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Oligopoly Power Under the Sherman and Clayton Acts -- From Economic Theory to Legal Policy

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Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy

Joseph F. Brodley

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The development of antitrust law in the United States, now in its seventy-sixth year, has not proceeded at a steady and even pace. Rather, it has been marked by a limited number of outstandingly creative periods in which new antitrust concepts and approaches have been shaped by the courts. At times, the tide has ebbed as well as flowed. But looked at from the perspective of three-quarters of a century, the tendency of antitrust law has been to move inexorably toward a more pervasive regulation of business conduct and market structure. Much of this development would appear to have resulted from the large advances made in the analysis of the competitive behavior of the modern corporation and in economic theory.

Beginning with the denunciation in early decisions of flagrant economic abuse by monopolies and dominant combines, the law of antitrust through an increasing perception of the various practices that might serve as tools to undermine free competition moved in the 1920's and 1930's to prevent or restrict a variety of specific trade practices, including price fixing, group boycotts, tie-in sales, certain patent restrictions, exclusive dealing, and price discrimination. The legal vehicle for the most significant antitrust regulation became the per se rule: the denunciation of a particular economic practice (for example, price fixing) as so likely to be anticompetitive in its effect as to justify, barring exceptional circumstances, a conclusive presumption of illegality. Such rules made antitrust law both knowable and highly effective in the areas covered.

Through greater understanding of both corporate behavior and the market power of one or a combination of firms possessing total or near total monopoly in a market, the law took a notable step some twenty years ago in such decisions as United States v. Aluminum Co. of America; American Tobacco Co. v. United States; and United States v. Griffith in recognizing monopoly power itself as being inherently undesirable, irrespective of any abuse of such power. The mere possession of monopoly power was declared unlawful, where it had been deliberately and knowingly acquired or purposefully maintained. Its use, whether deliberate or not, to gain advantages in another nonmonopoly market was likewise held to violate the Sherman Act. It was even suggested that the use by a monopoly enter-

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1. 148 F.2d 416 (2d Cir. 1945).
2. 328 U.S. 781 (1946).
3. 334 U.S. 100 (1948).
prise of certain kinds of restrictive business practices, which were otherwise perfectly legitimate, might be illegal.7

Yet even while these advances of the 1940's were heralded under the banner of the "New Sherman Act," economic theory had identified a new disease of the competitive economy—oligopoly power, the market power of jointly acting oligopolists. Existing legal rules were not adequate to deal with oligopoly power since by definition oligopoly itself was a market condition falling short of monopoly and since, as became apparent, oligopoly power could be exercised without overt agreement. Even the vocabulary of antitrust failed. Prices were not fixed but "administered." Conditions of sale were not dictated by a monopoly combine, but set by a "price leader." Yet the results of oligopoly power could be as destructive of a competitive market as those caused by the exercise of monopoly power or by other economic behavior susceptible to antitrust discipline. Despite the imaginative suggestions of a few as to how existing doctrine might be utilized to deal with oligopoly power,8 the observation seemed clearly justified that the greatest defect of antitrust was its inability to cope with oligopoly power.9 And some even suggested drastic statutory modifications to cure this defect.10

Beginning in 1962, however, the Supreme Court began to recognize explicitly and to come to grips with the problem of oligopoly power. Antitrust has not been the same since. It is the thesis of this Article that a body of law shaped to deal in the first instance with various types of behavioral misconduct by businessmen and secondly with a problem of monopoly power is in the process of adaptation to a much more complicated economic disorder, oligopoly power—a problem not of economic behavior but of market structure. As an additional complication, the attempt to deal with oligopoly power has resulted in, or at least been accompanied by, the identification of seemingly new categories of anticompetitive behavior, such as reciprocal buying, conglomerate mergers, and certain aspects of joint ventures. It is hardly surprising that this process of change has caused some disorder of legal doctrine.

This Article attempts to set forth the economic and legal background for this convolution of established antitrust concepts, to identify what appears to be the underlying consistency of the developing legal theory of oligopoly power, to examine critically the recent decisions of the Supreme

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Oligopoly is, of course, a market condition falling short of monopoly in which a single firm controls the entire market. It is important to realize that oligopoly refers to the horizontal structure of the market only.

The modern development of oligopoly theory began with the publication in 1933 of two works of economic theory, Chamberlin’s *Theory of Monopolistic Competition* and Robinson’s *Economics of Imperfect Competition*.

The central thesis of these and later studies is that market action by firms in a market in which there are only a few sellers is fundamentally different from market action in the classical competitive market of many sellers, for, as Chamberlin phrased it, where the number of sellers is few their fortunes are not independent. According to the theory, in a market of three sellers, one seller cannot significantly increase his market share without causing a significant decrease in the market shares held by his competitors, assuming demand for the product is relatively inelastic. The rational self-interest of sellers with similar cost factors in such a market, intent upon maximizing their profits, will then lead them to charge identical prices and sooner or later to arrive at the identical equilibrium price that will yield the largest return. This price may be, not unnaturally, the same price that a monopolist intent upon maximizing profits would charge. The difference under such circumstances between oligopoly and monopoly pricing becomes the fact that under the oligopoly model several firms share

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11. C. Wilcox, *COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY* 5 (TNEC Monograph No. 21, 1940).
the monopoly profit, whereas under the monopoly model, all the profit goes to one firm.

The situation is quite different in a market of many sellers, for economic theory teaches that there a significant increase in the market share of one seller will have no appreciable effect on the shares of other sellers. Thus, in a market of one hundred sellers, a doubling of sales by one seller, if drawn equally from the other sellers, would reduce their respective shares by only $\frac{1}{100}$. This is an insufficient amount, as a matter of rational economic self-interest, to compel any competitive response, and hence the would-be price cutter will not be inhibited in his market action. Other sellers or new entrants in such a market will also feel free to reduce price if they determine that they would increase profits by increasing business. As this process is repeated, price is forced below the monopoly price level.\(^2\)

Subsequent economic studies, both theoretical and empirical, tended on balance to confirm these basic postulates.\(^3\) To Chamberlin’s analysis was added the observation that unrestrained competition is not the most pleasant method of doing business, that it is “costly of nervous energy and money, and disruptive of friendly relations.” Hence, psychological as well as profit considerations were thought to motivate sellers in an oligopoly market to avoid price competition.\(^4\)

It was also observed that price uniformity in an oligopoly market could result without any formal, or even informal, agreement. An historical pattern of price leadership could develop within an industry in which one seller would become the price leader and the others would be content to follow a single judgment of the changing market situation in return for certainty of knowledge as to what their rivals would do. This could be characterized as “an agreement to agree,” but there would be no agreement in any legal sense with respect to the various price changes, only the uniform response of the competitive firms.\(^5\)

Such tacit understandings may extend not only to price but to market shares, or at least customers. Thus, where the number of customers is limited, there may be an accepted pattern of not attempting to change or switch individual accounts or customers associated with particular sellers, a policy of “live and let live.”\(^6\)


\(^{13}\) See Bain, op. cit. supra note 9, at 266–315; W. Fellner, Competition Among the Few 175–91 (1949); F. Machlup, The Economics of Sellers’ Competition 347–474 (1952); Stocking & Watkins, op. cit. supra note 12, at 85–100.

\(^{14}\) Machlup, op. cit. supra note 13, at 434–45.

\(^{15}\) Much the same thought was voiced by Judge Learned Hand in the first Alcoa case (with respect to monopoly power): “immunity from competition is a narcotic . . . the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.” United States v. Alcoa Co. of America, 148 F.2d 416, 427 (2d Cir. 1945).

\(^{16}\) See Machlup, op. cit. supra note 13, at 443–44. See also Bain, op. cit. supra note 9, at 296–98.

\(^{17}\) See Comment, 68 Yale L.J. 1627, 1641 (1959).
OLIGOPOLY POWER

As more was learned about the behavior of oligopoly markets, it was recognized that highly concentrated oligopoly markets tend to be less competitive than less concentrated ones. A terminology has grown up which describes the former as a "concentrated" or "tight oligopoly" and the latter as a "loose oligopoly." 18

A study by Professor Bain has shown a strong positive correlation between concentrated oligopoly markets and high profits. That study, covering profits in forty-two manufacturing industries over a five-year period, indicated that where the largest eight firms in an industry supplied seventy per cent or more of the industry output, profits much higher than average resulted. This pattern did not hold in less concentrated oligopoly markets, thus suggesting that there is a critical point at which a market becomes sufficiently concentrated to lead to substantial excess profits. 19

Modern game theory also suggests the existence of a difference between tight and loose oligopoly markets. Game theory teaches that there is an enormous difference in the complexity of formulating game strategy as the number of players increases, and since a three- or four-person game in an economic setting is already a matter of great complexity, a ten- or twelve-person game may present so many variables as to defy formulation of a rational approach. 20 (Of course, the number of separate firms in a market may be greater than the real number of players, since for various reasons some firms, particularly small ones, may be counted on to play wholly passive roles.) This suggests that loose oligopoly markets may behave in a fundamentally different way than tight oligopoly markets; that is to say, an "agreement to agree" is impracticable except in tight oligopoly markets.

18. A tight oligopoly is defined as a market in which eight or fewer firms supply 50% or more of the market with the largest firm having 20% or more; a loose oligopoly, as a market in which fewer than twenty firms supply 75% of the market, but no firm supplies more than 10% to 15%. Kayser & Turner, op. cit. supra note 10, at 72.

19. Bain, op. cit. supra note 9, at 411-16. Where, in addition to high seller-concentration, entry barriers were also high, the profit rate tended to become even more excessive. Id. at 415. Similarly, a more recent economic study found that both absolute size and the extent of concentration were "[positively] and significantly related to the variation in profit rates" in 340 of the largest firms in the economy. Hall & Weiss, Corporate Profits and Size of Firms (unpublished manuscript), cited in Hall, The Crisis in Antitrust: Reconsidered, 10 Antitrust Bull. 897, 899-900 (1965). But see G. Stigler, Capital and Rates of Return in Manufacturing Industries 54-71 (1965). Stigler found no significant variation in return on investment as between concentrated and unconcentrated industries during the period 1947-1954. Stigler did find a significant variation in the prewar years 1938-1940; he would discount a smaller variation in the postwar years 1947-1954, however, on the basis that small firms have a greater tendency to withdraw profits in the form of excessive salary than large firms, which are more often found in oligopoly markets. Further, Stigler found that the stability of the rate of return in a given industry was significantly higher in concentrated than in unconcentrated industries; at the same time he found a greater variation industry by industry in average rate of return in concentrated than in unconcentrated industries. Id. at 69-70. Thus, Stigler's findings would indicate that those concentrated industries that have achieved high rates of return have been able to maintain such high rates consistently over the years.

20. "[A] three-person game is very fundamentally different from a two-person game, a four-person game from a three-person game, etc. The combinatorial complications of the problem . . . increase tremendously with every increase in the number of players . . . . Whenever the number of players, i.e. of participants in a social economy, increases, the complexity of the economic system usually increases too; e.g. the number of commodities and services exchanged, processes of production used, etc." J. Von Neumann & O. Morgenstern, Theory of Games and Economic Behavior 13 (3d ed. 1953). See also Machlup, op. cit. supra note 13, at 429-30.
and that loose oligopoly markets may behave in a manner quite similar to competitive markets.

The problem of oligopolistic interdependence of action, or predictability of the responses of other firms, will surely be accentuated by the growing use of highly sophisticated computers to assist in guiding market strategy, particularly if used by each firm in an oligopoly market. It has also been urged that oligopoly firms are better able to survive credit and monetary restrictions than other firms are, because of their superior ability to pass increased borrowing costs on to their customers and their generally greater access to money markets (though the latter may only be the result of large size). This proposition has been said to have been demonstrated by the harsher impact that periods of credit restriction have had on the competitive industries, agriculture and housing, as compared with the heavy industries (which are generally oligopolistic).

To be sure, there are economic dissents from this analysis, particularly as it points to greater regulation of oligopolies, based on the views that not enough is yet known about oligopoly to justify generalizations of the type set forth above; that if they are justified in some cases, they are not justified in all cases; that oligopolists are moved by motives other than profit maximization; that no predictions of any sort are justified in a market situation in which the actions of one participant can affect the result; that oligopoly power of sellers is counterbalanced by the power of large buyers and other large economic or political forces; that large oligopoly firms achieve economies of scale and can support widespread research activities essential for maximum industrial progress in oligopoly markets where technology is fluid; that oligopoly prevents ruinous competition; and, finally, that the possibility of oligopoly firm growth with consequent high profits is a necessary incentive to entrepreneurship, which among other things makes possible the raising of the enormous quantities of capital required by modern industry. It has been suggested that greater price rigidity in oligopoly markets may be offset by greater incentive for product innovations that cannot readily be matched. A study has also suggested


24. See Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1355 (1965). However, Professor Turner cites no economic authority to refute the statement; made some years earlier in a perceptive comment, that there was no empirical evidence that innovation has been either more or less prevalent in oligopoly industries and that, as a matter of economic analysis, product innovations where they can (as is frequently the case) be readily matched by other firms may actually decrease in oligopoly industries for the same reason that price competition declines: the unwillingness to expend funds on activities that will not expand a firm's market share. Comment, 68 Yale L.J. 1627, 1641-42 (1959).
that oligopolistic market behavior can be substantially modified if barriers to entry of new firms into the market are reduced.\textsuperscript{25}

Whatever can be said for the above views, which essentially hold that it is premature to make a negative judgment concerning oligopoly power, the weight of economic authority is critical of oligopoly power, at least in concentrated oligopoly markets.\textsuperscript{26} As will become clear below, the Supreme Court has adopted the critical view. The balance of this Article will proceed on this economic assumption.

\textbf{II. Failure of Past Decisions To Deal With Oligopoly Power or To Recognize It as Economically Undesirable}

Until 1962 there were virtually no references to the concept of oligopoly power in the antitrust decisions of the Supreme Court. Legally speaking, the illness had not been diagnosed. Although many antitrust decisions did in fact deal with the manifestations of oligopoly power, they did not do so explicitly. It is not surprising, therefore, that neither oligopoly power nor the oligopoly structure of a large fraction of American industry was significantly altered by antitrust.

The 1955 report of the Attorney General's National Committee To Study the Antitrust Laws prefaced its discussion of economic concepts, including oligopoly, with the caveat, "Legal requirements are prescribed by legislatures and courts, not by economic science."\textsuperscript{27} Since clearly the framers of the Sherman\textsuperscript{28} and Clayton Acts,\textsuperscript{29} could not have had in mind an oligopoly theory that did not exist at that time, such views tend to keep the analysis in antitrust cases within the traditional framework of a simple dichotomy of monopoly and competition.\textsuperscript{30}

Thus, the bitterly contested \textit{Columbia Steel} case\textsuperscript{31} was decided under section 1 of the Sherman Act without any reference to oligopoly power, although steel is clearly a highly oligopolistic industry. In determining the

\textsuperscript{25} J. Bain, \textit{Barriers to New Competition} (1956). Market entry barriers, which typically tend to be high in oligopoly markets, included, in order of importance, product differentiation, economies of scale, and absolute cost advantages in favor of established firms (such as superior patents). A study of twenty industries revealed great variation in crucial entry barriers in different industries, however. See J. Bain, \textit{Industrial Organization} 229–61 (1959).

\textsuperscript{26} See Kayen & Turner, \textit{op. cit. supra} note 10, at 25 ("Both economic theory and experience indicate the likelihood of a monopoly problem in the structurally oligopolistic markets."); Markham, \textit{The Effectiveness of Clayton Act Section 7}, in \textit{PERSPECTIVES ON ANTITRUST POLICY} 164, 187 (Phillips ed. 1965) ("[E]conomic theory argues persuasively that competition is more effective with a dozen or so sellers than with four or five."); Whitney, \textit{The Economic Impact of Antitrust: An Overview}, 9 \textit{ANTITRUST BULL.} 509, 510 (1964) ("[M]ost economists writing on antitrust appear to favor a campaign against oligopoly.").


\textsuperscript{30} Such a dichotomy was even reflected in the work of distinguished legal scholars. See, e.g., Bork, \textit{Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception}, 22 U. Chi. L. Rev. 157 (1954), which analyzes vertical integration on that basis.

\textsuperscript{31} United States v. Columbia Steel Co., 334 U.S. 495 (1948).
legality of United States Steel's acquisition of the largest independent steel fabricator on the West Coast, the majority opinion dealt with the issue of the additional market power that would accrue to United States Steel, without reference to the oligopolistic market structure in which "Big Steel" was the leading producer and without attention to the issue of whether approval of the merger would further accentuate that market structure. Even the four dissenters focused on the unilateral market power that would accrue to United States Steel, in protesting that as a result of the merger the company would be able "to wrap its tentacles tighter around the steel industry of the West." 22 Although the dissenters spoke of the value of diffusion of economic power and the danger of its concentration "in the hands of an industrial oligarchy," 23 there is no reference to the existence of oligopoly power or the economic mechanisms of an oligopoly market.

In the second Alcoa case 24 Judge Knox, in carrying out the broad mandate of the court of appeals to restore competitive conditions in the aluminum industry, refused to divide the United States facilities of Alcoa into two companies. He concluded that a degree of competition already existed, since Alcoa, which had previously enjoyed a complete monopoly, was now faced with two competitors (Reynolds and Kaiser) and under the decree would potentially soon be faced with a third (Aluminum Ltd.). In fact, the condition of the market to which he referred was one of tight oligopoly.

Indeed, in the first Alcoa case 25 Judge Learned Hand in his famous 30-60-90 dictum (90 per cent of a market was a clear monopoly, 60 per cent doubtful, and 30 per cent clearly not) 26 had in both the 60- and 30-per-cent instances referred to a market that would almost certainly have been oligopolistic; yet, in an opinion filled with pace-setting ideas, the point was passed without discussion.

In addition to the lack of explicit recognition of the problems posed by oligopoly power, the pre-1962 decisions, not surprisingly, did not effectively deal with it. Cases under section 1 of the Sherman Act focused on whether an actual agreement could be proved, whereas economic theory teaches that one of the characteristics of oligopoly markets is the fact that uniformity of price and other terms of sale can occur without agreement. The closest the pre-1962 law ever came to the notion that the price-leadership pattern apparent in many oligopoly industries might violate the Sherman Act was in the so-called doctrine of "parallel action"—that the uniform or parallel action of several firms in setting prices might in and of itself be held to establish a conspiracy in violation of section 1 of the Sherman Act. Al-

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22. Id. at 537.
23. Id. at 536.
25. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
26. Id. at 424.
though controversy raged for a time, the notion was rejected both by courts and by most commentators. Oligopoly pricing in and of itself has not been held illegal under section 1 of the Sherman Act.

