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DEPARTMENT STORES ON SALE: AN ANTITRUST QUANDARY

Mark D. Bauer *

INTRODUCTION

Department stores occupy a unique role in American society. With memories of trips to see Santa Claus, Christmas window displays, holiday parades or Fourth of July fireworks, department stores—particularly the old downtown stores—are often more likely to engender civic pride than a city hall building or a courthouse.¹ Department store companies have traditionally been among the strongest contributors to local civic charities, such as museums or symphonies. In many towns, the department store is the primary downtown activity generator and an important focus of urban renewal plans. The closing of a department store is generally considered a devastating blow to a downtown, or even to a suburban shopping mall.

Many people feel connected to and vested in their hometown department store.² In 2005, Macy's,³ already the largest department

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1. See, e.g., Barbara Cloud, *Department Stores Evoke Warm Memories*, PITTSBURGH POST-GAZETTE, Dec. 4, 2006, at C3. See also Alan Lupo, *When a Store Closes Its Doors, a Bit of the Past Disappears*, BOSTON GLOBE, Dec. 20, 1998, at 3.

2. Sandra Jones, *Hoarding Names No Game: Federated Keeps Tight Grip on Dearly Departed Department Stores to Protect Its Star Brand*, CHI. TRIB., July 23, 2006, § 5, at 1.

3. In 2005, Macy's was an operating arm of Federated Department Stores (FDS). On February 27, 2007, FDS announced that it would seek shareholder approval to change its corporate name to Macy's

store group in the United States, acquired May Department Stores, its largest competitor, for \$17 billion.⁴ The merger was closely examined by federal antitrust authorities, but the regulators took no action.⁵ Although this industry was no stranger to mergers, name changes, or reorganizations, nothing came close to Macy's dramatic decision in 2005 to rename—and indeed, drastically alter—hundreds of former May department stores to Macy's.⁶ Although each Marshall Field's, Filene's, Hecht's, Strawbridge's, and Foley's store, among others, had long since become part of a distant holding company, shoppers in each separate city were able to participate in an unbroken chain of tradition and memories that hearkened back to each stores' local founder.

According to the doctrine of law and economics, however, none of this really matters.⁷ To a devotee of law and economics, antitrust is a study of elasticity of demand, market power, and a concept called “consumer welfare” that has little to do with lay definitions of the

Inc., recognizing that 90% of its sales come from Macy's (the other 10% coming from its other department store chain, Bloomingdale's). Press Release, Federated Department Stores, Inc., *Federated Plans Corporate Name Change*, Feb. 27, 2007, <http://phx.corporate-ir.net/phoenix.zhtml?c=84477&p=irol-newsArticle&ID=967632&highlight>. That name change was approved by stockholders and became effective June 1, 2007. Sandra Jones, *Macy's: State St. Store 'Doing Badly': Official Says Greater Effort Needed to Get Traffic into Flagship*, CHI. TRIB., May 19, 2007, at C1. The mixed lineage and nomenclature of the various entities discussed in this article can be confusing because FDS and Macy's both had long independent histories before finally merging in 1993. Although many of the events discussed occurred while Macy's was part of FDS, this article will only refer to FDS when necessary for historical clarity, particularly relating to the period before 1994 when FDS bought Macy's.

4. Brenon Daly, *Federated, May to Tie Knot*, DAILY DEAL, Mar. 1, 2005; David Moin, Evan Clark, Vicki M. Young & Amy S. Choi, *Federated-May Merger: With a Deal Imminent, Market Weighs Fallout: Federated Department Stores and May Department Stores to Merge*, WOMEN'S WEAR DAILY, Feb. 28, 2005, at 1.

5. See, e.g., Stephanie Strom, *FTC Ends Inquiry into Macy Deal*, N.Y. TIMES, Aug. 20, 1994, at 37; Statement of the Commission Concerning Federated Department Stores, Inc./The May Department Stores Company, FTC File No. 051-0111 at 1 (FTC 2005); see generally Federal Trade Commission, *Pre-Merger/Hart-Scott Rodino Act*, available at <http://www.ftc.gov/bc/hsr/> (last visited Aug. 17, 2008); Federal Trade Commission, *Revised Jurisdictional Thresholds for Section 7A of the Clayton Act*, <http://www.ftc.gov/os/2007/01/P859910RevisedSection7AClaytonAct2007.pdf>.

6. Jones, *supra* note 2, at 1.

7. Law and economics—often referred to as “the Chicago School”—boiled down to its most simplistic description, would argue that “[a]ntitrust concerns should kick in only when a firm had a dominant market share in a market protected by entry barriers, and entry itself could be relied upon to solve most competitive problems, except when government action protected incumbents.” Jonathan Baker, *A Preface to Post-Chicago Antitrust*, in POST-CHICAGO DEVELOPMENTS IN ANTITRUST ANALYSIS 60, 66 (2002).

words “consumer” or “welfare.”⁸ To these scholars, department stores are analogous to a basket of goods, or simply a retail channel distributing products made by others and offering nothing substantive of value to purchasers.⁹ Were a department store to raise prices, law and economics informs us that shoppers would make rational economic decisions by flocking to less expensive sellers of similar wares.

At odds with the predictions of the law and economics crew, however, was the reaction of consumers to Macy’s acquisition of May, particularly in Chicago. Upon hearing of Macy’s plan to change the name of Marshall Field’s, Chicago’s iconic downtown anchor, hundreds of Chicagoans took to the streets in protest.¹⁰ These shoppers were not content to purchase similar or even identical goods elsewhere. Even now, several years after the merger, fans of Marshall Field’s continue to protest at Macy’s annual shareholders meeting.¹¹

8. The term “consumer welfare” is confusing to some because it does not mean that the welfare of the majority of consumers is maximized. STEPHEN F. ROSS, *PRINCIPLES OF ANTITRUST LAW* 3–4 (The Foundation Press, Inc. 1993). Consumer welfare means maximization of societal wealth, not that of individuals, which can simply mean there is more wealth, but it is concentrated among the already wealthy. *Id.* Similarly, “allocative efficiency” does not mean “competition.” *Id.* at 4. The Chicago School usually focuses on short-term rather than long-term efficiencies. *Id.*

9. The concept of a collection of goods taking on a characteristic separate and apart from the individual goods themselves has not received considerable attention from antitrust scholars. *See generally* Jonathan B. Baker, *Product Differentiation Through Space and Time: Some Antitrust Policy Issues*, 42 *ANTITRUST BULL.* 177 (1997); Jonathan B. Baker, *Unilateral Competitive Effects Theories in Merger Analysis*, 11 *ANTITRUST* 21–26 (Spring 1997); Jonathan B. Baker & Timothy F. Bresnahan, *The Gains from Merger or Collusion In Product-Differentiated Industries*, 33 *J. INDUS. ECON.* 427 (1985); Craig M. Newmark, *Price Concentration Studies: There You Go Again* 12, <http://www.usdoj.gov/atr/public/workshops/docs/202603.htm> (suggesting that consumers compare prices on individual products but are actually interested in buying a package of bundled services); 1992 Horizontal Merger Guidelines, 57 *Fed. Reg.* 41552, §§ 2.2–2.21 (Sept. 10, 1992). The Supreme Court did, however, at least hint at this in one of the earliest merger cases. *See United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 356–57 (1963).

10. Gail Heriot, *Give the Lady What She Wants*, *WALL ST. J.*, June 17, 2006, at A10; Rummana Hussain, *Protestors Wear Green, See Red: 200 Demonstrate on State As Field’s Becomes Macy’s*, *CHI. SUN-TIMES*, Sept. 10, 2006, at A9. Slogans on the protestors signs included “Boycott Macy’s, Field’s is Chicago,” “Hell No, Not My Dough,” and, thinking along similar lines as this author with regard to the title of this article, “Give the Lady What She Wants and She Wants Marshall Field’s.” Hussain, at A9. The Chicago Tribune in an editorial compared it to renaming Wrigley Field as Yankee Stadium. Editorial, *Farewell to Field’s*, *CHI. TRIB.*, Sept. 21, 2005, at C26.

11. Sandra M. Jones, *Field’s Backers Take Beef to Macy’s Annual Meeting*, *CHI. TRIB.*, May 24, 2008, at C1.

There is something important about department stores and antitrust that is not captured in a conventional law and economics analysis. Economic science does not lie, but law and economics may be focusing on the wrong data. There may be a reason even within conventional antitrust analysis to explain the cries of outraged consumers.¹²

Part I of this article will review the history of department stores and examine their importance to American culture, particularly to the development of the urban fabric. The literature and scholarship focusing on this period amply chronicle the importance of department stores to the development of cities, civic identity, and popular culture. Indeed, antitrust arose in the same populist era as department stores, and both share common origins and ideals of consumerism and democracy.¹³

Part II of this article will provide the background and necessary context for the antitrust laws. Part III of this article will review the United States Federal Trade Commission's (FTC) decision to permit Macy's to acquire May. The conclusion of this article offers a suggestion for remedial action.

I. HISTORY AND GROWTH OF DEPARTMENT STORES

A. *The Relevance of Department Store History*

Law and economics generally ignores retail.¹⁴ “The most extreme form of neglect is to act as though retailers do not even exist—as

12. See generally Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending*, 65 MD. L. REV. 709, 754–57 (2006); Herbert Simon, *A Behavioral Model of Rational Choice*, in *Models of Man, Social and Rational: Mathematical Essays on Rational Human Behavior in a Social Setting*, 69 THE Q. J. OF ECON. 99 (1955); Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449 (Dec. 2003).

13. See Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 75–76, 90 (2003); 51 CONG. REC. 11228, 11105, 11109, 14936 (1914) (statements of Sens. Robinson, Cummings, Newlands, and Rep. Stevens); Neil W. Averitt, *The Meaning of “Unfair Acts of Practices” in Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225, 230–31 (1981).

14. See Robert L. Steiner, *The Nature of Vertical Restraints*, 30 ANTITRUST BULL. 143 (1985) [hereinafter Steiner, *Vertical Restraints*]; Pamela Jones Harbour, *An Enforcement Perspective on the Work of Robert L. Steiner: Why Retailing and Vertical Relationships Matter*, 49 ANTITRUST BULL. 985, 985–86, 992 (Winter 2004); Michael P. Lynch, *Why Economists Are Wrong to Neglect Retailing and*

though manufacturers sell directly to consumers.”¹⁵ But this segment of the economy is just too big to ignore. In recent years, more than 20 million people worked in the distributive trades: 1.5 workers for every worker in manufacturing.¹⁶ Wal-Mart is not only a retailer employing more than one million Americans—Wal-Mart is also one of the two largest corporations in the world.¹⁷

Law and economics generally predicts that in the event of a manufacturer-imposed price increase, retailers will pass through 100% of the increase to consumers.¹⁸ This presumes that retail can be “modeled as a perfectly competitive industry with constant marginal costs.”¹⁹ Because retailers face imperfect competition from their counterparts, they “often are able to exercise a degree of market power.”²⁰ Furthermore, retail giants like Macy’s are no longer just retailers; Macy’s is a vertically integrated giant that produces nineteen percent of its sales from store brands that it designs, manufactures, and sells.²¹

The importance of department stores, however, is more than just numbers reflecting industrial might. To fully appreciate the ramifications of the Macy’s/May merger, it is necessary to consider department stores in context, including their historical development and their role in the national fabric.

How Steiner’s Theory Provides an Explanation of Important Regularities, 49 ANTITRUST BULL. 911 (Winter 2004). See generally Robert L. Steiner, *Marketing Productivity in Consumer Good Industries—A Vertical Perspective*, 42 J. MKT. 60, 61–63 (1978); Robert L. Steiner, *A Dual-Stage View of the Consumer Economy*, 35 J. ECON. ISSUES 27 (2001).

15. Lynch, *supra* note 14, at 911.

16. *Id.* at 912.

17. *Fortune Global 500*, FORTUNE, 2006, available at <http://money.cnn.com/magazines/fortune/global500/2006> (last visited Aug 17, 2008); *Fortune Global 500*, FORTUNE, 2005, available at <http://money.cnn.com/magazines/fortune/global500/2005> (last visited Aug 17, 2008); Laurent Belsie, *Wal-Mart: World’s Largest Company*, CHRISTIAN SCI. MONITOR, Feb. 19, 2002, at 1.

18. Lynch, *supra* note 14, at 911, 915, 920–21.

19. *Id.* at 921.

20. Harbour, *supra* note 14, at 987; Steiner, *Vertical Restraints*, *supra* note 14, at 157–58.

21. See <http://www.macysinc.com/Investors/FinancialInformation/SalesByCategory.aspx> (last visited Feb. 15, 2010); Jennifer Steinhauer, *Strutting Their Own Stuff*, N.Y. TIMES, Sept. 27, 1997, at D1.

B. *The Beginnings*

From small peddler outposts to ubiquitous suburban mall landmarks, department stores have grown with America and at the same time changed America. Indeed, the pervasiveness and success of department stores today belies a remarkable history. Department stores radically changed the rules that governed shopping for hundreds of years.²² Peddlers of modest means, often Jewish immigrants,²³ became shopkeepers, and many built enormous institutions over a few decades. The institutions they built were so well received that, within a generation, these former peddlers and members of ethnic and religious minorities were frequently accepted into the upper crust of society.²⁴

Department stores made urban cores a focal point for city life, rather than a dreary and austere collection of offices.²⁵ And department store buildings became symbols of urbanity and a central fixture of community identity.²⁶

22. JOHN WILLIAM FERRY, *A HISTORY OF THE DEPARTMENT STORE* 3 (The Macmillan Co. 1960).

23. The founders of America's largest department stores were invariably of British ancestry, Jewish émigrés escaping oppression in Germany and Eastern Europe, or descendants of Quaker families that settled in New England in the 1600s. *Id.* at 23–24; see also JAN WHITAKER, *SERVICE AND STYLE: HOW THE AMERICAN DEPARTMENT STORE FASHIONED THE MIDDLE CLASS* 184 (St. Martin's Press 2006).

24. See generally Bill Hendrick, *Getting Past Prejudice; Lieberman Choice May Herald Decline in Anti-Semitism*, ATLANTA J.-CONST., Aug. 9, 2000, at 1D; ISADORE BARMASH, *MACY'S FOR SALE* 30 (Weidenfeld & Nicholson 1989); WILLIAM LEACH, *LAND OF DESIRE: MERCHANTS, POWER, AND THE RISE OF A NEW AMERICAN CULTURE* 117 (Pantheon Books 1993); Dave Simanoff, *Maas Bros Store Once Was Tampa*, TAMPA TRIB., Apr. 11, 2006, Moneysense, at 1.

25. GUNTHER BARTH, *CITY PEOPLE: THE RISE OF MODERN CITY CULTURE IN NINETEENTH-CENTURY AMERICA* 111, 147 (Oxford Univ. Press 1980).

26. THOMAS J. SCHLERETH, *VICTORIAN AMERICA* 146 (HarperPerennial 1992). Although there is some dispute as to which department store was founded first (and some gradually transitioned from small dry goods stores), many credit Bon Marché in Paris founded in 1852 by Aristide Boucicaud. FERRY, *supra* note 22, at 2; ROBERT HENDRICKSON, *THE GRAND EMPORIUMS: THE ILLUSTRATED HISTORY OF AMERICA'S GREAT DEPARTMENT STORES* 25–27 (Stein and Day 1979). Boucicaud's department store was a revolutionary change in retail: customers were encouraged to browse without any obligation to make a purchase; a money-back guarantee allowed shoppers to feel more secure in their purchases; the merchandise was sold with a small mark-up, requiring rapid turnover to yield profit; and goods were clearly marked with fixed prices and clerks were forbidden to haggle over the price. HENDRICKSON, at 25–27. Other retailers made similar innovations around the same time and it is difficult to determine who invented what first. *Id.* at 28. For example, Adam Gimbel introduced fixed prices to his Vincennes, Indiana trading post in 1840; Potter Palmer (the original partner of Marshall Field), R.H. Macy, and the founders of Strawbridge & Clothier in Philadelphia introduced cash discounts long before their stores became department stores. *Id.*

Most American department stores were founded between 1860 and 1910, and were a product of the industrial revolution.²⁷ Americans shifted from rural areas to urban centers and millions of immigrants came to the United States.²⁸ The increased density of population in cities as well as advances in industrial production allowed department stores to be created and flourish.²⁹ Department stores gave textile manufacturers a dependable outlet for their wares, and their heavy advertising allowed city daily newspapers to grow and prosper.³⁰

Department stores in the United States democratized luxury.³¹ All women were “ladies” to department store staff and the principal of first-come-first-served allowed a servant to be waited upon before an heiress.³² Women aspiring to middle class comfort could find it temporarily in this new downtown center of life, creating an illusion of shared luxury between shoppers.³³ Obsequious acts, such as greeting shoppers, accepting returns, and treating all equally, regardless of position in society, were elevated to the level of public service, something highly regarded in a democratic society.³⁴

The principal cause of the stores’ success is that their founders understood that they were creating democratic and almost public institutions for a newly industrialized society by satisfying consumer hunger in the cheapest possible way, while at the same time providing a taste for elegance and comfort unknown to previous generations.³⁵ Thorstein Veblen called this democratic phenomenon “pecuniary cannons of taste,” meaning that all people were equal if they had the money to acquire certain goods.³⁶

27. HENDRICKSON, *supra* note 26, at 30–31; WHITAKER, *supra* note 23, at 1; LEACH, *supra* note 24, at 16.

28. WHITAKER, *supra* note 23, at 1; HENDRICKSON, *supra* note 26, at 30–31.

29. BARTH, *supra* note 25, at 113; HENDRICKSON, *supra* note 26, at 31.

30. WHITAKER, *supra* note 23, at 137.

31. BARTH, *supra* note 25, at 115.

32. *Id.* at 123.

33. *Id.* at 130; *see also* JONATHAN RABAN, HUNTING MISTER HEARTBREAK: A DISCOVERY OF AMERICA 51 (Harpercollins Publishers 1991); LEACH, *supra* note 24, at 20.

34. BARTH, *supra* note 25, at 133.

35. SCHLERETH, *supra* note 26, at 149.

36. *Id.*; BARTH, *supra* note 25, at 133.

Department stores became “meccas of consumerism and materialism,” pioneering the art of commercial displays and taking advantage of new technology for larger, stronger, and clearer windows, allowing pedestrians to shop without even entering a store.³⁷ Like World’s Fairs, another popular phenomenon of this era, department stores used exciting interior designs, fashion shows, holiday events, parades, fairs, and carnivals to sell merchandise.³⁸ Urban department stores even learned to commercialize Christmas³⁹ and persuaded the federal government to move Thanksgiving one week earlier in order to increase the time available for Christmas shopping.⁴⁰

By the late 1800s, a new world of retailing was created as department stores created a new market position as universal providers of substantially all goods.⁴¹ The most prominent department stores emerged from small peddler shops and became some of America’s largest businesses. Department stores required new building materials because of their enormous size, glass technology for giant display windows, and innovations in heating and cooling systems for the comfort of customers, among other architectural advancements. The store layouts made shopping easier for consumers and allowed persons of different social and economic backgrounds to mix. The department store also offered new customer services never before seen such as restaurants, restrooms, reading rooms, home delivery, wrapping services, late and dependable store hours, new types of merchandise displays, and other improvements.

While owing a creative debt to the early pioneers of dry goods⁴² stores, John Wanamaker in Philadelphia, Marshall Field in Chicago,

37. SCHLERETH, *supra* note 26, at 148.

38. *Id.*

39. *See id.* at 144. To promote shopping, department stores resurrected dormant holidays and invented new ones. *Id.* at 161.

40. Tim Feran, *Lazarus Worthy of Loving Farewell*, COLUMBUS DISPATCH, Aug. 9, 2004, at 1C; Greg Saitz, *Back to Black: The Legend of the Day After Thanksgiving, and How It Became the Main Event for Retailers and Holiday Shoppers*, NEWARK STAR-LEDGER, Nov. 27, 2003, at 63.

41. *See* LEACH, *supra* note 24, at 23–24.

42. The term “dry goods” has long been associated with the items carried by department stores. *See* HENDRICKSON, *supra* note 26, at 30. Dry goods stores take their name from the practice of early New England merchants to sell “wet goods” or rum on one side of the store, and “dry goods” or bolts of

and Rowland Hussey Macy in New York were the originators of the American department store, creating enduring legacies that continue to this day.⁴³

C. Growth of the Early Department Stores

John Wanamaker opened his first store in Philadelphia in 1861.⁴⁴ What started as a small thirty-by-eighty foot shop became the largest men's store in the city within seven years.⁴⁵ As Wanamaker's expanded over the years, its founder instituted some of the policies for which he would be famous, including a complete satisfaction guarantee on all items sold.⁴⁶ Wanamaker's was not the first store to institute a no-haggle pricing system, but it was the first to adopt the system on such a large scale.⁴⁷

In 1876, Wanamaker opened his flagship store, portions of which still stand today, albeit as a Macy's.⁴⁸ On opening day, more than seventy thousand people entered the store, which contained more than three acres of retail space, 129 counters, 1,400 stools "for the convenience of shoppers," stained glass skylights, and great gas chandeliers.⁴⁹ This early store contained a version of the racetrack, or circular pathway, design still used by most department stores today.⁵⁰

calico on the other side of store. *Id.* The term wet goods appears to have slipped from usage, but some department stores and department store literature still refers to the items carried therein as dry goods. *See id.*

43. *Id.* at 38, 61; SCHLERETH, *supra* note 26, at 147; Jane M. Von Bergen, *Retail Revolution of His Own: John Wanamaker's Stores Are Long Gone. But His Influence on American Shoppers Is Incalculable*, PHILADELPHIA INQUIRER, Nov. 21, 1999. A.T. Stewart's "Cast-Iron Palace" opened in New York City in 1862 and introduced to American shoppers the practices found at Paris' Bon Marché, including special attention to female customers, a fixed price policy with no haggling, departmentalized stock, centralized management, an impressive physical structure, shopping amenities such as organ music, and basement sales. John Wanamaker bought the Cast-Iron Palace from Stewart's beneficiary, Judge Henry Hilton, in 1896. *See generally* FERRY, *supra* note 22; BARTH, *supra* note 25.

