Florida Law Review

Volume 27 | Issue 2 | Article 13

January 1975

Monopolies: Clayton Section 7 and the Potential Competition Doctrine–What Sort of Standards for Commercial Banks?

W. Robinson Frazier

Follow this and additional works at: https://scholarship.law.ufl.edu/flr

Part of the Law Commons

Recommended Citation

W. Robinson Frazier, *Monopolies: Clayton Section 7 and the Potential Competition Doctrine--What Sort of Standards for Commercial Banks?*, 27 Fla. L. Rev. 574 (1975).
Available at: https://scholarship.law.ufl.edu/flr/vol27/iss2/13

This Case Comment is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Law Review by an authorized editor of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.

Frazier: Monopolies: Clayton Section 7 and the Potential Competition Doctr

MONOPOLIES: CLAYTON SECTION 7 AND THE POTENTIAL COMPETITION DOCTRINE – WHAT SORT OF STANDARDS FOR COMMERCIAL BANKS?

United States v. Marine Bancorporation, Inc., 94 S. Ct. 2856 (1974)

The United States brought a civil antitrust action under section 7 of the Clayton Act[1] to challenge a proposed merger between two commercial banks. The acquiring bank, National Bank of Commerce (NBC), was a large, nationally chartered bank based in Seattle, Washington.[2] The acquired bank, Washington Trust Bank (WTB), was a medium-sized, state-chartered bank located at the opposite end of the state in Spokane.[3] The banks were not direct competitors to any significant degree in Spokane or any other part of the state. Accordingly, the United States based its case exclusively on the potential competition doctrine under section 7 of the Clayton Act.[4] The district court, after a full trial, concluded that the proposed merger would not violate section 7.[5] On direct appeal,[6] the United States Supreme Court affirmed and HELD, in applying the potential competition doctrine to commercial banking, courts must take into account the extensive federal and state regulation of banks, particularly the legal restraints on entry unique to that line of commerce.[7]

Section 7 of the original Clayton Act and its 1950 amendments were enacted to stem the rising tide of economic concentration in the American economy.[8] Concentration in the banking industry was deemed particularly

1. 15 U.S.C. §18 (1973) provides in pertinent part: "[N]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation . . . shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition . . . ."

2. "NBC is a wholly owned subsidiary of a registered bank holding company, Marine Bancorporation, Inc., and in terms of assets, deposits, and loans is the second largest banking organization with headquarters in the state of Washington. At the end of 1971, NBC had total assets of $1.8 billion, total deposits of $1.6 billion, and total loans of $881.3 million." 94 S. Ct. 2856, 2862 (1974).

3. "WTB is the eighth largest banking organization with headquarters in Washington and the ninth largest banking organization in the State. At the end of 1971, it had assets of $112 million, total deposits of $95.6 million, and loans of $57.6 million." *Id.*

4. "The United States sought to establish that the merger 'may . . . substantially . . . lessen competition' within the meaning of section 7 . . . by eliminating the prospect that NBC would enter Spokane *de novo* or through acquisition of a smaller bank." Brief for Appellant at 27-28, *quoted* in 94 S. Ct. at 2866.

5. United States v. Marine Bancorporation, 1973-1 Trade Cas. ¶74,496 (W.D. Wash. 1973).

6. The Government brought a direct appeal to the United States Supreme Court under the Expediting Act. 15 U.S.C. §29 (1973).

7. 94 S. Ct. 2856 (1974) (White, Brennan, Marshall, JJ. dissenting) (Douglas, J., took no part in the decision).

8. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962), *quoting* H.R. REP. No. 1191, 81st Cong., 1st Sess. 3 (1949): "That the current merger movement [during the years 1940-1947] has had a significant effect on the economy is clearly revealed by the fact that the asset value of the companies which have disappeared through mergers amounts to 4.2 billion dollars, or no less than 5.5 percent of the total assets of all manufacturing corpora-

Published by UF Law Scholarship Repository, 1975

dangerous, for "if the costs of banking services and credit are allowed to become excessive by the absence of competitive pressures, virtually all costs, in our credit economy, will be affected."[9]