Per se rules that have developed under section 1 of the Sherman Act, have been applied with some few exceptions to both the strong and the weak, the entrenched oligopoly firm as well as the new competitor seeking to enter an oligopoly market. Thus, resale price maintenance agreements have been upheld under section 1 of the Sherman Act, provided they followed the fair trade route, with no consideration of whether such contracts have been entered into in an oligopolistic or fully competitive market or by a leading firm or small competitor.

Section 2 of the Sherman Act has also proved ineffective against oligopoly power. Most section 2 cases have dealt with the issue of whether a single firm had monopoly power in a market. The principal decisions dealing with oligopoly under section 2 were Tobacco and United States v. Paramount Pictures, Inc., although neither did so explicitly. Instead, in each case the Court viewed the problem from the standpoint of monopoly power, finding a combination or conspiracy among the defendants to maintain or use such power collectively in the market. Both cases involved tightly oligopolistic markets, but this fact was not mentioned. There was hope, nevertheless, from Tobacco, based on the importance given to the close price leadership maintained by the "big three" in the cigarette industry, that at last a legal weapon had been forged to deal with the market power of jointly acting oligopoly firms, but such promise was unfulfilled. In Tobacco there had been other evidence of agreement and the parallelism was dramatically vivid (involving among other things uniform price increases, accompanied by enormous earnings, in the midst of a great depression). Paramount, perhaps, gave greater support to the concept of a section 2 violation based on the uniform action of oligopoly firms. In up-

41. 334 U.S. 131 (1948).
43. Thus, notwithstanding the Tobacco case, price leadership continued in the cigarette industry. As recently as March 21, 1966, a representative of a smaller cigarette producer said of the two largest cigarette producers (both were defendants in Tobacco), "When one of them does something like change prices, all we do is wait for the other shoe to drop and follow their lead." Wall Street Journal, March 21, 1966, at 2, col. 2.
holding the district court’s findings of conspiracy to fix prices and to monopolize, the Court commented that it was unnecessary to find an express agreement in order to hold that there was a conspiracy, for “[i]t is enough that a concert of action is contemplated and that the defendants conformed to the arrangement.” Although the point is not analyzed in depth, such a doctrine might proscribe consciously interdependent (but nonconspiratorial) action of oligopoly firms.

In any event, the hope that an effective weapon had been forged to cope with oligopoly power was unrealized, for following Tobacco and Paramount no significant section 2 cases were decided involving monopolization by a group of jointly acting oligopolists. Perhaps in part the problem was the burden of such industrywide proceedings on enforcement agencies with limited budgetary resources, accentuated by the failure of the doctrine of parallel action to develop into an effective legal tool that might have simplified the proof of joint action among oligopoly firms.

Nor has section 3 of the Clayton Act proved effective against oligopoly power. Although section 3 has been used against vertical arrangements in oligopoly markets, analysis has for the most part centered on the market position of the firm entering into the vertical arrangement and the amount of the total market foreclosed by the particular arrangement in question. Virtually no consideration has been given in the cases to the question of the perpetuation of oligopoly market conditions by vertical arrangements reachable under the Clayton Act, and only occasional consideration has been given to the cumulative market effect of the use of such arrangements by other firms in the market.

Administration of the Robinson-Patman Act has, if anything, shown an even greater blindness as between the large and the small, even to the point of probably having hurt the weak more than the strong.

In short, decisions of the courts in antitrust cases prior to 1962 scarcely disturbed the structure of oligopolistic industries, or for that matter the overt exercise of oligopoly power, provided careful legal guidance was obtained. With some substantial justification, one legal commentator an-
swered the question of what saves the coordinated price structure of a highly oligopolistic industry from illegality as follows:

The answer is technique. The lessons of the cases have been well learned: there is no "agreement" as to prices; nobody circulates freight rate schedules to facilitate identical pricing; no trade association executive writes inspirational editorials urging higher prices and restricted production; official meetings of the trade are limited in number and follow legally aseptic agenda. Conspiratorial techniques are unnecessary.

This is not to say that every now and then a rather shocking case of overt conspiracy may not occur in an oligopoly industry, such as in the recent Electrical Cases. Indeed, although a concentrated market may make overt collusion unnecessary for the achievement of price stability, it also paradoxically increases the facility to engage in outright collusion, since the smaller the number of firms that need be brought into the conspiracy, the smaller the risk of detection. For the most part, however, overt conspiracies have not been necessary to achieve a coordinated and stable price structure in highly oligopolistic industries.

Thus, before the recent decisions discussed in this Article, antitrust policy had been singularly unsuccessful in deterring the development and maintenance of oligopoly power. In fact the problem had scarcely been recognized by the courts.

III. THE RECENT DECISIONS OF THE SUPREME COURT VIEWED AS AN ATTACK ON OLIGOPOLY POWER

In ten major decisions since 1962 the Supreme Court has struck directly at oligopoly market power, actual or threatened. These decisions have covered mergers (horizontal, vertical, and conglomerate), joint ventures, and the distribution practice of consignment selling. In each of these decisions the Court has acted to curb or to prevent the growth of oligopolistic market power. In no major decision during this period has it sustained an oligopoly market structure.

A. Incorporation in Recent Decisions of the Economic Theory of Oligopoly

There was perhaps no more striking fact in the Supreme Court's pioneering Philadelphia Bank decision than its reliance upon primary eco-

51. Schwartz, Administered Prices, Oligopoly and the Sherman Act, in Section of Antitrust Law, ABA, Proceedings at the Spring Meeting 29 (1958).
nomic authority in shaping a new rule of law for testing the legality of mergers. Bain, Machlup, and Mason, all economists, have become authorities alongside prior judicial precedent and legislative history. The economic assumptions of the Court have been based on the current findings of these and other economists, and a rule of law is required to be more consistent with economic theory than with past precedent.

The extent to which the basic economic theory of oligopoly has become explicit in the Court’s recent decisions is striking. The following short sketch of oligopoly theory is drawn solely from recent statements of the Supreme Court. Competition will be most effective in a market in which there are many sellers, none of which has any significant market share. In such a market no single seller or group of sellers acting in concert has the power to choose its level of profits by giving less or charging more. Where the number of sellers is limited, however, competition gives way to parallel policies of mutual advantage. In such a market, prices tend to be established by administration rather than competition. Small firms may be content to follow the high prices set by the industry leaders. The growth of oligopoly has an adverse effect upon small business and local control of industry. The preservation of potential competition becomes particularly vital in oligopolistic markets. The Federal Trade Commission has been even more explicit; and the opinions of Commissioner Elman in Procter & Gamble Co. and Beatrice Foods Co. show more than a passing acquaintance with oligopoly theory and many of its primary source works. Thus, Commissioner Elman concluded in Procter & Gamble that the results of oligopoly are likely to be an unnaturally high price level, a general deadening of competition, conscious parallelism, excess capacity, heavy advertising in lieu of technological innovation, and administered prices.

B. Analysis of Recent Decisions of the Supreme Court as Attempts To Control and Limit Oligopoly Power

It is illuminating to analyze these ten decisions in which the Court comes to grips with oligopoly power. In seven of the decisions, the Court was dealing with a presently highly concentrated oligopoly market, in two

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58. Id. at 172; United States v. Aluminum Co. of America, 377 U.S. 271, 280 (1964).
64. 3 TRADE REG. REP. ¶ 16831 (FTC 1965) (appeal pending).
decisions, with a tendency toward oligopoly, and in the tenth, with multiple markets, in part highly concentrated and in part not. In the following analysis of these decisions the policy objective of limiting oligopoly power will be assumed. Among the questions that will be explored are the conceptual consistency of the decisions with oligopoly theory and with each other, their effectiveness in limiting oligopoly power, and the impact of other policy values that may impinge on the goal of limiting oligopoly power.

1. Horizontal mergers.

Since the basic concept of oligopoly is one of horizontal market power, the initial group of decisions of the Supreme Court in its confrontation with oligopoly power appropriately concerned horizontal mergers. These decisions were Brown Shoe, Philadelphia Bank, Alcoa-Rome, Continental Can, and Lexington Bank. Indeed, so strong appeared the Court's preference for viewing mergers from the context of horizontal market power, that Alcoa-Rome and Continental Can opened the Court to the criticism of having unduly strained the definition of the relevant line of commerce in order to force the mergers into horizontal market concepts. More recently the Court has again been concerned with horizontal mergers in Von's Grocery and Pabst Brewing, each of which is also open to serious criticism.

Brown Shoe Co. v. United States. This 1962 decision, the first merger case to reach the Supreme Court under amended section 7 of the Clayton Act, was also the first to recognize clearly the inherent undesirability of oligopoly power. Viewing the 1950 amendment to section 7 as designed in part to prevent the formation of further oligopolies, the Court's invalidation of the merger was based primarily on the finding that it might be a step in a trend toward oligopoly in the industry involved.

Brown Shoe was both a horizontal and vertical merger, but discussion (and criticism) of the vertical aspects will be deferred for a separate section of this Article. The horizontal aspects of the merger appeared in the combination of the retail shoe stores of the two merging companies in the various relevant markets—defined as separate cities of 10,000 or more people. Although in several of such markets the merger created a firm occupying a dominant share of the market (twenty to forty per cent), in a number of cities the postmerger market share was no more than about five per cent. Nevertheless, given a trend in the shoe industry toward increased concentration by merger, this was a sufficient market share to make the merger unlawful. Said the Court: "If a merger achieving 5% control were now

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68. See 370 U.S. at 333-34.
69. See text accompanying notes 159-65 infra.
approved, we might be required to approve future merger efforts by Brown’s competitors seeking similar market shares. The oligopoly Congress sought to avoid would then be furthered and it would be difficult to dissolve the combinations previously approved.”

The Court then went on to say that in the fragmented shoe industry control of even a small share of the market by a “large national chain can adversely affect competition” and that the Clayton Act was designed not only to protect competition, but also “viable, small, locally owned businesses” even if it means “occasional higher costs and prices.”

It is easy to criticize the Court’s analysis. It fails to distinguish between concentrated oligopoly and loose oligopoly, which would have been the worst that would have happened even if every firm in the industry merged up to five per cent (as the Court feared might happen). Yet the economic consequences of concentrated and loose oligopoly clearly differ. Moreover, protection of small local competitors appears to be viewed as an ultimate policy goal of equal importance alongside protection of competition and control of oligopoly power. Such views may amount to economic protectionism and can be criticized as going far beyond the requirements of an economic policy aimed at maintaining a competitive market structure.

Finally, as will be developed, the Court’s opinion is confusing because it applied an essentially horizontal market concept of oligopoly power to the vertical aspects of the merger.

Nevertheless, the horizontal-merger aspect of the decision is clearly correct under oligopoly theory. In several markets a concentrated oligopoly market problem would have been presented by the creation of a firm with from twenty to forty per cent of market sales. Even in the markets where only a five-per-cent firm would have been created, given a merger trend and the Supreme Court’s assumption that other firms might have subsequently sought to merge under the five-per-cent umbrella, it seems preferable absent some special showing to maintain a competitive industry rather than to permit its conversion into a loose oligopoly. We are, after all, dealing with the very foundation of oligopoly power: horizontal combination of firms. With a few competitive casualties, some unmatched product innovations, or simply some voluntary retirements from the market, the loose oligopoly of today might well become the concentrated oligopoly of tomorrow. Even if it be a fact that entry into the market is easy at the time of the merger, how could a court justify the disappearance

70. 370 U.S. at 343-44.
71. Id. at 344.
of present competition on any assumption as to probable entry into the market by new competitors in the future? By what valid reasoning could a court assume that in view of the swiftly changing nature of business and of productive technologies the market conditions of today will be similar to those of tomorrow?

Brown Shoe is also important for giving explicit recognition to the principle that a small firm seeking to challenge the power of dominant market leaders may utilize devices forbidden to larger rivals, including mergers and, in some circumstances, even tie-ins. This is a principle of great importance and potential for the development of the legal theory of oligopoly regulation and control. Thus, the first Supreme Court decision under amended section 7 of the Clayton Act clearly identified prevention of the formation of further oligopolies as a target of section 7 enforcement and of a reorientation of antitrust policy. And the Court exhibited such sensitivity to the development of oligopoly power that it perceived a trend toward oligopoly long before the market had approached oligopoly conditions. Despite the controversial features of the decision and some policy bifurcation as between protection of competition and protection of competitors, its place in antitrust law appears secure, for with it began the conscious and explicit attack on oligopoly power.

United States v. Philadelphia Nat'l Bank. If Brown Shoe was the beacon signaling a reorientation of antitrust policy in relation to oligopoly power, Philadelphia Bank provided the chart for the general course and direction such a development would take. Philadelphia Bank made clear that, at least as to horizontal mergers, market structure would be the paramount decisional factor. Modern economic theory was brought directly into judicial policy-making, not gradually but almost suddenly and with decisive results. At the same time legal rules were shaped with a pragmatic recognition of the sharp limitations of the judicial system in dealing rationally with complex issues of economic fact and market behavior.

On its facts Philadelphia Bank was an extreme case of oligopoly, for it involved a merger creating a large market share in an already highly concentrated oligopoly market. The merger would have created a bank having thirty per cent of the relevant market and a market structure in which the four largest banks occupied seventy-eight per cent of the market. The acquired bank was in no sense a de minimis market factor, but was a significant competitor with a premerger market share of seventeen per cent.

In reaching its conclusion that the merger was illegal under section 7, the Court drastically simplified the test of illegality for horizontal mergers involving sizable firms. Taking note of the quagmire into which a judicial

74. See id. at 330.
proceeding might fall if a court attempted to assess the probable future effects of a merger through a full consideration of all the "complex and illusive" economic data that might be relevant, it laid down a rule of presumptive illegality. 76 A horizontal merger would be presumed illegal if it "produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market . . . ." 77 The facts in Philadelphia Bank easily satisfied the test since the merger would have resulted in the concentration of thirty per cent or more of the relevant market in a single firm and would have increased the share of the market held by the largest firms (including the surviving firm) by roughly one-third.

These facts alone established a prima facie presumption of illegality, and the burden then shifted to the defendants to present evidence "clearly showing that the merger is not likely to have . . . anticompetitive effects." 78 Just how difficult such a showing would be was then made clear by the Court's brusque treatment of the evidence which defendants had proffered in their defense. First, the Court rejected the testimony of bankers operating in the local market area that competition among banks was vigorous and would continue to be so after the merger, for "lay evidence on so complex an economic-legal problem . . . was entitled to little weight . . . ." 79 In any event, the Court noted, small firms might flourish under oligopolistic market conditions by following high prices set by the dominant firms. 80 Second, the Court rejected the concept of "countervailing power"—that is, that anticompetitive effects in one market (the Philadelphia area) might be justified by procompetitive effects in another market (the regional or national market in which the much larger New York City banks were included). 81

Finally, although this aspect of the decision has probably been weakened by the passage of the Bank Merger Act of 1966, 82 the Court refused even to consider other possible values a merger might promote, such as Philadelphia's need for a larger bank for future economic development. The Court thought such a value choice "beyond the ordinary limits of judicial competence" and in any event irrelevant under amended section 7. 83 The Bank Merger Act may be said to have registered congressional disagreement with the proposition that judges lack competence to consider

76. Id. at 362-63. The quagmire is convincingly detailed in Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226 (1960), upon which the Court openly relied.
77. 374 U.S. at 363.
78. Ibid.
79. Id. at 367.
80. Id. at 367 n.43.
81. Id. at 370.
83. 374 U.S. at 371.
general questions of public interest, at least in the banking area, for that is precisely what the act authorizes them to do. However, except as to bank mergers and perhaps as to certain other mergers in regulated industries, the second part of the Court's evaluation remains valid—the question of other possible values promoted by a merger is irrelevant under amended section 7.

In adopting its rule of presumptive illegality the Court frankly and without apology relied on the economic theory of oligopoly. Indeed, the Court defended its rule of presumptive illegality as "fully consonant with economic theory." To be sure, in support of the decision the Court cited several contract integration cases under section 3 of the Clayton Act, but the relevance of these cases, which deal with vertical contractual arrangements, to a horizontal merger is more assumed than explained.

Economic authorities, not the strained citations to the contract integration cases, emerge as the dominant support of the decision. Thus, the Court cites the work of five economists (Stigler, Markham, Machlup, Bain, and Mason), one economist-lawyer team (Kaysen and Turner), one lawyer-economist (Bok), and one student comment which takes as its starting point the economic theory generally developed by those authorities. The significance of reliance on economic authority is worth a moment's reflection. Ordinarily the views of economists would be matters of expert testimony for examination and cross-examination at trial. That the Court took judicial notice of them necessarily means that the Court considered such economic views to be clearly a part of accepted knowledge. With the Philadelphia Bank decision, the position of the volumes on oligopoly theory became secure on the shelves of antitrust lawyers, and the general direction of the development of a legal policy aimed at controlling oligopoly power was established.

United States v. Aluminum Co. of America (Alcoa-Rome) and United States v. Continental Can Co. In the year following Philadelphia Bank these cases posed three related problems, none of which had been present in that decision: (1) the merging firms were not in the same industry but were essentially in distinct but competitive industries; (2) as a result, definition of the product market was in sharp issue; and (3) al-

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84. Courts reviewing bank mergers are authorized to determine de novo whether anticompetitive effects (other than violations of § 2 of the Sherman Act) are "clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." 12 U.S.C.A. §§ 1828(c)(5)(B), 1828(c)(7)(B) (Supp. March 1966).
85. 374 U.S. at 363.
87. 374 U.S. at 363 nn.38 & 39, 364 n.41.
89. 378 U.S. 441 (1964).
90. "Industry" is used in the same sense as it was in Continental Can. It denotes a group of firms using similar production facilities to produce markedly similar products. Id. at 444 n.2.
though the mergers involved leading firms in highly concentrated oligoplastic industries, the increased concentration in any definable market resulting from the mergers was relatively slight. Despite these differences the Court declined to formulate special rules for interindustry mergers, but in both decisions applied the straight horizontal merger doctrine enunciated in Philadelphia Bank. The result of this was doctrinal confusion, for in order to achieve the desired legal result in each case under a Philadelphia Bank approach, it was necessary to force the market definition.

Alcoa-Rome involved the merger of Alcoa, a producer of aluminum conductor wire, with Rome Cable, ninety per cent of whose production was in copper wire, which Alcoa did not produce at all. Although, as the district court had found, aluminum and copper wire were competitive as to at least some uses, the Supreme Court ignored all such interindustry impacts of the merger. Instead it seized upon the fact that Rome, in addition to its primary role as a producer of copper wire, was also a small producer of aluminum wire. This foothold by Rome in Alcoa's own industry became the vehicle for the determination of illegality, for it enabled the Court to focus on the narrow overlap of identical products and to construct the relevant line of commerce at that point. Further, and again contrary to the district court's findings, the Court lumped bare and insulated aluminum wire together as a single line of commerce.