44. HENDRICKSON, *supra* note 26, at 76.

45. *Id.*

46. *Id.* at 77.

47. HOWARD E. COVINGTON, JR., *BELK: A CENTURY OF RETAIL LEADERSHIP* 16 (Univ. of North Carolina Press 1988).

48. HENDRICKSON, *supra* note 26, at 78. Though the store was rebuilt in 1911, portions of the original store remain, and the rebuilt store occupies the same location as the 1876 store. *Id.* at 79.

49. *Id.* at 78.

50. *See id.* at 78; *see also generally* Sway, RoxAnna, *The Department Store: Headed for the Dustbin or Ready to Re-Energize?*, DISPLAY & DESIGN IDEAS, June 1, 2003, at 1.

Grand openings like this became celebrated national events; when Wanamaker rebuilt the store in 1911, President William Howard Taft dedicated the store.⁵¹

Wanamaker's innovations extended to employees as well. He made cash payments to employees upon completion of their work; hired women; gave half of Saturday off; instituted bonuses, insurance, pensions, health and recreational facilities; and paid competitive wages.⁵²

One of Wanamaker's peers was Marshall Field in Chicago.⁵³ While Field created the world's first bargain-basement department store, the downtown Chicago store was known as the "grandest of the grand emporiums."⁵⁴ The store's south atrium, one of three in the store, was designed and built by Louis Comfort Tiffany and includes a glass mosaic covering 6,000 square feet.⁵⁵

Business was good for Marshall Field; when he died in 1906, he left an estate worth more than \$120 million—more than \$2.6 billion in today's dollars.⁵⁶ He endowed Chicago's natural history museum,

51. SCHLERETH, *supra* note 26, at 148.

52. HENDRICKSON, *supra* note 26, at 80. Wanamaker was later appointed Postmaster General of the United States. *Id.*; LEACH, *supra* note 24, at 116. One of his most important acts, which benefited millions of Americans, as well as department stores, was to institute direct and free delivery of mail to all homes in the United States in 1896. HENDRICKSON, *supra* note 26, at 80, 210.

53. Unlike most of the merchant princes, Field did not start with a small cramped shop of his own. HENDRICKSON, *supra* note 26, at 82; LLOYD WENDT & HERMAN KOGAN, GIVE THE LADY WHAT SHE WANTS! 47–55, 62–64 (Rand McNally & Co. 1952). Potter Palmer, known as "The A.T. Stewart of the West," sold his store to Field and a junior partner in 1868. HENDRICKSON, *supra* note 26, at 83. Field bought out his partner, Levi Leiter, in 1881. *Id.* at 86. The store grew bigger and stronger, despite the brief setback of burning to the ground in Chicago's Great Fire of 1871. *Id.* at 85. Field earned the loyalty of his employees by posting a sign in the ruins of his store telling the staff where they could pick up their pay. *Id.*

54. HENDRICKSON, *supra* note 26, at 82. *See also* LEACH, *supra* note 24, at 27–28.

55. HENDRICKSON, *supra* note 26, at 82. Some consider it the most architecturally significant department store in the United States. David Moin, Vicki M. Young, Meredith Derby & Joanna Ramey, *Macy's Coast-to-Coast: Federated-May Deal Forges New Retail Giant*, WOMEN'S WEAR DAILY, Mar. 1, 2005, at 1. Field's also amassed an art collection, including Norman Rockwell's "The Clock Mender." William Mullen, *Times Heals Rift Over a Rockwell: Tiff Between 2 Retail Chains Comes to an End with the Donation of the Painting 'The Clock Mender' to the Chicago History Museum*, CHI. TRIB., Sept. 27, 2006, Metro, at 3. When Macy's bought Marshall Field's it found that the famous painting was missing and began a public argument with Target, the former owner, to get the painting back. *Id.* Target finally donated the painting to the Chicago History Museum. *Id.* *See also* LEACH, *supra* note 24, at 136–37.

56. U.S. Federal Reserve Bank for Minneapolis, *What Is a Dollar Worth*, http://www.minneapolisfed.org/community_education/teacher/calc (last visited Aug. 17, 2008). *See also* WENDT & KOGAN, *supra* note 53, at 257.

which was renamed the Field Museum of Natural History, and also donated the land that comprises the central core of the University of Chicago campus.⁵⁷

Rowland Hussey (“R.H.”) Macy was born on Nantucket Island to a Quaker family in 1822.⁵⁸ He left on a whaling ship at age fifteen and returned with a red star tattooed on his hand—the red star that now serves as the trademarked logo of Macy’s, Inc.⁵⁹ After whaling, Macy tried careers in retail, the stock market, and real estate before opening a store in Manhattan in 1858.⁶⁰

R.H. Macy’s small store was sixty feet deep with a twenty-foot front and located on Sixth Avenue near Fourteenth Street.⁶¹ With no money, he financed the store with loans of \$20,000 and instituted the basic policies Macy became known for: selling at fixed, marked prices; selling at lower prices than other stores; buying and selling for cash only; and advertising vigorously.⁶² The store was a success and soon grew to occupy eleven storefronts.⁶³

Macy had little confidence in his son’s business skills; instead, two years after opening his store, Macy hired and came to depend on one of the first women in American department stores, a distant relative named Margaret Gretchell.⁶⁴ When Macy died suddenly in 1877,

57. *Id.* at 176; AXEL MADSEN, *THE MARSHALL FIELD’S 130–33* (John Wiley & Sons, Inc. 2002); *A City Builds a University*, U. OF CHI., http://www.lib.uchicago.edu/e/spcl/centcat/city/citych1_03.html (last visited Aug. 17, 2008); *Marshall Field Document*, U. OF CHI., http://www.lib.uchicago.edu/e/spcl/centcat/city/city_img08.html (last visited Aug. 17, 2008).

58. FERRY, *supra* note 22, at 55; HENDRICKSON, *supra* note 26, at 62.

59. *Id.* See generally L.H. Robbins, *The City Department Store: The Evolution of 75 Years*, N.Y. TIMES, Feb. 12, 1933; Rob Lenihan, *Federated Navigates Choppy Waters*, THE STREET.COM, <http://www.thestreet.com/newsanalysis/retail/10343526.html> (last visited Aug. 17, 2008); *Macy and Company, Inc.*, BRITANICA CONCISE, available at <http://www.britannica.com/EBchecked/topic/355535/Macys> (last visited Aug. 17, 2008). Over the course of its history, Macy’s has sometimes used a whale in its logo, or referred to promotion as a “whale of a sale,” perhaps hearkening back to its founder’s early career. During the Cold War, Macy’s was encouraged to drop the red star in the face of criticism that it was a communist symbol; Macy’s refused, suggesting it was a guiding star or a brilliant star of hope. HENDRICKSON, *supra* note 26, at 62–63; <http://www.forgotten-ny.com/SLICES/macy/macy.html> (last visited Feb. 15, 2010).

60. FERRY, *supra* note 22, at 56–57; HENDRICKSON, *supra* note 26, at 62.

61. HENDRICKSON, *supra* note 26, at 63.

62. *Id.* at 63–64; FERRY, *supra* note 22, at 57. Macy’s operated on a cash-only basis until 1939. HENDRICKSON, *supra* note 26, at 64.

63. HENDRICKSON, *supra* note 26, at 64.

64. *Id.* at 65; BARMASH, *supra* note 24, at 23; FERRY, *supra* note 22, at 57–58.

Gretchell's husband and one of Macy's nephews acquired the store.⁶⁵ Over the next few years, the store changed hands several times, each time being purchased by another one of R.H. Macy's relatives.⁶⁶

The last of these Macy's family owners, Charles Webster, became the sole owner of Macy's within a short period of time, but Webster lacked experience and retailing knowledge.⁶⁷ A few years before his death, R.H. Macy leased the 2,500 square foot china department to Lazarus Straus, a Jewish peddler who emigrated to the United States from Germany in 1852.⁶⁸ It became Macy's most profitable department, with sales reaching twenty percent of the store's total.⁶⁹ Webster offered Straus a partnership in 1887, and in 1896, Lazarus's two sons, Isidore and Nathan, bought Webster out.⁷⁰ Although the store still carries Macy's name today, Macy's was owned by the Straus family for decades—far longer than it was owned by the Macy family.⁷¹

The Straus family achieved national prominence in that era. At the same time they were consolidating their control over Macy's, Isidore and Nathan were also taking over Brooklyn's grand department store, Wechsler & Abraham, later renamed Abraham & Straus (or as Brooklynites knew it, A&S).⁷²

65. FERRY, *supra* note 22, at 57–58.

66. *Id.* at 58.

67. BARMASH, *supra* note 24, at 24. *See generally* HENDRICKSON, *supra* note 26, at 66.

68. BARMASH, *supra* note 24, at 24; FERRY, *supra* note 22, at 59.

69. BARMASH, *supra* note 24, at 25–26. *See generally* HENDRICKSON, *supra* note 26, at 66.

70. *Id.*; FERRY, *supra* note 22, at 59. Lazarus Straus died in 1888. BARMASH, *supra* note 24, at 27.

71. *See generally* BARMASH, *supra* note 24. Some have theorized that as long as the Straus family's name was immortalized in one department store—Abraham & Straus—the family did not feel it necessary to change the name of Macy's. *Id.* Abraham & Straus, however, was acquired by and renamed Macy's in 1995. <http://www.macysinc.com/AboutUs/History/MacysAHistory.aspx> (last visited Feb. 15, 2010).

72. LEACH, *supra* note 24, at 25–26. Abraham Abraham was born in New York City in 1843 into a Jewish family, and the son of a man who had emigrated from Germany. FERRY, *supra* note 22, at 64. He left school at age fifteen to work in a Newark dry goods store along with Benjamin Altman (who founded B. Altman's department store) and Lyman Bloomingdale (co-founder of Bloomingdale's). *Id.* Wechsler sold his interest in Wechsler & Abraham in 1893 to the three Macy's partners, Isidore and Nathan Straus, and Charles Webster, changing the name of the store to Abraham & Straus. *Id.* at 65. The Strauses, separately, took over the A&S china department, as they had done at Macy's. *Id.*; *see* BARMASH, *supra* note 24, at 26–27. Other department store founders unofficially apprenticed at these great stores; William Dillard worked at Wanamaker's in New York City while earning his MBA at Columbia—that job, as well as visits to Macy's and Gimbels, provided him with examples of how prosperous stores operated. LEON JOSEPH ROSENBERG, *DILLARDS 7* (Univ. of Arkansas Press 1988).

Isidore died in 1912 while sailing on the maiden voyage of *Titanic*,⁷³ and Nathan continued to run the business. Although Macy's went public in 1922, the Straus family continued to be involved as investors, corporate officers, and directors until Macy's was taken private in 1985.⁷⁴

Macy's flourished under Straus family control. In 1902, Macy's moved uptown to Manhattan's Herald Square into a new nine-story store featuring thirty-three elevators and four escalators.⁷⁵ The Herald Square store cost \$4.5 million, which was a huge sum at the time, but the Straus family was considered such a good credit risk that neither Macy's nor A&S had to be used as collateral for the loan.⁷⁶ Additions were made to Macy's so that by the early 1930s it occupied the entire block from Broadway to Seventh Avenue, and from Thirty-Fourth Street to Thirty-Third Street, making it the largest store in the world.⁷⁷

Macy's opened branches in Brooklyn and in the New York City suburbs, and also acquired other department store chains in Toledo, Ohio (1923); Atlanta (1924); New Jersey (1929); San Francisco (1945); and Missouri (1947).⁷⁸

Oscar Straus, Lazarus' youngest son, graduated from law school and was appointed ambassador to Turkey by President Grover Cleveland—a controversial move because Oscar was Jewish. BARMASH, *supra* note 24, at 29–30. In 1906, President Theodore Roosevelt appointed Oscar as Secretary of Commerce and Labor; Oscar was the first Jew to be appointed to a cabinet position. BARMASH, *supra* note 24, at 30.

73. *Id.* Isidore died along with his wife Ida. *Id.* Isidore refused to enter a lifeboat because there was not enough room for women and children; Ida refused to go because she had been married to Isidore for forty years and saw no reason to end it at that moment. *Id.* A plaque on the 13th floor of Macy's flagship store in Manhattan commemorates their courage, and Straus Hall at Harvard memorializes them. *Id.* Actors Lew Raven and Elsa Palter play Isidore and Ida in James Cameron's blockbuster film, *TITANIC* (Paramount Pictures 1997). The Internet Movie Database, *Titanic*, <http://www.imdb.com/title/tt0120338/fullcredits#cast> (last visited Aug 17, 2008).

74. See BARMASH, *supra* note 24, at 19, 126, 132.

75. HENDRICKSON, *supra* note 26, at 66.

76. BARMASH, *supra* note 24, at 28.

77. HENDRICKSON, *supra* note 26, at 66–67. Macy's even won an antitrust lawsuit during this period. Charging twenty to twenty-five percent less than publishers' advertised prices on books, Macy's was accused by a book publishers' association of devaluing the copyright on the books it sold. *Straus and Straus v. Am. Publishers' Assc.*, 231 U.S. 222, 229 (1913). Macy's prevailed in the Supreme Court, but the struggle may have contributed to Macy's singular decision to develop private labels for merchandise to give it greater pricing independence. See generally BARMASH, *supra* note 24, at 32.

78. *Id.*; HENDRICKSON, *supra* note 26, at 69.

Wanamaker's, Field's, and Macy's were remarkable for their success, growth, and longevity, but they were not alone. David May, the founder of May Department Stores, emigrated to the United States in 1863 with less than one dollar to his name.⁷⁹ By 1914, May owned department stores in Denver; Cleveland; Pittsburgh; Akron, Ohio; and St. Louis.⁸⁰

Adam Gimbel, who founded the store across the street from Macy's, was a German immigrant peddler who first opened a trading post in Vincennes, Indiana.⁸¹ His success led to stores in Milwaukee, Philadelphia, and finally, in 1910, New York City.⁸² Gimbels was sold to British American Tobacco in 1982, which shuttered the chain in 1986. Many of the former Gimbels stores that remain standing are now Macy's.

Morris Rich, a Jewish immigrant from Hungary, opened his first store in Atlanta in 1867, just three years after General Sherman had burned the city to the ground.⁸³ At a time when *caveat emptor* ruled, Rich's guaranteed customer satisfaction and treated customers with southern hospitality.⁸⁴ Among many other contributions, the Rich family endowed Emory University's business school.⁸⁵ Although Rich's had faced Macy's as a competitor from 1924 on, the Rich family sold out to FDS in the 1970s, which, in 2003, combined the Rich's and Macy's stores in Atlanta.⁸⁶

Almost every city in America had a local department store that contributed to its development and character. And some institutions begun by department stores outlived the department stores themselves. Dayton's department store of Minneapolis turned its

79. HENDRICKSON, *supra* note 26, at 110.

80. LEACH, *supra* note 24, at 25.

81. HENDRICKSON, *supra* note 26, at 71.

82. *Id.* at 72.

83. HENRY GIVENS BAKER, RICH'S OF ATLANTA: THE STORY OF A STORE, SINCE 1867, at 1, 11 (Univ. of Georgia 1953).

84. HENDRICKSON, *supra* note 26, at 97.

85. *Id.* at 95–96. See also *Goizueta Business School History*, Emory University, http://www.goizueta.emory.edu/aboutgoizueta/goizueta_through_the_decades.html (last visited Aug. 17, 2008).

86. <http://www.macysinc.com/AboutUs/History/1979.aspx> (last visited Feb. 15, 2010); <http://www.macysinc.com/AboutUs/History/present.aspx> (last visited Feb. 15, 2010).

basement into the “Downstairs Store,” which set out to be a “quality discounter.”⁸⁷ The “Downstairs Store” was eventually turned into a separate and freestanding store that Dayton’s called “Target.”⁸⁸ Similarly, Filene’s of Boston created the “Automatic Bargain Basement” where prices were automatically reduced the longer items remained in stock.⁸⁹

Membership stores, well-represented today by Costco, B.J.’s Wholesale Club, and Sam’s Club, have their roots in the antitrust laws enacted in part to combat the rising popularity of department stores. In 1936, with a populist intent to punish all large department stores because of their enormous power, Congress passed the Miller-Tydings Act.⁹⁰ Miller-Tydings allowed states to enact “fair trade” legislation, effectively allowing individual states to overrule the Supreme Court’s decision in *Dr. Miles Medical Co. v. John D. Park & Sons. Co.*,⁹¹ and allowing manufacturers to fix prices with retail outlets.⁹²

87. LAURA ROWLEY, *ON TARGET: HOW THE WORLD’S HOTTEST RETAILER HIT A BULL’S EYE* 117 (John Wiley & Sons, Inc. 2003).

88. *Id.* at 117–18. See also MARVIN TRAUB & TOM TEICHOLZ, *LIKE NO OTHER STORE . . . : THE BLOOMINGDALE’S LEGEND AND THE REVOLUTION IN AMERICAN MARKETING* 266 (Times Book/Random House 1993). Dayton’s continued in the department store business for many years, acquiring Hudson’s of Detroit and Marshall Field’s, but the company eventually decided it had better growth prospects with Target, changing the name of the corporation to “Target” and selling its department stores to May. ROWLEY, *supra* note 87, at 117. Dayton Hudson was not the only store to create a discount chain, although it may have been the most successful. Rich’s created Richway, Associated Dry Goods acquired Caldor, FDS created Gold Circle, and May created Venture. *Id.* See also TRAUB, *supra* note 88, at 266–67. Richway, Caldor, and Gold Circle were liquidated during the Campeau debacle and Venture ceased operations in the late 1990s in the face of heavy competition from Target and Wal-Mart. *Id.*

89. HENDRICKSON, *supra* note 26, at 129–30. Although Filene’s Department Store is now owned by Macy’s, the basement store, now “Filene’s Basement,” was spun off as a separate entity during the 1980s and continues to operate independently. RVI – *Filene’s Basement*, Retail Ventures, Inc., <http://www.retailventuresinc.com/index.jsp> (last visited Aug. 17, 2008); http://www.retailventuresinc.com/PressReleases/2009/RVI_FB_DISPOSITION.pdf (last visited Feb. 15, 2010) (announcing RVI’s disposal of Filene’s Basement).

90. Miller-Tydings Act, ch. 690, tit. 8, 50 Stat. 673, 693 (1937).

91. *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). In 1975, Congress passed the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801, repealing Miller-Tydings, and restoring the precedent established in *Dr. Miles*. In 2007, the Supreme Court overruled *Dr. Miles*. *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007); Mark D. Bauer, *Whither Dr. Miles?*, 20 LOY. CONSUMER L. REV. 1 (2007).

92. Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution*, 90 IOWA L. REV. 1011, 1064–69 (2005).

Miller-Tydings provided an exemption whereby stores that were open only to members could in fact sell at a discount to the manufacturer's suggested list price.⁹³ E.J. Korvette's, the first of many predecessors to today's Costco, opened in New York City in 1948.⁹⁴ Membership was not selective or even pricey: Korvette's founder gave out free membership cards to anyone who asked.⁹⁵

D. Merger and Consolidation

While Wanamaker's and Gimbels operated in (respectively) two or three cities, and Macy's and May acquired a few other department store groups early on, most department stores remained local operations. But from the beginning, the entrepreneurial merchant princes recognized certain economies of scale could be achieved by working cooperatively.

In 1916, A&S, Filene's, Dayton's, Emporium, Bullock's, Lazarus, Hudson's, Strawbridge & Clothier, and eighteen other family-owned, non-competitive department stores in different cities formed the Retail Research Association, which was later renamed Associated Merchandising Corporation.⁹⁶ These organizations conducted joint market research and pooled buying.⁹⁷ Additionally, A&S and Macy's shared a buying office in Paris and made joint arrangements with factories.⁹⁸

93. Miller-Tydings Act 693.

94. ROWLEY, *supra* note 87, at 115.

95. *Id.* The chain stores, such as Sears and Montgomery Ward, also did well in this period, but followed a business model substantially different than the department stores. WHITAKER, *supra* note 23, at 2-3. See MARK STEVENS, LIKE NO OTHER STORE IN THE WORLD: THE INSIDE STORY OF BLOOMINGDALE'S 164 (Thomas Y. Crowell, Publishers 1979); see also generally HENDRICKSON, *supra* note 26, at 205-50. Until World War I, Sears and Wards were solely catalog businesses, selling mostly to customers in rural areas. *Id.* Even after opening retail stores, the chains rarely chose downtown locations, had inventory managed centrally without any discretion given to store managers for local tastes, and specialized in mass-produced goods rather than fashion or style. *Id.* It is unclear whether J.C. Penney is part of the chain store group, the discount store group, or even the department store group; Penney's has changed its marketing strategies many times.