Since 1963 it has been the general rule that standard section 7 principles applicable to unregulated industries apply equally to mergers between commercial banks.[10] *United States v. Philadelphia National Bank,*[11] which expounded this doctrine, and subsequent bank merger cases[12] involved horizontal acquisitions[13] between banks in actual competition. Accordingly, the "standard section 7 principles" applicable in these cases were the well developed concepts of market structure analysis,[14] reflective of section 7's apparent focus upon companies in actual competition.[15]

Under the doctrine of "potential competition" the scope of section 7 has been extended to the geographic market extension merger[16] involving noncompeting firms. This doctrine has evolved over the past decade through a number of Supreme Court decisions[17] involving acquisitions between conventional manufacturing firms. In these cases the Supreme Court has been concerned with at least three factors in regard to lessening of potential competition: (1) the elimination of the acquiring firm as a future independent en-

---

tions — a significant segment of the economy to be swallowed up in such a short period of time."

9. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 372 (1963).

10. *Id.* at 365.

11. 374 U.S. 321 (1963).

12. *See, e.g.,* United States v. Phillipsburg Nat'l Bank, 399 U.S. 350 (1970); United States v. Third Nat'l Bank, 390 U.S. 171 (1968); United States v. First Nat'l Bank, 376 U.S. 665 (1964).

13. A horizontal merger is one between companies performing similar functions in the production or sale of comparable goods or services.

14. This analysis proceeds in three distinct steps. First, there must be a determination of the "line of commerce" involved (relevant product market). In the banking context, the Supreme Court has invariably held that the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term "commercial banking," composes a distinct line of commerce. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 356 (1963). Second, there must be a determination of the "section of the country" involved (relevant geographic market). In bank merger cases this has been held to be the local community in which the merging firms' offices were located. *Id.* at 356-62. Third, there must be a determination of the probable effect of the merger. If the merger produces a firm controlling an undue percentage share of the relevant market and so results in a significant increase in the concentration of firms in that market, then it is "so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *Id.* at 363.

15. See note 1 *supra.*

16. The geographic market extension merger entails an acquisition of a firm operating within a target market by a noncompetitor at the edge of the target market. The acquired and acquiring companies manufacture the same products, but sell them in different geographic markets — for example, a fluid milk distributor in Washington and a fluid milk distributor in Miami.

17. The potential competition theory is derived from three principal cases: FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964).

Frazier: Monopolies: Clayton Section 7 and the Potential Competition Doctr

trant,[18] (2) the elimination of the present influence of the acquiring firm as a potential entrant[19] into a concentrated market,[20] and (3) the threat that the acquisition of an already dominant firm by a much larger outside firm will in fact perpetuate the dominance of the acquired firm and perhaps eliminate all competition in the market.[21]

Potential competition applies most significantly to concentrated markets, which are characterized by "imperfect competition."[22] Since the banking industry has achieved that trait the Department of Justice has attempted to invoke the theory[23] in several suits attacking geographic market extension mergers[24] between commercial banks. The instant case is the first[25] to squarely present to the Court the threshold issue of the applicability of the potential competition doctrine to commercial banking.

Relying on principles enunciated in prior bank merger cases involving

---

18. An independent entry by the acquiring firm may take either of two forms: entry de novo or entry by acquisition and expansion of a smaller firm (a so-called "foothold" acquisition). The preference for independent entry stems from the belief that a firm entering in this manner does so as a challenger to the status quo rather than an inheritor of it. The new entrant has every incentive to increase its market position by adopting procompetitive measures such as new services, lower prices, and longer hours. See Baker, *Potential Competition in Banking: After Greely, What?*, 90 BANKING L.J. 362 (1973).

19. A firm standing on the fringes of a market gives rise to what is commonly known as the "wings effect": the probability that the existing firm's perception of the acquiring firm as a potential de novo entrant exerted premerger procompetitive effects within the target market. *See* United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973). The theory presumes that if a firm is aware another is on the "periphery" or "in the wings" of its market, with the ability and desire to enter, the conduct of the first firm will be affected as though the second firm were already competing in the market.

20. Concentration measures market structure in terms of the number of firms in a market and their relative sizes. For example, a market is concentrated if the four largest competitors control 75% of the market. A merger in such a market is suspect where the acquiring and acquired concerns have as little as 4% of the market. The larger the acquirer, the greater its susceptibility to close scrutiny. U.S. Department of Justice, *Merger Guidelines*, 1 TRADE REG. REP. ¶4510 (1974).