Continental Can involved the merger of a producer of metal cans with a producer of glass containers. Neither had any production in the other's industry, and for the most part they were producing containers for different end uses. The Court found that interindustry competition justified grouping metal cans and glass containers together as a line of commerce. However, as the Court acknowledged, interindustry competition did not exist for many end uses, and for other uses there was an available competitive alternative, plastic containers. Only by the market definition actually adopted was the Court able to reach market percentages approximating those in Philadelphia Bank.

The market-definition difficulties in these cases can be graphically illustrated by the following tables, which show the percentage market shares of the merging firms under alternative market definitions. (The market definition actually used by the Supreme Court in each case is indicated by italics.) These tables demonstrate that, of the various possibilities open for reasonable consideration, only the market definition actually adopted by the Court in each decision could have met the twofold test of Philadelphia Bank.

92. Id. at 509-11.
93. 377 U.S. at 276-77. Even the Government had not asserted that bare and insulated aluminum wire were competitive. Id. at 286 (dissenting opinion).
Table 194
(Alcoa-Rome)

<table>
<thead>
<tr>
<th></th>
<th>Bare Aluminum Wire</th>
<th>Insulated Aluminum Wire</th>
<th>Combined Bare and Insulated Aluminum Wire</th>
<th>All Aluminum and Copper Wire</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alcoa</td>
<td>32.5%</td>
<td>11.6%</td>
<td>27.8%</td>
<td>1.8%</td>
</tr>
<tr>
<td>Rome</td>
<td>0.3%</td>
<td>4.7%</td>
<td>1.3%</td>
<td>1.4%</td>
</tr>
<tr>
<td>Total</td>
<td>32.8%</td>
<td>16.3%</td>
<td>29.1%</td>
<td>3.2%</td>
</tr>
</tbody>
</table>

Table 295
(Continental Can)

<table>
<thead>
<tr>
<th></th>
<th>Metal Cans</th>
<th>Glass Containers</th>
<th>Combined Metal and Glass Containers</th>
<th>All Containers Including Plastics</th>
</tr>
</thead>
<tbody>
<tr>
<td>Continental</td>
<td>33%</td>
<td>0%</td>
<td>21.9%</td>
<td>Not determinable</td>
</tr>
<tr>
<td>Hazel-Atlas</td>
<td>0%</td>
<td>9.6%</td>
<td>3.1%</td>
<td>Not determinable96</td>
</tr>
<tr>
<td>Total</td>
<td>33%</td>
<td>9.6%</td>
<td>25.0%</td>
<td></td>
</tr>
</tbody>
</table>

Bank that a merger is presumptively unlawful if (a) it produces a firm controlling an undue percentage share of the relevant market and (b) it results in a significant increase in the concentration of firms in that market. Thus, in each case it is apparent that only the italicized market definition would have (a) produced a firm with a market share approaching the thirty-per-cent market share in Philadelphia Bank and (b) at the same time indicated an increase in concentration of more than de minimis proportion. Even so, it should be noted that in each instance the increase in concentration resulting from the merger was significantly less than the thirty-three-per-cent increase in Philadelphia Bank (only one per cent in Alcoa-Rome and only five per cent in Continental Can.)97

94. Id. at 278; 214 F. Supp. at 514.
96. The district court found that the total packaging industry is so vaguely defined and encompasses such a broad range of products that it was not feasible to determine market shares. 217 F. Supp. at 788.
97. 377 U.S. at 280; 378 U.S. at 461. Increase in concentration was tested in Philadelphia Bank by computing the percentage increase in the total market share held by the acquiring firm and all firms larger than the acquired firm, 374 U.S. at 365. In Continental Can the Court referred to the increase in market share held by the acquiring firm alone (which was 14%). 378 U.S. at 461. Of course, the latter method of computation will give a higher percentage than the former (in Philadelphia Bank, for example, the increase in market share held by the acquiring firm alone would have been 71%). Although both measures may be of value, the former seems more pertinent to an oli-
To arrive at its market definitions, the Court had to abandon any careful application or balanced use of the market definition rules laid down in Brown Shoe (industry or public recognition, peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors). Indeed, the conclusion seems inescapable that in Alcoa-Rome and Continental Can the market definition was not so much the prelude to the conclusion of illegality as the conclusion of illegality was the prelude to the market definition. Essentially the Court acted in both cases to prevent a dominant firm in a highly concentrated industry from merging with a substantial firm in a competing industry (which in Continental Can was also highly concentrated).

A case could be stated in Alcoa-Rome justifying prohibition of the Rome acquisition based solely on the disappearance of one of the four remaining nonintegrated fabricators of aluminum wire with any significant share of the market (more than one per cent). This was an acquisition which the Court viewed as part of a trend of acquisitions of independent fabricators by integrated aluminum companies. But this consideration was not treated as decisive. Would the Rome acquisition have been upheld if Rome had produced only copper wire? Or, put another way, could the illegality have been cured if the aluminum wire production aspect of Rome's operations had been spun off?

In fact, the result in both cases seems clearly consistent with a determined policy of controlling the growth of oligopoly power. In a highly concentrated industry, competition from substitutes, whether actual or potential, may well be the most effective limitation on oligopolistic market behavior within that industry. Significant mergers into a competing industry by oligopoly firms could well diminish such competition. It would reduce competitive efforts to displace one product with another produced by the merger partners. What is the point of spending money to switch a customer from product X to Y if a firm is already selling him X? As the Court said in Continental Can: "It would make little sense for one entity within the Continental empire to be busily engaged in persuading

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99. As Professor Pitofsky noted, in Alcoa-Rome the Court relied on a single criterion, distinct prices, to separate aluminum and copper wire into separate product-markets, while in Continental Can the Court ignored the fact of distinct prices in combining metal and glass containers into a single product market. Pitofsky, Trade Regulation—1964, 20 Bus. Law. 657, 662 (1965).
100. In Alcoa-Rome the first four companies in the aluminum conductor field produced 76% of aluminum wire sold in the United States, and the top nine, 96%. 377 U.S. at 278. In Continental Can the first three firms in the metal-can industry produced 76% of the industry total, and the first three firms in the glass-container industry produced 55%. See 378 U.S. at 442-46.
101. See 377 U.S. at 278-81.
the public of metal's superiority over glass for a given end use, while the other is making plans to increase the Nation's total glass container output for that same end use.\textsuperscript{103}

The essential competitive danger found by the Court in an interindustry merger of large proportion may be paraphrased in more general terms as follows: The optimum market strategy of a substantial firm engaged in the manufacture of both metal and glass containers would be to obtain a maximum share of the combined metal and glass container market. Most likely this objective or strategy will lead to a decision to bend the efforts of the total enterprise toward emphasizing metal containers for certain end uses and glass containers for others and to abandon efforts to displace glass containers with metal all across the competitive front. Once one firm had gained the advantage of being able to employ such a flexible market strategy, further mergers might well be triggered by other companies seeking to achieve similar competitive advantages. The court held in \textit{Continental Can} that a merger involving these possibilities is presumptively illegal when the acquiring firm is a "dominant firm in a line of commerce in which market power is already concentrated among a few firms."\textsuperscript{104}

What \textit{Alcoa-Rome} and \textit{Continental Can} seem to add up to is a virtual prohibition of mergers by market leaders in highly concentrated markets with firms in competing industries, provided the market definition can, on some more or less rational basis, be manipulated to show that (1) the merger involves a leading firm in the market, (2) the postmerger share will be large (roughly twenty-five per cent or more), and (3) the acquired firm has more than a \textit{de minimis} share of the market (roughly one per cent). The handling of interindustry mergers by such a result-oriented market-definition approach seems undesirable, however, for there may be instances involving a merger by a dominant firm in an industry when even ingenious minds may be unable to construct a market with sufficiently large percentages to permit a finding of illegality under the doctrine (for example, in \textit{Alcoa-Rome} if Rome had not produced any aluminum conductor). Alternatively, and equally undesirably, the rule of presumptive illegality may be extended to cover percentage increases in market concentration too small to be of any economic significance—a tendency perhaps visible in \textit{Alcoa-Rome}. Such a market-definition approach also fails to recognize any distinctions in degree of competitive effect that may exist as between an intraindustry and an interindustry merger.\textsuperscript{105} Finally, such an approach leads to unpredictability, since it can never be clear precisely how far a court will go in any particular case in shaping a result-oriented mar-

\begin{footnotesize}
\textsuperscript{103} Id. at 465.
\textsuperscript{104} Id. at 464.
\end{footnotesize}
Market definition. At the same time, it would not be correct to treat such mergers as pure conglomerates, which they certainly are not.

*United States v. Von's Grocery Co.* and *United States v. Pabst Brewing Co.* The Court dealt in its most recent horizontal merger decisions with the problems of (1) mergers in markets not yet highly concentrated and (2) definition of the geographical market. Although the general direction of antitrust policy remains unchanged by the result in these cases, each reflects serious defects in legal theory. The *Von's Grocery* decision is particularly subject to criticism in that, far from building on the developing oligopoly doctrine it had previously shaped, the Court regressed to the use of earlier and cruder concepts.

In *Von's Grocery* the third largest grocery chain in the Los Angeles market sought to merge with the sixth largest chain. As a result of the merger the surviving firm would have become the second largest chain in Los Angeles with a postmerger market share of 7.5 per cent. The market was neither a tight nor a loose oligopoly; indeed, there were some 3,818 single-owner stores in existence. Nevertheless, the trend in the market was clearly toward increased concentration. The eight largest chains had increased their market share in the ten-year period from 1948 to 1958 (up to and including the merger) from 33.7 per cent to 44 per cent, and the number of single-owner stores, although still large, had decreased substantially. The market was marked by a noticeable degree of turbulence, with extensive entry and exit (sometimes through bankruptcy). There was also some lack of stability in the identity of the leading firms.

The Court held the merger to be in violation of section 7 and ordered divestiture without delay. As far as appears in the majority opinion, however, the Court's finding of illegality was not based on a careful consideration of the market structure. Instead, the opinion appears to turn on essentially only three factors: (1) the substantial decline in the number of single-owner grocery stores; (2) the corresponding rapid growth of chains (two or more stores under one ownership), in part through merger; and (3) the merger of "two of the most successful and largest companies in the area, jointly owning 66 grocery stores . . . to become the second largest chain in Los Angeles." Based on such an inadequate factual foundation, the Court's rationale could not avoid an oversimplified and doctrinaire economic populism. Referring to "the steady erosion of the small independent business in our economy," the Court found the retail food market

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108. In the eleven-year period from 1950 to 1961 the number of owners operating single stores had declined from 5,365 to 3,818, or by 29%. 384 U.S. at 272-73.
109. See id. at 288, 291, 294 (dissenting opinion).
110. Id. at 277.
of Los Angeles to be "a market characterized by a long and continuous trend toward fewer and fewer owner-competitors" (although over 3,500 competitors were still engaged). From here, the Court moved in one large step to its ultimate conclusion that this was the kind of market which Congress feared "would, slowly but inevitably gravitate from a market of many small competitors to one dominated by one or a few giants . . . ."\textsuperscript{111}

Ironically, the strong economic protectionism of the Court's opinion was unnecessary. The actual market concentration figures were not unimpressive. Despite the large number of competitors, the retail grocery market in Los Angeles was approaching loose oligopoly conditions. Thus, under the Kaysen-Turner definition, the 1958 premerger market shares of 57 per cent for the 20 largest firms and 49 per cent for the 12 largest firms were not far from the loose oligopoly considered likely to threaten anti-competitive conditions.\textsuperscript{112} A trend toward oligopoly was clearly apparent in the ten-year period prior to the merger during which the market share of the 20 largest firms had grown from 44 per cent to 57 per cent and that of the 12 largest firms from 39 per cent to 49 per cent.\textsuperscript{113}

On the basis of these facts Von's Grocery could have been decided, as Mr. Justice White intimated in his concurring opinion\textsuperscript{114} and as the Government brief urged,\textsuperscript{115} on the basis of an oligopoly power analysis emphasizing the following facts: (1) a pattern of increasing concentration in food retailing in Los Angeles, which if continued would make this large and important retail food market structurally oligopolistic; (2) the elimination of a substantial competitor from that market; (3) a significant percentage increase as a result of the merger in the share of the market held by the market leaders; and (4) the consideration, emphasized in Brown Shoe,\textsuperscript{116} that if a merger creating a firm of this dimension (75 per cent) were approved other mergers up to the same percentage would have similarly strong claims for approval.\textsuperscript{117}

\textsuperscript{111} Id. at 278.
\textsuperscript{112} C. KAYSEN & D. TURNER, ANTITRUST POLICY 27, 72 (1959).
\textsuperscript{113} 384 U.S. at 281, 290 (dissenting opinion). Moreover, the recent report of the National Commission on Food Marketing (issued after the Von's Grocery decision) concluded that concentration in food retailing, as distinct from concentration at other levels of distribution, posed the greatest threat to competition in food marketing. The commission found that dominant power in food marketing had passed to food retailers and further that concentration in food retailing markets posed competitive threats not only at that level, but at other levels of distribution, such as food processing. Large buying power has enabled the food retailer to demand and get concessions from processors and producers. U.S. Nat'l Comm'n on Food Marketing, Food From Farmer to Consumer 72-75, 94, 96, 106 (1966). This aspect of the Von's merger was not referred to by the Court.
\textsuperscript{114} 384 U.S. at 280.
\textsuperscript{115} Brief for Appellant 20-39. The entire Government brief bristles with oligopoly market analysis, which makes the Court's apparent deliberate avoidance of the approach all the more discouraging.
\textsuperscript{116} Brown Shoe Co. v. United States, 370 U.S. 294, 343-44 (1962).
\textsuperscript{117} A correct approach under oligopoly theory would also have resulted from adoption of the test suggested in the Government's brief. The Government urged application of a rule of presumptive illegality as to horizontal mergers in relatively unconcentrated markets where the merger "(1) occurs in a market where there is a significant tendency in the direction of undue concentration and (2)
Under such an oligopoly concentration approach the many persuasive defenses offered (among others, ease of new entry, absence of oligopoly pricing patterns, lack of absentee ownership, and lack of stability in relative ranking of leading firms)\textsuperscript{118} could have been rejected on the ground that present evidence of market competitiveness is no basis for permitting conversion of a market into an oligopoly. Present competitiveness provides no guarantee of future competitiveness under more concentrated market conditions.

The rationale of \textit{Von's Grocery} represents a setback in the development of a consistent theory of oligopoly power. The excessive preoccupation by the Court with the continued existence of competitors in large numbers improperly moves the focus of antitrust policy from the maintenance of conditions of competition (here a structurally competitive market) to the preservation of competitors for their own sake, irrespective of economic efficiencies. Although in this instance the result is not altered by such an approach, in other cases the principle could work large mischief.

The danger is reflected in language in the opinion in which the grounds for recognition of possible procompetitive aspects of mergers appear to be drastically narrowed. Citing \textit{Brown Shoe}, the Court stated that the Von's merger could not be justified on the basis "that the two had to merge to save themselves from destruction by some larger and more powerful competitor."\textsuperscript{119} The narrow reading given \textit{Brown Shoe} is made clear by reference to the cited portion of that decision. For what the Supreme Court said there was that while section 7 prohibited demonstrably anticompetitive mergers, it did not bar mergers between two smaller companies to enable them "to compete more effectively with larger corporations dominating the relevant market."\textsuperscript{120}

The apparent narrowing of the test permitting mergers between small companies to those instances where it can be established that the merger is necessary to "save themselves from destruction" is most undesirable. Such cases will be rare, and the possibility of being able to present effective proof even rarer. As a result, mergers which might promote competitive vigor appreciably increases the existing level of concentration." Brief for Appellant 18, United States v. Von's Grocery Co., 384 U.S. 270 (1966).

\textsuperscript{118} These defenses are well stated in a stinging dissent by Justices Stewart and Harlan, stressing among other things the failure of the Court to consider (1) the level of existing economic concentration in the market, (2) the ease of new entry and the turbulence of both entry and exit from the market, (3) substantial changes over a ten-year period in the identity of the twenty largest firms in the market, (4) the increase in the number of chains (as distinct from single-owner stores), (5) the strong market-extension aspects of the merger (caused by the fact that the stores in the two merging chains were generally some distance apart), (6) the absence of any factor of absentee ownership which would result from the merger, (7) the lack of any showing of oligopolistic pricing patterns or other diminution of competition, and (8) the ability of small stores to compete with chains through membership in large cooperative buying organizations. See 384 U.S. at 281–99.

\textsuperscript{119} \textit{Id.} at 277.

\textsuperscript{120} \textit{Brown Shoe Co. v. United States}, 370 U.S. 294, 319 (1962).
in a market while not appreciably increasing its oligopoly concentration would be blocked.

Banning all mergers which decrease the number of competitors in an industry in which the absolute number of competitors is already decreasing would make a fetish of the antimerger law, unnecessarily freeze in the advantages of existing market leaders, and lead to needless economic rigidity. On the facts of the case, such an extreme reading of Von's Grocery is not necessary, and sound analysis should preclude it.

The decision in United States v. Pabst Brewing Co. is principally defective in its cavalier approach to the problem of market definition. The case involved the merger of the Pabst and Blatz brewing companies, the tenth and eighteenth largest brewers, respectively, in the United States. As a result of the merger, Pabst (the surviving firm) would obtain the following shares of each of three possible geographical markets: (1) 4.5 per cent of the United States market, where Pabst would become the fifth largest firm; (2) 11.3 per cent of the three-state market of Wisconsin, Illinois, and Michigan; and (3) 24 per cent of the Wisconsin market, where Pabst would become the largest firm.

None of the three possible markets could be called competitive in structure. The national market was probably a loose oligopoly, or at least very close to one, and the two more localized markets approached tight oligopoly. In all markets the number of competitors was declining and concentration increasing, although apparently not as a result of merger. In whichever of the three ways the market might be defined, the merging firms were engaged in substantial competition.