96. FERRY, *supra* note 22, at 66, 140; ROWLEY, *supra* note 87, at 113; JOHN M. BURNHAM, A VENTURE IN RETAILING, FEDERATED'S "FOLEY'S OF HOUSTON" BY MAX LEVINE, RETIRED CHAIRMAN OF THE BOARD, FOLEY'S OF HOUSTON 29-30 (The University of Texas at Austin College of Business Administration Foundation Oral Business History Project 1969).

97. *Id.*

98. FERRY, *supra* note 22, at 65.

The department stores cherished local control and family ownership, but also recognized that risks could be spread by affiliating with other stores so the businesses were not entirely dependent on the economy of a single city.⁹⁹ Sharing ownership responsibilities also reduced dependency on family succession where a future generation might not have the talent or interest to run the company.¹⁰⁰

In 1929, FDS was formed by the merger of Lazarus of Ohio, A&S, and Filene's; Bloomingdale's was asked to join a few months later.¹⁰¹ FDS was originally created as "a loosely knit federation of largely autonomous and quasi-independent retail entities."¹⁰² The original holding company controlled less than one hundred percent of the stock of its constituent entities, and its purpose was not to control, but to unify.¹⁰³ Over time, FDS centralized operations and acquired all of the stock of the member department stores.¹⁰⁴ Headquarters was moved from New York to Cincinnati—where it remains today—and the company began expansion in the 1940s.¹⁰⁵ FDS allowed critical decisions to be made locally, such as choosing fashions, but centralized accounting and encouraged competition between the divisions in different cities to produce the greatest revenue.¹⁰⁶

Joining together, each FDS department store could create buying strength, but by operating independently, each retained its distinct character, so customer loyalty was to the store and not the chain.¹⁰⁷ An FDS stockholder publication stated the following:

Because the company founders felt that Federated should not become a chain of identical stores with a common name and common merchandise trying to appeal to a mythical common

99. BURNHAM, *supra* note 96, at 24–25.

100. *Id.* at 25.

101. TRAUB, *supra* note 88, at 41, 264.

102. STEVENS, *supra* note 95, at 163–65; FERRY, *supra* note 22, at 4, 66; TRAUB, *supra* note 88, at 41, 264; BURNHAM, *supra* note 96, at 31–33.

103. BURNHAM, *supra* note 96, at 29–30.

104. *Id.* at 33.

105. *Id.* at 33, 45–46.

106. *Id.* at 33–34, 37–38, 45–46. See STEVENS, *supra* note 95, at 168–69.

107. TRAUB, *supra* note 88, at 41, 264.

customer, new merchandising concepts have been developed and tailored to the changing needs of the American consumer. Operating control has remained at the local level where management can closely relate to the needs of customers and community. Federated believes that a corporation, like an individual, has a duty to be an involved citizen in the community. This is even more important for department stores. By the very nature of their presenting total services, department stores are involved with most of the major elements of society.¹⁰⁸

The FDS business structure was highly successful and copied by other groups of department stores—each generally continuing some local control, extending the founding family's involvement, and making many merchandising decisions separately.

Allied Stores included many of the department stores not invited to join FDS; the most significant of which was Jordan Marsh in Boston.¹⁰⁹ May continued to acquire department stores but allowed their local character to continue. Carter Hawley Hale (CHH) grew out of a combination of stores in California; it later acquired Neiman Marcus of Dallas, Wanamaker's, and other stores. Similarly, Mercantile Stores (later acquired by Dillard's), Associated Dry Goods (later acquired by May), and on a smaller scale, Boscov's, Bon-Ton, Belk, and Proffitt's, followed the FDS model combining a hodgepodge of family-owned department stores, creating economies of scale, but decentralizing important management decisions. With each holding company except Dillard's, department stores kept their local name and much of their local character.

From the end of World War II until the 1980s, department stores continued as they were, dealing with the rise of suburbs and malls (and often the decline of downtowns), but almost invariably profitable and locally focused. By the end of the nineteenth century, there were 1,000 department stores; by 1950, there were 4,000 stores;

108. STEVENS, *supra* note 95, at 169.

109. BURNHAM, *supra* note 96, at 32–33.

and in 2002, there were 9,355 stores.¹¹⁰ Conservative operations in most department stores meant there was little debt, and the often incredibly valuable downtown real estate was not leveraged. That led directly to the most tragic event in the entire history of American department stores.

E. Robert Campeau

A perfect storm of greed, lust for power, and a liberal Wall Street regulatory scheme almost led to the end of the American department store in the 1980s. Starting in 1985, one man, a Canadian named Robert Campeau, with less than \$200 million in assets, was able to borrow \$11 billion to purchase the majority of department stores in the United States, plunging them into bankruptcy a short time thereafter. In his wake, Campeau left these department stores—stores with which he was unfamiliar until shortly before buying them—with thousands of layoffs; a required bail-out and foreign ownership by investment bank First Boston;¹¹¹ the collapse of the junk bond market, which depressed profits for all department stores (forced to compete with near fire sale prices on merchandise sold by the bankrupt Campeau department stores¹¹²); and a big drop in print and broadcast advertising (hurting newspapers and broadcast outlets). The mess continued for years, resulting in the merger between FDS and Macy's, as well as the permanent shuttering of flagship downtown department stores in cities across the country, including: Atlanta,¹¹³

110. Jean Palmieri, *Retailing's Seismic Shifts: From the Wal-Mart Rollout to the Nationalization of Macy's, Retailing Has Undergone Dramatic Changes*, NEWS REC (Los Angeles, CA), Apr. 24, 2006, at 98.

111. Sarah Bartlett, *Reassurance by First Boston That It Is Financially Sound*, N.Y. TIMES, Feb. 24, 1990, at 35; *CS First Boston: As Many Names As a Russian Novel*, THE ECONOMIST, Nov. 3, 1990, at 90; Steven Greenhouse, *Reviving a Humbled First Boston*, N.Y. TIMES, Mar. 11, 1991, at D1. First Boston was acquired by Credit Suisse and is now known as CS First Boston. *Id.*

112. Carol J. Loomis, *The Biggest Looniest Deal Ever*, FORTUNE, June 18, 1990, at 48.

113. JOHN ROTHCHILD, GOING FOR BROKE: HOW ROBERT CAMPEAU BANKRUPTED THE RETAIL INDUSTRY, JOLTED THE JUNK BOND MARKET, AND BROUGHT THE BOOMING EIGHTIES TO A CRASHING HALT 264–65 (Simon & Schuster 1991); Melissa Levy, *Who Exactly Is Federated Department Stores, Inc.?*, MINNEAPOLIS STAR TRIB., May 31, 2004, at 1D.

Boston,¹¹⁴ Columbus,¹¹⁵ Hartford,¹¹⁶ Newark,¹¹⁷ Los Angeles,¹¹⁸ Memphis,¹¹⁹ Philadelphia,¹²⁰ Pittsburgh,¹²¹ San Francisco,¹²² St. Petersburg,¹²³ Tampa,¹²⁴ and Washington, D.C.¹²⁵ *Fortune Magazine* called it “The Biggest Looniest Deal Ever.”¹²⁶

114. Jenn Abelson, *Shoppers Swarm Filene's Clearance: But Even Amid This Retail Circus, Many Voice Nostalgia and Sadness over the End of an Era*, BOSTON GLOBE, Mar. 7, 2006, available at http://www.boston.com/business/globe/articles/2006/03/07/shoppers_swarm_filenes_clearance.

115. *Lazarus Timeline*, WOSU-TV, <http://www.wosu.org/archive/lazarus/timeline.php> (last visited Aug. 17, 2008); Business Editors, *Downtown Columbus Lazarus-Macy's Store to Close in 2004; New Downtown Location Will Not Be Pursued*, BUS. WIRE, Oct. 17, 2003, available at http://findarticles.com/p/articles/mi_m0EIN/is_2003_Oct_17/ai_108988087 (last visited Aug. 17, 2008).

116. Kirk Johnson, *G.Fox to Close, Ending Retail Era*, N.Y. TIMES, Sept. 12, 1992, at 23.

117. Nat Bodian, *The "Big 3" Department Stores: Their Life and Times*, Old Newark Memories, <http://www.virtuallnewarknj.com/memories/downtown/bodianbig3.htm> (last visited Aug. 17, 2008).

118. *Robinson's Department Store*, S. CAL., http://www.usc.edu/dept/geography/la_walking_tour/new_downtown/robinsons_department_store_former.html (last visited Aug. 17, 2008); Max Pierce, *Before the Mall: When Local Department Stores Ruled Los Angeles*, LA DOWNTOWN NEWS ONLINE, <http://www.ladowntownnews.com/articles/2005/11/07/news/news06.txt> (last visited Aug. 17, 2008).

119. ROTHCHILD, *supra* note 112, at 264.

120. See generally Andrea Knox & Jane M. Von Bergen, *Strawbridge: Why a Sale? For Smaller Chains, It's Harder to Compete with Big Chains' Power*, PHILADELPHIA INQUIRER, Mar. 31, 1996; Von Bergen, *supra* note 43; Caroline E. Mayer, *Woodies Wins Bidding for Wanamaker's Stores*, WASH. POST, Nov. 5, 1986, at A16.

121. Randy Tucker & Ken Alltucker, *Downtown Lazarus Last of its Kind: Retailer Announces Plan to Close 5 Unprofitable Stores*, CIN. ENQUIRER, Jan. 17, 2004, at A1.

122. Gavin Power, *Retailer's Roots Trace Back to 1876*, S.F. CHRONICLE, Nov. 19, 1994, at A1. See also Gavin Power & Kenneth Howe, *Shoppers Mourn End of Emporium Era*, S.F. CHRONICLE, Aug. 16, 1995, at A1.

123. Mark Albright, *Maas Bros. Pulls out of Downtown St. Petersburg*, ST. PETERSBURG TIMES, Aug. 4, 1991, at 1B.

124. Bernice Stengle, *Maas Brothers to Close Downtown Tampa Store in 1989*, ST. PETERSBURG TIMES, Jan. 31, 1987, at 14A.

125. See Rudolph A. Pyatt, Jr., *Woodies Gets an Opportunity to Undo the Errors of an Era*, WASH. POST, Jan. 20, 1994, at D11 [hereinafter Pyatt, *Woodies*]; Kara Swisher, *Filene's Basement to Open Here*, WASH. POST, Jan. 13, 1993 at A1; Lena H. Sun, *Chicago Firm to Buy Raleighs*, WASH. POST, Dec. 1, 1988, at A1; Caroline E. Mayer, *Raleigh's Completes Garfinckel's Deal*, WASH. POST, Aug. 20, 1987, at B1; Rudolph A. Pyatt, Jr., *Washington's Retailing Upheaval*, WASH. POST, Sept. 12, 1988, at F5. “Woodies,” as Woodward & Lothrop was affectionately known, was a profitable store acquired by A. Alfred Taubman, a Detroit real estate developer, in 1984. Pyatt, *Woodies*, *supra* note 125. He combined its operations with Wanamaker's in Philadelphia and borrowed heavily based on the value of the store's real estate. *Id.* The store did not, however, entirely fade into history. Years later, Woodies's shopping bags, with a scripted “W & L,” were seen on *The Drew Carey Show*, which was set in a fictional department store with the same initials, Winfred-Louder, in Cleveland. *The Drew Carey Show* (Warner Bros. television broadcast 1995–2004). Art imitated life; during the nine seasons of the *Drew Carey Show*, family-controlled Winfred-Louder was acquired by a department store holding company and the big downtown Cleveland store was eventually closed, although in the show's last season, winfredlouder.com, an internet retailer, was established. See generally *The Drew Carey Show: Show Description, Cast & Crew*, http://tv.yahoo.com/the-drew-carey-show/show/64/castcrew;_ylt=AjP6bO4TEQA6uGNIOi5x2v2So9EF (last visited Aug. 17, 2008). Despite less than “stellar” profits, Macy's has elected to keep its downtown Cincinnati department store, adjacent to its corporate

Three unrelated events began this debacle. First, as interest rates dropped in the early 1980s, insurance and pension funds invested in high-yield junk bonds, making it easier for corporate raiders to raise capital to conquer new companies.¹²⁷ The old staid department stores, with valuable real estate, steady profits, and intangibles like century old household brand names, were very valuable, but unprepared for the onslaught.¹²⁸ Second, an inside group of executives and directors at Macy's took the store private. And third, Campeau, a successful real estate developer, sought to expand his business holdings. Although Campeau first considered purchasing a savings and loan or an insurance company, he decided that "since he was in the mall building business, it made sense to own retail companies whose stores could rent space in his centers."¹²⁹

F. Macy's Goes Private

Ed Finkelstein was a retail legend. After heading Macy's divisions in New Jersey, California, and New York, he was named chairman and chief executive officer of the entire company. Only twelve years after Macy's ended a century long chain of Straus family leadership,

headquarters, open. *Contra* Tucker & Alltucker, *supra* note 121. This suggests that there is at least some value to local ownership of department stores.

126. Loomis, *supra* note 112, at 48.

127. JEFFREY A. TRACHTENBERG, *THE RAIN ON MACY'S PARADE: HOW GREED, AMBITION, AND FOLLY RUINED AMERICA'S GREATEST STORE* 27 (Random House 1996).

128. At least one author who has studied this era would argue that the merger, bankruptcies, and consolidation of the national department stores began in 1984 when Limited Brands, owner of The Limited, Victoria's Secret, Express, and other popular brands, attempted a hostile takeover of CHH stores, owner of Neiman-Marcus, The Broadway, John Wanamaker's, and other major department stores. *See id.* 26-27. The takeover bid failed but ended with the bankruptcy of CHH, the sale of John Wanamaker's to Alfred Taubman, and the sale of The Broadway to Chicago billionaire Sam Zell. Taubman combined Wanamaker's with Washington, D.C.'s Woodward & Lothrop, later putting both into bankruptcy and shuttering the chains. Zell sold The Broadway to Federated, and Federated converted them to Macy's and Bloomingdale's. Another larger merger occurred in 1986 when May acquired Associated Dry Goods, which included Lord & Taylor, L.S. Ayre (Indiana), Joseph Horne (Pittsburgh), Hahne & Co. (New Jersey), and Robinson's (Los Angeles and St. Petersburg, FL). *See generally* Eric Schmitt, *May Stores Seek Associated Chain*, N.Y. TIMES, June 23, 1986, at A1; Martha Groves, *May Discloses Sweetened Bid for Associated*, L.A. TIMES, July 11, 1986, Part 4, at 1; *Associated, May Merger Talks Confirmed*, CHI. TRIB., July 11, 1986, at C3; Martha Groves & Greg Braxton, *Merger of May, Associated Faces Grass-Roots Opposition*, L.A. TIMES, Aug. 25, 1986, Part 4, at 1.

129. TRACHTENBERG, *supra* note 127, at 97.

Finkelstein repositioned Macy's to appeal to affluent consumers wanting high fashion, not bargains.¹³⁰ The changes led to record sales and earnings.¹³¹

Department stores were stable businesses with consistent—although perhaps not earth-shattering—profits. But department store companies, particularly in the older urban markets, owned incredibly valuable real estate “often valued on their books at only a fraction of true worth,” and had little or no debt.¹³²

In 1985, Herbert and Robert Haft of the Dart Group separately greenmailed both May and FDS,¹³³ making millions in profit.¹³⁴ Other targets of the Hafts, including Eckerd Drugs, Safeway, and Stop & Shop supermarket chains, were forced to sell parts of their companies to pay the enormous debt incurred in leveraged buyouts designed to save the companies from the Hafts. “Safeway sold or closed 300 stores and laid off 8,000 employees. Stop & Shop sold or closed [thirty-seven] of its Bradlee's stores and laid off 5,000 jobs.”¹³⁵

In April of 1985, *Business Week* predicted that Macy's would be a target for a corporate raider or greenmailer.¹³⁶ Macy's was in a dangerous situation and Finkelstein decided it was time to take the company private.¹³⁷ “Using the company's own cash flow and assets as collateral,” 384 insiders invested a mere \$17.5 million, and borrowed almost \$4 billion to buy Macy's, taking the company

130. *Id.* at 24.

131. *Id.*

132. *Id.* at 28; TRAUB, *supra* note 88, at 271. *See also* BARMASH, *supra* note 24, at 17.

133. TRACHTENBERG, *supra* note 127, at 27; ROTHCHILD, *supra* note 113, at 153. *See also* Rudolph A. Pyatt, Jr., *SEC Warnings Should Wake Up the Hafts*, WASH. POST, Mar. 5, 1990, at F3.

134. TRACHTENBERG, *supra* note 127, at 27; Caroline E. Mayer, *Hafts Turn Failure into Large Profits*, WASH. POST, July 12, 1987, at A1. In 1987, the Hafts made a run on Dayton Hudson stock, eventually mounting a takeover bid. ROWLEY, *supra* note 87, at 162. The state of Minnesota passed a law to make hostile takeovers of Minnesota companies more difficult, but the 1987 stock market crash dissuaded the Hafts from their bid. *Id.* at 163–65.

135. Peter Carlson, *Herbert Haft, Always Coming Up Aces*, WASH. POST, <http://www.washingtonpost.com/wp-dyn/articles/A99300-1989Aug13.html> (last visited Aug. 17, 2008).

136. Gene G. Marcial, *Why Retailing Is Ripe for the Raiders*, BUS. WK., Apr. 29, 1985, at 101. In 1985, there was \$24 billion of leveraged buyouts, five times as much as two years earlier. BARMASH, *supra* note 24, at 102.

137. TRACHTENBERG, *supra* note 127, at 28. *See* BARMASH, *supra* note 24, at 3–4.

private for the first time since 1922.¹³⁸ The financing was complicated with different instruments and collateral connected to Citibank, Manufacturers Hanover Trust, Goldman Sachs, and Prudential, among others.¹³⁹ It would not be obvious until 1993 that Prudential's one billion dollar investment secured by mortgages on the department store's valuable urban real estate was the most pivotal.¹⁴⁰

G. Campeau Buys Allied Stores

In March of 1986, Campeau began secretly buying shares of Allied Stores through a dummy corporation.¹⁴¹ Though the Campeau Corporation was "quite profitable,"¹⁴² only the leveraged-buyout craze of the 1980s could have allowed Campeau Corporation, a real estate firm with a market value of \$200 million and fewer than one thousand employees, to take on Allied.¹⁴³ Allied Stores had a market value of two billion dollars; twenty-four divisions, including Brooks Brothers, Jordan Marsh, Bonwit Teller, Bon Marché, and Stern's; 670 separate stores; and 70,000 employees.¹⁴⁴

By 1986, it was apparent that Campeau's raid on Allied required an unrealistic rate of return that doomed it from the start.¹⁴⁵ But the fees were too large to caution more prudent behavior. First Boston, for example, stood to earn more than approximately \$60 million in fees for various services, not including interest and additional fees if Allied had to be chopped up to pay off debt.¹⁴⁶ Eleven law firms and sixteen banks were involved, each generating enormous fees.¹⁴⁷

138. *Id.* at vii, 19.

139. TRACHTENBERG, *supra* note 127, at 88–89.

140. *Id.* at 226.

141. ROTHCHILD, *supra* note 113, at 43.

142. *Id.* at 33.

143. *Id.* at 14, 28–29, 36–42.

144. *Id.* at 29. This entire series of events may have been caused simply by Campeau's desire to bring a Brooks Brothers store into one of his Canadian shopping malls. *See id.* at 29, 93.

145. ROTHCHILD, *supra* note 113, at 115.

146. *Id.* at 99.

147. *See id.* at 105.

Making the Campeau/Allied deal work, however, required a return on investment of twelve percent.¹⁴⁸ The best any division of Allied had ever done was nine to 9.5 percent and the company average was six to seven percent.¹⁴⁹ Campeau was forced to raise one billion dollars almost immediately by selling sixteen of Allied's twenty-four divisions, including Block's in Indianapolis, Donaldson's in Minnesota, Joske's in Texas, and Bonwit Teller in New York.¹⁵⁰

H. Campeau Buys FDS

Although it was still unclear whether Campeau's purchase of Allied would ever be profitable—and while various Allied divisions were still on the market—Campeau decided it was time for another major acquisition.¹⁵¹ He was interested in acquiring May, but decided to buy FDS.¹⁵² Some at First Boston questioned the wisdom of being involved in such a risky transaction, but Campeau was responsible for half of the firm's 1986 and 1987 profits.¹⁵³ Though the other banks that financed Campeau's acquisition of Allied were unwilling

148. *Id.* at 116.

149. *Id.* at 115.