21. *See* FTC v. Procter & Gamble Co., 386 U.S. 568, 581 (1967).

22. "Imperfect competition" may be defined as "competition among sellers of inhomogeneous products in which the sellers are sufficiently few in number so that each exerts an influence upon the market." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1133 (1931).

23. The Government maintains that the principles developed in cases involving nonregulated industries also apply to banking, a regulated industry. The cases from which the potential competition doctrine emerged are collected in note 17 *supra*.

24. In addition to the district court decision in the instant case, see United States v. Connecticut Nat'l Bank, 362 F. Supp. 240 (D. Conn. 1973), *vacated*, 94 S. Ct. 2788 (1974); United States v. United Virginia Bankshares, Inc., 347 F. Supp. 891 (E.D. Va. 1972); United States v. First Nat'l Bancorporation, Inc., 329 F. Supp. 1003 (D. Colo. 1971), *aff'd mem.*, 410 U.S. 577 (1973); United States v. Idaho First Nat'l Bank, 310 F. Supp. 261 (D. Idaho 1970); United States v. First Nat'l Bank, 310 F. Supp. 157 (D. Md. 1970); United States v. First Nat'l Bank, 301 F. Supp. 1161 (S.D. Miss. 1969); United States v. Crocker-Anglo Nat'l Bank, 277 F. Supp. 133 (N.D. Cal. 1967) (three-judge court).

25. Actually, United States v. First Nat'l Bancorporation, Inc., 329 F. Supp. 1003 (D. Colo. 1971), *aff'd mem.*, 410 U.S. 577 (1973), was decided first. The Court, by a 4-4 vote, simply affirmed per curiam the district court's decision.

Published by UF Law Scholarship Repository, 1975

actual competition,[26] the Court held geographic market extension mergers by commercial banks subject to the potential competition doctrine.[27] The majority added the qualification, however, that application of the doctrine must take into account the unique federal and state regulatory restraints on entry into that line of commerce.[28]

The extent to which this qualification affects the full application of the potential competition doctrine is the source of the split between majority and dissent. The majority's position is illustrated by its treatment of the Government's major potential competition arguments. The Government contended that the merger violated section 7 because it eliminated the possibility that NBC might enter Spokane de novo or through a foothold acquisition. Entry by either of these means, it was argued, would be likely to produce deconcentration of the Spokane market over the long run or have other procompetitive effects.[29] Further, the Government argued that the challenged merger was illegal under established doctrine because it eliminated NBC as a perceived potential entrant standing "in the wings."[30]

The majority's analysis of the deconcentration theory focused upon the realistic probability of entry by NBC into the Spokane market and the likely effect of the various entry methods on the characteristics of the Spokane commercial banking market.[31] As to the possibility of entry by NBC, the Government contended that the alternate modes of "sponsorship" and foothold acquisition were available.[32] Although unconvinced about the feasibility of

26. 94 S. Ct. at 2872.

27. 94 S. Ct. at 2873.

28. Federal law subjects nationally chartered banks to the branching limitations imposed on their state counterparts. 12 U.S.C. §36(c) (1973). Accordingly, NBC's plans for expansion were affected by WASH. REV. CODE §30.40.020 (1973), which provides that no state chartered bank "shall establish or operate any branch . . . in any city or town outside the city or town in which its principal place of business is located in which any bank, trust company, or national banking association regularly transacts a banking or trust business, except by taking over or acquiring an existing bank, trust company, or national banking association . . . ."

The ability to acquire existing banks is limited by WASH. REV. CODE §30.08.020(7) (1973), which requires banks incorporating in Washington to include in their articles of incorporation a clause providing: "for a stated number of years, which shall not be less than ten . . . no voting share of the corporation shall, without the prior written approval of the supervisor, be affirmatively voted for any proposal which would have the effect of sale, conversion, merger, or consolidation to or with, any other banking entity . . . ." Furthermore, once a bank acquires or takes over one of the banks operating in a city or town other than the acquiring bank's principal place of business, it cannot branch from the acquired bank. WASH. REV. CODE §30.40.020 (1973).