The district court dismissed the complaint at the close of the Government's case, holding, among other things, that the only relevant market was the national market. The Supreme Court, reversing and remanding, found the evidence sufficient to establish a violation of section 7 in each of the three geographical markets. In so holding, the six-man majority failed to deal adequately with the problem of market definition, or even to recognize its importance. The Court explained that the relevant geographical market was not to be proved "in the same way the corpus delicti

122. Id. at 551.
123. In 1961 the 25 largest brewers had 77% of the total national market, and the 10 largest had 53%. Id. at 551.; United States v. Pabst Brewing Co., 233 F. Supp. 475, 490 (E.D. Wis. 1964) (lower court opinion).
124. In 1961 the eight largest brewers had 68% of the three-state market, and the four largest brewers had 59% of the Wisconsin market. 384 U.S. at 551.
125. See id. at 550-52. There was apparently no evidence introduced at trial to show a history of past mergers in the industry.
126. Id. at 551.
128. Four of the nine Justices filed concurring opinions, but Mr. Justice Douglas made it clear that he was fully in accord with the majority opinion. 384 U.S. at 553.
must be proved to establish a crime," or "by metes and bounds as a surveyor would lay off a plot of ground." Nor, said the Court, did the Government have the burden of proving "by an army of expert witnesses what constitutes a relevant 'economic' or 'geographic' market."129

Following these overstatements, with which few would quarrel in their exaggerated form, is this somewhat amazing statement: "Proof of the section of the country where the anticompetitive effect exists is entirely subsidiary to the crucial question in this and every § 7 case which is whether a merger may substantially lessen competition anywhere in the United States."130 Wisely, the Court does not attempt to explain how it can be demonstrated on any intellectual basis that a merger lessens competition except with respect to some definite area of competitive interaction.131 In two concurring opinions, Justices Harlan and Stewart and Mr. Justice Fortas took exception to the majority's market-definition approach and urged careful definition of the market in the light of a full factual record.132

As in the Von's Grocery decision, the controversial sweep of the Court's opinion in Pabst Brewing was quite unnecessary. As Justices Harlan and Stewart made clear in their concurring opinion, there was ample evidence in the record to develop a meaningful geographical market based on a standard of effective competition ("an area in which the parties . . . compete, and around which there exist economic barriers that significantly impede the entry of new competitors").133 Although the Pabst Brewing majority was correct in rejecting the simplified test proposed by the Government for defining the geographical market,134 it was both unnecessary and unwise to indicate that market definition could be simplified without any standard at all. The entire approach of market-concentration analysis as a tool by which to regulate oligopoly power rests on the determination of a real market, or area of effective competition, in which such concentration

129. Id. at 549.
130. Id. at 549–50.
131. See notes 291–293 infra and accompanying text.

The Court properly rejected the special defense that, in assessing the validity of a merger, a trend toward concentration in an industry is not to be considered unless it is the result of past mergers. If excessive market concentration is the evil, it seems entirely correct to state, as did the Court, that "a trend toward concentration . . . whatever its cause, is a highly relevant factor" in determining the anticompetitive effects of a merger. 384 U.S. at 552–53. In one sense a substantial merger in an industry tending toward concentration by means other than merger may be particularly dangerous, since in such an industry strict antitrust policy cannot be relied on to arrest the trend toward concentration. Under these circumstances the need may be even more acute to retain whatever competition exists by blocking mergers.

132. Id. at 555, 561. Thus, Mr. Justice Fortas stated that "[u]nless both the product and the geographical market are carefully defined, neither analysis nor result in antitrust is likely to be of acceptable quality." Id. at 562.
133. Id. at 556–57.
134. The Government urged that the existence of a geographical market be presumed on a prima facie basis if (1) sellers included in the market are in actual competition and (2) sellers not included in the market suffer from "some" disadvantage in competing with those included. Brief for Appellant 15–16, 32–35. Although it will be suggested that the test not be adopted, it is vastly preferable to no test at all—the result that emerges from the Pabst Brewing case. See notes 301–04 infra and accompanying text.
is of significance. Perhaps \textit{Pabst Brewing} is the logical consequence of the
market-definition analysis begun in \textit{Alcoa-Rome} and \textit{Continental Can}, but
that fact does not make it more acceptable. Market definition has clearly
become the least satisfactory area of current merger decisions.

In their reasoning, although not in result, both \textit{Von's Grocery} and
\textit{Pabst Brewing} pose a threat to the development of a consistent and mean-
ingful legal policy toward control of oligopoly power. Both also carry
some risk of evoking, sooner or later, a congressional reaction toward doc-
trines of antitrust law not resting on an adequate structure of economic
and legal theory.

2. Mergers and other horizontal arrangements under the
Sherman Act.

In light of the thinking of the Supreme Court in the decisions dis-
cussed, the result in the \textit{Lexington Bank} merger case\textsuperscript{135} seems hardly ex-
ceptional despite the fact that it arose under the Sherman Act rather than
the Clayton Act. If \textit{Lexington Bank} has importance, it is in the possibility
that it reflects a modification of the long-standing rule of reason under sec-
tion 1 of the Sherman Act. The decision could arguably be interpreted as
modifying the rule of reason when large oligopoly firms are involved in a
horizontal arrangement or agreement outside the area of per se violations.

The Court held that a horizontal merger was illegal under section 1 of
the Sherman Act where the merging firms were the first and fourth banks
in the market, holding, respectively, forty per cent and thirteen per cent
of commercial banking assets in such market, and where there were only
four other competitive banks. Although the Court did not say so, this was
a major merger which would have created a dominant firm nearly three
times the size of its nearest competitor in a highly concentrated oligopoly
market in what the Court considered to be a particularly sensitive
business.\textsuperscript{136}

The decision would have surprised no one if the case had arisen under
the Clayton Act rather than the Sherman Act. But the fact that the case
was decided under section 1 of the Sherman Act, which normally requires
proof of an actual restraint of trade and not a mere probability of competi-
tive injury and the fact that the Court seemed to dispense with such proof
and to apply a presumption of illegality evoked two dissents and two spe-
cial concurrences.\textsuperscript{137} Instead of undertaking an elaborate market analysis
of the effects of the merger, as had been done in \textit{United States v. Columbia

\textsuperscript{137} Justices Harlan and Stewart dissented; Justices Brennan and White concurred in the result
but not the reasoning of the Court. 376 U.S. at 673.
Steel Co., the leading Sherman Act merger decision up to that time, the Court announced the following rule: "Where ... the merging companies are major competitive factors in a relevant market, the elimination of significant competition between them constitutes a violation of §1 of the Sherman Act."

Phrasing a legal test in terms of "major competitive factors" in a market comes very close to announcing a special test applicable to concentrated oligopoly markets. Lexington Bank itself, as well as the precedents cited by the Court, clearly involved concentrated oligopoly markets. Independently of such precedents the words "major competitive factor" in a market can hardly refer to a firm with less than twenty per cent of the market.141 The merger of two major competitors, each holding fifteen to twenty per cent of a market, would result in a combined percentage of at least thirty to forty per cent of the market. In almost all cases a concentrated oligopoly market would be involved or created since it is unlikely that two firms would have achieved such large shares without some degree of general market concentration. Indeed, they would be close to possessing oligopoly power by themselves.142

With respect to horizontal mergers only, it seems no great step, given the current shape of the Court's thinking and the development of economic theory, to hold that a merger which creates or substantially intensifies a concentrated oligopolistic market condition is, without more, illegal, even under section 1 of the Sherman Act. Perhaps, this is all the decision means. If so, and if the author's rephrasing is correct, the decision does not seem as controversial as might otherwise appear.

The important question posed but not answered by Lexington Bank is whether other types of arrangements, agreements, or joint business understandings between major companies in concentrated oligopoly markets not amounting to per se violations may be subject to such a simplified test of illegality under section 1.143 It would be easy to become alarmed about such a prospect and let imagination run out of hand. However, the problem

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139. 376 U.S. at 672-73.
140. The Court cited the four so-called railroad cases, 376 U.S. at 670-71. As Mr. Justice Harlan pointed out, three of these cases "involved the combination of massive transportation systems" and the fourth "a combination of 'two great competing interstate carriers and ... two great competing coal companies ... '." Id. at 675 (dissenting opinion).
141. A firm with a smaller percentage, say 5% or 10%, would be but a minor competitive factor in most tight oligopoly markets where the market leaders would be likely to have far more formidable percentages. On the other hand, in the case where a firm with 5% or 10% of the market might be large relative to other firms, the proper conclusion, certainly in terms of economic theory, would be that no firm is a major competitive factor in the market since no firm could significantly affect the market solely through its own action.
142. See note 18 supra.
143. The broad relevance of the railroad cases cited by the Court, see note 140 supra, to "the legality of many types of contracts, ownership arrangements or business policies not within the reach of Section 3 or Section 7 of the Clayton Act" has been suggested before. Att'y Gen. Nat'l Comm. Antitrust Rep. 24-25 & n.83 (1955).
dissolves if there is imposed the simple precondition, which seems implicit in Lexington Bank, that such arrangements will be proscribed only if they can be shown to contribute directly and materially to the growth or maintenance of concentrated oligopoly power in a definable market.

When that precondition is imposed, it becomes hard to envision just where the Lexington Bank rule would have practical application outside areas already covered by either per se rules or the Clayton Act. Apart from the field of mergers, where it is close to redundant, the rule seems no more than a doctrine for potential use against some arrangement or agreed method of common operation by oligopoly firms which is not now in violation of law and which can be proved to be closely connected with the achievement or maintenance of oligopoly power. Perhaps on balance the case is an aberration, but if so, all the more does it reflect the deep-seated antipathy of a majority of the Court to concentrated oligopoly markets.

3. **Vertical mergers.**

The relationship of oligopoly market power to vertical merger is fundamentally different from its relationship to horizontal merger. A horizontal merger directly enhances the power of the oligopoly firms by adding to their market shares and thereby further concentrating the market. A vertical merger, however, adds nothing to horizontal market shares. At most, it may affect competition at the horizontal level, but it can increase, as well as decrease, competition. Thus, on the one hand, vertical integration may diminish competition by serving as a vehicle for protecting market power or transferring it from one stage of production to another; it may facilitate both price and nonprice discrimination, including the use of leverage against nonintegrated suppliers or customers of the integrated firm ("price squeeze"); it may accentuate product differentiation, which has been identified as among the most serious barriers to entry; it may diminish competitive confrontation at various stages of integrated operations by replacing buying and selling in an open market with closed intra-firm transactions not subject to competitive market discipline and thereby reduce the number of open-market transactions through which final prices to consumers are determined; finally, it may seriously increase the

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146. Kayser & Turner, op. cit. supra note 112, at 122; Adelman, supra note 144, at 45-46.

147. J. Bain, Barriers to New Competition 216-17 (1956).


149. Markham, The Effectiveness of Clayton Act Section 7, in Perspectives of Antitrust Policy 180 (Phillips ed. 1965).
amount of capital and know-how needed to enter the integrated market. On the other hand, vertical integration may promote competition. It may be the gateway to the achievement of greater economic efficiencies; it may serve as a means of bypassing monopoly (or oligopoly) stages of production and thereby avoid the paying of a monopoly toll; and vertical integration by one firm in an oligopoly market may provide a means for that firm to frustrate concerted action by its competitors by enabling it to initiate hard-to-detect price cutting at another, more competitive stage of production.

Although it has been denounced from time to time, vertical integration has never been illegal per se under either the Sherman or Clayton Acts. Until Brown Shoe, vertical integration was scrutinized in Sherman Act cases primarily to determine whether it would promote monopoly power, and that approach was reflected also in the work of many legal scholars. In Clayton Act cases the question was whether competitors were likely to be foreclosed from a substantial share of the relevant market. In both types of cases the question of the relationship between the vertical integration and the actual or probable oligopoly structure of the market was generally ignored. Thus, for example, in United States v. Paramount Pictures, Inc., the fact that leading firms in a highly oligopolistic production-distribution market had integrated forward to control three-quarters of the first-run theaters in cities with populations of over 100,000 was not necessarily illegal under the Sherman Act; the question of legality turned on whether the existence of monopoly power could be shown (together with the required intent or purpose to use such power), or alternatively whether vertical integration was "a calculated scheme... to restrain or suppress competition.

The first efforts of the Supreme Court to deal explicitly with the relationship between vertical mergers and oligopoly power were in Brown Shoe. At least by way of hindsight, the Court's treatment appears rudimentary and falls short of the sophistication the problem demands. The

150. Kayser & Turner, op. cit. supra note 112, at 120.
152. Adelman, supra note 144, at 47; Bork, supra note 144, at 200.
153. Dean & Gustus, Vertical Integration and Section 7, 40 N.Y.U.L. Rev. 672, 690, 707-08 (1965).
155. See, e.g., Adelman, supra note 144 (an economist, but also a "legal scholar"); Bork, supra note 144.
158. See id. at 167, 172-74.
vertical aspects of the *Brown Shoe* merger appeared in the acquisition by Brown, a shoe manufacturer, of Kinney's retail outlets. There was not actual or even near oligopoly in either market. Brown, although the fourth largest shoe manufacturer, possessed only four per cent of total shoe manufacturing facilities in a market with hundreds of competitors, while Kinney's retail outlets comprised a mere 1.2 per cent of total shoe stores in an unconcentrated market.\(^{160}\)

Despite these facts, the Court held the vertical aspects of the merger likely to injure competition. The Court said that, given the existence of a trend in the shoe industry toward vertical integration and a tendency for the acquiring manufacturing firm to become an increasingly important source of supply for its acquired retail outlets, "the necessary corollary . . . is the foreclosure of independent manufacturers from markets otherwise open to them." It then makes no difference, said the Court, that the industry is fragmented, as was the shoe industry, or that the industry remains "dynamically competitive," for "remaining vigor cannot immunize a merger if the trend in that industry is toward oligopoly."\(^{161}\)

In short, the Court began with the premise that vertical integration which causes a trend toward oligopoly is illegal. It then proceeded to find a trend toward oligopoly in the unconcentrated shoe industry, based solely on (1) a trend toward vertical integration and (2) a tendency following acquisition of retail shoe outlets for the acquiring shoe manufacturers to deal with their acquired outlets.

The Court's premise as to the general unlawfulness of vertical integration that promotes the growth of oligopoly power appears sound. There is little reason to prefer the growth of oligopoly power obtained by means of vertical mergers to the growth of such power by horizontal mergers. To be sure, there may be productive and distributive efficiencies achievable through vertical integration, but horizontal integration may also achieve efficiencies through economies of scale. In either event, the achievement of efficiencies not otherwise obtainable could be made a special defense to a general rule or presumption of illegality.

It is the Court's reasoning from its premise, however, that appears faulty. In every true vertical merger designed to achieve efficiencies through integration, it is to be expected that the merging companies will deal with each other on an increasing basis. This is, and must be, the very motive of such a vertical merger. Thus, *Brown Shoe* comes dangerously close to equating a trend toward vertical integration with a trend toward oligopoly itself. Quite simply, *Brown Shoe* fails to focus on the underlying economic assumption that excessive horizontal concentration is the basic vice and  

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160. *Id.* at 297, 300-03.
161. *Id.* at 332-33.
therefore that vertical integration by merger becomes important in fostering oligopoly conditions only to the extent it can be shown to contribute to the growth or maintenance of horizontal market power.

It is one thing to condemn in its incipiency a direct trend toward oligopoly clearly demonstrated by increased market concentration resulting from a series of horizontal mergers. It is quite another to condemn vertical mergers which, in and of themselves, add nothing to oligopoly concentration in any market, solely on the basis of speculation as to their effect on future patterns of trade. The anticompetitive inference becomes very weak when all the markets involved are unconcentrated and when no visible threat of near oligopoly is present in any market. Even the resulting “foreclosure of independent manufacturers” referred to in Brown Shoe is not necessarily a trend toward oligopoly. Independent manufacturers may find other market outlets. They may even be able to undersell the integrating firms if the latter have unwisely judged the economies resulting from integration. The independent manufacturers may themselves integrate. That some competitors may fall by the wayside because of efficiencies gained by their rivals through general vertical integration does not necessarily mean that the market will become an oligopoly at any level. The market may remain structurally competitive, although having fewer competitors—a natural, and perhaps under some circumstances a desirable, result that should be fully expected from time to time under the dynamics of competition and changing economic conditions.

In short, the economic case has not been presented that would justify a sacrifice of all the possible efficiencies and benefits that vertical mergers can bring through interchange of technology and ideas because of a fear that a trend toward vertical mergers in an unconcentrated market may lead to horizontal concentration at some unknown future date.

To proscribe vertical mergers generally in nonconcentrated markets would be to impose a drastic limitation on business experimentation. It would be opposed to what may be the most basic premise of our antitrust laws: that free initiative and experiment in business endeavor is the surest road to our national economic welfare and that antitrust should preserve insofar as possible market conditions in which such free experimentation can take place. An undiscriminating policy against vertical mergers might even turn out to be less desirable than a policy against pure conglomerates. In the case of a vertical merger there is a far greater chance that a management theory of how to achieve greater efficiencies or technical progress is being tested than in the case of a conglomerate merger, which in many instances reflects only a desire to diversify capital investment.

Vertical mergers involving large firms in concentrated markets or clearly threatening to create excessive concentration are a different matter.
Although in a particular case there may be justification for such a merger, either because it achieves otherwise unreachable efficiencies or is in fact pro-competitive, a general presumption against mergers of this type seems reasonable. When firms in a concentrated oligopoly market integrate vertically with the result that they become major factors in a vertically related market, the most natural result is to project the oligopoly consensus in their own market forward into the new market. As in the case of vertical integration where there is monopoly power, price competition is prevented from "backing up and infecting earlier markets."¹⁶²

Because of the pessimistic, but too often verified, notion that excessive power, if possessed, is likely to be used, the general conclusion can be drawn that vertical integration in such circumstances also increases the probability of the other anticompetitive practices and conditions described above.¹⁶³ The long congressional investigation of "dual distribution," which explored the relationship between vertically integrated firms and their nonintegrated customers and competitors, tends also to confirm the conclusion that excessive market power possessed by vertically integrated oligopolies carries a risk of detrimental competitive effect. A subcommittee report thus concludes that while vertical integration and dual distribution were not in and of themselves undesirable, "when detrimental effects have occurred, dual distribution has been coupled with either predatory conduct or substantial market power."¹⁶⁴ That is to say, apart from overt, predatory acts, the danger to competition resulting from dual distribution occurred in those cases where the vertically integrated firm had a strong oligopoly position as a supplier to the customer with whom it was also engaged in competition at a lower level of distribution. Moreover, as the market becomes more concentrated and the number of firms decreases, the anticompetitive conditions arising from vertical integration (prize squeeze on nonintegrated firms, price discrimination against customers selling in inelastic markets, and increased capital requirements for entry) tend to have even greater adverse impact and significance.¹⁶⁵

4. Consignment selling and restraints on marketing and distribution.

Consignment selling is a method of resale price maintenance, which in turn is one of several types of restraints on marketing and distribution. In recent Supreme Court decisions it is possible to see the beginnings of a

¹⁶². Adelman, supra note 144, at 46.
¹⁶³. See text accompanying notes 145-50 supra.
legal policy aimed at controlling the use of such restraints where an oligopolistic industry is involved. Even as late as 1960 the Court, in invalidating a resale price maintenance system involving an oligopolistic industry, made no reference to any relationship between resale price maintenance and oligopoly power. However only three years later, Mr. Justice Brennan, concurring in *White Motor Co. v. United States*, noted that resale price maintenance is intended to, and "almost invariably does in fact, reduce price competition not only among sellers of the affected product, but quite as much between that product and competing brands." In this connection, Mr. Justice Brennan also referred to a *Harvard Law Review* note which stated that resale price maintenance has a "settled propensity . . . to carry an oligopolistic price structure down from the manufacturer's level into the chain of distribution . . . ." Then came *Simpson v. Union Oil Co.* in which, for the first time with relation to the facts of an actual case, the connection was made (although not explained) between resale price maintenance and oligopoly power. Prior to *Simpson* an effective method of nationwide resale price maintenance existed in the form of consignment agreements (provided the manufacturer was willing to assume the legal burdens of the consignor-consignee relationship). In *Simpson* the Supreme Court overturned this long-standing rule in the context of a highly concentrated oligopoly market, seemingly in a conscious effort to control oligopoly power further.