150. *Id.* at 121–123, 154 (quoting letter from FDS to shareholders). In the opening credits during the first season of *The Mary Tyler Moore Show* (the opening sequence was changed in later seasons), it is possible to see a Donaldson's sign as Mary Tyler Moore is tossing her hat in the air. *The Mary Tyler Moore Show* (20th Century Fox television broadcast 1970–77). See generally *The Mary Tyler Moore Show—Overview*, <http://www.imdb.com/title/tt0065314/> (last visited Oct. 10, 2009). At the right price, Bonwit Teller could have been profitable, “but First Boston’s job was to insure that [the buyer] wouldn’t pay the right price.” ROTHCHILD, *supra* note 113, at 123. Bonwit Teller’s new buyer placed the chain into Chapter 11 and liquidated the franchise; Carson Pirie Scott, which bought Donaldson’s at an excessive price, took on too much debt to avoid being taken over by Campeau and was another corporate casualty. *Id.* at 125. Proffitt’s (which later changed its corporate name to Sak’s Fifth Avenue) bought Carson Pirie Scott, later selling it to the Bon-Ton; Bon-Ton announced in 2006 that it would close Carson Pirie Scott’s downtown Chicago store, which is on the national historic register. Sandra Jones, *Flag of Change on State: Carson’s Closing Historic Store; New Uses for Landmark Building*, CHI. TRIB., Aug. 26, 2006, at C1. Dillard’s purchased the twenty-seven Joske’s department stores, located mostly in Texas. ROSENBERG, *supra* note 72, at 99. Because of the purchase of Joske’s, the Texas attorney general investigated Dillard’s to determine whether it was attempting to monopolize the department store market; the investigation was later dropped. *Id.*

151. See ROTHCHILD, *supra* note 113, at 137. At the same time, the banks, law firms, investment partners, and former executives were sharing more than \$130 million in fees and severance packages, while 3,500 Allied employees were being laid off. *Id.* at 145–46.

152. *Id.* at 138–40.

153. *Id.* at 139.

at first to extend themselves further, Security Pacific decided to take the risk.¹⁵⁴

FDS's board immediately turned down Campeau's tender offer,¹⁵⁵ but the company was now in play with multiple suitors.¹⁵⁶ Ohio, the home of FDS, hastily passed an antitakeover bill,¹⁵⁷ but the bill was quickly declared unconstitutional by a federal judge.¹⁵⁸ Campeau raised his bid higher than the others interested in FDS, including Kohlberg Kravis Roberts & Co., the Pritzker family of Chicago and Dillard's Department Stores.¹⁵⁹

FDS instead tentatively agreed to sell itself to Macy's.¹⁶⁰ Macy's had taken on considerable debt to go private, but some of that was paid off, and a properly structured acquisition of FDS would have resulted in considerable profit for Macy's executive and institutional owners.¹⁶¹

Macy's and Campeau began a bidding war; as the price went higher and higher,¹⁶² Campeau's backers consoled themselves upon reviewing the higher bids with the assumption that Macy's certainly must have known what it was doing in offering to pay so much.¹⁶³

154. *Id.* at 140–41, 162–63. Although Security Pacific was later largely cut out of the deal in favor of Citicorp, the terms included Security Pacific's paying Citibank and Manufacturers Hanover Trust the entire balance of their Allied loans—each bank made more than \$20 million in profits, its largest profit on this type of loan ever. *Id.* at 142, 181. A sense of urgency was also created by the chance of an antitakeover statute under consideration in Federated's home jurisdiction of Delaware, and Donald Trump's announcement to the Securities and Exchanges Commission that he intended to purchase up to \$15 million of Federated shares, perhaps to be used as greenmail. *See id.* at 147.

155. *Id.* at 153. *See also* TRAUB, *supra* note 88, at 270, 272. One reason that First Boston enthusiastically went ahead with the hostile takeover attempt was because its star banker, Bruce Wasserstein, left the firm in a disagreement over policies and opened his own shop. ROTHCHILD, *supra* note 113, at 158. Unless First Boston could prove that it could do billion dollar deals without Wasserstein, its future was questionable—and the only billion dollar deal on the horizon was working with Campeau to acquire Federated. *Id.* at 159–60.

156. *Id.* at 165–66.

157. OHIO REV. CODE ANN. § 1701.01 (1986), *amended by* Act of Nov. 22, 1986 (codified as amended at Ohio Rev. Code § 1701.01 (2006)).

158. *Campeau Corp. v. Federated Dep't Stores*, 679 F. Supp. 735, 739 (S.D. Ohio 1988); *CRFT Corp. v. Federated Dep't Stores*, 679 F. Supp. 731 (S.D. Ohio 1988); *see* ROTHCHILD, *supra* note 113, at 166–67.

159. ROTHCHILD, *supra* note 113, at 168; *see* TRAUB, *supra* note 88, at 275–76. An inside group at Federated was also unsuccessful at putting together a management buyout. *Id.* at 274–75.

160. ROTHCHILD, *supra* note 113, at 179; *see* TRAUB, *supra* note 88, at 279–82.

161. ROTHCHILD, *supra* note 113, at 182.

162. TRAUB, *supra* note 88, at 282–84.

163. ROTHCHILD, *supra* note 113, at 183.

The final compromise allowed Campeau to acquire FDS, with Macy's acquiring three FDS divisions (Bullock's, Bullocks/Wilshire, and I. Magnin—all West Coast stores) for just over one billion dollars, with Macy's also receiving a \$60 million dollar cash settlement to pay its bankers and lawyers.¹⁶⁴ Campeau also agreed to lower debt and raise cash by selling two FDS department stores, Foley's (founded in Houston) and Filene's (founded in Boston), to May.¹⁶⁵ Campeau borrowed more than \$6.5 billion dollars to pay for Federated, in addition to the \$3.6 billion he had borrowed to purchase Allied.¹⁶⁶ Advisors and bankers on all sides earned \$350 million.¹⁶⁷

I. Allied/FDS and Macy's Declare Bankruptcy

Because of the enormous debt incurred, Campeau's acquisition of FDS was doomed from the start.¹⁶⁸ Campeau paid more than \$200 million for fees and charges to acquire FDS, which was more than the entire chain earned in a year.¹⁶⁹ In an industry traditionally focused on outstanding customer service, 3,400 jobs were eliminated almost immediately.¹⁷⁰ At first, the financial situation of the combined Allied/FDS was blurred by layoffs and consolidation of certain functions, but by 1989, it was clear the companies were doing terribly.¹⁷¹ In order to service the debt, the bankers had projected profits at \$740 million for the year, but reached only \$372 million; at the same time, interest on the debt incurred by Campeau was \$516 million.¹⁷²

164. *Id.* at 186; TRAUB, *supra* note 88, at 284. The final deal was personally negotiated by Joseph Flom of Skadden, Arps, Slate, Meagher & Flom. *Id.*

165. Bryan Burrough, Jacquie McNish & Carol Hymowitz, *Betting the Store: Campeau at Last Gets Federated*, WALL ST. J., Apr. 4, 1998.

166. *Id.*

167. TRAUB, *supra* note 88, at 284.

168. ROTHCHILD, *supra* note 113, at 203–05.

169. *Id.* at 205.

170. *Id.* at 210. Bloomingdale's, for example, was given thirty days notice to cut \$50 to \$60 million. TRAUB, *supra* note 88, at 290. The cuts may have been counter-productive; for example, the cuts turned Jordan Marsh from a profitable department store into a money loser. *Id.*

171. Loomis, *supra* note 112, at 48. For example, the deal was structured based on budget cuts and gains in sales, but no banker had ever asked the heads of the department stores whether the projections were realistic. TRAUB, *supra* note 88, at 293.

172. Loomis, *supra* note 112, at 48.

By early 1990, the Campeau Corporation board of directors stripped Robert Campeau of all authority and put FDS, Allied, and sixty-five subsidiaries into Chapter 11 bankruptcy, after seventy-five years of continuously solvent operations.¹⁷³ Vendors for the most part continued shipping goods to Allied/FDS because they had essentially no other purchasers for their goods.¹⁷⁴

Meanwhile, Macy's had trouble digesting the Bullock's, Bullocks/Wilshire and I. Magnin acquisitions and began to struggle under its debt as well.¹⁷⁵ Many executives resigned in the turmoil,¹⁷⁶ and in 1988, Macy's began to lose money.¹⁷⁷ Finally, in 1992, as a consequence of Robert Campeau's buying spree, Macy's filed for bankruptcy and Finkelstein was fired.¹⁷⁸

J. FDS Buys Macy's

Although Macy's made progress in its bankruptcy proceedings, an unexpected event changed everything in 1993. Prudential, which held one billion dollars in mortgages on Macy's real estate, sold half of its claim to FDS,¹⁷⁹ which had emerged from bankruptcy a year earlier.¹⁸⁰ FDS also received an option to purchase Prudential's

173. *Id.*; see also, e.g., *In re Federated Department Stores, Inc.*, 1990 Bankr. LEXIS 2075 (S.D. OH 1990); *In re Campeau Corp. Cal.*, 1990 Bankr. LEXIS 1778 (N.D. Calif. 1990). Just before filing bankruptcy, Campeau said to Marvin Traub, CEO and Chairman of Bloomingdale's, "Chapter Eleven is a good thing because you can lay off all the people you want, pay reduced salaries with greater incentives, and stop paying pensions." TRAUB, *supra* note 88, at 332. Today, Robert Campeau is in his mid-80s and living on his savings in a rented townhouse in Ottawa, Ontario. Paul Waldie, *Collected Woes*, CANADA GLOBE AND MAIL, Nov. 24, 2006, at 37; Paul Waldie, *Fallen Titan Campeau in Bitter Divorce Spat*, CANADA GLOBE AND MAIL, Nov. 18, 2006, at A1. He is involved in a highly public lawsuit demanding \$25,000 (Canadian) per month from his former wife in spousal support. *Id.* Ilsa Campeau, his ex-wife, maintains a website giving her side of the story, <http://www.ilsa.at/> (last visited Aug. 17, 2008).

174. See Loomis, *supra* note 112, at 48; ROTHCHILD, *supra* note 113, at 255; see generally TRAUB, *supra* note 88, at 333.

175. TRACHTENBERG, *supra* note 127, at 127–28; see Kara Swisher, *I. Magnin at White Flint Mall to Close*, WASH. POST, Mar. 6, 1992, at D10.

176. See, e.g., TRACHTENBERG, *supra* note 127, at 135. Terry Lundgren, who resigned from Bullocks Wilshire after it was acquired by Macy's, later became CEO of Federated after it acquired Macy's.

177. See, e.g., *id.* at 138.

178. *Id.* at 207, 213–16; TRAUB, *supra* note 88, at 338.

179. TRACHTENBERG, *supra* note 127, at 226. FDS had at this point consolidated all Allied operations that it still owned into FDS. See *American Retailing*, ECONOMIST, Jan. 8, 1994, at 65.

180. TRACHTENBERG, *supra* note 127, at 197–98; Wade Lambert, *Federated May Face Sharp Curbs As a Major Creditor of R.H. Macy*, WALL ST. J., Jan. 4, 1994, at B5.

remaining share at a later date—giving FDS ownership or control of one billion dollars of Macy’s, which had been valued by its board at the time of its bankruptcy at two billion dollars.¹⁸¹

FDS was in a no-lose position. Even if a merger did not occur, FDS would end up owning a substantial part of Macy’s.¹⁸² Finally, in July of 1993, Macy’s agreed to be acquired by FDS, just five years after Macy’s had almost purchased FDS.¹⁸³ The New York Attorney General raised concerns that FDS/Macy’s would own thirty-nine department stores in the New York City metropolitan area and consumer groups expressed fears about higher prices.¹⁸⁴ But FDS agreed to “attempt” to sell six department stores and that resolved the state’s antitrust concerns.¹⁸⁵

K. The Industry Regroups; Macy’s Buys May

In some respects, the department store industry never recovered from the Campeau-related bankruptcies, cuts in service, and store closures.¹⁸⁶ The “stores were boring, the service nonexistent and the merchandise ubiquitous without being interesting.”¹⁸⁷ The mainstream department stores lost sight of their customer: affluent customers turned to luxury purveyors like Neiman Marcus, Nordstrom, Saks Fifth Avenue, and Bloomingdale’s, while bargain hunters found what they were looking for at Wal-Mart and Target.¹⁸⁸

181. TRACHTENBERG, *supra* note 127, at 207.

182. TRACHTENBERG, *supra* note 127, at 228.

183. *Id.* at 231–32; Edward R. Silverman, *Federated, Macy’s Merger OK’D*, NEWSDAY, Dec. 9, 1994, at A63; *see also* Patrick M. Reilly & Laura Jereski, *Macy, Federated Reach Accord in Merger Talks*, WALL ST. J., July 15, 1994, at A3.

184. TRACHTENBERG, *supra* note 127, at 232.

185. *Id.*; *see also* Margaret Webb Pressler, *N.Y. Attorney General Challenges Macy’s Deal*, WASH. POST, Aug. 24, 1994, at F1; Edward R. Silverman, *Sears Mulls Buying NY Stores from Federated*, NEWSDAY, Oct. 8, 1994, at A19; Edward R. Silverman, *Federated Will Sell Six Stores*, NEWSDAY, Sept. 20, 1994, at A33; Laura Bird, *Macy, Federated Plan Hits Snag in New York*, WALL ST. J., Aug. 24, 1994. The FTC took no action. Margaret Webb Pressler, *FTC Will Not Block Merger Between Federated, Macy’s*, WASH. POST, Aug. 20, 1994, at F1.

186. *See, e.g.*, TRAUB, *supra* note 88, at 290. Deep cuts in operations at Jordan Marsh turned it from a profitable department store into a money loser. *Id.*

187. Dody Tsiantar, *Department-Store Superstar*, TIME, Feb. 6, 2006. *See also* Loomis, *supra* note 112, at 48.

188. Tsiantar, *supra* note 187.

Macy's, for example, no longer had "its own feisty identity. Instead, a new culture [was created], one that emphasized cost-cutting, controls, and uniformity."¹⁸⁹ Departments unique to Macy's were closed or reduced in size and the store began to sell clothing that could be found in dozens of chains across the country.¹⁹⁰

The Campeau-related bankruptcies may even be responsible, at least in part, for the ascendancy of Wal-Mart and Target. It was only after these bankruptcies and consolidation of department stores that "discount stores first made inroads in winning many popular department store brand accounts, to which they would not have ordinarily had access. This helped stoke the fires at Wal-Mart and Target and helped catapult both retailers to their current leadership positions."¹⁹¹

A tension existed between cost-cutting and business rationalization, and making department stores desirable places to shop. After Campeau, department stores stopped innovating and launching new concepts.¹⁹² Department stores historically had the foresight, entrepreneurial spirit, and nerve to experiment and remain relevant; Campeau sucked the "lifeblood" out of department stores, forcing them to focus only on "better efficiencies and financial streamlining."¹⁹³ In recent years, department stores have become imitators, not innovators, borrowing coffee shops from Starbucks; cosmetics marketing from Sephora; store layouts, shopping carts, and central checkout from Kohl's; and designer shops from Ralph Lauren.¹⁹⁴ In fact, the current trend of department stores to turn over considerable space to brands like Ralph Lauren makes it "a street filled with boutiques," which resembles—and fails to distinguish itself from—the mall itself.¹⁹⁵

189. TRACHTENBERG, *supra* note 127, at 236.

190. *Id.*

191. Sway, *supra* note 50, at 1.

192. *Id.*

193. *Id.*

194. *Id.*

195. Adam Gopnik, *Under One Roof*, NEW YORKER, Sept. 22, 2003, at 92.

Retail Forward,¹⁹⁶ an industry consulting group, compiled a list of consumers' complaints about department stores, which included look-alike stores; inconvenient mall locations; time-consuming and difficult to shop stores; shoddy service; no pricing credibility; and loss of one-stop-shopping appeal.¹⁹⁷ Stores have discontinued management training programs and terminated many layers of executives, which may be contributing to a perceived decrease in customer service—the area that distinguished department stores for more than one hundred years.¹⁹⁸

Consolidation, however, continued. Dayton Hudson bought Marshall Field's in 1990 and renamed all the Dayton stores in Minnesota and Hudson stores in Michigan to Marshall Field's.¹⁹⁹ In 1998, Dillard's acquired Mercantile Stores, which had operated under approximately thirteen local names.²⁰⁰ In 2004, May bought Marshall Field's from Target (the former Dayton Hudson) for \$3.24 billion.²⁰¹ In 2005, Bon-Ton acquired Carson Pirie Scott, Younkers, Herberger's, Bergner's, and Boston Store from Saks Fifth Avenue²⁰² (which soon afterwards sold off Proffitts, McRae's, and the Parisian stores not already sold to Bon-Ton, to Belk's).

May's 2004 purchase of Marshall Field's for \$3.24 billion²⁰³ received considerable attention. Target had announced three months

196. Retail Forward, <http://www.retailforward.com> (last visited Aug. 17, 2008).

197. Sway, *supra* note 50, at 1.

198. *See id.*

199. Jennifer Dixon, *Marshall Field's Chain Sold to May in \$3.2 Billion Deal*, DETROIT FREE PRESS, June 10, 2004, at 1A. *See* Palmieri, *supra* note 110, at 98.

200. Dina Bunn, *Dillard's Extends Offer to Purchase Joslin's Stores*, ROCKY MOUNTAIN NEWS, Aug. 7, 1998, at 2B; *Dillard's Acquisition of Mercantile OK'D*, ROCKY MOUNTAIN NEWS, Aug. 12, 1998, at 2B. A complicated swap was arranged with the FTC to satisfy antitrust concerns that included selling twenty-six stores to May and Proffitt's (which later became Saks Fifth Avenue, and sold these stores to Belk's).

201. Allyce Bess, *May Co. Will Buy Marshall Field's*, ST. LOUIS POST-DISPATCH, June 10, 2004, at A1.

202. *See* Sandra Jones, *Pleased with Growth, Carsons to Expand*, CHI. TRIB., Dec. 22, 2006, at C1; Dees Stribling, *Saks Appeal*, RETAILING TODAY, June 2006.

203. Bess, *supra* note 201. The transactions also included a "handful of Mervyn's stores." *Id.* Mervyn's is a discount soft goods store with a format similar to J.C. Penney and Kohl's.

earlier that its department stores were on the auction block, leading to a bidding war between Macy's and May.²⁰⁴

Some found the transaction "bewildering," suggesting that May overpaid by as much as \$1.5 billion.²⁰⁵ A year earlier, May had announced the closing of thirty-two Lord & Taylor stores, many operating in direct competition to Bloomingdale's and other Macy's stores.²⁰⁶ It is possible that May's closing of so many Lord & Taylor stores was an effort to groom May for eventual sale to Macy's: May made itself more enticing by buying Marshall Field's, which spoke to Macy's geographic gap in the Midwest, and growing so large that it was too big for Macy's to ignore.²⁰⁷ May's closing of Lord & Taylor stores in many markets where Macy's operated stores might have been a reaction to declining business prospects, or could have been an attempt to resolve potential FTC antitrust concerns before May put itself up for sale.

Regardless of whether May intended to put itself up for sale when it bought Marshall Field's, in 2005—just one year later—Macy's acquired May for \$17 billion.²⁰⁸

After a six month investigation, the FTC allowed the merger to proceed as planned.²⁰⁹ Several state attorneys general, however, determined that the merger between Macy's and May would hurt competition and consumers through diminished choices and higher prices.²¹⁰ The Attorneys General of California, Maryland,

204. *Id.*; Dixon, *supra* note 199; Allyce Bess, *May Co. Might Be Overpaying for Field's*, ST. LOUIS POST-DISPATCH, June 11, 2004, at A01.

205. Allyce Bess, *May Co. Might Be Overpaying for Field's*, ST. LOUIS POST-DISPATCH, June 11, 2004, at A01.

206. Sandra Jones, *Lord & Taylor to Leave City*, CHI. TRIB., Oct. 5, 2006, at C1. *See generally* Dixon, *supra* note 199.

207. *See generally* Christina Cheddar Berk, *Federated Says Not Much Overlap with May Stores*, DOW JONES NEWSWIRES, Feb. 28, 2005.

208. \$11 billion was in cash and \$6 billion was in Macy's stock. Daly, *supra* note 4; Moin *supra* note 55.

209. *See, e.g.*, Stephanie Strom, *F.T.C. Ends Inquiry into Macy Deal*, N.Y. TIMES, Aug. 20, 1994, at 37; Statement of the Commission Concerning Federated Department Stores, Inc./The May Department Stores Company, F.T.C. File No. 051-0111 at 1 (2005). *See also* FTC, *Pre-Merger/Hart-Scott Rodino Act*, *supra* note 5; FTC, *Current HSR Thresholds*, *supra* note 5.

210. *See* Terence O'Hara, *Federated Must Sell Stores to Rivals*, WASH. POST, Aug. 31, 2005, at D1; *California Requires Spinoffs to Clear Federated-May Merger*, 89 ANTITRUST & TRADE REG. DAILY 258 (BNA), Sept. 2, 2005; Press Release, N.Y. St. Att'y Gen., Department Store Chain to Divest Three

Massachusetts, New York, and Pennsylvania mandated that Macy's divest twenty-six duplicate stores in malls, and further required that the stores could only be sold to traditional department store companies,²¹¹ even if Macy's received higher offers from other parties.²¹²

New York's then Attorney General Eliot Spitzer said that the divestiture agreement was necessary because otherwise Macy's acquisition of May would end department store competition for some consumers:²¹³ "[w]ith the divestitures, consumers will benefit from lower prices, greater choice, and increased services that will result from the competition generated by placing the divested department stores under new ownership."²¹⁴ At least publicly, Macy's indicated acquiescence to the divestiture; James Sluzewski, a spokesman for Macy's, said that "the agreement with state antitrust regulators was expected, given the large number of Macy's and Bloomingdale's stores that overlap in malls with May stores."²¹⁵

In addition to ordered divestitures, Macy's chose to sell off an additional eighty stores, or approximately twenty percent of the entire May purchase.²¹⁶ To increase geographic concentration, Macy's sold to, or swapped locations with, other department stores, including

NY Stores As Part of Acquisition (Aug. 30, 2005), http://www.oag.state.ny.us/press/2005/aug/aug30b_05.html; Press Release, Mass. Att'y Gen., AGS Reach Multi-State Antitrust Agreement Requiring Retail Rivals to Take Over Space Currently Occupied by Filene's and Macy's (Aug. 30, 2005) (on file with author).

