August, 1962).