At issue in *Simpson* were the consignment agreements of a large oil company which fixed the price at which some 3,300 consignee service stations in eight western states sold gasoline. The concentrated oligopoly structure of the oil company's market is hinted at in the opinion, which refers to "a vast gasoline distribution system" which is "able to impose noncompetitive prices on thousands of persons," and to the consignment "device" used as "a wooden formula for administering prices on a vast scale." The term "administered prices" is an expression typically used to describe the price structure of concentrated oligopoly, and it seems clear

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172. Id. at 21-22.
that the Court was using the terms in that sense. The Court appears to have placed considerable reliance for its understanding of consignment agreements "in the gasoline field" on congressional hearings in which a Union Oil official testified, in effect, that Union Oil in establishing its price was following other price leaders. In fact, the market was clearly a tight oligopoly. In California, the largest state included in the geographical market, eight companies produced ninety-five per cent of the gasoline sold in 1964, and the four leading firms (of which Union Oil was one) produced sixty-five per cent. Probably the reason that the Court did not specifically refer to the concentrated oligopoly characteristics of the market was simply that the briefs (based on a stipulated record) did not contain the information.

I would suggest, therefore, that Simpson indicates that resale price maintenance through consignment contracts is illegal per se when used by a sizable firm in a concentrated oligopoly market whether or not the firm's competitors use the device and whether or not its own consignees are in competition with each other. From the point of view of regulation of oligopoly power, this rule seems clearly justified. Where the manufacturer's market is one of tight oligopoly and therefore is likely to be marked by an absence of price competition, but where the product is distributed through numerous relatively small dealers and outlets, there is always the chance that unpredictable price cutting at wholesale and retail levels, possibly accompanied by dealer pressure for price concessions, can unsettle the price uniformity at the manufacturing level. In addition, even though competition may be blocked at the manufacturing level, some competitive benefits may accrue at the retail level in the form of lower

173. See id. at 22. With reference to administered prices the Court quotes at length from an article by Professor A. A. Berle, which discusses "administered prices" as established by "[t]he three or four 'bigs' in any particular line," briefly describes the price mechanism of concentrated oligopoly markets, and then specifically refers to the automobile market (a classic tight oligopoly). See Berle, Bigness: Curse or Opportunity?, N.Y. Times, Feb. 18, 1962, § 6 (Magazine), at 18, 55, 58 (quoted in 377 U.S. at 22 n.9).

174. 377 U.S. at 19-21. The official had testified, "Now, we go out into the market area and find out what the competitive major price is, what the level is, and we set our house-brand at that." Hearings on Distribution Practices in the Petroleum Industry Before Subcommittee No. 5 of the House Select Committee on Small Business, 85th Cong., 1st Sess., pt. 3, at 79-80 (1957).

175. Los Angeles Times, Feb. 22, 1965, pt. III (Financial), at 9, col. 5. A similar pattern of concentration was considered at an earlier date in the Standard Stations decision. At that time seven leading companies produced 65% of the gasoline sold in seven western states. Standard Oil Co. v. United States, 337 U.S. 293, 295 (1949).

176. The briefs indicated only that Union had 10% of the service stations on the West Coast and sold 11.5% of all gasoline sold through service stations in California. Brief for Respondent 17, 26; Brief for Petitioners 14.

177. But see Rahl, The Demise of Vertical Price Fixing Through Consignment Arrangements: The Simpson Case, in 29 A.B.A. ANTITRUST SECTION 216, 231 (1965). I would disagree with Professor Rahl's suggestion (as applied to oligopoly markets) that resale price maintenance as to consignees not in competition with each other may be permissible despite Simpson. It would be a rare situation, however, in which a firm of oligopoly size would have consignees who were not to some extent in competition.

prices or other advantages for consumers. If the distributors and retailers are setting their own price, the manufacturer cannot cause them to follow a prevailing oligopoly price even though he would like them to do so. On the other hand, if each manufacturer can ensure a uniform price at each level of distribution, the oligopoly market consensus can be maintained at every step in distribution.

Where only some of the firms in a tight oligopoly market engage in resale price maintenance, there is less contribution to the maintenance of oligopoly conditions in the manufacturer's market. Nevertheless, to the extent that some retail distributors are prohibited from initiating price cuts, the retail market may become less competitive. It would appear reasonable to assume that a manufacturer engaging in resale price maintenance will not ordinarily wish to initiate price cutting at the retail level. The previously discussed testimony of the Union Oil official showing that Union Oil caused its consignees to follow the prevailing market price is consistent with this supposition.97

What are the other implications of Simpson in the context of the growing doctrine aimed at controlling oligopoly power? First, in the area of resale price maintenance, it is possible that the Supreme Court may eventually hold that fair trade, the only remaining effective method of resale price maintenance, cannot be used by manufacturers in highly concentrated oligopoly markets. This could be done by giving content to the so far almost meaningless statutory prerequisite in the McGuire Act that fair traded goods be "in free and open competition with commodities of the same general class produced or distributed by others."98 The Court could hold, without doing violence to the statutory language, that goods produced by firms in highly concentrated oligopoly markets are simply not in free and open competition, in contrast to the goods produced by firms in less concentrated markets.99 Many of the economic and legal authorities previously referred to in this Article concerning the noncompetitive characteristics of oligopoly markets could be marshaled. It would not be a giant step; such an interpretation has already been applied to preclude monopoly firms from utilizing fair trade for the precise reason that the goods they produce are not in free and open competition.100

Beyond resale price maintenance, Simpson, or at any rate the present

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97. See note 174 supra.
100. See Eastman Kodak Co. v. FTC, 158 F.2d 592 (2d Cir. 1946), cert. denied, 330 U.S. 828 (1947). Moreover, the Supreme Court has said that the resale price maintenance exemption is to be narrowly construed since "resale price maintenance is a privilege restrictive of a free economy." United States v. McKesson & Robbins, Inc., 351 U.S. 305, 316 (1956).
trend of Supreme Court decisions, may have implications with respect to other contractual restraints on marketing and distributing, including exclusive dealing, territorial restrictions, and customer limitations. These arrangements may also contribute to maintaining anticompetitive rigidity at various levels in concentrated markets. Collectively, and even individually, such arrangements may operate to reduce the number of competitors at each level of distribution. They give manufacturers in oligopoly markets the power, through joint but noncollusive action, to establish in the channels of distribution the same market structure that prevails in the manufacturing market. If such a structure is one of concentrated oligopoly, it will raise competitive risks at whatever level of distribution it occurs. Exclusive arrangements, like vertical integration, tend to make entrance into consumer-goods manufacturing more difficult, for the new entrant must build up a new distributor network in order to market his product or else integrate forward into distribution at large expense. Exclusive outlets also appear to be important in building up high degrees of product differentiation in the public mind. Such differentiation, as previously indicated, has been identified as among the most important barriers to entry of new firms.

At the same time, exclusive dealing and territorial and customer restrictions tend to reduce the power of the distributor in relation to the manufacturer. If the distributor handles only the manufacturer's products and is cut off, he may be put out of business. In a concentrated market it may be extremely difficult to obtain a new distributorship line. By limiting each distributor to a particular territory and perhaps also to particular

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183. Professor Bork challenges such an analysis, labeling it a mere "truism." In Bork's view, jointly acting oligopolists cannot further injure consumer interests by vertical restraints since, assuming they are already extracting a full oligopoly return in the first market, they would have no incentive or even market ability to extract a higher net return as result of restrictions imposed in the second market since by assumption, they are already charging the optimum oligopoly price to ultimate consumers. Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, 75 Yale L.J. 373, 415-16 (1966). A student author has suggested that thrusting oligopolistic structure into lower levels of distribution is possible only if all manufacturers divide the market into substantially the same territories. Even then the distributors, being subject to pressures other than those from manufacturers, might not act like oligopolists. Note, Restricted Channels of Distribution Under the Sherman Act, 75 Harv. L. Rev. 795, 834 (1962).

The very essence of oligopoly behavior is interdependent response, and clearly such response gains in both predictability and uniformity if the oligopolistic manufacturing firms themselves control the price and handling of their product through the channels of distribution. Similarly, absence of such vertical control may well inhibit oligopolists from taking their maximum net return from distributors, and thus there may be something more to be extracted from the market by vertical restraints. In addition, vertical restraints tend to raise entry barriers (particularly through product differentiation) and thereby to add stability to oligopoly markets; the result is to permit a higher price to be charged without attracting new entry. See also notes 184-89 infra and accompanying text.


185. See J. BAIN, BARRIERS TO NEW COMPETITION 217 (1956).
classes of customers, the national manufacturer, among other things, ensures as far as possible that no one distributor will become indispensable. This serves to prevent the growth of a distributor with enough "counter-vailing power" to negotiate in any effective sense with a manufacturer concerning price or other terms of distribution.

On the other hand, distributorship restrictions can have procompetitive effects even in concentrated oligopoly markets. As the Supreme Court noted in *White Motor Co. v. United States*, they may be the "only practicable means a small company has for breaking into or staying in business," a policy consideration that may possibly justify even a tying contract. They may guarantee a small firm an assured source of supply. There may also be problems inherent in marketing the product requiring, or at least making it desirable, that distributorship restrictions be imposed—for example, risks in introducing a new product or service of a complex machine.

It is appropriate to conclude, then, that the treatment of these restrictions should be selective: severe when employed by substantial firms in concentrated markets and more lenient when used by smaller firms, particularly where they are new market entrants or are attempting to challenge market leaders in concentrated markets. Indeed such a distinction has recently been increasingly recognized by the lower courts and the commentators. Such a selective policy might be criticized on the basis that it could provoke large firms into forward integration, thereby ending the independence of many small distributors throughout the country and eliminating intrabrand competition in the products of the forward-integrating firm. But a determined antitrust policy could probably forestall such a development. Vertical acquisitions by market leaders in concentrated oligopoly markets of existing distributors or their assets could be blocked under section 7 of the *Clayton Act*. Thus, a manufacturer would have to be prepared to open his own distribution system without the benefit of acquiring existing outlets. A number of factors would appear to militate

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188. *See* ibid.
189. *See* Address by FTC Commissioner Philip Elman, First Annual Antitrust Institute, printed in 5 TRADE REG. REP. ¶ 50128 (Nov. 5, 1965) (control of resale price may be required for the development of a firm's marketing and advertising strategy).
192. *See* text accompanying notes 144-65 supra. Where distributors are not incorporated, § 7 would not be literally applicable, but § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1964), has been held applicable to such situations. Beatrice Foods Co., 3 TRADE REG. REP. ¶ 17244, at 22355 (FTC 1965).
against such an undertaking by a manufacturer who has built up a network of independent distributors. There appear to be many valid business reasons why manufacturers often prefer to be represented by independent local merchants rather than by company-owned outlets. Nor would it be an easy task simply to terminate relationships with an entire network of distributors located throughout the country in favor of company-owned outlets. Litigation, dislocation of distribution, ill will, and perhaps other problems would be the likely result. In short, an established, successful marketing arrangement tends to have a certain amount of built-in inertia.

The trend of both current Supreme Court decision and economic analysis then appears to indicate the appropriateness of extending the policy of oligopoly control to the areas of distributorship arrangements. The extension should be accompanied, however, by recognition that the connection between the questioned practices and horizontal oligopoly is indirect and often complex.

5. Reciprocity and the conglomerate merger.

In *FTC v. Consolidated Foods Corp.* the Supreme Court faced for the first time the legality under section 7 of a true conglomerate merger. A key factor in the Court's decision invalidating the merger was its determination that the merger tended to solidify and protect the market share of a leading firm in a highly concentrated oligopoly market. The acquired firm (Gentry, Inc.), a manufacturer of dehydrated onion and garlic, held approximately thirty-two per cent of the relevant market; the degree of oligopoly concentration was measured by the fact that Gentry and its one leading competitor together held almost ninety per cent of the market. The acquiring firm (Consolidated Foods), a diversified processor and seller of food products, was in no sense a competitor of the acquired firm; nor were the two in the vertical relationship of buyer and seller.

In sustaining the finding of illegality, the Court agreed that the merger would strengthen the hold of Gentry in the dehydrated onion and garlic market because of the leverage the affiliation with Consolidated would give the merged firm over food processors who were both suppliers to Consolidated and customers or potential customers of Gentry, as can be shown graphically in the following diagram:

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193. The reasons include the desire to use capital for other purposes, dislike of assuming local credit risks as well as state and local tax liabilities, and the sales superiority of a self-employed distributor over a salaried employee of a manufacturing outlet. See Note, 75 Harv. L. Rev. 795, 834 (1962).
195. Id. at 595.
Consolidated’s patronage as a buyer from food-processor middle firms could be used as a lever to induce them to buy from Gentry, or in the language of antitrust, to engage in the practice of reciprocity. The result of facilitating the practice of reciprocity, the Court said would be that “the two-firm oligopoly structure of the industry is strengthened and solidified and new entry by others is discouraged.”

It must be recognized that there are by definition at least two markets in which an injury to competition can occur in a reciprocal buying relationship. Thus, in Consolidated Foods the quid pro quo inducing the middle firms to buy their onion and garlic from the Gentry division of the merged firm was the continued (or increased) ability of the same middle firms to sell the processed foods which they produced to the Consolidated division. An injury to competition, therefore, could occur in the market in which the middle firm buys (onions and garlic) or the market in which it sells (processed food). The Supreme Court focused on the first of these two markets in its decision and referred to the possible foreclosure of Gentry’s competitors as a result of reciprocal buying pressures on middle firms. However, it seems equally apparent that there could also be foreclosure of competitors of a favored middle firm, who might find themselves unable to sell to Consolidated. This possibility is especially apparent where, for example, competitive middle firms are not sufficiently diversified to need Gentry’s products or are already committed to one of Gentry’s competitors under a long-term supply contract.

Concentrating on the market in which the middle firm bought, the Court began with the assumption that reciprocity made possible by merger “is one of the congeries of anticompetitive practices at which the antitrust laws are aimed.” It stated that an FTC finding that a merger will result in probable reciprocal buying is not to be upset if the acquired company “commands a substantial share of a market” and if there is substantial evidence to support the finding. The Court did not stop to say, or sug-

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196. Id. at 601 (quoting the FTC opinion).
198. 380 U.S. at 600.
gest, what "substantial share of a market" meant other than that it was more than \textit{de minimis}.

The single most decisive factor in \textit{Consolidated Foods} clearly appears to be the tight oligopoly structure of the acquired firm's (Gentry's) market. The FTC opinion had analyzed reciprocity in some detail, analogizing it to tying contracts, to abuses of large buying power as in \textit{United States v. Griffith} and to vertical foreclosure of competitive suppliers. Making no reference to these portions of the Commission's decision, however, the Court referred almost entirely to that part of the opinion discussing the merger from the viewpoint of the oligopoly problem.

\textit{Consolidated Foods} thus indicates that in those mergers involving reciprocity a crucial inquiry will be whether the expected reciprocal buying will have an appreciable effect on the maintenance of oligopoly conditions in the industry or industries involved. It is possible that under certain conditions there may be no such effect, as where other firms are similarly diversified and can make equally effective demands on their supplier-customers. The issue, however, appears clear: whether the merger will be likely to maintain, intensify, or create oligopoly conditions in the relevant market.

Such an inquiry rests on the assumption that there is an important relationship between oligopoly conditions and reciprocity. This assumption appears to be well supported by economic theory. To begin with, reciprocity, which stated simply is the use of buying power to promote sales, is not likely to be an important force except in buying markets which are oligopolistic. Buyers will not be able to exert pressure on their suppliers unless the market to which these suppliers sell is not fully competitive, and, therefore, a supplier is not able readily to replace a buyer attempting to exert leverage, by selling to others at the same or a slightly shaded price. Thus, if Consolidated had been a small chain of local food markets, no different from hundreds of other small chains, it would be most unlikely that it could have exerted any leverage over the food-processor middle firms to change their buying patterns. Other characteristics of markets susceptible to reciprocity influence are lack of symmetry in the size and diversification of firms, existence of unused short-run capacity in the suppliers' market—raising the threat of serious price retaliation by a supplier's competitors if he cuts price rather than bow to reciprocal buying pressures, and predomi-
nance of sales to industrial firms and large distributors rather than to ultimate consumers. These conditions are most likely to be present in oligopolistic buying markets, and particularly in highly concentrated oligopoly markets.

Second, the existence of reciprocal buying contributes to further market imperfections since the practice of reciprocity facilitates the further growth of the large and diversified firms at the expense of their smaller and less diversified competitors. Alternatively, the smaller and less diversified firms are stimulated to become larger and more diversified, probably by following the merger route (often the cheapest and certainly the fastest way to grow).

Finally, reciprocal buying practices may discourage new entry into the market since the potential entrant may well conclude that his market success will not be determined by his own competitive efforts in terms of the price and quality of his product, but that he will be blocked by established reciprocal buying patterns. For these and other reasons there is justification for concluding that reciprocity promotes and encourages industrial concentration.

If the above analysis is sound, reciprocity seems destined to play a key role in the development of conglomerate-merger law. This conclusion is supported by Professor Turner's severe criticism of the practice in his recent article on conglomerate mergers and his recommendation of a stringent test of illegality. The result of such a development could well be a strong bias in favor of forcing legal analysis of conglomerate mergers into the reciprocity category. Such a tendency should be resisted, however, as it is likely to lead to the same kind of confusion and opaque reasoning which marked the failure in Alcoa-Rome and Continental Can to come to grips with the interindustry merger as a distinct problem.