211. The traditional department stores acceptable to the attorneys general included Nordstrom, Dillard's, Gottschalk's, Neiman Marcus, Saks Fifth Avenue, Sak's Department Store Group (which included Parisian), Bon-Ton, Elder-Beerman, Boscov's, Belk and Von Maur. O'Hara, *supra* note 210.

212. *See id.*; William T. Lifland & Elai Katz, *Department Store Combination Scrutinized by States*, 234 N.Y. L.J. 2 (Sept. 22, 2005); *Assurance, State of New York, State of California, Commonwealth of Massachusetts, Commonwealth of Pennsylvania and State of Maryland Against Federated Department Stores, Inc.* at 6, http://www.oag.state.ny.us/media_center/2005/aug/Federated%20Assurance.pdf (last visited Aug. 17, 2008). Another copy of the Assurance can be found at http://ag.ca.gov/newsalerts/cms05/05-071_0a.pdf (last visited Aug. 17, 2008). The settlement required only that the offers from traditional department store companies be "commercially reasonable." *Id.*

213. Press Release, N.Y. St. Att'y Gen., Department Store Chain to Divest Three NY Stores As Part of Acquisition (Aug. 30, 2005), http://www.oag.state.ny.us/press/2005/aug/aug30b_05.html.

214. *Id.*

215. O'Hara, *supra* note 210. Though Mr. Sluzewski's comment is interesting, it does not explain why the FTC reached such a different conclusion after its own investigation.

216. *Federated Announces Plan to Expand Macy's Brand in 2006; About 330 May Company Stores to Convert to Macy's Nameplate Following Merger, Macy's Inc.*, BUS. WIRE, July 28, 2005, http://www.macysinc.com/investors/maymerger/template/pressrelease.asp?item_id=736315.

Boscov's and Belk.²¹⁷ Macy's converted a few former May stores into its upscale department store, Bloomingdales.²¹⁸ But the majority of the closed department stores were sold to Target or back to the mall owners.²¹⁹ Mall owners recognize that new department store entry is unlikely and many of these former department stores were turned into multi-tenant space, restaurants, food courts, movie theaters, or sporting goods stores, perhaps permanently eliminating the possibility of future department store entry and competition.²²⁰

Macy's also sold what remained of the Lord & Taylor chain to NRDC, a private equity group, for just over one billion dollars.²²¹ Lord & Taylor's flagship store in New York City by itself was valued at \$384 million dollars.²²²

L. Department Stores Today

In the past few years, there have been many attempts to label department stores, particularly middle-market department stores such

217. *Id.*; *Federated to Exchange Stores with Belk*, BUS. WIRE, Nov. 9, 2006, http://findarticles.com/p/articles/mi_m0EIN/is_2006_Nov_9/ai_n27046988; *Shopping Centers Today, Boscov's Buys 10 Federated Stores*, INT'L COUNCIL OF SHOPPING CENTERS, Feb. 6, 2006, <http://www.icsc.org/srch/apps/newsdsp.php?storyid=2103>. Boscov, the last remaining large family owned department store, declared Chapter 11 bankruptcy in August of 2008. Kim Leonard, *Boscov's Closing Sales Begin Soon*, PITTSBURGH TRIB.-REV., Aug. 5, 2008. Boscov's acquisition of Macy's stores came at a bad time. Because of the slow-down in the economy in 2008, compounded by the expense of buying so many Macy's stores, Boscov's filed for bankruptcy in 2008. *Id.* After closing several stores, Boscov's intends, however, to remain in business. *Id.*

218. *Shopping Centers Today, Federated to Close Six More Stores*, INT'L COUNCIL OF SHOPPING CENTERS, Oct. 27, 2005, <http://www.icsc.org/srch/apps/newsdsp.php?storyid=2030>.

219. *Shopping Centers Today, Federated Sells 4 Mall Anchor Stores to Target*, INT'L COUNCIL OF SHOPPING CENTERS, July 20, 2006, <http://www.icsc.org/srch/apps/newsdsp.php?storyid=2213>; *Shopping Centers Today, Simon Buys Back Nine Federated Stores*, INT'L COUNCIL OF SHOPPING CENTERS, May 2, 2006, <http://www.icsc.org/srch/apps/newsdsp.php?storyid=2164>. *See also, e.g.*, Dana Hedgpeth & Michael Barbaro, *Shaking up Regional Retail; Federated-May Merger Likely to Bring Closings, Reshuffling*, WASH. POST, Mar. 1, 2005, at E1.

220. *Id.*

221. *Federated Finalizes Sale*, CHI. TRIB., Oct. 4, 2006, at C2; Press Release, NRDC Equity Partners, NRDC Completes Acquisition of Lord & Taylor (Oct. 3, 2006), http://www.nrdcequity.com/pdf/pr/NRDCequity_LandAcquisition.pdf; Press Release, NRDC Equity Partners, NRDC to Acquire Lord & Taylor (June 22, 2006), http://www.nrdcequity.com/pdf/pr/nrdc_acquiresLT_062206.pdf.

222. Sharon Edelson, *With Federated-May Merger, Developers Eye L&T Flagship*, WOMEN'S WEAR DAILY, June 17, 2005. The same Wall Street analyst who valued Lord & Taylor's flagship at \$384 million said "[t]here is no way the FTC will allow Federated to keep Macy's, Bloomingdale's and Lord & Taylor . . . Federated would become too dominant a presence." *Id.*

as Macy's, as a dying breed.²²³ Some economists have suggested that the under-one-roof convenience, the bailiwick of department stores, is now pushing consumers desiring an easier and quicker shopping experience towards specialty stores such as Gap and Limited.²²⁴

In 2008 and 2009, the American economy slowed and entered into recession in substantially all sectors, largely related to difficulties in the real estate market and related financial institution shake-outs. The year 2007, after the Macy's/May merger but before the economy slowed, may give a better indication of the strengths of retail and department stores.

In 2007, department stores were alive and well, and doing better than specialty stores.²²⁵ In fact, it is the specialty stores that may be the most endangered.²²⁶ "The great advantage the department store has is the ability to quickly move from one brand to another to keep itself fresh," said Stephen I. Sadove, chief executive of Saks; "[t]he specialty store does not have that luxury."²²⁷

During the past few years, Limited Brands, Inc. has sold off Lane Bryant, Lerner New York, Abercrombie & Fitch, and Tween Brands, and consolidated Structure and Express into one chain.²²⁸ In May of 2007, Limited announced that it would sell a majority interest in its underperforming Express stores, and is considering options for its Limited stores.²²⁹ The goal of all these divestitures is to allow

223. Jeffrey A. Trachtengerg & Ann Zimmerman, *Are Department Stores Dying?* WALL ST. J. (Classroom Edition), May 2002, http://www.wsjclassroomedition.com/archive/02may/COVR_department.htm.

224. *Id.*

225. Michael Barbaro, *Showing a New Style, Department Stores Surge*, N.Y. TIMES, Nov. 17, 2006, at A1; Anne D'Innocenzio, *Retailers Post Weak April Sales*, ASSOCIATED PRESS (May 10, 2007), available at http://www.usatoday.com/money/markets/2007-05-10-1947799814_x.htm. See Sandra Jones, *Young Shoppers Buying into Department Store Makeovers*, CHI. TRIB., Oct. 17, 2006, at C1; see also generally *Macy's Net Slips; Warning Issued*, CHI. TRIB., Aug. 14, 2008, at C2.

226. Rachel Dodes, *Style & Substance: Liz Clairborne's Unexpected Stumble—Buying Up Juicy Couture, Lucky Jeans Wasn't Enough to Escape Industry Woes*, WALL ST. J., May 2, 2007, at B1 (Gap closes Forth & Towne chain).

227. Barbaro, *supra* note 225.

228. *Limited to Sell Most of Express*, CIN. POST, May 16, 2007, at B11; Reuters, *Limited to Sell Interest in a Unit and Explore the Sale of Another*, N.Y. TIMES, May 16, 2007, at C5; Bloomberg News, *Quarterly Profit Plunges at Limited Brands*, N.Y. TIMES, May 17, 2005, at C3.

229. *Id.*

Limited Brands to focus on “intimate apparel, and personal care and beauty.”²³⁰

In May of 2007, Gap, Inc., owner of Gap, Banana Republic, and Old Navy, reported its seventh consecutive quarterly decline in profits.²³¹ Gap’s chief executive was fired in January 2007 after a third year of dismal holiday sales, and the chain is considering selling itself.²³²

During the past two years there has been a cooling of the retail market, and that has included a decline in sales in most clothing outlets.²³³ Some of this can be attributed to rising fuel prices and other inflationary pressures, as well as a decrease in consumer discretionary spending.²³⁴ Specialty retailers such as Gap, Abercrombie & Fitch, and Limited have had a significant drop in same-store sales.²³⁵ Upscale department stores, however, such as Saks Fifth Avenue and Nordstrom, posted substantial gains.²³⁶ Although many department stores and specialty stores showed slower growth or losses in 2007 as compared to 2006, the department stores as a whole are doing no better or worse than specialty stores.²³⁷ In fact, Macy’s did better than many of the most famous specialty stores.

For example, Liz Claiborne, which operates retail stores under several brand names and also sells to department stores, experienced a sixty-five percent drop in profits from 2006 to 2007.²³⁸ During the same period, Gap, which is planning on laying off as many as 3,000 employees, had a drop in same-store sales of sixteen percent, and

230. *Id.*

231. Bloomberg News, *Ann Taylor and Gap Say Earnings Fell in the Quarter*, N.Y. TIMES, May 25, 2007, at C2.

232. Michael Barbaro & Andrew Ross Sorkin, *Under Fire, Gap Chief Steps Down*, N.Y. TIMES, Jan. 23, 2007, at C1; Michael Barbaro & Andrew Ross Sorkin, *Gap Is Said to Explore Selling Itself*, N.Y. TIMES, Jan. 9, 2007, at C1.

233. Rachel Dodes, *Style & Substance: Liz Claiborne’s Unexpected Stumble—Buying Up Juicy Couture, Lucky Jeans Wasn’t Enough to Escape Industry Woes*, WALL ST. J., May 2, 2007, at B1.

234. *Id.*

235. *Id.*

236. Emily Fredrix, *Kohl’s, Penney, Nordstrom Profits Grow*, ASSOCIATED PRESS, May 17, 2007.

237. D’Innocenzio, *supra* note 225.

238. Dodes, *supra* note 233.

Abercrombie & Fitch had a fifteen percent drop in same-store sales.²³⁹

Fears of competition from Wal-Mart may have been exaggerated, at least for now. Wal-Mart's attempt to sell better fashions and more upscale clothing has been unsuccessful.²⁴⁰ "[o]ne of Wal-Mart's main problems is that its strategy to broaden its appeal to higher-income shoppers with upscale merchandise was poorly executed. It filled its fall clothing racks with too many trendy items like skinny jeans that shoppers just didn't want."²⁴¹

Meanwhile, Macy's stock rose for most of 2007, with as much as a forty-three percent increase in its share price from the time it announced its merger with May in February 2005.²⁴² "The merger is not just going well," said Terry Lundgren, Macy's chief executive. "It's going extremely well."²⁴³ Such an outcome was in fact predicted by two FTC economists, who studied May's earlier acquisition of Associated Dry Goods and found that May experienced "positive abnormal returns," suggesting the merger had lessened competition and led to higher prices for consumers.²⁴⁴

Same-store sales, for Macy's stores open at least one year and that had not been part of May, were up more than seven percent for the first part of 2007.²⁴⁵ In 2006, same-stores sales were up more than three-and-one-half percent.²⁴⁶ Macy's has experienced difficulties digesting the former May stores, but even with the May stores,

239. D'Innocenzio, *supra* note 225.

240. Sandra O'Loughlin, *Research: Wal-Mart May Fashion a Comeback in Apparel*, BRANDWEEK, Apr. 2, 2007, available at <http://www.allbusiness.com/marketing-advertising/branding-brand-development/4675186-1.html>; *Wal-Mart Shuffles Chief Marketing Officer*, UNITED PRESS INT'L, Jan. 24, 2007, available at http://www.upi.com/BusinessNews/2007/01/24/WalMart_shuffles_chief_marketing_officer/UPI-73631169661284; Parija B. Kavilanz, *Corporate Branding Oops*, CNNMONEY.COM, Mar. 19, 2007, available at <http://wakep.walmart.com/mews/article.htm?article=696> (last visited Oct. 13, 2009).

241. Anne D'Innocenzio, *Wal-Mart Sales Decline; Report Contrasts with Rivals' Results, Alarms Industry*, FT. LAUDERDALE SUN-SENTINEL, Dec. 1, 2006, at 3D.

242. Robert Berner, *Is Federated As Flush As It Looks?*, BUS. WK., May 28, 2007, at 71.

243. *Id.*

244. John David Simpson & David Hosken, *Are Retailing Mergers Anticompetitive?: An Event Study Analysis*, <http://www.ftc.gov/be/workpapers/wp216.pdf> (last visited Aug. 17, 2008).

245. Berner, *supra* note 242.

246. Barbaro, *supra* note at 225.

Macy's experienced an overall increase in same-store sales of almost one-half-of-one percent during the first part of 2007.²⁴⁷

In 2007, Macy's operating income as a percentage of net revenues jumped sixty-four percent, up to more than four percent from two-and-one-half percent in 2006.²⁴⁸ Some analysts suggested that Macy's profitability took a hit from the inevitable difficulties of an enormous corporate merger and consolidation, and predicted a three-to-four percent increase in same-store sales, at least before the economy slowed in all sectors.²⁴⁹

Other department stores did well, too: Saks had same-store sales increases of almost twelve percent and Nordstrom had an increase of over three percent.²⁵⁰ Sales rose almost seven percent at Neiman Marcus and almost nine percent at Saks in the first three months of 2007.²⁵¹ According to the chief executive of J.C. Penney, after four decades of decline, "[t]he department store has become a destination again."²⁵²

II. ANTITRUST FRAMEWORK

A. Background

For decades, courts and commentators have cited the Supreme Court's admonition that the antitrust laws were enacted to protect "competition, not competitors."²⁵³ But according to Judge Robert Bork—a major contributor to the doctrine of law and economics—though "preservation of competition was often cited as the aim of the

247. *Id.*

248. Jeremy MacNealy, *Will "M" Be a Moneymaker for Federated?* MOTLEY FOOL, May 18, 2007, <http://www.fool.com/investing/general/2007/05/18/will-m-be-a-money-maker-for-federated.aspx>.

249. Federated Department Stores, Inc., STANDARD & POOR'S STOCK REP. (McGraw-Hill, Apr. 21, 2007).

250. D'Innocenzio, *supra* note 225.

251. Barbaro, *supra* note 225.

252. *Id.* After losing more than \$900 million in 2003, J.C. Penney earned more than \$1 billion in 2006. *Id.* It planned to open 28 new stores in 2007. *Id.*

253. *See, e.g.,* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977); Brown Shoe Co. v. U.S., 370 U.S. 294, 320 (1962).

law, there seemed no agreed definition of what, for the purposes of antitrust, competition is.”²⁵⁴

Law and economics²⁵⁵ offers a pro-market and largely anti-government view of antitrust policy,²⁵⁶ firmly rooted in neoclassical price theory and with a Coasian²⁵⁷ assumption that minimizing transaction costs will promote perfect (or near perfect) competition.²⁵⁸ Law and economics informs that at least in the long run, markets tend to correct their own imperfections. In fact, government interference tends only to prolong the distortion or create new imperfections.²⁵⁹ And “court-ordered antitrust fixes actually make markets less rather than more competitive, or injure consumers for the benefit of competitors.”²⁶⁰

Markets dynamics aside, the concept of competition itself is less clear. Some would argue that competition is about keeping prices low for consumers,²⁶¹ others suggest it is about consumer welfare, or societal wealth maximization through allocative efficiency.²⁶² Some antitrust regimes support the notion of competition as a means of protecting small businesses.²⁶³ Others debunk the entire field, arguing that law and economics—if not all of antitrust—is based on an unrealistic economic model that compares the structure of existing

254. *Id.*

255. Law and economics is often referred to as the “Chicago School,” because of its association with the University of Chicago. *See* discussion *supra* note 7. According to Judge Bork, the books and articles that transformed and infused antitrust with economics began at the University of Chicago Law School and to a lesser extent, the Department of Economics and Graduate School of Business. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 427 (Basic Books 1993). *But see* Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 259 (2001) (noting that “[c]ontrary to common perception, the Chicago School was hardly the first time that United States antitrust law confronted economic theory”).

256. *See generally id.*

257. *See generally* Daniel Kahneman, Jack L. Knetsch, & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990).

258. Thomas L. Greaney, *Chicago’s Procrustean Bed: Applying Antitrust Law in Health Care*, 71 ANTITRUST L.J. 857, 859 (2004).

259. Hovenkamp, *supra* note 256, at 257, 269–70; Greaney, *supra* note 258, at 857, 860–61.

260. Hovenkamp, *supra* note 256, at 257, 267.

261. *Id.*

262. *Id.*

263. *See* ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, *ANTITRUST LAW IN PERSPECTIVE; CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 31–32 (Thomson/West 2002); Julian Epstein, *The Other Side of Harmony: Can Trade and Competition Laws Work Together in the International Marketplace?*, 17 AM. U. INT’L L. REV. 343, 360 (2002).

markets with an arbitrary abstract and unattainable ideal of perfect competition.²⁶⁴

The question of whether department store mergers are (or can be) anticompetitive raises these threshold questions and more. Most schools of antitrust are fearful of coordination between businesses, but differ on the odds of success for potential cartels. According to law and economics, two or three firms can make a market dynamically competitive; if that is insufficient, supra-competitive pricing will be undermined by new entrants into the market.²⁶⁵ Post-Chicago antitrust—an alternative, or perhaps complement to law and economics²⁶⁶—believes that markets are “somewhat messier” than law and economics claims, and that law and economics is less robust in explaining all behavior that arises through competition, or lack thereof.²⁶⁷ Post-Chicago antitrust is “fearful of strategic anticompetitive behavior by dominant firms,” and also believes that government intervention can be successful.²⁶⁸

Although Macy’s acquisition of May does not present the opportunity to definitively resolve this long debate, the question of whether the FTC correctly applied the relevant antitrust merger law remains.

264. See generally Colin Camerer, *Behavioral Economics, Past, Present & Future*, in COLIN CAMERER, GEORGE LOEWENSTEIN & MATHEW RABIN, *ADVANCES IN BEHAVIORAL ECONOMICS* (2003); Christine Jolls, Cass Sunstein & Richard H. Thaler, *A Behavior Approach to Law and Economics*, 50 *STAN. L. REV.* 1471 (1998); Daniel Kahnemann & Amos Tversky, *Prospect Theory, An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263, 263 (1979).

265. Hovenkamp, *supra* note 256, at 257, 266.

266. GAVIL, KOVACIC & BAKER, *supra* note 263, at 68. See Hovenkamp, *supra* note 256, at 257, 258–59.

267. Hovenkamp, *supra* note 256, at 257, 258. See also *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1983) (“Nonetheless, while technical economic discussion helps to inform the antitrust laws, those laws cannot precisely replicate the economists’ (sometimes conflicting) views. For, unlike economics, law is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve.”).

268. Hovenkamp, *supra* note 256, at 257, 267.

B. Clayton § 7

Clayton § 7 empowers the government²⁶⁹ to enjoin mergers whose effect “may be substantially to lessen competition, or to tend to create a monopoly.”²⁷⁰ This allows the government to challenge mergers before they are consummated and lead to actual anticompetitive effects, arresting mergers at a time when the trend towards a lessening of competition in a line of commerce was still in its incipiency.

Clayton § 7A, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR), requires parties to large mergers to notify the FTC and United States Department of Justice (DOJ) (and supply substantial amounts of information) before consummating the transaction.²⁷¹ The adoption of HSR reflected a Congressional intent to more aggressively block anticompetitive mergers through the Clayton Act.²⁷²

Horizontal combinations raise antitrust concerns when the merging parties produce the same (or substitutable) products while competing in the same geographic market.²⁷³ Both the FTC and DOJ dedicated

269. Private parties also may sue to enjoin a merger. 15 U.S.C. § 15 (2000). Private parties would, however, have a difficult time bringing a claim under Clayton § 7 before a merger, because only the government is given access to confidential transaction materials and a waiting period before consummation of the merger. *See generally* 15 U.S.C. § 18a(b) (2000) (amending 15 U.S.C. § 7A). Retrospective merger reviews may present few choices for an appropriate remedy because it would require a court to “unscramble integrated business assets and activities.” GAVIL, KOVACIC & BAKER, *supra* note 263, at 420. *See also* Hovenkamp, *supra* note 256, at 492–93.