29. 94 S. Ct. at 2875. The Court had previously declined to rule on the Government's deconcentration argument in United States v. Falstaff Brewing Corp., 410 U.S. 526, 537 (1973): "We leave for another day the question of the applicability of §7 to a merger that will leave competition in the marketplace exactly as it was, neither hurt nor helped, and that is challengeable under §7 only on grounds that the company could, but did not, enter *de novo* or through 'toe-hold' acquisition and that there is less competition than there would have been had entry been in such a manner."

30. *See* note 19 *supra*.

31. 94 S. Ct. at 2875-78.

32. In essence, "sponsorship" involves a procedure in which the prospective entrant ar-

these methods of entry, the majority assumed *arguendo* that either method conceivably could be successful.[33]

State law, which prohibits branching from a sponsored or foothold bank once either is acquired,[34] was determinative as to the likely effect of "sponsorship" or foothold acquisition. Entry by NBC into Spokane would be frozen at the level of its initial acquisition. This fact, coupled with the absence of evidence indicating that the three small banks presently in Spokane had had any meaningful effect on the economic behavior of the large Spokane banks,[35] led the majority to conclude that the posited methods of entry offered little realistic hope of ultimately producing deconcentration or other procompetitive effects in the Spokane market.[36]

State law also determined NBC's status as a perceived potential entrant. Commercial bankers in Spokane, the Court assumed, were aware of the regulatory barriers[37] that rendered NBC an unlikely or an insignificant potential entrant except by merger. Consequently, it was improbable that NBC exerted any meaningful procompetitive influence over Spokane banks by standing "in the wings."[38]

In the dissent's view, the Government offered sufficient evidence to make out a prima facie case under section 7, which, absent effective rebuttal, entitled the United States to judgment.[39] The majority's answer, that without branching NBC could have no reasonable likelihood of developing a signif-

---

ranges for the formation of a new bank. The entrant insures that the stock for such a new bank is placed in friendly hands, and then ultimately acquires the bank.

As an alternate method of entry, the Government contended that NBC could enter by a foothold acquisition of one of two small, state-chartered commercial banks that operated in metropolitan Spokane. There are no allegations that the third small bank in Spokane, a branch of a nationally chartered bank in Seattle, was a potential foothold acquisition. *Id.* at 2866.

33. The majority's doubt as to the availability of these methods of entry was based upon the state law constraints associated with each method. *See* note 28 *supra.*

34. WASH. REV. CODE §30.40.020 (1973).

35. It is unlikely that such an effect could have been demonstrated, given the negligible size of the small banks relative to the large banks. The three large Spokane banks had a total market share of 92.3%, leaving the three small banks with a combined market share of 7.8%. 94 S. Ct. at 2863.

36. *Id.* at 2878. The instant Court's use of the language of probability is consistent with prior cases. *See, e.g.,* United States v. Third Nat'l Bank, 390 U.S. 171, 173 (1968) ("tend to lessen competition"); United States v. Von's Grocery Co., 384 U.S. 270, 272 (1966) ("reasonable probability"); United States v. Penn-Olin Chem. Co., 378 U.S. 158, 170-71 (1965) ("reasonable likelihood").

37. *See* note 28 *supra.*

38. 94 S. Ct. at 2878.

39. The dissent's argument for a prima facie case under §7 proceeded as follows:

"The Spokane market was highly concentrated. NBC had the resources and the desire to enter the market. There were no impenetrable legal or economic barriers to its doing so; and it is sufficiently plain from the record that absent merger with WTB, NBC could and would either have made a foothold entry or been instrumental in establishing a sponsored bank in Spokane. But NBC chose to merge with a larger bank and to deprive the market of the competition it would have offered had it entered in either of two other ways." *Id.* at 2882.

icant share of the market, was repudiated because it bordered on a per se view that branching is a *sine qua non* to substantial competitive influence.[40]

The dissent also took issue with the majority's market share conclusion in support of its contention that small banks can grow rapidly and profitably. For instance, during the period 1966-1972 deposits in the three small banks in Spokane increased approximately 160 per cent and their market share rose from 3.9 per cent to 7.8 per cent.[41] This evidence indicated that a small entrant in the market should neither be deemed without influence in the market nor beyond the ambit of section 7.[42] This conclusion was underscored by the fact that the putative entrant was a large and successful banking organization with wide experience in developing new markets.[43]