In any event, it appears to be clear from Consolidated Foods that no merger involving the substantial probability of reciprocal buying in a concentrated oligopoly market is likely to pass muster under section 7. The principal questions left open are (1) whether the Court in its ambiguous dictum concerning the added weight to be given to the FTC's determina-

204. Stocking & Mueller, Business Reciprocity and the Size of Firms, 30 J. Bus. 73, 75-77 (1957); Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1387-88 (1965). A further condition leading to reciprocity is a sloping demand curve for individual firms in industries where marginal costs are constant over a wide range of output. Stocking & Mueller, supra, at 73-77.

205. Stocking & Mueller, supra note 204, at 93-94.

206. The FTC noted this possibility in the Consolidated Foods case: "Other diversified food firms may follow Consolidated's lead and seek to acquire the remaining industry members for reciprocity purposes. This development would stifle fair competition on an industry wide basis." Trade Reg. Rep. ¶ 16182, at 20980 n.7 (FTC 1962).

207. Hausman, supra note 197, at 879-80.

208. Ibid.

tion of expected anticompetitive results where the acquired company "commands a substantial share of a market"\textsuperscript{210} has adopted an effective presumption of illegality (absolute or conditional) as to mergers in concentrated oligopoly markets; (2) if so, whether the presumption may eventually apply to loose oligopoly or even nonoligopoly markets; (3) where the presumption does apply, what minimum market share will have to be subject to potential reciprocal buying pressures (and, therefore, to market foreclosure) before the presumption comes into effect;\textsuperscript{211} and (4) whether the potential market foreclosure will be measured not only at the supplier level but also at the middle-firm level.\textsuperscript{212}

There is a major policy consideration involved in formulating any strict rule against conglomerate mergers raising the possibility of reciprocity. Such a rule tends to freeze in the existing advantages of large diversified firms over their smaller rivals. However, this consideration applies with equal force elsewhere in merger law and in antitrust generally. A more permissive antitrust policy as to smaller firms might do much to correct such disparity. The long-range solution no doubt lies in the correction of the market imperfections that contribute to the practice of reciprocity and that the practice of reciprocity contributes to maintaining.\textsuperscript{213}

In short, antitrust policy as to mergers involving reciprocity should be a part of a general policy of controlling oligopoly power.


A joint venture, like a merger, is the joining together of two distinct business entities in a common business endeavor. Unlike a merger, however, a joint venture does not eliminate one of the partners but results in the creation of a new producing business organization.\textsuperscript{214} The relationship between the formation of a joint venture and oligopoly power appears quite complicated. Unless the new venture enters the market of one of the parents, there is no increase in concentration in any market, but in fact a direct and immediate decrease in concentration in the market entered. The unfavorable effects, if any, are all indirect, involving the removal of potential competition or some other risk to future competition. Yet clearly,
under some circumstances, a joint venture can have serious anticompetitive effects.

The complications of the inquiry as to the competitive effects of a joint venture appear to defy the formulation of any clear and simple test, even as to oligopoly markets. At the same time, it seems perfectly apparent that businessmen must have a relatively clear and speedy method of determining the probable legality of such a device, for joint ventures are a constantly used and generally accepted business technique. Their development has been previously encouraged under the umbrella of a considerable degree of immunity from antitrust litigation.

In its first decision dealing with joint ventures in more than a decade and its first such decision ever under section 7, the Supreme Court in United States v. Penn-Olin Chem. Co. held a reinvigorated section 7 fully applicable to joint ventures and attempted to relate its determination on the merits to the problem of controlling oligopoly power. In Penn-Olin two large producers of chemicals and chemical products (Olin Mathieson and Pennsalt) formed a joint venture (Penn-Olin) to enter a highly concentrated oligopoly market: the production of sodium chlorate (a chemical bleach used in making paper) for use in the southeastern section of the United States. The high concentration of this market was reflected in the fact that, at the time the joint venture was organized, only three companies in the United States produced sodium chlorate, and only two of these were favorably situated geographically to serve the relevant southeastern market, neither of which included the joint-venture partners. Thus, Pennsalt, although a major producer in western markets, had no plant in the Southeast and shipped into that territory only a small part of the sodium chlorate consumed there; Olin Mathieson was not a producer of sodium chlorate at all, but did have the know-how, resources, and capacity to enter the southeastern market. Both companies had considered entering the market singly prior to formation of the joint venture.

The district court found for the defendants on the ground that the Government had failed to establish that both Pennsalt and Olin Mathieson would have entered the market separately in the absence of the joint venture. Therefore, injury to competition had not been proved, since the joint venture would presumably become as effective a competitor in the new market as would either of its parents.

216. What litigation there has been has arisen under the Sherman Act, and the cases decided by the Supreme Court have all involved various anticompetitive practices in addition to the fact of the joint venture. See Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); Associated Press v. United States, 326 U.S. 1 (1945); United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912); Kaysern & Turner, op. cit. supra note 214, at 137; Backman, supra note 214, at 653-55.
218. Id. at 174-75.
The Supreme Court reversed and remanded, holding that the district court had erred in failing to consider whether there was a reasonable probability that one of the two parents would have entered the market “while the other . . . remained a significant potential competitor.” Specifically focusing on the oligopolistic conditions in the sodium chlorate market, the Court said: “The existence of an aggressive, well-equipped and well-financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated.”

To support this economic conclusion the Court quoted from a TNEC monograph:

Potential competition . . . as a substitute for [actual competition] . . . may restrain producers from overcharging those to whom they sell or underpaying those from whom they buy. . . . Potential competition, insofar as the threat survives [as it would here in the absence of Penn-Olin], may compensate in part for the imperfection characteristic of actual competition in the great majority of competitive markets.

In addition, the Court quoted a paragraph from the report of the Attorney General’s National Committee To Study the Antitrust Laws stating the importance in the maintenance of “effective competition” of preserving potential market entrants as well as existing competitors.

The Court’s opinion unmistakably indicates that it had the oligopoly problem well in mind in reaching its decision and, indeed, that this may have once more been a decisive factor. But the Court gives little hint of just how the law of joint ventures is to be related to the control of oligopoly power despite its apparent strong feeling that it should be so related.

Unlike each of the major decisions dealing with oligopoly power discussed up to this point, Penn-Olin did not formulate or even suggest a simplified test of legality. Instead, it listed a number of criteria which it said the district court “might” take into account. These include almost every conceivable factor relevant to a full study of the competitive impact and market setting of a joint venture, including, for example, “the number and power of the competitors in the relevant market; . . . the competition existing between [the joint venturers] and the power of each in dealing with the competitors of the other; the setting in which the joint venture was created; the reasons and necessities for its existence; . . . an appraisal

220. 378 U.S. at 175-76.
221. Id. at 174.
222. Ibid., quoting from C. Wilcox, COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY 7-8 (TNEC Monograph No. 21, 1940).
223. Id. at 176, quoting from ATT’Y GEN. NAT’L COMM. ANTITRUST REP. 320 (1955). As an indication of how far the law has moved since 1955 it is interesting to note that this portion of the Report begins with the specific disclaimer that economic theory “does not provide a standard of legality under any of the antitrust laws,” for “[l]egal requirements are prescribed by legislatures and courts, not by economic science.” ATT’Y GEN. NAT’L COMM. ANTITRUST REP. 316 (1955).
of what the competition in the relevant market would have been if one of
the joint venturers had entered it alone . . . ; the effect, in the event of
this occurrence, of the other joint venturer's potential competition'; and
finally—just in case something was left out—"such other factors as might
indicate potential risk to competition in the relevant market."224

It is immediately apparent that a full exploration of such factors would
involve a court in what Professor Bok has described as "the inscrutable
problems of predicting the effects of a single merger on competition."225

How is it to be determined whether one or both of the parents was a po-
tential competitor "waiting anxiously to enter an oligopolistic market" and
what should be the significance of such a determination? In Penn-Olin
the joint venture almost certainly had the immediate effect of strengthen-
ing competition, at least to some extent, in the highly concentrated south-
eastern sodium chlorate market. It substituted a new producing facility
located in the southeastern market for the relatively minor competition
provided by the long-distance shipments Pennsalt had previously made
from the West. Indeed, within two years the joint venture held 27½ per
cent of the market (in place of Pennsalt's previous 9 per cent)."226

The crucial issue posed by Penn-Olin is whether an immediate gain in
competition is to be sacrificed on a finding of a mere "reasonable prob-
ability" that one of the parents would have entered the market while the
other remained a potential competitor. Such an inquiry requires a deter-
mination of who is a potential competitor together with an attempt to
weigh the benefits of increased actual competition against the loss of po-
tential competition.

The attempt to determine such fundamentally obscure facts in the con-
text of a legal proceeding seems most difficult. Except in the clearest case it is
difficult to know who is in fact a potential entrant to any particular
market.227 The identity of such entrants is subject to sudden change with
shifts in economic conditions and management desires.228 Suggested tests
for determining the identity of potential entrants in terms of internal cor-
porate intent or even in terms of external recognition of potential en-
trants229 tend to mire antitrust proceedings in a prolonged and unsatis-
factory examination of what corporate officials either intended as to them-
selves or understood regarding others. Finally, the significance of loss of

224. 378 U.S. at 176-77.
225. Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L.
Rev. 226, 296 (1960). As noted earlier, the Court relied on Bok's analysis in this regard in the
76 supra and accompanying text.
226. 378 U.S. at 164-65.
227. See text accompanying notes 317-25 infra.
229. See Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev.
any one potential entrant is related to the number of other potential entrants, and hence the latter fact must also be determined.

The essential difficulty in shaping antitrust policy is that a joint venture, unlike a merger, may have the immediate effect of promoting competition by adding a new factor to the market even where very large companies are involved. Moreover, a joint venture may uniquely promote other important economic values. It may serve as a vehicle to combine overlapping or related technologies, supply necessary technical assistance to a firm entering a new market, make possible the sharing of business risks beyond the ability of any single firm, enable joint and more effective use of specialized and scarce managerial talent, ensure sales outlets or supplies of raw materials for the manufacture of a new product, and provide a means for achieving economies of scale, particularly in research and development. All of these advantages can serve to encourage industrial experimentation and may even facilitate the creation of new technologies and industries, with large gains for the entire economy. Finally, as an alternative to merger, a joint venture may be clearly preferable. Due to the balance of power between the co-owners of the venture, the officers of the new entity may have more independence than would the officers of a wholly owned subsidiary or division of a single company with consequent benefit to both competition and individual initiative and responsibility.

On the other hand, the joint venture, at least when it involves oligopoly firms, seems inferior from a competitive standpoint to the unilateral entry into the new market of one or both of the parents. The joint venture permanently cuts off the possibility that each of the parents would have entered the market, which would have added two more competitors instead of one. It may facilitate the transfer of oligopoly power existing in one market into a second market (in much the same way as might occur through vertical integration). The joint venture puts the parents, particularly if they are competitors, in dangerous proximity to discuss and act jointly on aspects of their business apart from the joint venture and creates

230. See Backman, Joint Ventures in the Light of Recent Antitrust Developments: Joint Ventures in the Chemical Industry, 10 Antitrust Bull. 7, 11-12 (1965).
231. See id. at 14-15; Hale, supra note 214, at 929.
232. Kaysen & Turner, op. cit. supra note 214, at 136; Hale, supra note 214, at 935 (citing the development of foreign oil fields).
234. Ibid.
236. See Kaysen & Turner, op. cit. supra note 214, at 138.
an aura of cooperative team spirit which is apt to dampen competitive fires between the firms involved.\textsuperscript{237} It also creates reciprocal buying opportunities among the related corporations and their affiliates. A joint venture entering one market for a beneficial purpose may not always remain confined to that market or true to its original purpose.\textsuperscript{238} Finally, a corporation which becomes a parent in several joint ventures may thereby be involved in a whole network of relationships with competitors and suppliers which potentially could "blunt" competition in some markets and force anticompetitive concessions in others\textsuperscript{239} with grave implications to antitrust policy.

Considered from the standpoint of a developing legal policy to control oligopoly power, what comments can be made and what inferences can be drawn concerning joint ventures? To begin with, it is not clear how important a factor joint ventures are in the concentration of American industry. Although the Supreme Court mentioned the "spawning of thousands" of joint ventures,\textsuperscript{240} a recent examination showed a "minimum" figure of only fifteen joint ventures among the 1,000 largest manufacturing corporations. The total joint-venture assets were 900 million dollars, as compared with total assets for all 1,000 corporations of 221.3 billion dollars.\textsuperscript{241} Clearly the present rate of formation of joint ventures, especially domestic ones, appears to be much lower than the current rate of industrial mergers.\textsuperscript{242}

However, these facts relating to the number and rate of formation of joint ventures may not constitute the whole story. For one thing, they fail to tell us how many large corporations have already come together in smaller joint ventures in markets crucial to competition. Thus, in the chemical industry, seventeen of the fifty-four leading corporations in 1958 held interests in one or more joint ventures.\textsuperscript{242} An earlier FTC study showed the extent to which the highly concentrated steel industry tied up one of its basic raw materials, iron ore, through a virtual labyrinth of joint ventures and joint subsidiaries.\textsuperscript{244} The anticompetitive implications of this situation become apparent in the light of other studies which have identified as the greatest barrier to new entry into steel production the lack of access by a would-be entrant to iron ore supplies caused by backward ver-

\textsuperscript{237} Ibid.
\textsuperscript{238} See Gesell, Joint Ventures in the Light of Recent Antitrust Developments: Joint Ventures and the Prosecutor, 10 Antitrust Bull. 31, 39 (1965).
\textsuperscript{239} Ibid.
\textsuperscript{241} Hearings on Economic Concentration Before Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 88th Cong., 2d Sess., pt. 1, at 113 (1964) (testimony of Wil­lard F. Mueller).
\textsuperscript{242} Recent FTC data show that in 1965 there were 171 newly organized joint ventures, of which only 58 were domestic, while there were 1,893 mergers in the same year. FTC Release, Feb. 11, 1966.
tical integration (largely through joint ventures) of the large steel compa-
nies; at the same time the iron ore industry has manifested rigid price
leadership. These considerations would seem to point to the need for
more information concerning the prevalence of joint ventures and at the
very least for some sort of industrial census of joint ventures.

Beyond such quantitative considerations, the mode of analysis suggest-
ed by the Court in *Penn-Olin* is subject to serious deficiencies. Although it
will be suggested below that a superior test for determining potential en-
trants is one that would rest primarily on the nearness of the market to
that of the potential entrant, rather than on subjective criteria, it would
also seem desirable to deemphasize the test of potential competition in the
field of joint ventures insofar as possible. Greater attention should be fo-
cused on the competitive relationship between the parents, the direction
of the joint venture as horizontal, vertical, or conglomerate, the market struc-
ture and degree of concentration of both the parents and the joint venture’s
market, and possible reciprocity and similar risks to competition. Thus,
to suggest the scope of the problem, if (1) the parents’ market is highly
concentrated, (2) at least one of the parents has a significant market share,
and (3) the joint venture is horizontal, then any supposed advantage from
the increase in the number of competitors in the market as a result of the
joint venture seems wholly illusory. Indeed, the most probable result of the
formation of the joint venture would be to add to the already excessive
market share of the parent or parents. It must be assumed that parent and
progeny will not compete, but will work together to extract a joint maxi-
mum return from the market they influence together.

If, on the other hand, a joint venture is vertical and if the parents are
competitors, much will depend upon the relative concentration of the par-
ents’ and the joint venture’s markets. If the parents’ market is highly con-
centrated, both in an absolute sense and in comparison with the joint ven-
ture’s market, and if at least one parent has a significant market share, the
effect of the joint venture would appear generally to be damaging to com-
petition on the basis of an analysis similar to that applicable to a vertical
merger from a concentrated market into a less concentrated market. In
one sense a joint venture appears more inimical to competition than indi-
vidual entry by each parent through vertical mergers, for the merger route
would not involve the increased risk of joint action between the parents.
Conversely, and again speaking generally, where the joint venture’s mar-
ket is highly concentrated and the parents’ market or markets are less con-

246. See HINES, PRICE DETERMINATION IN THE LAKE ERIE IRON ORE MARKET, 41 AM. ECON. REV. 650
(1951).
247. See Part IV infra (further discussion of potential competition).
248. See text accompanying notes 144–50, 162–65 supra.
centrated, the vertical joint venture may well serve to increase competition by introducing a new entrant into the highly concentrated market. The benefits of entry may tend to outweigh any loss of competition in the less concentrated market.

The conglomerate joint venture, like the conglomerate merger, presents the greatest policy difficulty. Perhaps the chief danger in conglomerate joint ventures with respect to the oligopoly problem arises more from the risk of joint action by competitors in concentrated markets than from any "loss" of potential competition, for the loss of the potential competition of the parents in the joint venture's market must be balanced against the increased actual competition arising from the joint venture.240

The possible effects of reciprocal buying arrangements arising from joint ventures have scarcely been considered. Yet clearly, whether the joint venture is in the nature of a vertical integration or of conglomerate diversification, there is a multiplication of opportunities for the joint venture partners to engage in reciprocal buying through and, more obviously, with the joint ventures. Examination of reciprocity effects, therefore, is relevant in determining the section 7 legality of joint ventures, particularly where oligopoly markets are involved.

A further crucial consideration to my view is the question of a technological creativity.250 If a joint venture brings together two technologies and if it can be shown that neither parent had the technical capacity to proceed alone, then I would be inclined to permit the joint venture.251 Public policy directed against the growth of oligopoly power must give way to technological experimentation and industrial creativity even though additional concentration may be the result. It simply appears to be a consequence of the ever-increasing swiftness of technological change252 that the proper combination of resources and talents for a vital new step forward, or for an industrial experiment, may require a joint venture between firms in highly concentrated markets. Antitrust, and specifically antitrust policy aimed at controlling oligopoly power, should not attempt to block such technical interchange and creative innovation, particularly when there is no direct addition to oligopoly power, but only an indirect and remote effect. Indeed, when the effect is remote, joint ventures should be positively encouraged as a more desirable route to realization of these

240. As to the uncertainty of measuring a loss of potential competition against a loss of actual competition, see Beatrice Foods Co., 3 TRADE REG. REP. ¶ 17244, at 22330–33 (FTC 1965); Backman, Joint Ventures in the Light of Recent Antitrust Developments: Joint Ventures in the Chemical Industry, 10 ANTITRUST BULL. 7, 9–14 (1965); Rahl, Applicability of the Clayton Act to Potential Competition, in SECTION OF ANTITRUST LAW, ABA, PROCEEDINGS AT THE SPRING MEETING 128, 138 (1958).

250. By technological creativity I do not simply mean a modest gain in efficiency, economies of scale, or innovation, but a significant, creative advance or new combination of technologies.