270. 15 U.S.C. § 18 (2000) (amending 15 U.S.C. § 7). As originally enacted, Clayton § 7 contained a significant weakness by not attempting to regulate asset acquisitions or merger of firms that were not direct competitors. In 1950, the Celler-Kefauver Act was passed to amend the Clayton Act and address these issues. Pub. L. No. 81-899, 64 Stat. 1125 (1950) (codified as amended at 15 U.S.C. §§ 18, 21 (1982 and Supp. V 1987)).

271. Hovenkamp, *supra* note 256, at 589. *See Introductory Guide I to the Premerger Notification Program: What Is the Premerger Notification Program?* FTC, <http://www.ftc.gov/bc/hst/introguides/guide1.pdf> (last visited Aug. 17, 2008). The “size of person” and “size of transaction” tests were increased to higher dollar amounts effective February 21, 2007. 72 Fed. Reg. 2692–93 (Jan. 22, 2007). The tests are quite complicated, but, generally speaking, they capture transactions where one party has assets in excess of \$239.2 million, or one party has assets in excess of \$119.6 million and the other party has assets in excess of \$12 million. *Id.*; 15 U.S.C. §§ 18a(a)(2)(A)–(B).

272. ROSS, *supra* note 8, at 324–25.

273. Hovenkamp, *supra* note 256, at 492; Jonathan Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129, 129–30 (2007).

substantial resources to examining horizontal mergers because it can be a path to an oligopoly or monopoly.²⁷⁴

In order to determine whether a merger raises horizontal concerns, the government must determine the relevant product market,²⁷⁵ although that may be the single most difficult task in all of antitrust. “One reason is that the concept, even in the pristine formation of economists, is deliberately an attempt to oversimplify—for working purposes—the very complex interactions between a number of differently situated buyers and sellers, each of whom in reality has different costs, needs, and substitutes.”²⁷⁶

1. *Product Markets and Submarkets*

A relevant antitrust market under Clayton § 7 is one that includes all firms making goods or services that consumers would consider identical—or reasonable substitutes (considering the cross-elasticity of demand)—sold within the trade area where consumers might reasonably purchase the goods or services. This analysis, made by studying industry dynamics, corporate documents, and customer needs, leads to an estimate of the market share for each firm in the relevant market. The market share data is then used to discern market power and potential anticompetitive effects.²⁷⁷

In *Brown Shoe Co. v. United States*,²⁷⁸ the Supreme Court stated that “[t]he outer boundaries of a market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.”²⁷⁹

The Court also held that within a broad product market, “well-defined submarkets may exist which, in themselves, constitute

274. LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 575 (West Group 2000).

275. *Id.* at 575–76.

276. James A. Keyte, *Market Definition and Differentiated Products: The Need for a Workable Standard*, 63 *ANTITRUST L.J.* 697, 703 (1995). See also Dennis W. Carlton, *Market Definition: Use and Abuse*, 3 *COMPETITION POL’Y INT’L* 1, 3 (2007).

277. *Id.*

278. 370 U.S. 294 (1962).

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

product markets for antitrust purposes.”²⁸⁰ Because Clayton § 7 created no single standard for defining a product market, the Court directed that “practical indicia” be used, including industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique product facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.²⁸¹ Examining the “practical indicia” in *Brown Shoe*, the Court held that there were distinct submarkets for men’s, women’s, and children’s shoes, rather than just a broader market for all shoes.²⁸²

It is possible that department stores are a submarket of a greater clothing market, or home products market. Many goods sold in department stores can be purchased elsewhere, but for more than one hundred years, many consumers still continue to show a preference to buy these products in department stores. This suggests at least some consumer inelasticity of demand, or refusal to substitute products (and distribution channels) that law and economics scholars might find fungible.²⁸³ Indeed, many courts have found antitrust products markets limited by the product’s distribution channel.²⁸⁴

280. *Id.* (citing *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593–95 (1957) (there are two du Pont antitrust cases in the mid-1950s, this case is usually referred to as “General Motors”).

281. *Id.*

282. *Id.* at 325–26. Since *Brown Shoe*, however, the concept of “practical indicia” has often been used by courts erroneously, leading many commentators and other courts to be hostile to the concept of submarkets. Baker, *supra* note 273, at 74. At least one Court of Appeals has asked litigants to avoid the term submarket because of its misuse and complexity. *Satellite Television & Associated Res., Inc. v. Continental Cablevision of Va., Inc.*, 714 F.2d 351, 355, n.5 (4th Cir. 1983), *cert. denied*, 465 U.S. 1027 (1984).

283. See *F.T.C. v. Whole Foods Mkt., Inc.*, 2008 U.S. App. LEXIS 16562; *F.T.C. v. Staples, Inc.*, 970 F. Supp. 1066, 1076–77 (D.D.C. 1997); *Bon-Ton Stores, Inc. v. May Dep’t Stores Co.*, 881 F. Supp. 860, 869–70 (W.D.N.Y. 1994); David J. Dadoun & Diana L. Dietrich, *After Gillette: An Analysis of Premium Product Markets Under the 1992 Merger Guidelines*, 17 HARV. J.L. & PUB. POL’Y 567, 577 (1994). See also *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 992–97 (11th Cir. 1993), *cert. denied*, 512 U.S. 1221 (1994); Keyte, *supra* note 276, at 709, 712; *Vitale v. Marlborough Gallery*, 1994 WL 654494, at *8 (S.D.N.Y. 1994).

284. See, e.g., *California v. Am. Stores Co.*, 872 F.2d 837, 841 (9th Cir. 1989) (separate product market for supermarkets); *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1342 (8th Cir. 1987) (separate product market for automotive battery sellers); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 712 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980) (separate product market for drive-through film processors); *Bon-Ton Stores*, 881 F. Supp. at 860 (separate product market for department stores).

2. Cluster Markets

In *United States v. Philadelphia National Bank* (“PNB”), the Supreme Court—just one year after the *Brown Shoe* decision—endorsed the concept of a cluster market:²⁸⁵ a market comprised of a cluster of goods or services that could be purchased separately, save for a consumer preference to buy them together.

In *PNB*, which concerned the merger of two banks, the Court found that banks offered a cluster of services.²⁸⁶ For example, banks often offer mortgages, personal loans, checking accounts, savings accounts, safe deposit boxes, and notary services. Consumers may purchase each of these services separately, seeking out the cheapest or best provider of each service.²⁸⁷ But most consumers turn to one provider to bundle these separate services, even if better rates or lower fees are available elsewhere.²⁸⁸ The Court quoted a trial witness who said:

There are four banks on the corner of Broad and Chestnut. Three of them are commercial banks all offering 3 percent, and one is a mutual savings bank offering 3 1/2. As far as I have been able to discover, there isn't anybody in Philadelphia who will take the trouble to walk across Broad Street to get 1/2 of 1 per cent more interest. If you ask me why, I will say I do not know. Habit, custom, personal relationships, convenience, doing all your banking under one roof appear to be factors superior to changes in the interest rate level.²⁸⁹

Though law and economics informs us that consumers will rationally maximize wealth, the Coase theorem itself notes that people will act to minimize transaction costs.²⁹⁰ In *PNB*, a “settled

285. 374 U.S. 321, 356 (1963).

286. *Id.* at 357.

287. *See id.* at 326–27.

288. *Id.* at 357. When this case was decided, only commercial banks were permitted to offer checking accounts. *See id.* at 326.

289. *Id.* at 357 n.34.

290. *See generally* Daniel Kahneman, Jack L. Knetsch, & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990).

consumer preference” insulated individual commercial banking products from competition offering a better rate of return.²⁹¹ Consumers see certain goods and services as complementary to one another and seek to buy them together. In justifying them as a separate antitrust product market, lower courts have applied this concept to several industries, including department stores.²⁹²

3. Price Discrimination Markets

The U.S. Government Horizontal Merger Guidelines (“Guidelines”), jointly issued by the FTC and DOJ, disclose the government’s standards for evaluating mergers under Clayton § 7.²⁹³ Although an administrative guidance document, the Guidelines are influential and routinely cited by courts considering mergers.²⁹⁴

The Guidelines recognize “price discrimination,” in which businesses charge different prices to different buyers of the same product.²⁹⁵ “The term price discrimination is applied when a [seller can] raise price profitably to a class of targeted buyers, notwithstanding the incentive of buyers to substitute to other products

291. 374 U.S. at 357.

292. ABA SECTION OF ANTITRUST LAW, *MERGERS AND ACQUISITIONS: UNDERSTANDING THE ANTITRUST ISSUES* 61–62 (2d ed. 2004). Cluster markets have also been used to challenge mergers involving supermarkets, beauty products, office supplies, ammunition, rotary drills, marine engines, industrial gasses and a variety of medical services. *Id.* at 62. *See also* Keyte, *supra* note 276, at 727; Gregory J. Werden, *The History of Antitrust Market Delineation*, 76 MARQ. L. REV. 123, 166 (1992); *but see generally* Baker, *supra* note 273, at 157–58 (“[C]luster market approach inappropriate for market definition because clusters include products and services that are no demand (or supply substitutes).”).

293. 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41, 552 (Sept. 10, 1992). The Guidelines were revised in 1997 to update the policies on efficiency. *See* 1992 *Horizontal Merger Guidelines*, FTC, <http://www.ftc.gov/bc/docs/horizmer.htm> (last visited Aug. 17, 2008). Earlier versions of government merger guidelines were released by the DOJ in 1982 and the FTC in 1984. *See Merger Guidelines*, U.S. Dep’t Just., at n.4, http://www.usdoj.gov/atr/public/guidelines/horiz_book/0.html (last visited Aug. 17, 2008).

294. *See, e.g.*, *F.T.C. v. Tenet Health Care Corp.*, 186 F.3d 1045, 1053 (8th Cir. 1999); *United States v. Engelhard Corp.*, 126 F.3d 1302, 1304 (11th Cir. 1997); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1108 (N.D. Cal. 2004); *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 335 (S.D.N.Y. 2001); *F.T.C. v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 53 (D.D.C. 1998); Darren Bush & Salvatore Massa, *Rethinking the Potential Competition Doctrine*, 2004 WISC. L. REV. 1035, 1080 (2004); GAVIL, KOVACIC & BAKER, *supra* note 263, at 455. *But see* Ronald Katz, Janet Arnold Hart & Theodore R. Snyder, *Courts Adopt a Practical Approach: A Post-Kodak Working Guide to Market Definition*, 11 ANTITRUST 38, 39 (1997).

295. Baker, *supra* note 273, at 151.

and more distant sellers”²⁹⁶ The sale of airline tickets is a commonplace example of price discrimination. When buying airline tickets, even passengers sitting adjacent to one another may pay vastly different prices to fly on the same plane.²⁹⁷

Hypothetically, department stores may find it possible to engage in price discrimination. For example, as is common today, Macy’s or Dillard’s may be the only middle-market department store in a mall, city or other geographic market.²⁹⁸ Such a middle market department may revise its strategies to: a) price clothing for older, non-computer savvy customers, at a supra-competitive level, if the only alternative is making purchases on the internet; b) price business attire for busy executives at supra-competitive levels, if the only alternative would be to shop at one or more specialty stores (as opposed to the one stop shopping available at a department store); c) price tailored clothing, often difficult to find outside department stores, at supra-competitive prices; and d) price gift items (such as those registered for weddings and baby showers) at supra-competitive prices under the theory that gift registries need to be accessible to friends and family across the nation.²⁹⁹

4. Anticompetitive Effects

Macy’s and May merged in 2005 and at this time it is less important to look at the antitrust theory behind the market definition than to examine the anticompetitive effects that might have resulted. An empirical study conducted as a companion to this article found that Macy’s customers are in fact paying more and receiving less.³⁰⁰

296. Jonathan B. Baker, *Stepping Out in an Old Brown Shoe: In Qualified Praise of Submarkets*, 68 ANTITRUST L.J. 203, 207–08 (2000) (citing Horizontal Merger Guidelines at § 1.12).

297. This alone is not an antitrust violation, because airlines are reacting to supply and demand.

298. This hypothesis would also be appropriate if there were more than one middle-market department store and oligopolistic behavior, conscious parallelism, or collusion.

299. The challenge is charging a high price (and selling only to consumers who do not search other stores), versus charging a low price (and potentially also selling to consumers that bargain hunt). See Daniel S. Hosken & David Reiffen, *Pricing Behavior of Multiproduct Retailers* (June 2007), F.T.C. Bureau of Economics Working Papers, Working Paper No. 225.

300. Mark D. Bauer, *Give the Lady What She Wants – As Long As It’s Macy’s*, 80 Temple L. Rev. 949, 1006 (Winter 2007); Michael Barbaro, *Given Fewer Coupons to Clip, Bargain Hunters Snub Macy’s*, N.Y. TIMES, Sept. 29, 2007, at 1. See also Statement of the Commission Concerning Federated

Before the merger, the FTC “conducted an exhaustive six-month investigation,”³⁰¹ and subsequently permitted Macy’s to acquire May without modification of the deal the parties suggested. Particularly after considering the history of this industry, some of the FTC’s reasoning must be reconsidered.

III. FTC STATEMENT ON THE MACY’S/MAY MERGER

Although acknowledging that the Macy’s/May merger would “create by far the largest chain of so-called ‘traditional’ or ‘conventional’ department stores in the country,” and that the merger would create “high levels of concentration among conventional department stores in many areas of the country,” the FTC cleared Macy’s to acquire May.³⁰²

The FTC issued its Statement in accord with its policy “to help provide transparency for decisions in high-visibility matters.”³⁰³ The FTC recognized that “consumers mourn the gradual disappearance of department stores in their hometowns,” and that traditional department stores “stock[ed] the kinds of merchandise best suited [to] their personal tastes” as well as “provided a particular ambiance that

Department Stores, Inc./The May Department Stores Company, FTC File No. 051-0111 at 3 (FTC 2005).

301. Press Release, FTC, FTC Issues Statement on Closure of Federated/May Investigation (Aug. 30, 2005), <http://www.ftc.gov/opa/2005/08/federatedmay.shtm>.

302. Statement of the Commission Concerning Federated Department Stores, Inc./The May Department Stores Company, FTC File No. 051-0111 at 1 (FTC 2005). The FTC “conducted an exhaustive six-month investigation” following notification of the proposed merger and a second request. *Id.*; see also *Briefs*, FTC: WATCH (April 25, 2005); Letter from FTC to Phillip A. Proger, Esq., at <http://www.ftc.gov/os/caselist/0510001/050830ltrfed0510001.pdf> (last visited Aug. 17, 2008); Letter from FTC to Neal R. Stoll, Esq., available at <http://www.ftc.gov/os/caselist/0510001/050830ltrmay0510001.pdf> (last visited Aug. 17, 2008).

303. Press Release, FTC, FTC Issues Statement on Closure of Federated/May Investigation (Aug. 30, 2005), <http://www.ftc.gov/opa/2005/08/federatedmay.shtm>. On April 11, 1997, the FTC announced that it would publicly acknowledge that a particular merger was being investigated under the Clayton Act where a party to the transaction had disclosed its existence in a press release or other public filing. *Notice of Policy of Disclosing Investigations of Announced Mergers*, 62 Fed. Reg. 18,630 (Apr. 16, 1997); FTC, *FTC: Merger Acknowledgement*, <http://www.ftc.gov/opa/1997/04/mergdisc.htm> (last visited Aug. 17, 2008).

they found congenial,” but in the end the FTC concluded the merger would not have “any adverse effect on consumers.”³⁰⁴

An analysis of the FTC’s more salient points follows below.

A. Suburban Malls Replaced Downtown Shopping

According to the FTC, “[f]ifty years ago, many individual department stores were freestanding in cities, rather than suburban malls, and they offered consumers the convenience of one-stop shopping, particularly for home furnishings or clothing.”³⁰⁵ Today the “overwhelming majority of department stores are located in some one-thousand-two hundred enclosed suburban shopping malls” and “malls have largely replaced flagship downtown department stores as shopping destinations.”³⁰⁶ Because of this, the FTC said, the merger of Macy’s and May would not substantially reduce competition.³⁰⁷

The FTC’s statement is correct as far as it goes—the majority of department stores are located today in suburban malls. The problem is that metropolitan areas, which often include a plethora of shopping malls, are not the relevant geographic market for all shoppers.

Approximately thirty million Americans live within the confines of the country’s twenty largest cities—not in the suburbs.³⁰⁸ Approximately nine percent of American households—or thirty million people—have no car.³⁰⁹ Seventeen percent of elderly American households have no car.³¹⁰

Presumably most car-less Americans are dependent upon public transportation, which, if it exists at all, is designed to carry commuters from far-off suburban locations and bring them into

304. Statement of the Commission Concerning Federated Department Stores, Inc./The May Department Stores Company, FTC File No. 051-0111 at 5 (FTC 2005).

305. *Id.* at 2.

306. *Id.*

307. *Id.*

308. See Information Please Almanac, *Top 50 Cities in the U.S. by Population and Rank* (2005), <http://www.infoplease.com/ipa/A0763098.html> (last visited Aug. 17, 2008).

309. U.S. Census Bureau, *Population and Housing Narrative Profile: 2004*, http://factfinder.census.gov/servlet/NPTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2004_EST_G00_NP01&-ds_name=&-redoLog=false (last visited Aug. 17, 2008).

310. *Chapter 7: The Places People Live: Housing, 1999*, U.S. Census Bureau, <http://www.census.gov/population/pop-profile/1999/chap07.pdf> (last visited Aug. 17, 2008).

employment centers in urban cores, not to take city dwellers to suburban shopping malls.³¹¹ In at least two cities, perhaps perceiving a risk of crime or as an attempt to keep inner-city minorities out, suburban shopping malls have refused to allow buses from the city to drop off passengers.³¹²

In Cincinnati, the corporate headquarters of Macy's, approximately twenty-five percent of households have no car and are dependent³¹³ on the city's rudimentary bus system.³¹⁴ While car-less Cincinnati residents can enjoy the convenient downtown Macy's store, "[i]t's true, we would not have built the store unless our headquarters were here," said Carol Sanger, a Macy's spokesperson.³¹⁵ According to a former Macy's chief executive:

I refer to the downtown . . . store as enlightened philanthropy It wasn't intended to be only philanthropic. But would we have built it if our corporate headquarters had been somewhere else? Probably not. We had a store here, we had a history here and we thought we had a chance to do our part to help in the development of downtown.³¹⁶

Of course department stores are in the business to make a profit and do not ordinarily keep stores open unless it makes business sense. And having closed downtown stores in numerous cities, Macy's apparently does not feel this obligation outside Cincinnati. But in

311. See generally Robert Byrd, *Bias Seen in Opposition to Expanding South's 1st Rapid-Transit Lines*, L.A. TIMES, Oct. 15, 1989, at A34 (racism may be behind decision not to expand Atlanta's subway lines); Kevin Collison, *State Aid to Help NFTA Expand Suburban Mall Service*, BUFFALO NEWS, Aug. 16, 1996, at 1B (state aid to help city residents reach shopping); Jean Grossman & Beth Palubinsky, *'Bridges to Work' Can Change the Geography of Opportunity*, DENV. POST, Aug. 27, 1995, at H5 (difficult for urban residents to get to suburbs on bus); Stephen J. Lynton, *Commuting Tough for D.C. Poor*, WASH. POST, Dec. 9, 1985, at A25 (transit accessibility to suburbs poor).

312. Editorial, *Mall Discrimination Is Outrageous*, BUFFALO NEWS, Jan. 30, 1996, at 2B; Sabrina Eaton, *Public Transit Called Ticket to Jobs*, CLEVELAND PLAIN DEALER, Jan. 17, 1997, at 3B.

313. Barry M. Horstman, *Voters Say No to Higher Taxes: Proposed Light Rail System Loses Big*, CIN. POST, Nov. 6, 2002, at A1.

314. See Liz Oakes, *Transit Meeting Feeling Gloomy*, CIN. ENQUIRER, Dec. 7, 2003, at 2C.

315. Tucker & Alltucker, *supra* note 121.

316. Randy Tucker, *Better Than It Was*, CIN. ENQUIRER, Apr. 6, 2003, at 1D.

many cities, downtown stores are in fact profitable.³¹⁷ In other cities, downtown stores were either close to profitable, or inconsistently profitable, but the Campeau-related bankruptcies—which still haunt many department stores because of deferred maintenance and upkeep or the transfer of a local headquarters to a distant city—heralded the closing of the downtown store.³¹⁸

The field of behavioral economics suggests that not all consumer purchasing decisions are based on allocative efficiency and wealth maximization.³¹⁹ A “consumer’s willingness to pay in the real world is skewed by a variety of biases and predictable misperceptions that are also well understood by the seller.”³²⁰ The typical consumer does “not approach the marketplace with a series of predetermined preferences, precisely and numerically weighted, seeking like a computer algorithm the package of goods and services that maximizes the fulfillment of their preferences at the lowest cost.”³²¹ A department store appeals to a consumer sense of place, history, ambience, service, support, tradition, and convenience. Even the FTC agreed that at least some consumers are swayed by these factors.³²²

In another departure from law and economics, not even all business decisions are rational with the goal of maximizing profits. For example, some businesses seem to fear the inner city and do not wish to do business there, even though a substantial profit could be made.³²³ Some department store chains just do not care to understand

317. See Michael Barbaro, *Retailers Finding a Market Downtown*, WASH. POST, Oct. 13, 2004, at A1; Steve Ginsberg, *Nordstrom S.F.: Staying Hot*; *San Francisco*, WOMEN’S WEAR DAILY, Dec. 13, 1988, at 1; LEACH, *supra* note 24, at 153.