The dissent found further error in the Court's holding that NBC could not be found to have exercised substantial influence on the Spokane market as a perceived potential entrant, particularly to the extent that the conclusion rested on a "branch disability" theory.[44] Preferring to rely on objective factors indicating awareness, the dissent concluded that the reasonably minded competitor in the Spokane market should have been aware of the likelihood and impact of an entry by NBC.[45]

As the dissent pointed out, the case as decided turned not on barriers to entry, but "barriers" to effective competition.[46] This outcome has firm foundation in both reason and economic realty. At the outset, it should be noted that inability to branch is not an *absolute* barrier to effective competition.[47] The majority did not disagree with the dissent's contention that small banks can grow rapidly and be profitable.[48] In the context of the Government's "deconcentration" theory, however, the branching disability did constitute a barrier *relative* to the prospect for long-run deconcentration.

---

40. *Id.*

41. *Id.* at 2883.

42. The banks relied on the experience of Pacific National Bank of Washington. In 1964 a large banking holding company acquired a foothold in Spokane by acquiring an existing small bank, but by 1972 it had gained only 2.2% of the total bank deposits in Spokane. A vice president of the bank testified at trial that its disappointing share of the market was probably due to its inability to branch. *Id.* at 2878.

43. See note 2 *supra.*

44. See text accompanying notes 37-38, 40-43 *supra.*

45. The only objective factor mentioned by the dissent to show probable awareness was NBC's acquisition negotiations with Farmers and Merchants Bank—a three-office suburban bank with about $13 million in deposits and 2.5% of the market—prior to its acquisition of WTB. 94 S. Ct. at 2885.

46. The dissent argued that these "barriers" to effective competition are not limited to regulated industries. It suggested that economic as well as legal barriers confront new competitors. *Id.* at 2886. The majority, however, limited the scope of the instant decision to the regulated industry of commercial banking, making clear that its holding rested primarily on state statutory barriers to de novo entry and to expansion following entry, which are unique to the commercial banking industry. *Id.* at 2879.

47. For example, the branching prohibition would not affect the ability of a new entrant to compete within the parameters of its initial entry. A newcomer, although limited to only a few offices, has every incentive to increase its market position. Moreover, it has the capability to do so by offering new services, lower prices, longer hours, and the like.

48. See text accompanying note 41 *supra.*

Even absent the branching prohibition, it would be extremely difficult for an entrant of negligible size to significantly reduce the 92.3 per cent market share of the three large Spokane banks. The success of such an attempt depends on the ability to freely and effectively compete. This ability entails the freedom on the part of firms to base their decisions regarding entry into a new geographic market on nonregulatory considerations including their own financial capabilities, their long-range goals as to markets, the cost of creating new production and distribution facilities, and above all, the profit prospects in the target market.[49]

Commercial banks lack this requisite range of alternatives. Entry and exit have been extensively regulated in the commercial banking business by the federal and state governments. Moreover, state law restricts de novo geographic expansion through branching and multibank holding companies.[50] The restriction on branching is highly significant because banking is a service industry wherein convenience of location is essential to secure customers and thus to compete effectively.[51]

In the context of the Government's "deconcentration" theory, NBC as a small de novo or foothold entrant would compete against the numerous branches of the three large Spokane banks.[52] Inability to branch and reach new customers is such a competitive disadvantage that a significant reduction in the larger banks' market share would be unlikely. NBC's competitive potential would very probably be frozen at the level of its initial entry.

The majority's position on NBC's status as a perceived potential entrant is similarly sound. Rational commercial bankers in Spokane probably are aware of the regulatory barriers that render NBC an unlikely or an insignificant potential entrant except by merger with WTB.[53] Allowance would be made for this factor in the banker's calculation of profit maximization.[54]

---

49. The Court's potential competition cases, which are collected in note 17 *supra,* have repeatedly noted these factors. *See* P. AREEDA, ANTITRUST ANALYSIS 517 (1967): "The sight of a particular firm 'waiting at the market's edge' may emphasize the entry threat, but it is ease of entry, not necessarily an identifiable potential entrant, that limits present market power by reminding existing firms that high profits will attract outsiders."