251. See Kayser & Turner, op. cit. supra note 214, at 139-40.

benefits than outright merger. This argument becomes even stronger when it is realized that the clear alternative to private technological advance is direct government intervention—always the alternative to an effective and rational antitrust policy.

Apart from the technologically justified joint venture, which should generally be exempted from antitrust attack, what generalizations are possible as to the probable and desirable direction of antitrust policy with respect to joint ventures and oligopoly power? I would suggest tentatively (and with the hope of promoting further thought and discussion) the following: Horizontal joint ventures by competitors within their own market will almost certainly be proscribed in any oligopoly market where either firm is of substantial size. Vertical joint ventures from oligopoly markets into nonoligopoly markets will also be scrutinized. They should probably be considered presumptively illegal where the joint venturers are themselves in identical or closely related tight oligopoly markets, with the burden then shifting to the defendants to show that their venture will not substantially injure competition. Conglomerate joint ventures from oligopoly markets into both oligopoly and nonoligopoly markets will also be subject to scrutiny, but a careful weighing of the pluses and minuses to competition will probably be necessary, with particular emphasis on the risks to competition through joint action between the parents and with some attention given to the question of potential competition. Joint ventures, whether vertical or conglomerate, from competitive into both oligopoly and nonoligopoly markets should probably not be challenged barring severe reciprocity problems, a widespread pattern of joint ventures threatening to alter the market's structural characteristics, or other unusual circumstances.

IV. Future Development of a Legal Policy Aimed at Controlling Oligopoly Power

Assuming the validity of the economic assumption that concentrated oligopoly markets are inherently anticompetitive, many problems confront the future development of a realistic and sound antitrust policy aimed at controlling or regulating oligopoly power. Initially, we must attempt to ascertain how much change has been accomplished by the Supreme Court. In the light of changes made, how strong is the need for additional rules to control oligopoly power? Ought we to embark on a policy of forced deconcentration of oligopoly markets? Should the use of presumptive rules of illegality be continued or extended? If such rules are to be utilized and if we are attempting to make legal decisions predictable, can the problem of market definition be simplified? Once the market is defined, how is concen-
tration within that market to be measured? What is the relationship of potential competition to oligopoly power, and how are we to identify potential competitors? What is the relationship between conglomerate size and oligopoly power? Finally, what effect will the further development of rules aimed at oligopoly power have on other prime values, such as economic incentive and technological progress? The balance of this Article will explore these and related questions. Necessarily, the discussion will be less than exhaustive and the conclusions tentative.

A. Significance of the Change in the Direction of Antitrust Policy
   Made by the Supreme Court

   Frequently lost in the tumult of criticism and controversy that has surrounded the decisions of the Supreme Court since Brown Shoe is recognition of the significance of accomplishing in such a short time a major re-orientation and updating of antitrust policy.

   i. Economic assumptions underlying legal policy.

   In its recent decisions the Court has adopted as the foundation of its antitrust policy a basically sound economic premise upon which both critics and defenders of the Court seemingly agree: that a horizontal market structure which is composed of only a few firms—a concentrated oligopoly—is inherently anticompetitive. In practice, such a market may or may not at any particular point in time behave in an anticompetitive way, and the firms in the market may or may not therefore be extracting an oligopoly return. That is to say, oligopoly market behavior may be lessened or even eliminated in structurally oligopolistic markets by such factors as ease of entry, competition from close substitutes, technological change, and self-restraint. Nevertheless, what the Court and economic theorists agree in affirming is the fundamental assumption that oligopoly markets are essentially different from less concentrated markets in that they carry within them the seeds of anticompetitive behavior. Remove the conditions inhibiting oligopoly behavior in the market and the anticompetitive behavior of the classical oligopoly can gradually or even quickly reappear. Thus, concentrated market structure is necessarily a root cause of oligopoly behavior, and, of equal importance, it can be easily recognized.

253. See, e.g., Blake & Jones, Toward a Three-Dimensional Antitrust Policy, 65 Colum. L. Rev. 422 (1965); Bork, Contrasts in Antitrust Theory: I, 65 Colum. L. Rev. 401 (1965); Markham, The Effectiveness of Clayton Act Section 7, in PERSPECTIVES ON ANTITRUST POLICY 164 (Phillips ed. 1965).

2. Reformulation of legal theory in light of modified economic assumptions.

It follows logically from these premises that in determining whether a challenged activity unreasonably restrains trade under the Sherman Act or threatens to injure competition under the Clayton Act, a prime decisional factor should become the relationship between the challenged conduct and oligopoly market structure. Does the challenged conduct tend to create, maintain, or intensify an oligopoly structure in an economically distinguishable industry or market? Taken as a whole the major decisions of the Supreme Court from Brown Shoe onward reveal an increasing tendency to focus on this question, as this Article has attempted to demonstrate.

This is not to say that an oligopoly market structure in itself violates any antitrust law. Both the Sherman and Clayton Acts are limited statutes. They proscribe specific kinds of acts or conduct which injure competition or restrain trade, or as suggested here, which achieve concentrated oligopoly market conditions. And this is as it should be since concentrated oligopoly structure does not necessarily mean that the firms in the market will behave in an anticompetitive way. Oligopoly structure, in other words, is not a sufficient condition for anticompetitive market behavior. Nevertheless, although the law takes no action against the static market structure of oligopoly, it should recognize the competitive danger which oligopolistic market structure poses and should act vigorously to prevent its further growth or consolidation.

This approach differs in vital respects from the traditional per se rules, such as the flat prohibition against price fixing. There, a particular kind of market conduct is declared to be so inherently anticompetitive as to be in and of itself illegal. Here, a market structure which is not in and of itself illegal is declared to be so conducive to the emergence of anticompetitive conduct that agreements, mergers, and possibly other acts that tend to create or maintain such a market structure are held presumptively illegal.

The proof of a per se violation will often be relatively simple since all that need be established in any usual case is that the defendants carried out the acts charged. On the other hand, where oligopoly market structure

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255. Kayser & Turner, op. cit. supra note 214, at 95–98, briefly discuss and reject such an approach as an alternative to forced deconcentration: “The central question to be asked [under this approach] about any practice... is: how does it contribute to sustaining or increasing market power...” Id. at 95. Although recognizing the advantages of administrative simplicity and greater conformity to traditional antitrust standards, Kayser and Turner view the approach suggested in this Article as insufficient in view of the fluctuating vigor in antitrust administration and the inability to correct existing oligopoly situations where dominant firms have entrenched power which they can maintain without further merger. Id. at 95–96.

256. Per se rules still leave open the possibility of proving that in the particular situation it would be nonsense to apply a per se rule, but such circumstances will be both exceptional and rare. See Van Cise, The Future of Per Se in Antitrust Law, 50 VA. L. Rev. 1165, 1171–74 (1964); cf.
is at issue, the proof that certain acts were performed by the defendants is only a first step. It then must be established, or presumed on some valid basis, that such acts will lead to an oligopoly market structure. Except in the case of a significant horizontal merger, the proof is necessarily indirect, likely to be complicated, and therefore subject to sharp debate. Even where a presumption is applied, complications in proof cannot be altogether avoided since thus far in the cases, and as suggested here, the presumption would be subject to rebuttal.

Another complication of proof is the market definition. In the usual per se case involving price fixing, there is no problem of market definition since it is enough to show the fixing of prices of a given article or commodity in commerce, whether or not it constitutes a separate market or submarket. In a case involving oligopoly market structure, however, the market definition is crucial to the resolution of the key issue to be determined—the degree of concentration in the market. Thus, definition of the market in oligopoly cases will often present difficult questions of economic analysis.

3. Advantages gained by reformulation of legal theory.

On balance, the reformulation of legal theory as to oligopoly has much to recommend it, despite difficulties in application. First, legal rules can be constructed which carefully differentiate between market activities involving oligopoly firms and those involving other firms. Although such rules will be restrictive as to activities by oligopoly firms, they can also operate to give greater freedom of economic action to nonoligopoly firms. For example, the operation of rules as to exclusive distribution, vertical mergers, and joint ventures could become far more permissive as to non-oligopoly firms. This relaxation might give small firms more effective weapons to challenge market leaders in oligopoly markets and, in any event, would allow small firms greater freedom to experiment and innovate in their market arrangements—a desirable goal in itself.

Second, a condition of market structure such as oligopoly—unlike competition or other behavioral characteristic—is easily recognized once the market is defined. This characteristic makes it possible for firms falling within such a market structure or considering entering into economic relationships with firms in such a market to identify easily that fact and to be aware of the consequent risk.

somewhat similar type of tentative rules suggested by Professor Turner in his recent article on conglomerate mergers. Assuming no increase in market-definition problems (and there is no reason to suppose there should be), presumptions lead to greater predictability and easier enforceability. On the other hand, rules that must be applied to all markets and to all firms in a market, regardless of size, necessarily involve a greater complexity in application if they are not to raise large risks of injuring the very competition we wish to preserve.

Fourth, the result of focusing the rules primarily on the market structure rather than on the exercise of market power, avoids great complexities. If the rules sought to measure whether or not oligopoly power had actually been used, questions of efficiency, progressiveness, ease of entry, effectiveness of substitute competition, and other economic issues involved would obscure predictability and uniform enforcement. Rules that focus primarily on market structure, however, avoid such complex issues in the first instance. On the other hand, by framing the rules as prima facie presumptions, defendants are given the opportunity to prove, if they can, that despite oligopoly structure there is no danger to competition based on the particular market facts.

Finally, the goal of oligopoly market control does not involve the policy contradiction of attempting at one and the same time to protect both competitive conditions and competitors, the bizarre results of which can be seen most clearly in Robinson-Patman enforcement. Oligopoly control equally avoids the wistful quest for a return to the society of the little entrepreneur, a bygone age. At the same time, such a policy does preserve some of the basic objectives that lie behind the preference for the society of the small entrepreneur. It tends to promote and preserve, insofar as modern conditions permit, industrial deconcentration and thereby a greater diversification of the centers of economic power and decision-making.

The basic concept of competition as a criterion for antitrust decision has recently been criticized because it is a process, rather than "an ultimate desideratum," and the suggestion has been advanced, derived from early antitrust cases, that in lieu of "competition" the policy objective of antitrust ought to be "maximization of wealth or consumer want satisfac-


258. For a discussion of some of the difficulties involved in such dual policy goals, see Note, 72 Yale L.J. 1265, 1278-81 (1963).

259. It would also seem to meet Professor Bork's criticism that an antitrust policy which seeks to limit undue concentration of economic power has no built-in stopping place short of "grinding society down to an aggregation of small producers." Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, 74 Yale L.J. 775, 831-32 (1965). The concept of oligopoly structure, however, does indeed provide a "built-in stopping place" that falls far short of attempting to turn the clock back to the era of the small producer.
The criticism would necessarily apply to a legal policy directed at control of oligopoly power since it is a derivative of the general policy of preserving and protecting competition.

To my mind, however, the great value of the concept of competition, including imperfect competition, lies precisely in the fact that it is an economic process and not an end result. It cannot be conclusively demonstrated that the process has always led to optimum resource allocation; but neither can it be demonstrated that more direct pursuit of resource allocation goals will lead to any better resource allocation or maximization of wealth. One thing appears clear, however: once resource allocation becomes the explicit goal of antitrust, an implicit assumption has been made that public authority (judicial, legislative, or executive) can and should determine what business decisions will service that goal. This assumption, if carried to its logical conclusion, could lead to direct Government intervention or supervision with loss of business freedom and initiative and, to my view, also a loss in optimum resource allocation; it also involves courts in tasks of economic regulation for which they are ill equipped. Concentration on the process, on the other hand, involves control of only the excesses that would undermine the process, and preserves maximum freedom of business action. It is because oligopoly market structure so clearly raises the threat of undermining the process of competitive market action that it seems right to oppose its extension or active maintenance.

B. Need for Further Legal Rules To Control Oligopoly Power

The need for further development of legal rules to control oligopoly power is evidenced by the continued high concentration of much of American industry. It is hardly open to dispute that in many important United States markets, oligopoly concentration is high. Thus, the one hundred largest corporations control over thirty per cent of total assets employed in manufacturing, mining, and distribution, and the identity and relative ranking of such firms has tended to become more stable over time. In one-third of the thirty-nine product classifications having annual shipments in excess of one billion dollars, the four largest firms control at least fifty per cent of total shipments. Indeed, one study concluded that there are more concentrated than unconcentrated industries in manufacturing and mining.


263. Kayser & Turner, op. cit. supra note 214, at 41. Although similar concentration probably does not exist in the distribution, service, and construction industries, they may be of less economic importance than the commodity-producing industries. Ibid.
Recent studies, moreover, have failed to show any slackening in the rapid pace of corporate acquisitions and mergers. From 1951 to 1963, 216 of the 1,000 largest manufacturing firms merged or were acquired, and as a result 139 corporations ranking in size from number 501 to number 1,000, representing 27.8 per cent of all the manufacturing firms in this size category, were acquired. In 1964 and 1965 both the total number of all manufacturing firms acquired and the total number of large firms acquired increased. Whether these figures reflect an overall increase in concentration or whether they merely show the maintenance of existing levels of industrial concentration does not seem crucial to the conclusion that the problem of sufficient control and limitation of oligopoly power has not been solved.

Recent Government efforts to interfere with and regulate pricing in oligopoly markets reveal what could be viewed as a dangerous accommodation with oligopoly power. Thus, the Government-inspired rollbacks of aluminum and copper prices in early 1966 were possible precisely because the industries involved were concentrated oligopolies; the Government had only to influence the chief officers of one or two of the market leaders in order to control the price level.

Whatever the immediate economic benefits of such government price-stabilization efforts, they carry with them the clear risk of leading to additional governmental intervention in pricing decisions by oligopoly firms and of leading in the direction of a kind of ad hoc government price control of oligopoly markets. This in turn could lead to an easy toleration of such "tamed oligopolists" and a dulling of any governmental effort to change, or even limit, concentrated oligopoly market power. In a fundamental sense, government control has always been the implied response to oligopoly pricing, for government planning has always been the implied alternative to workable competition. Our economic system has been built, however, on the belief that private action in competitive markets is the surer path to economic progress, and that no government planning agency is likely to be as creative or as energetic as private enterprise impelled by the profit motive.

Thus, avoidance of the temptation by the federal government to use oligopoly market power to achieve desired economic objectives supplies a further reason for developing additional rules and a deeper-based national
policy against the creation, maintenance, or use (even by government) of oligopoly power.²⁶⁸

Further development of the rules is needed also to make legal decisions more predictable. The development of the law with respect to the relation between oligopoly power and vertical and conglomerate mergers, joint ventures, and distributor integration is in a very early stage, and many difficulties surround formulation of workable rules. There can be little dispute that greater certainty in business planning is needed than now exists.

C. Direction of Further Development of Legal Policy Designed To Control Oligopoly Power

1. Rejection of the policy goal of dissolution.

In law, as in politics, public policy must often be the art of the possible. For this, as well as for other reasons, I put to one side the proposal that existing concentrated oligopoly firms be broken up, even where past growth is due to merger (and therefore the Du Pont—General Motors rule of retroactive section 7 application would be available). Although there may be an occasional case, such as Du Pont—General Motors, where a long-standing combination can be dissolved, there would seem to be no realistic basis for believing that any general attack on existing oligopoly structure could be mounted or sustained. Du Pont—General Motors itself was an unusual case, involving control by the fourth largest corporation in the United States of the second largest.

The truth of these conclusions appears to have been demonstrated by the recent passage of the Bank Merger Act of 1966.²⁷⁰ That act, in establishing a special legal framework for testing the legality of bank mergers, adopted a conclusive presumption to prevent retroactive application of the antitrust laws to bank mergers. Thus, the act conclusively presumed that all bank mergers consummated prior to the Philadelphia Bank case in 1963, including those cases actually in litigation in the federal courts at the time the bill was passed, were not in violation of the antitrust laws (except section 2 of the Sherman Act).²⁷¹ Even more remarkable was the provision that mergers consummated after Philadelphia Bank, when presumably every lawyer knew that section 7 applied to bank mergers, and prior to the enactment of the Bank Merger Act could not be attacked thereafter in any judicial proceeding (except under section 2 of the Sherman Act).²⁷²

²⁶⁸. It may, of course, be necessary to control prices in times of artificially high economic demand such as war (or limited war).
²⁷². See 12 U.S.C.A. § 1828(c) (2)(b) (Supp. March 1966). Additionally, there was a provision that mergers consummated after Philadelphia Bank and under governmental attack at the time of
Although bank mergers have their own peculiar regulatory history, it nevertheless seems apparent, when it is remembered how liberally oriented the 89th Congress was, that any large or even moderate scale attack on existing industrial concentration would run into congressional storm-waters of imposing magnitude.

In part, this may simply reflect an ambivalence of attitude in United States antitrust laws. The British writer, Neale, has noted the tendency of Americans "to take a romantic view of the achievements and efficiency of large industrial organizations even while they take a suspicious view of their power." Such an attitude has made the remedy of divestiture rare even in Sherman Act monopoly cases.

Perhaps, more basically, in a nation so thoroughly pragmatic as this one, there is an understandable reluctance to push an economic theory, however well founded, to the extreme conclusion of causing drastic rearrangements of large sections of American industry, many of them vital to the nation's defense and to its continued technological leadership in the world. Moreover, the most articulate exponents of a policy of divestiture have found, I think inevitably, that it is necessary to include as a part of the criteria to be considered an investigation into the actual market performance, including the efficiency and progressiveness of the firms involved. Among other reasons, this requirement arises from the essential unfairness of imposing the drastic remedy of divestiture on oligopoly firms that may in fact have never exercised such power but may—for whatever cause—have been behaving competitively. The enormous burden of an inquiry into efficiency and performance and the lack of qualifications of courts to undertake it have been fully discussed elsewhere. At the very least, the inquiry would lead to almost total unpredictability as to which oligopoly firms would be sent to the block. This consequence alone would cause severe confusion and difficulty in business planning.

On the other hand, an antitrust policy which does not attack the structure of existing oligopoly firms might allow significantly more economic freedom to nonoligopoly firms, and thereby could provide a powerful incentive toward some amount of voluntary deconcentration and an effective deterrent against increasing concentration. Such a policy could include specific action in particular markets where extreme conditions prevailed and, insofar as legally possible, attacks on entry barriers, on an industry-wide basis.

enactment were to be determined in accordance with the new criteria under the act. 12 U.S.C.A. § 1328(c) (3) (c) (Supp. March 1966).
275. See Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 259-99 (1960); Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1318 (1965).

The present trend of decision is toward the development of legal rules that presume the illegality of a merger or other conduct significantly enhancing the market share or market power of oligopoly firms. Such a development in general appears to be both sound and essential to reasonable predictability of business action by firms in oligopoly markets and to effective enforcement of the antitrust laws.