318. See, e.g., Chris Burritt, *Rich’s Finally Bit the Bullet*, ATLANTA J. CONST., Apr. 18, 1991, at C1.

319. See generally Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 709, 754–57 (2006); HERBERT SIMON, A BEHAVIORAL MODEL OF RATIONAL CHOICE, in MODELS OF MAN, SOCIAL AND RATIONAL: MATHEMATICAL ESSAYS ON RATIONAL HUMAN BEHAVIOR IN A SOCIAL SETTING (1955); Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449 (2003), available at <http://www.aeaweb.org/aer/contents/dec2003.html> (last visited Aug. 17, 2008).

320. Alan White, *Behavior and Contract*, 27 LAW & INEQ. 135, 144 (2007).

321. *Id.* at 18.

322. Statement of the Commission Concerning Federated Department Stores, Inc./The May Department Stores Company, FTC File No. 051-0111 at 5 (FTC 2005). The question remains as to whether these consumer preferences serve to restrain prices for all consumers.

323. See James T. Madore, *Urban Markets Ill Served*, NEWSDAY, Jan. 20, 1999, at A8. See also May Edwards & Bill Ryan, *Challenges Facing Shopping Malls: Opportunities for Downtowns and*

the inner city and have no interest in doing business there.³²⁴ Dillard's, for example, does not operate a full service downtown store in any city in the United States.³²⁵

Inner cities, however, represent a retail market larger than that of Mexico—between eighty-five and one hundred billion a year.³²⁶ In Cleveland alone, where Dillard's closed its historic but dilapidated downtown store, hundreds of millions of dollars in retail spending flows from the city to the suburbs every year.³²⁷ Shoppers might have been more interested in spending money in downtown Cleveland's last department store had the landmark building, which opened in 1931, been well-maintained: one year before it closed, the store had red duct tape holding down the stained carpet, peeling paint, unlit chandeliers, and a Santa Claus with “a busted eye, held together with tape.”³²⁸

Businesses are apparently held back by the perception that inner cities are unprofitable and unsafe places to do business.³²⁹ But because of population density, inner cities can have more buying power than an affluent suburb.³³⁰ Target and Wal-Mart, which the traditional department stores sometimes claim are their competitors,

Community Business Districts, U. WISC.-COOPERATIVE EXTENSION, CENTER FOR COMMUNITY ECON. DEV., June 1998 No. 22, available at <http://www.uwex.edu/ces/cced/downtowns/lfb/lets/lets698.html> (last visited Aug. 17, 2008).

324. See, e.g., Mya Frazier, *Downtown Dillard's in Decline*, CLEVELAND PLAIN DEALER, Jan. 16, 2001, at 2C.

325. Alison Grant, Mya Frazier & Marcia Pledger, *Shoppers Say Farewell to Downtown Dillard's*, CLEVELAND PLAIN DEALER, Jan. 1, 2002, at A1. Dillard's operated a store with limited offerings in a portion of a historic department store building in downtown San Antonio, Texas, next to the Alamo, but that store is now closed. Tricia Lynn Silver, *Historic Joske's Building Purchased By Rivercenter Mall Owners*, <http://www.bizjournals.com/sanantonio/stories/2008/06/02/daily29.html> (last visited February 9, 2009). See generally Mike Greenberg, *Building Boom; Despite Growth, Much of San Antonio's Downtown Retains Former Look, Charm*, SAN ANTONIO EXPRESS-NEWS, Dec. 28, 1999, at 3M. Dillard's also operates a new store in Midtown Atlanta, on the fringes of Atlanta's central business district, in an enormous new suburban style development. See Deborah Held Maslia, *Atlantic Station Shopping a Retail Rush for City*, ATLANTA BUS. CHRON., Mar. 3, 2006, <http://atlanta.bizjournals.com/atlanta/stories/2006/03/06/focus7.html#>.

326. *Id.*; Chris Reidy, *Inner Cities' Retail Punch*, BOSTON GLOBE, June 12, 1998, at C1.

327. Sandra Clark, *Developers Going Back to the Market Recapturing Sales Lost to Suburbs Is Incentive for Inner-City Investment*, CLEVELAND PLAIN DEALER, Mar. 21, 1993, at 18A.

328. Frazier, *supra* note 324.

329. Reidy, *supra* note 326.

330. *Id.*

have identified inner cities as areas for growth.³³¹ Cities are often willing to offer department stores substantial subsidies to open downtown stores as activity generators.³³² But with mergers resulting in fewer department store companies, and some of the remaining stores making a decision to avoid downtowns, there may be no takers. Even without subsidies, “the cost to operate a store [downtown] is much higher than in a suburban mall, [but] the payoff can be far greater.”³³³

Department store companies, accustomed to the safety and ease of operations at a greenfield suburban mall, may fundamentally misjudge cities. For example, in downtown Washington, D.C., the local May store, Hecht’s, was profitable enough to justify \$15 million in improvements and renovations in 2004.³³⁴ Nonetheless, May headquarters originally resisted when customers asked for higher-end merchandise.³³⁵ Apparently May executives relied on demographic data for the relatively small downtown residential population, rather than taking into account the large number of people who work, but do not live, in downtown Washington.³³⁶ “The way demographic data is compiled, [the May executives at headquarters] could not appreciate what was happening downtown,” said a former Hecht’s president and chief executive.³³⁷

331. See, e.g., Robert Manor, *Wal-Mart Targeting Inner City for Buildup*, CHI. TRIB., Apr. 5, 2006, at C1; Lorraine Mirabella, *Inner-City Centers a Good Investment; Rundown Retail Areas Draw Investors; Money: The High Density of Inner-City Neighborhoods Is Making Them Good Targets for Retail Development*, BALTIMORE SUN, Jan. 13, 2005, at 1D.

332. See, e.g., Barbaro, *supra* note 317 (Washington, D.C. offering up to \$30 million); Jackie Crosby, *St. Paul Store Likely to Stay Open Until 2011*, MINNEAPOLIS STAR TRIB., June 11, 2004, at 12A (St. Paul gave \$7.8 million in subsidies); Frazier, *supra* note 324 (Cincinnati gave \$26 million in subsidies).

333. Pia Sarkar, *Westfield San Francisco Centre; Fashionable Expansion; Bringing the Shoppers Back to Downtowns*, S.F. CHRON., Sept. 26, 2006, at E1. See generally J.K. Wall & John Strauss, *Centre of Rebirth; The Mall Has Helped Transform the Culture and Economy of Downtown. But Will It Continue to Thrive?*, INDIANAPOLIS STAR, Sept. 8, 2005, at 1A.

334. Barbaro, *supra* note 317. The store itself was relatively new by downtown department store standards; Hecht’s had an older store in downtown Washington but sales justified building a new store closer to the heart of downtown in 1980. ZACHARY M. SCHRAG, *THE GREAT SOCIETY SUBWAY 205* (The Johns Hopkins Univ. Press 2006). See also Ylan Q. Mui, *Era Ends With New Beginning: Transformation from Hecht’s to Macy’s Will Be Completed Today*, WASH. POST, Sept. 9, 2006, at D1.

335. Barbaro, *supra* note 317.

336. *Id.*

337. *Id.*

Despite the improvements to Hecht's (now Macy's) in downtown Washington, \$1.1 billion is spent annually by D.C. residents in the suburbs.³³⁸ According to a recent study, the city's population and income could support two additional department stores downtown³³⁹—a place that is easily accessible by public transportation³⁴⁰ for the thirty-seven percent of D.C. residents that have no car and cannot necessarily visit a suburban mall.³⁴¹

B. Merger Will Not Affect Non-Price Competition

The FTC recognized that “many of the products now sold in department stores—most particularly, women’s apparel—have non-price attributes that are also important to consumers.”³⁴² FTC staff reviewed documents obtained in its investigation to look for “potential effects in non-price competition, *e.g.*, reductions in merchandise assortment or new product introductions, reductions in store service and assistance, or reductions in store improvement and innovations.”³⁴³ The FTC concluded that it “found no reason to believe that [FDS] is likely to be able to reduce non-price competition [as a result of its merger with May].”³⁴⁴

Of course, precisely what the FTC found in its investigation will remain a secret protected by the confidentiality requirements of Clayton § 7A.³⁴⁵ But in reviewing the FTC’s statement that there will be no reduction in non-price competition, several important issues are of concern.

338. Dana Hedgpath, *Downtown Could Support Big Stores, Study Finds*, WASH. POST, Oct. 28, 2005, at D4.

339. *Id.*

340. See generally Washington Metropolitan Area Transit Authority, <http://www.wmata.com> (last visited Aug. 17, 2008).

341. U.S. Department of Transportation, *CTPP 2000 Status Report*, <http://www.fhwa.dot.gov/ctpp/sr0103.htm> (last visited Aug. 17, 2008). Several Washington area suburban shopping malls are near Metro subway stops, including Pentagon City, Wheaton Plaza, and Ballston Commons. These malls, however, may be quite far from where the least affluent D.C. residents live.

342. Statement of the Commission Concerning Federated Department Stores, Inc./The May Department Stores Company, FTC File No. 051-0111 at 4 (FTC 2005).

343. *Id.*

344. *Id.*

345. 15 U.S.C. § 18a(h) (2000).

1. *Less Service*

Customer satisfaction must be very important for a successful retailer.³⁴⁶ If Macy's faces as much competition as both Macy's and the FTC claim, then, logically, it should have excellent customer service to win over customers and keep them coming back. But according to one widely reported metric, Macy's does not make the list; in fact in recent years, Macy's only made the list in 2006, and then perhaps only because it knocked Marshall Field's off the list by buying it.³⁴⁷

The National Retail Federation and American Express in 2005 developed a survey to determine who provided the best customer service in a variety of areas.³⁴⁸ In order to keep the comparison fair, the index was weighted by each company's 2004 sales, in order to compensate for retailers' varying sizes or geographic market coverage.³⁴⁹ According to the 2004 survey, Nordstrom was rated number one for customer service among all retailers, and Marshall Field's was rated number three.³⁵⁰ The public results only reported the top ten, so it is not known where Macy's fell on this list. In the 2006 survey, Macy's was ranked number ten and has not appeared on the list again.³⁵¹

346. Cecily Hall & Emily Kaiser, *Satisfied Shoppers*, WOMEN'S WEAR DAILY, Dec. 15, 2005, at 16.

347. *Id.*; see L.L.Bean Once Again Number One in Customer Service, According to NRF Foundation/American Express Survey, National Retail Federation (Jan. 13, 2009), http://nrf.com/modules.php?name=News&op=viewlive&sp_id=653;

From Online Retailers to Department Stores, Best Retailers for Customer Service Run the Gamut, National Retail Federation, <http://www.nrf.com/content/default.asp?folder=press/release2006&file=custserv1106.htm> (last visited Aug. 17, 2008).

348. *Id.*

349. *Id.* A total of 8,648 consumers were surveyed by BIGresearch; the methodology and results were reviewed by Professor Martin P. Block, Ph.D of Northwestern University. *Id.*

350. *Id.* Nordstrom was noted for its long commitment to customer service; Marshall Field's was cited for "fashion leadership, superb guest service and a commitment to community involvement." *Id.*

351. *Id.* Amazon.com was ranked number one in the 2006 survey; Nordstrom was ranked number two. *Id.* Macy's has not been ranked since 2006. Other organizations conducting such surveys include *Business Week* magazine (Nordstrom and Neiman Marcus were the only two department stores ranked in the top fifty of all companies) and Corporate Research International (Nordstrom, Saks Fifth Avenue, and Bloomingdale's ranked as top three department stores. See *The Customer Service Elite*, http://bwnt.businessweek.com/interactive_reports/customer_service (last visited Aug. 17, 2008); *Corporate Research International Reveals Best Customer Service*, Market Wire, July 23, 2008, <http://www.reuters.com/article/pressRelease/idUS135334+23-Jul-2008+MW20080723>.

Macy's may not even consider a high level of customer service to be an attainable or desirable metric. Terry Lundgren, chief executive officer of Macy's, apparently believes that top-notch customer service is only appropriate at higher-end stores. He "bristles when Macy's is compared with Nordstrom and its renowned customer service."³⁵² "We're going to be known for affordable luxury," says Lundgren. "That's something Nordstrom's could never say."³⁵³

Lundgren's statements suggest that Macy's does not believe excellent customer service is possible for a mid-priced store. This, however, is at odds with the fact that Boscov, another middle-market department store competing against Macy's in several mid-Atlantic markets, was ranked sixth in 2006 and fifth in 2005, and Kohl's, a discount clothing and housewares store similar to J.C. Penney, was ranked seventh in 2008 and 2006, and fourth in 2005.³⁵⁴

Macy's has had customer service problems for many years and has acknowledged—Lundgren's recent remark notwithstanding—a need to improve.³⁵⁵ In Chicago, where there was at least a perception of better customer service in the past (when Marshall Field's existed as a separate brand), according to National Retail Federation/American Express survey, customers "are increasingly bitter at what they see as lower levels of merchandise and customer service at Macy's compared with Field's."³⁵⁶

Despite a pledge by Macy's to make it easier to reach an operator at its customer service number, customers now face "a confusing

352. Jayne O'Donnell, *Beloved Stores Get a Lot More Than a New Name; Macy's Swoops in with Big Changes to Field's, Hecht's, Others but a Few Old Touches Will Stay*, USA TODAY, June 8, 2006, at 1B.

353. *Id.*

354. National Retail Federation, *supra* note 347. J.C. Penney did not make the list in 2005, but was ranked number seven in 2006. It returned to the list, ranked number seven in 2009. http://nrf.com/modules.php?name=News&op=viewlive&sp_id=653 (last visited February 9, 2009).

355. See, e.g., Matthew Kauffman, *Mall Competitors Roll out Welcome Mat for Nordstrom*, HARTFORD COURANT, Aug. 17, 1997, at A1; Tami Luhby, *Convenience Counts As Macy's Moves In*, NEWSDAY, Feb. 13, 2001, at A42; Jennifer Steinhauer, *Just Another Retail Bankruptcy? Maybe Not.*, N.Y. TIMES, July 9, 1997, at D1; Andrea K. Walker, *Retail Makeover; The Challenge for Macy's Is to Keep Hecht's Customers but Few Traditions*, BALTIMORE SUN, Sept. 5, 2006, at 1A; O'Donnell, *supra* note 352.

356. Sandra Guy, *Macy's Faces the Music: Shoppers Tuning out Since Name Change; Sears Outlook Better*, CHI. SUN-TIMES, Dec. 12, 2006, at 50.

array of menu options,” and must enter their Social Security number to speak to a live operator.³⁵⁷ According to Macy’s, it is trying to strike a balance between customer service and minimizing costs.³⁵⁸

After acquiring May, Macy’s cut at least 6,200 jobs, including regional buyers.³⁵⁹ Regional headquarters were eliminated in Boston, Los Angeles, Houston, and Arlington, Virginia, for a total loss of 1,900 jobs.³⁶⁰ One-thousand-seven hundred jobs were eliminated in St. Louis, May’s former headquarters.³⁶¹ In contrast, Chicago, whose residents may have complained more vigorously than the residents of any other city, lost only 250 jobs; in addition, Macy’s tentatively agreed to bring Frango Mint production back to the Chicago area with a test kitchen in the flagship downtown store.³⁶²

In addition to services directly related to customer purchases—including store hours, the number of employees available for assistance, and brand selection—department stores have long been known for community service. Specifically, department stores have typically been large contributors to local philanthropy, sponsors of community events and the host of a variety of in-store services not conveniently found—if at all—elsewhere.³⁶³ It remains to be seen whether a corporation headquartered in a distant city with little local management or control will be as charitable to local organizations.

From the first display windows that created the phenomenon of window shopping,³⁶⁴ department stores have been a nexus of community events that promote shopping, but also create value for communities by hosting cherished local traditions. A full catalog of these long-time practices would fill a book, but they include Jordan

357. Jolayne Houtz, *Navigating the Phone Maze; Our New List of Automated-Phone-System Tricks Just Might Get You to a Human Before You Hit the Wall*, SEATTLE TIMES, Nov. 12, 2006, at M1.

358. *Id.*

359. David Moin, *Terry Lundgren’s Macro/Micro Game Plan for Federated*, WOMEN’S WEAR DAILY, Nov. 28, 2005, at 1.

360. Susan Chandler, *Pain of a Name Change Cutting Deeper in Chicago*, CHI. TRIB., June 4, 2006, at C1.

361. *Id.* St. Louis retained other jobs because it was designated headquarters of Macy’s Midwest. *Id.*

362. *Id.* Target had outsourced Frango Mint production to a company in Pennsylvania. *Id.*

363. See generally Jeffrey Sheban, *For Many, It Was the Heart of the City*, COLUMBUS DISPATCH, Aug. 8, 2004, at 1F.

364. SCHLERETH, *supra* note 26, at 148.

Marsh's enchanted village in Boston;³⁶⁵ Rich's pink pig train³⁶⁶ and the lighting of the tree on the crystal bridge in Atlanta;³⁶⁷ Burdine's Circus in the Sky in Miami;³⁶⁸ Foley's Thanksgiving Day Parade in Houston;³⁶⁹ local fireworks, Thanksgiving³⁷⁰ and Christmas parades, and of course visits by Santa Claus. Most local traditions have now been replaced by one Thanksgiving parade³⁷¹ and one Fourth of July fireworks display,³⁷² sponsored by Macy's in New York City, but broadcast on national television. This cost-cutting is surely a rationalization of services, but it suggests a decrease in service or output, and an increase in price—paying the same or more but getting less.³⁷³

365. Matt Viser, *Enchanted Village Is a Broken Spell*, BOSTON GLOBE, Nov. 29, 2006, at 1B.

366. See *the Pink Pig at Macy's Lenox Square*, Macy's, http://www.fds.com/pressroom/macys/common/download.asp?fn=/pressroom/macys/media_kits/190/docs/The_Pink_Pig_At_Macys.pdf (last visited Aug. 17, 2008). After closing Rich's downtown store, FDS eliminated the pink pig train in 1991. To meet community demands, Macy's created a brand new ride reminiscent of the pink pig (the original was a monorail; the new pink pig is a children's ride on a short circular track) running in a tent at Macy's Lenox Square Mall. See generally Susan Chandler, *Pain of a Name Change Cutting Deeper in Chicago*, CHI. TRIB., June 4, 2006 at C1; *Macy's Pink Pig*, Macy's, <http://www.macys.com/campaign/pinkpig/index.jsp> (last visited Aug. 17, 2008); *Priscilla the Pink Pig*, The New Georgia Encyclopedia, <http://www.georgiaencyclopedia.org/nge/Multimedia.jsp?id=m-9324> (last visited Aug. 17, 2008).

367. *M. Rich and Brothers and Co. Building*, City of Atlanta, <http://apps.atlantaga.gov/citydir/URBAN/MRich%20and%20Brothers%20and%20Co.htm> (last visited Aug. 17, 2008).

368. Robert Trigaux, *Burdines Not Alone in Retail Boneyard*, ST. PETERSBURG TIMES, Feb. 14, 2005, at 1D.

369. See generally *Thanksgiving Day Parade Loses Title Sponsor*, HOUSTON BUS. J., Jan. 11, 2006, <http://www.bizjournals.com/houston/stories/2006/01/09/daily26>; Press Release, *57th Annual H-E-B Holiday Parade Will Float Through the Streets of Downtown Houston on Thanksgiving Day: Themed "Superheroes," the Parade Will Celebrate Both Favorite Fictional Characters and Everyday Superheroes in the Greater Houston Community* (Oct. 12, 2006), <http://www.wamuparade.com/media/HEB%20Parade%20General%20Release%20FINAL.pdf>.

370. Thanksgiving was moved to the third Thursday in November from the fourth Thursday by President Franklin Roosevelt at the behest of chief executive of FDS, so the stores would have an extra week of pre-Christmas shopping. Feran, *supra* note 40; Saitz, *supra* note 40.

371. *Macy's Thanksgiving Day Parade*, Macy's, <http://www.macys.com/campaign/parade/parade.jsp> (last visited Aug. 17, 2008).

372. *Macy's Fourth of July*, Macy's, <http://www1.macys.com/campaign/sitelets/fireworks/direction.jsp> (last visited Aug. 17, 2008).

373. Macy's has, however, agreed to continue certain local traditions, generally after the local community has protested. See, e.g., Teresa F. Lindeman, *Pittsburgh Traditions to Live on as Kaufmann's Stores Become Macy's*, PITTSBURGH POST-GAZETTE, July 27, 2006, <http://www.post-gazette.com/pg/06208/708982-28.stm> (Post-Thanksgiving parade, holiday windows and "Santaland"); Steve Tawa, *Macy's Opens in Former John Wanamaker Store*, KYW NEWSRADIO 1060 PHILADELPHIA, <http://www.kyw1060.com/pages/63717.php?contentType=4&contentId=181420> (last visited Aug. 17, 2008) (Wanamaker's Christmas Light Show in Philadelphia).