50. For an example one need only look at the Washington laws. *See* note 28 *supra.*

51. Individuals and corporations typically confer the bulk of their patronage on local banks; they find it impractical to conduct their banking business at a distance. *See* Transamerica Corp. v. Board of Governors, 206 F.2d 163, 169 (3d Cir. 1953). The factor of inconvenience localizes banking competition as effectively as do high transportation costs in other industries.

52. These branches are presumably situated in locations convenient to a large number of actual and potential customers.

53. See note 28 *supra.*

54. Industrial organization theory posits that the condition of entry, or height of the barrier to entry, tends to influence conduct and performance found in the market in two ways. First, it establishes a long-run limit on pricing, which established firms may choose not to exceed in order to forestall entry. This is a distinct possibility if the industry is oligopolistic and the established firms are thus large enough to take account of the effects of their price policies on the likelihood of new entry. Second, the decision of established firms to exceed the limit price will induce entry, increase industry output, and probably tend in the long run to keep that price from being exceeded. *See* J. BAIN, INDUSTRIAL ORGANIZATION 26-36 (1959).

Spokane bankers may then engage in anticompetitive activities, such as raising prices, on a scale consistent with NBC's perceived inability to enter the market freely. It is therefore improbable that NBC exerts any meaningful procompetitive influence over Spokane banks as a perceived potential entrant.

The practical effect of the instant decision is likely to be the encouragement of bank mergers in states with restrictive banking laws.[55] This result does not comport with section 7's policy of barring mergers that may contribute to further concentration in the structure of American business.[56] A contrary decision, however, would have resulted in an outcome hardly more desirable: a potentially stagnant and unresponsive banking industry, the result of the combined effects of state statutory restrictions on bank branching and the enforcement of federal antitrust statutes.[57]

The solution would appear to lie in reform of state banking statutes unduly restrictive of de novo bank growth.[58] Many of the limitations, which date from the Depression, are ostensibly designed to prevent banks from encountering financial difficulties through overextension.[59] If bank safety is their purpose, such restrictions deserve reconsideration in light of other contemporary safeguards, including federal and state supervision of the issuances of new

---

With de novo entry or foothold acquisition rendered impracticable by state statutes, Spokane bankers had little to fear from NBC's entry. The Spokane market's long-run limit on pricing would have been high in relation to forestalling the discounted probability of entry by NBC. Therefore, the removal of NBC as a potential competitor by its acquisition of WTB eliminated only the negligible influence NBC exerted upon the pricing and profit decisions of Spokane bankers.

55. Fifteen states allow unit banking only, although 10 of the 15 allow tellers' windows separate from the unit bank itself. The 10 are: Arkansas, Florida, Illinois, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, and Oklahoma. The five that allow only unit banks with no auxiliary offices are: Colorado, Minnesota, Texas, West Virginia, and Wyoming.

Sixteen states have limited bank branching laws that restrict branch banking either on a county-wide, region-wide, or mileage basis. These states are: Alabama, Georgia, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Tennessee, and Wisconsin. Gup, *A Review of State Laws on Branch Banking*, 88 BANKING L.J. 675, 682 (1971).

56. Advisory letters of the Department of Justice demonstrate its increasing concern with rising deposit concentration in those states in which high levels of merger activity are accompanied by regulatory or other barriers to entry by charter of new banks. *See, e.g.*, Letter from Department of Justice to Board of Governors of the Federal Reserve System, Dec. 18, 1969, *cited in* Solomon, *Bank Merger Policy and Problems: A Linkage Theory of Oligopoly*, 90 BANKING L.J. 116, 120 (1973). Some commentators have suggested, however, that concepts such as concentration do not transfer well into the banking context. *See, e.g.*, Shenefield, *Annual Survey of Antitrust Developments*, 31 WASH. & LEE L. REV. 20 (1974); Wu & Connell, *Merger Myopia: An Economic View of Supreme Court Decisions on Bank Mergers*, 59 VA. L. REV. 860 (1973).

57. *See* Comment, *Bank Branching in Washington: A Need for Reappraisal*, 48 U. WASH. L. REV. 611 (1973).

58. A relaxation of regulatory barriers to new entry by local groups would promote a "balanced banking structure" and prevent homogeneity, on the one hand, while lessening the entrenchment of local monopoly situations, on the other. *See* Solomon, *supra* note 56.

59. 94 S. Ct. at 2865 n.8.