2. Fewer Choices

The FTC “carefully reviewed the voluminous investigative record” for indications that Macy’s would “[reduce the] merchandise assortment” and found none.³⁷⁴ Again, despite the FTC’s best efforts, Macy’s has defied predictions.

Even before Macy’s eliminated the name Marshall Field’s, Prada pulled its product out of the former Marshall Field’s stores.³⁷⁵ Though Prada refused to comment, a retail consultant suggested that “[h]igh-end brands only want to be in high-end stores, places that they think are consistent with their brand image Perhaps some of these designers don’t feel that Macy’s is the same level as Marshall Field’s. I think most customers don’t, either.”³⁷⁶

Prada was only the first designer to jump ship. Also deciding not to sell in Macy’s were Miu Miu, Dsquared, Dolce & Gabbana (for men), and Jimmy Choo.³⁷⁷ Elizabeth Arden pulled out of the salons.³⁷⁸ YSL left Marshall Field’s for Neiman Marcus.³⁷⁹ Prada, David Yurman, and Gucci (shoes) went to Nordstrom. For the most part, Macy’s in-house brands have taken their place.³⁸⁰

Vendors, particularly smaller ones, fear Macy’s enormous size, perhaps even a monopsony in certain geographic markets. “There’s a huge portion of the vendor community that feels very threatened,” according to an investment banker specializing in apparel.³⁸¹ Not only are vendors eliminated simply because of the consolidation of

374. Statement of the Commission Concerning Federated Department Stores, Inc./The May Department Stores Company, FTC File No. 051-0111 at 4 (FTC 2005).

375. Allison Kaplan, *High-End Prada Decides Macy’s Isn’t a Good Fit*, MINNEAPOLIS-ST. PAUL PIONEER PRESS, May 17, 2006, at 1C.

376. *Id.*

377. Thomas Lee & Sara Glassman, *The Uncertain Future of the American Department Store; With the Switch to Macy’s, Federated Has the Daunting Task of Wooing Core Marshall Field’s Shoppers, Who Still Care About Things Like Holiday Windows*, MINNEAPOLIS STAR TRIB., Sept. 3, 2006, at 1A.

378. *Id.*

379. Sandra Jones, *Field Days Here for Macy’s Rivals; Other High-End Stores in the Area Were Quick to Offer Space When Designers Loyal to Field’s Were Displaced*, CHI. TRIB., Feb. 28, 2007, at C1.

380. Sandra Jones, *House Brands Heavy at Macy’s; Federated Uses a Legion of Designers to Help Set Its Clothes, Other Products Apart, Increase Profitability*, CHI. TRIB., Sept. 8, 2006, at C1.

381. *Merger Could Change Local Malls; Retail: Shoppers Unhappy About Macy’s Owner’s Buy of Robinsons-May*, LONG BEACH PRESS-TELEGRAM, Mar. 1, 2005, at A1.

department stores, but smaller vendors simply cannot serve the larger structure.³⁸²

C. State Action Will Cure Possible Problems

One puzzling statement made by the FTC concerns remedial action by other antitrust authorities. Specifically, in justifying the end of its own investigation, the FTC said that “participation by state agencies, which are familiar with specific local conditions, may be particularly helpful . . . and we also note that inquiries by various individual state antitrust agencies are ongoing.”³⁸³ Effectively, the FTC was ceding its authority to the states.

Every state can in theory pursue antitrust remedies in its capacity as *parens patriae* under the federal antitrust law,³⁸⁴ and most states can bring antitrust actions based on their respective “Little FTC Act.”³⁸⁵ Many states have enacted specific antitrust laws patterned on the federal Sherman and Clayton Acts.

In the Macy’s/May merger, the Attorneys General of California, Maryland, Massachusetts, New York, and Pennsylvania conducted their own antitrust investigation and required Macy’s to divest twenty-six duplicate stores in malls, demanding that the stores could only be sold to other traditional department stores.³⁸⁶ But some states refuse to bring antitrust suits claiming a lack of authority to do so.³⁸⁷

For example, in 1998, Daryl Robinson, deputy counsel to then Georgia Attorney General Thurbert Baker said, “[w]e do not have a state antitrust law, and so don’t have statutory authority to bring such

382. *Id.*

383. Statement of the Commission Concerning Federated Department Stores, Inc./The May Department Stores Company, FTC File No. 051-0111 at 4 (FTC 2005).

384. See, e.g., 15 U.S.C. §§ 15(f)–(g); *California v. ARC Am. Corp.*, 490 U.S. 93 (1989); *Illinois Brick Co., v. Illinois*, 431 U.S. 720 (1977); *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972).

385. See generally Mark D. Bauer, *The Licensed Professional Exemption in Consumer Protection: At Odds with Antitrust History and Precedent*, 73 TENN. L. REV. 131, 140–47 (2006).

386. *Assurance, State of New York, State of California, Commonwealth of Massachusetts, Commonwealth of Pennsylvania and State of Maryland against Federated Department Stores, Inc.*, <http://www.oag.state.ny.us/press/2005/aug/Federated%20Assurance.pdf> (last visited Aug. 17, 2008).

387. See, e.g., Jennifer Brett, *Rich’s, Macy’s Can Stay at Mall but if Federated Sells Either Store, J.B. White’s May Consider Move, Company Spokesman Says*, ATLANTA J. CONST., Dec. 1, 1994, at B7; Gene Tharpe, *No Antitrust Law = No Antitrust Suit; But Why Not? Citing Lack of Authority, Georgia Did Not Take Part in the Microsoft or Tobacco Cases*, ATLANTA J. CONST., July 5, 1998, at 4G.

actions[.] . . . But having said that, if the federal government is filing an antitrust suit, we will get the benefit of whatever relief they get.”³⁸⁸

In Georgia, Rich’s and Macy’s consolidated during the Campeau era (closing both downtown Atlanta stores), and the state was not affected by Macy’s acquisition of May. But states other than California, Maryland, Massachusetts, New York, and Pennsylvania were impacted by this merger, and some of them may have been relying on the FTC to take decisive action.

D. What the FTC Did Not Discuss: Entry Barriers, Monopsony And Mall Owners

In trying to determine the effect of the Macy’s/May merger on non-price competition, the FTC interviewed interested vendors and mall owners, viewing them as “particularly useful surrogates for consumers.”³⁸⁹ The problem is that the interests of mall owners and consumers may be at significant variance.

At first glance, mall owners’ interests could conceivably be in line with consumers. Mall owners have an interest in “maximizing consumer traffic”³⁹⁰ as well as keeping consumers happy and interested (and coming back for more). At least in theory, mall owners should prefer a large number of department-store companies and brand names in order to have the maximum number of choices for anchor stores, and even to have the maximum number of anchors physically possible within the confines of the mall’s real estate.

In fact, malls originally developed as long corridors connecting two or more department-store anchors, whose aggressive advertising brought ample traffic to the mall.³⁹¹ In turn, department stores either owned their anchor space or were given long-term leases requiring

388. Tharpe, *supra* note 387.

389. Statement of the Commission Concerning Federated Department Stores, Inc./The May Department Stores Company, FTC File No. 051-0111 at 4 (FTC 2005).

390. *Id.*

391. Andy Fixmer, *Mall Owners Won’t Lament Federated-May Deal: Sales Rise As Department Stores Depart*, L.A. BUS. J., Mar. 7, 2005, at 1.

little or no rent, and mall owners made money renting space in between the department stores.³⁹²

But the answer to whether mall owners and consumers have identical interests is quite complicated today, and the FTC's reliance on the opinion of mall owners may be misplaced. Shopping malls have evolved from being relatively small or local efforts, often substantially funded or owned by a local department store, to being units in vast real-estate empires, often owned or controlled by Real Estate Investment Trusts (REIT),³⁹³ which are often publicly owned and traded on exchanges. As malls are traded and sold, their value depends in part on the traffic, revenues, and the caliber of tenants. Mall owners, therefore, have been substantially affected by both the constant turmoil stemming from department store consolidation, as well as the bankruptcies of Macy's, FDS, Allied, CHH, and others.³⁹⁴

The financial stability and credit worthiness of a major anchor affects the value of the mall itself.³⁹⁵ When a department store is owned by a venture capital firm—as is true for Lord & Taylor since its divestiture from Macy's in 2007—there is a perception among shopping center owners that it will not be a stable long-term anchor tenant.³⁹⁶ All this instability affects the value of the shopping center, and in turn the stock price or credit worthiness of the REIT.³⁹⁷

For example, Macerich Co., a REIT owning several shopping malls,³⁹⁸ found itself with four anchors at The Oaks Mall in Thousand Oaks, California, all owned by Macy's.³⁹⁹ Even worse, Macy's had to divest some of these stores to comply with an agreement with the California Attorney General, and there was no guarantee Macy's

392. *Id.*; see also Sandra Jones, *Water Tower Gets All Dolled Up, Boosts Sales; \$35 Million in Updates, Including New and Renovated Stores, Is Paying off for the Mall, Despite the Weakening Economy*, CHI. TRIB., July 21, 2008, at C1.

393. See generally Brannon Boswell, *Merger Good for Mall Industry, Landlords Say*, SHOPPING CENTERS TODAY, Apr. 2005.

394. See generally Comment, *Regional Mall REITs*, MERRILL LYNCH, Nov. 24, 2003.

395. See generally Jon Springer, *Industry Weighs Implications of Grocery Mergers*, SHOPPING CENTERS TODAY, Oct. 1999.

396. *Id.*

397. *Id.*

398. Macerich Co. Overview, <http://www.macerich.com/overview.asp> (last visited Aug. 17, 2008).

399. Shelly Garcia, *Breakthrough at the Oaks: Purchase of Center Anchors Will Speed Expansion Plans*, SAN FERNANDO VALLEY. BUS. J., June 5, 2006, at 1.

would sell to any entity Macerich would want at the mall.⁴⁰⁰ Macerich agreed to purchase two of the anchor department store spaces from Macy's and plans to tear them down.⁴⁰¹ In place of one of the Macy's stores, Macerich will add Nordstrom; the other space will include smaller retail stores and, the REIT hopes, a movie theater.⁴⁰²

Macerich is not alone in turning department store anchor space into something else. In Phoenix, Westcor Partners turned three stories of vacant department-store space into an MCI call center.⁴⁰³ At Westfield Shoppingtown Wheaton, outside Washington, D.C., the mall was anchored by both Hecht's (a former May brand) and Macy's.⁴⁰⁴ The mall owners will buy the Hecht's store from Macy's and try to remarket it to Best Buy or some other big box discounter.⁴⁰⁵ These are just a few examples.⁴⁰⁶

It is possible that several factors are at work: 1) mall owners are loathe to continue to see the value of their properties decline overnight because department stores declare bankruptcy, consolidate or close;⁴⁰⁷ 2) mall owners have found that although they still cannot live without at least some department stores,⁴⁰⁸ converting anchor space into big box retailers (e.g. Best Buy or Barnes & Noble), movie theaters, restaurants or other traffic generators will suffice;⁴⁰⁹ and 3) having gradually been weaned by department stores (whether by

400. *Id.* See Boswell, *supra* note 393; see also *Assurance, State of New York, State of California, Commonwealth of Massachusetts, Commonwealth of Pennsylvania and State of Maryland against Federated Department Stores, Inc.*, <http://www.oag.state.ny.us/press/2005/aug/Federated%20Assurance.pdf> (last visited Aug. 17, 2008).

401. *Id.*

402. *Id.*

403. Anne Watson, *Owners Finding New Uses for Old Centers*, INT'L COUNCIL OF SHOPPING CENTERS, May 2002, <http://icsc.org/srch/sct/sct0502/page82.php> (last visited Aug. 17, 2008).

404. Dana Hedgpeth and Michael Barbaro, *Shaking Up Regional Retail; Federated-May Merger Likely to Bring Closings, Reshuffling*, WASH. POST, Mar. 1, 2005, at E1.

405. *Id.*

406. See also Fixmer, *supra* note 391; Debra Hazel, *Check-in Time*, SHOPPING CENTERS TODAY, Nov. 2003; Michael Sasso, *Changes in Store for Malls*, TAMPA TRIB., May 24, 2006, at 1.

407. See generally Ben Johnson, *The Future of the Department Store*, RETAIL TRAFFIC, Aug. 1, 2002, http://retailtrafficmag.com/mag/retail_future_department_store.

408. *Id.*; Boswell, *supra* note 393; Dody Tsiantar, *Department-Store Superstar*, TIME, Feb. 13, 2006.

409. *Id.*

choice or circumstance), mall owners have come to enjoy the benefits of owning anchor space and generating rents from them.⁴¹⁰

In the end, the Horizontal Merger Guidelines standard of entry being “timely, likely, and sufficient”⁴¹¹ is not being facilitated by mall owners tearing down empty department stores. Though new entry remains possible—assuming there are any department store companies left to take an anchor position—expansion increasingly requires the construction of a new anchor building and potential reconfiguration of the mall.

Macy’s may be a monopsony in many geographic markets; mall owners are doing their best to reduce dependence on an organization with market power and in fact have other options for traffic-building tenants. Consumers, however, may not be as fortunate, and the FTC’s reliance on mall owners as a proxy for consumer opinion may have been misplaced.

Furthermore, when Macy’s first announced its proposed acquisition of May and antitrust concerns were raised in the media, Macy’s pointed out that the overlap between the department store groups was limited to a few states.⁴¹² This, however, discounts theories of perceived potential competition (where the threat of entry limits anticompetitive behavior by the incumbent firm)⁴¹³ or actual potential competition (where the incumbent acquires a firm that would otherwise have entered the market and made it more competitive).⁴¹⁴ The FTC did not publicly disclose whether it

410. See Boswell, *supra* note 393; Fixmer, *supra* note 391; Jones, *supra* note 392; *Mega-Mergers: It’s All About the Real Estate*, 6 CO-STAR ADVISOR Issue 2 (on file with Georgia State University Law Review) (hereinafter *Mega-Mergers*); see generally Garcia, *supra* note 399; David Koch, *Anchors Anew*, RETAIL TRAFFIC, Dec. 1, 2004, http://retailtrafficmag.com/mag/retail_anchors_anew/index.html;

411. U.S. Horizontal Merger Guidelines 3.0, http://www.usdoj.gov/atr/public/guidelines/horiz_book/30.html (last visited Oct. 23, 2009).

412. Berk, *supra* note 207.

413. See, e.g., *United States v. Marine Bancorporation*, 418 U.S. 602, 639–40 (1974); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 532–34, n.13 (1973); *F.T.C. v. Procter & Gamble Co.*, 386 U.S. 568, 581 (1967). See also GAVIL, KOVACIC & BAKER, *supra* note 263, at 453–54. See generally U.S. Horizontal Merger Guidelines 1.0, http://www.usdoj.gov/atr/public/guidelines/horiz_book/10.html (last visited Oct. 23, 2009).

414. *Tenneco, Inc. v. FTC*, 689 F.2d 346, 353–54 (2d Cir. 1982); *Mercantile Texas Corp. v. Bd. of Governors*, 638 F.2d 1255, 1265–66 (5th Cir. 1981); *BOC Int’l Ltd. v. FTC*, 557 F.2d 24 (2d Cir. 1977); *In re B.A.T. Industries*, 104 F.T.C. 852, 916–48 (1984). See also GAVIL, KOVACIC & BAKER, *supra* note

considered perceived potential competition or actual potential competition. Unfortunately, it is not possible for even an interested observer without the FTC's compulsory authority to hazard a guess as to whether Macy's or May would have entered the other's geographic market were it not for the merger.⁴¹⁵

CONCLUSION

The perfect markets contemplated by law and economics predict that consumers always maximize welfare by making efficient choices. Yet something important is going on with department stores that is not accurately reflected in a law and economics analysis. These factors together have created a perfect storm of sorts that has touched a nerve in many shoppers.

The experience of shoppers in Philadelphia is illustrative. In 1979, after more than one hundred years of family involvement, Wanamaker's was sold to California-based CHH,⁴¹⁶ which had just tried and failed to buy Marshall Field's (which had just tried and failed to buy Wanamaker's.)⁴¹⁷ In 1986, after incurring considerable debt to fight two hostile take-over attempts, CHH sold Wanamaker's to real estate developer Alfred Taubman of Detroit, who had incurred considerable debt a few years earlier acquiring Woodward & Lothrop of Washington, D.C.⁴¹⁸ Taubman converted most of the historic Wanamaker's building in Center City Philadelphia into offices, leaving a pared-down department store without most of its departments.⁴¹⁹ All management and fashion buying decisions were taken out of local Philadelphia hands and consolidated in

263, at 453–54. See generally U.S. Horizontal Merger Guidelines 1.0, http://www.usdoj.gov/atr/public/guidelines/horiz_book/10.html (last visited Oct. 23, 2009).

415. It is possible that because the FTC defined the market as going far beyond traditional department stores that it did not consider theories of perceived potential competition or actual potential competition.

416. CHH eventually went bankrupt and was acquired by FDS. Diana B. Henriques & David Cay Johnston, *Managers Staying Dry As Corporations Sink*, N.Y. TIMES, Oct. 14, 1996, at A1.

417. HENDRICKSON, *supra* note 26, at 81; WHITAKER, *supra* note 23, at 28–29.

418. WHITAKER, *supra* note 23, at 28–29.

419. *Id.* See also Von Bergen, *supra* note 43.

Washington, a city not generally known as one of the great fashion capitols of the world.⁴²⁰

Taubman put both Wanamaker's and Woodward & Lothrop into bankruptcy in 1994 and then shuttered both chains. In 1995, May purchased thirteen Wanamaker's stores, renaming all of them Hecht's (a Baltimore/Washington regional department store).⁴²¹ In 1996, May acquired another Philadelphia department store, the family-owned Strawbridge and Clothier, and renamed all the recently renamed Philadelphia Hecht's stores as Strawbridge's, except for the original Center City Wanamaker's store, which was recast as Lord & Taylor.⁴²² When Macy's acquired May in 2005, it renamed all the Strawbridge's stores (*née* Wanamaker's and *née* Hecht's) Macy's. Then it closed the original Center City Strawbridge's store (doing business on that site since 1868) and converted what was left of the original Wanamaker's store from a Lord & Taylor into a Macy's.

Are these department stores retail "dinosaurs," as many commentators have called them, or are customers simply confused?⁴²³ The mere fact that department stores have generally returned steady profits despite such upheavals is a testament to the overall strength of the institution.

It is certainly possible that there was an oversupply of department stores and some consolidation and rationalization of operations was necessary for efficiency. It is also possible that a lax Wall Street regulatory climate and hunger for junk bonds allowed profitable and popular enterprises with valuable intangibles and real estate to be chopped up for short-term profit and then swallowed by a sea of debt.⁴²⁴

420. *Id.* See generally Unspoken Rule, *Congress: Dressing for the Legislative Look*, N.Y. TIMES, Apr. 26, 1984, at B10; Fay Fiore, *California Dreamy: Congressman Hunk*, L.A. TIMES, Oct. 7, 1994, at A3.

421. WHITAKER, *supra* note 23, at 28–29.

422. *Id.*; Gopnik, *supra* note 195.

423. See, e.g., Suzanne S. Brown, *Meet the New Department Store*, DENV. POST, Sept. 3, 2006, at L1; Sandra Guy, *Changes Aim To Save Tradition*, CHI. SUN-TIMES, Sept. 8, 2006, at 55; Sandra Jones, *May-Federated Merger Could Add to Overstock of Space; Expected to Shut 75–100 Stores Even as Other Retailers Jettison Sites*, CRAIN'S CHI. BUS., Mar. 7, 2005, at 2; Lee & Glassman, *supra* note 377.

424. See *Mega-Mergers*, *supra* note 410.

None of these changes, in Philadelphia and elsewhere, could possibly have been good for business. They were short-term decisions made for immediate profit, and to monetize real estate assets; they were not good for the long-term profitability of department stores and probably the reason the industry came to be thought of as outdated and dying.

Antitrust has its roots in the same populist era in which department stores arose. Department stores and the antitrust laws share common origins and ideals of consumerism and democracy.⁴²⁵ The subrogation of antitrust to the field of economics ignores its roots as a “charter of freedom.”⁴²⁶

There is another side to antitrust: not every decision by consumers is about buying the lowest-price good and maximizing allocative efficiency. And putting the department stores on sale—rather than the goods contained therein—has done nothing to improve competition, innovation, or consumer choice.

Consumers not only care about service and ambience—Macy’s experience shows that consumers are also concerned by a homogenization of retail choices, a loss of civic identity and at least perceived disrespect by distant corporations that have usurped cherished local institutions. These issues demand further investigation by the FTC.⁴²⁷

425. See 51 CONG. REC. 11228, 11105, 11109, 14936 (1914) (statements of Sens. Robinson, Cummings, Newlands and Rep. Stevens); Averitt, *supra* note 13, at 225, 230–31; Winerman, *supra* note 13, at 75–76, 90.

426. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940).

427. The FTC has authorization to issue subpoenas to corporations whose business affects commerce. 15 U.S.C. § 46(b).