Presumptions: absolute or rebuttable. That such rules are presumptive only means that defendants can introduce by way of defense much of the economic complexity that the rules serve to eliminate from the plaintiff's case-in-chief. Greater certainty could be achieved by cutting off or limiting possible defenses, and generally, by making the rules more in the nature of conclusive presumptions. However, it is no doubt frequently sufficient for the business executive simply to be able to know whether there is a risk of antitrust litigation with respect to contemplated action. Such knowledge alone may be a sufficient deterrent of questionable action.

In any event, despite the greater certainty resulting from absolute presumptions, I would be reluctant to make the rules more than *prima facie.* In view of the diversity of factors that may operate to influence competition in any one market and the consequent hazards of making any conclusive generalization about the effects of particular conduct on oligopoly structure in all markets, or the effects of oligopoly structure, however concentrated, on market behavior,*276 it would seem unwise to eliminate totally the possibility that the defendants may be able to show that the conduct would have strong procompetitive consequences in a particular case.

Definition of concentrated oligopoly markets and firms. Modification of the presumptive rules is required, however, in order to differentiate more carefully as between concentrated oligopolies and loose oligopolies. Economic studies do not justify a conclusion more sweeping than one that concentrated oligopoly markets have inherently anticompetitive tendencies. There appears to be no justifiable basis for extending presumptive rules to situations beyond that of concentrated oligopoly structure, except in the case of horizontal mergers.*277*

It is thus necessary to define precisely what will be viewed as a concentrated oligopoly market for purposes of application of the presumptive rules and what size firms within such a market will be subject to such rules. For clarity of terminology, a market falling within the definition of concentrated oligopoly—however defined—can be termed a "proscribed oligopoly market" (although, of course, the proscription would be far

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276. See authorities cited note 254 *supra.*

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from absolute) and a firm within such a market of sufficient size to be subject to the presumptive rules can be referred to as a "proscribed oligopoly firm."

At what actual point should the line be drawn between proscribed oligopoly markets and other markets? Considering Bain's study of levels of profit, a proscribed oligopoly market might well be defined as one in which the eight largest firms in an industry supply over a period of several years seventy per cent or more of total output.278 Firms within such a market having a significant market share—I would suggest tentatively ten per cent—would be proscribed oligopoly firms. Necessarily, the exact point at which the line between concentrated and loose oligopoly markets is drawn will be somewhat arbitrary,279 and further refinements can no doubt be developed. But some line must be drawn if predictability is to be obtained.

It can always be urged that there will be injustice to firms that are close to the line. Suppose that the eight largest firms control only sixty-five per cent of the market. How can it be proved that the economic consequences of this market structure are significantly different from those where the same eight firms control seventy per cent of the market? In fact, the economic consequences of identical market concentration no doubt vary from industry to industry.280

Yet, is this problem essentially different from that confronted by the law in many other fields? Is it not the classic question of how far unmanageable complexity should be accepted in legal rules in an effort to do justice in each specific situation? Perceptive commentators have suggested that in recent times the law has moved too far in the direction of complexity and that overcomplexity may in the end be self-defeating even as to the objective of doing justice in the specific case.281 The problem is particularly acute in the antitrust field, where the demand to investigate all consequences of a market situation may mean in effect nonenforcement of the antitrust laws.282

It is not necessary, however, that the line be drawn at identical points as to all types of market activities by oligopoly firms. Where the relation

278. This point seems appropriate because it was at this level of concentration that Bain observed profit rates appreciably higher than those in less concentrated markets. See J. Bain, Barriers to New Competition 218 (1956); Industrial Organization 411-13 (1959).
279. In Kayser & Turner, op. cit. supra note 274, at 72, a concentrated or "tight" oligopoly is defined as one in which eight or fewer firms supply 50% or more of the market, with the largest firm supplying 20% or more of the market.
280. In the FTC's view there is "no ascertainable critical point, in terms of the number and size distribution of sellers in the market" at which competitive behavior becomes oligopolistic, "for everything depends on the psychology of the business planners." Procter & Gamble Co., 3 TRADE REG. REP. 16673, at 16758 (FTC 1963), rev'd, 358 F.2d 74 (6th Cir. 1966), cert. granted, 35 U.S.L. WEEK 3136 (U.S. Oct. 17, 1966) (No. 342).
281. "We need the courage to recognize that there are areas in which it is better that final decisions be promptly reached, even with a somewhat poorer batting average, than that the game last twenty innings . . . ." Friendly, Satisfaction, Yes—Complacency, No!, 51 A.B.A.J. 715, 718 (1965).
between a questioned practice or activity and oligopoly power is less clear, a narrower definition of the firms covered by a presumptive rule could be justified. To illustrate, in the case of a vertical merger a proscribed oligopoly market might be defined as one in which not eight but four firms account for seventy per cent or more of the market and a proscribed oligopoly firm might be defined as one accounting for at least twenty per cent of the market. Although the strength of the presumption and the number of firms to which it applies might vary, it is nevertheless true that proscribed oligopoly firms would be prohibited from doing what other firms were free to do. Such development would be more or less analogous to the emergence of special rules restricting what a monopoly firm may do. The reason for the restriction would be the same in each situation: recognition that such firms possess, actually or potentially, superior market power and must surrender a certain amount of economic freedom. Unlike monopoly firms, since the oligopoly firms may not in fact have superior power, the prohibition is not absolute but conditional.

3. Modification of presumptive rules to include consideration of entry barriers.

Entry barriers bear an important relationship to the question of whether an oligopoly market structure will lead to undesirable manifestations of oligopoly power.

A case could therefore be made for not applying any presumptive rule to mergers or other market conduct involving oligopoly firms unless it could be shown that there were high entry barriers in the market. In support of such a modification of the presumptive rules it could be urged, first, that entry barriers are structural characteristics of the market since they tend to remain relatively stable over substantial periods of time; second, that special recognition of entry barriers does not necessarily mean that such other factors as speed of technological change and closeness of substitutes must also be considered, since the former can provide the basis for only a hazardous guess regarding future technology and the latter appears analytically to be a problem of market definition not requiring separate treatment; and, third, that since entry barriers have been identified
and recognized as an important determinant of whether oligopoly power in a concentrated market will be used to extract more than a competitive return, they carry a strong claim for consideration in formulation of any general or presumptive rules as to oligopoly markets.

There appear to be several convincing reasons why the presumptive rules should not be modified to incorporate directly an assessment of the presence of entry barriers. To begin with, direct measurement of the existence and height of entry barriers is a complex task of economic analysis. Each market tends to be different, and thus the simplicity and predictability obtained by use of presumptive rules would be lost if it were first necessary to determine the height and extent of entry barriers in a particular market.

Second, it does not follow that because entry barriers are low in a concentrated market, they will necessarily remain low in the future, particularly if the oligopoly firms are permitted to add to their existing market power, for example by merger, contract integration, or increased advertising resulting in high product differentiation.

Third, there is no basis for assuming that where entry barriers are low increased entry will necessarily be followed by a decrease in concentration. The net effect instead may only be to induce alternating cycles of new entry followed by excess capacity and subsequent elimination of such excess capacity through merger or failure. The result may be increased concentration in the long run and periodic returns to oligopoly pricing.

Thus, the conclusion appears sound that although high entry barriers may introduce undesirable market behavior, low entry barriers give an insufficient guarantee of long-run competitive behavior to justify exemption from presumptive rules.

If, notwithstanding the above analysis, it should be desired to give some consideration to conditions of entry in formulating presumptive rules, it would seem reasonable to exclude from the operation of the rules certain market situations in which it appeared that entry barriers were low and that concentration was decreasing (even though the industry was still a concentrated oligopoly). Presumptive rules might be held inapplicable to a concentrated oligopoly market (except in the case of horizontal merger) upon proof of the following facts:

(1) within the last five years several firms had entered the market;

(2) the new entrants (or some of them) had been able to remain in the market and to operate profitably;

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(3) the new entrants had been able to grow, in part by cutting into the market shares of the existing firms; and
(4) as a result, overall concentration in the market had decreased (although it remained a tight oligopoly).

Proof of these requirements would seem to pose no great difficulty, with the possible exception of the profitability of new entrants. However, this inquiry should be no more than a gross reference as to whether the entrants operate with some modicum of success or whether they are in the market only because they are willing to lose money. In the latter situation there can be no conclusion that entry barriers are low. But except where low entry barriers could be demonstrated in such a manner, I would not allow them, even under this alternative approach, to modify presumptive rules as to oligopoly firms.

In short, although entry barriers are relevant to oligopoly behavior and might be taken into account in a limited way in the application of presumptive rules, it is oligopoly market structure that appears to be the root cause of oligopoly behavior. So long as that structure exists, the basic potential for oligopoly behavior must necessarily remain. Accordingly, legal policy should be reasonably strict in prohibiting increases in the existing market power of oligopoly firms even where they may be able to demonstrate to the satisfaction of a court that prior to such increase in market power entry barriers were low.

4. The problem of defining the market and measuring market shares.

If presumptive rules of illegality are to be applied to oligopoly firms in concentrated oligopoly markets, the definition of the market as well as the measurement of the share held by an individual firm within the market become crucial. As Kaysen and Turner have pointed out, "Without a minimally reasonable definition of markets, criteria based on quantitative shares become whimsy."291 As was seen in the analysis of Alcoa-Rome and Continental Can the choice among alternative market definitions can radically affect market shares.292

Defining the market. Analysis of the problem of market definition must be related to the purpose legal policy is attempting to achieve. As related to the purpose of controlling oligopoly power, the objective of market definition is to identify a distinguishable sector of trade in which an oligopoly structure could lead to the power to extract more than a competitive return. In other words, the crucial question is whether there is a sufficient distinction in the product and in the geographical area of operations under consideration to allow exploitation by a limited number of

292. See Tables 1 and 2 in text accompanying notes 94-95 supra.
jointly acting firms having a dominant share of sales of that product in that area. This is a question for factual economic inquiry based upon careful observation and analysis of the particular markets involved. Here at least we must face unavoidable complexity. Stated generally, the determination will rest on the degrees of difference in quality, price, use, and cost.\textsuperscript{293} The \textit{Brown Shoe} decision suggested many specific tests that will be pertinent to such a determination (among others, industry or public recognition, peculiar characteristics and uses, distinct prices, sensitivity to price changes, and unique production facilities).\textsuperscript{294}

In identifying an oligopoly market, it would seem clearly improper to attempt to rest the analysis on the basis of some single test and ignore the other tests. For example, even though a particular industry has unique production facilities, if a second industry produces a closely similar product selling for about the same price with about the same production cost and if consumers have no preference for the product of one industry, it is meaningless to say that any group of companies in the first industry has oligopoly power. Under these circumstances, raising the price for the product of the first industry will simply have the direct effect of increasing the sales of the product of the other industry. That is to say, if there is perfect cross-elasticity of demand and no cost advantage between one industry and another, there would appear to be no market advantage that jointly acting firms in either industry could exploit.\textsuperscript{295}

On the other hand, if an industry is insulated to any appreciable extent over any substantial period of time from competition by other industries, whether because of consumer preference, cost advantage, qualitative distinctions, or other differences, the industries should be separated for purposes of oligopoly power analysis. As recognized by Judge Learned Hand long ago in a statement made with respect to monopoly, but which seems equally true as to oligopoly, a monopoly may be limited, but within such limits it may be able to extract a monopoly advantage.\textsuperscript{296}

This analysis may suggest that the definition appropriate for purposes of identifying an oligopoly market is closer to that typically employed under the Sherman Act than to some of the exceedingly narrow definitions recently utilized in section 7 cases.\textsuperscript{297} This may well be so. For if the oligopoly firms in a hypothesized market are so restricted by competitive substi-

\textsuperscript{293} See Turner, \textit{Antitrust Policy and the Cellophane Case}, 70 Harv. L. Rev. 281, 318 (1956).

\textsuperscript{294} Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

\textsuperscript{295} "[M]arkets are to be defined in terms of the close substitutability of either product (demand) or production facilities (supply), since it is ultimately the degree of substitutability that limits the exercise of market power...." United States v. Aluminum Co. of America, 377 U.S. 271, 283 (1964) (Stewart, J., dissenting).


\textsuperscript{297} Compare, e.g., United States v. Aluminum Co. of America, 148 F.2d 416, 424–26 (2d Cir. 1945) (Sherman Act market of primary aluminum ingot), \textit{with} Reynolds Metals Co. v. FTC, 309 F.2d 223, 225–29 (D.C. Cir. 1962) (Clayton Act market of aluminum florist foil distinct from market for decorative aluminum foil of same quality and use).
tutes that they have no power over price, the most serious question imme-
diately arises as to whether an oligopoly market in fact exists.

It does not follow that the views advanced in this Article require aban-
donment for all purposes of the narrow line of commerce and submarket
definitions that have appeared in recent Clayton Act decisions. As Profes-
sor Bok has pointed out, several markets might be constructed as to any
particular business transaction, even under a single statute, depending upon
the economic evils one is attempting to avoid. All that follows is that in
attempting to protect against the possible evils arising from use of oligop-

A9opoly power, it is necessary to use essentially a Sherman Act type of market
definition. For other purposes, other types of market-definition approaches
could be relevant. Thus, assuming for the sake of analysis that for some
purposes antitrust policy seeks to protect potential competitors as such, a
market definition solely in terms of potential competitors, regardless of
other competitive factors, would be justified.

Although market definition will not in every case be a difficult issue, when
rules of presumptive illegality are used, it is the most complex eco-
nomic issue to be decided in oligopoly cases. Indeed, we must face the fact
that market-definition complexity is unavoidable if oligopoly power as a
distinct market problem is to be controlled and regulated in any mean-
ful or rational way.

In its brief in United States v. Pabst Brewing Co., the Government
argued for adoption of a simplified prima facie rule for defining the mar-
ket in horizontal merger cases. The Government suggested that the valid-
ity of a geographical market be presumed upon a showing that (1) "sellers
whose sales are included in the market] were in fact in competition with
each other," and that (2) "there is reason to believe that sellers whose sales
were not included in the market suffer from some disadvantage in com-
peting with those whose sales were included." Although acknowledging
the importance of proper market definition and agreeing that the objective
is to define an area of effective competition, the Government urged that
an exhaustive analysis of market boundaries would lead to confusion in
result and loss of predictability of future decisions. It argued that simplified
market-definition rules are as necessary to successful administration of the
antimerger statute as are simplified rules for determining market shares

398. See Bok, The Tampa Electric Case and the Problem of Exclusive Arrangements Under the
Clayton Act, 1961 SUPREME COURT REV. 267, 300-02 & n.99. On the other hand, possible convergence
of Sherman and Clayton Acts market-definition analysis is visible in the recent decision of the Supreme
Court in United States v. Grinnell Corp., 384 U.S. 563 (1966), in which the Court used Clayton Act
cases in defining the market for Sherman Act purposes and explicitly recognized the possibility
of two or more markets and submarkets under the Sherman Act.
and that exhaustive market-definition analysis would yield no better results than a more limited inquiry.303

Contrary to the Government, I think there is a basic and fundamental difference between presumptions as to market definition and presumptions as to market share percentages once the market is properly defined. Although we cannot tell in advance at exactly what percentage of concentration market behavior will become oligopolistic, we know at least that if market concentration is carried far enough, oligopolistic behavior will at some point result. In the case of market definition, however, unless concentration is identified with an actual market, it cannot be viewed as necessarily leading to oligopoly behavior. For this reason incorrect market definition can lead to absurd legal consequences.

Although market definition raises difficult problems, the difficulty is not of the same order as that encountered in predicting the anticompetitive effects of a particular merger; for the latter determination is based on predictions of future behavior, while the former is, or at least should be, based on past facts, which while they may be obscure and extended over a period of time, are presumably knowable.304 Such facts are, of course, open to conflicting interpretations. Further, although predictability is highly important to business planning, business confidence that antitrust is leading to results that make some rudimentary economic sense is also important in stimulating voluntary compliance. Such confidence is likely to be eroded if decisions turn in even a few cases on excessive concentration in nonexistent markets defined with the aid of the Government-sponsored simplified presumptions. Therefore, in the area of market definition, I would not allow the Government to indulge in a presumption, but would require that it bear the full burden of proving the existence of a distinct geographical and product market.

303. Id. at 30-33.

304. The advantages of dealing with relatively objective facts as to the past dimensions of industries and markets would be lost, however, if the suggestion of respondents in the recent FTC-General Foods litigation were adopted. They argued that, in conglomerate merger cases, the court should attempt to account for future markets in the market definition by including potential substitutes. General Foods Corp., 3 Trade Reg. Rep. ¶ 17,657, at 22722 (FTC 1966) (appeal pending). The theory urged to support such an inclusion is that in a conglomerate merger case the issue will frequently not be the loss of actual competition, but of potential or future competition, and that therefore the potential competition of substitutes ought also to be considered in defining the market.

Such a change in market definition seems highly undesirable, however. The emergence of future substitute products is at best problematic, especially as the speed of technological change increases. In any event, such a determination would require the fact-finding agency to engage in speculative and complex economic prediction as to the shape of future markets. Cases defended by resourceful counsel would be likely to bog down in a morass of conflicting economic and technological testimony.

To the extent future substitutes are to be considered at all, they should be used to assess the future competitive effects of the loss of a particular potential competitor, rather than to obscure the definition of the existing market. As Commissioner Elman suggested in General Foods, loss of a particular potential competitor may be without significance even in an oligopoly market because it seems probable that potential substitute products will at a future time expand the market and thus offset the loss of the potential competitor. Id. at 22747-49 (dissenting opinion). But as a matter of correct analysis, the definition of the present market should not be confused by expanding it to include potential substitutes.
Measuring the market share. A question related to market definition is the measurement of the market share itself once the market has been identified. This may superficially appear relatively easy, but actually it can involve large imponderables since the firms to be compared may have different product mixes, different degrees of vertical integration, and differing accounting methods.\textsuperscript{306} Indeed, the choice of particular parameters to be used in comparing the market shares of various firms may also pose problems. Should such shares be measured with reference to total sales, assets, value of shipments, value added by manufacture, productive capacity, employment, or other criteria, or by some combination of these factors?\textsuperscript{306} Whatever is to be measured, should it be at one fixed point in time or should it be over a period of years?\textsuperscript{307} If it is to be measured over a period of years (as seems preferable), should it be based on an average or rolling-average figure which would give greater weight to the most recent years? A separate factor to be considered is the change in relative ranking of firms within an industry. To what extent do the amount and velocity of changes indicate that an otherwise structurally oligopolistic market is behaving more competitively,\textsuperscript{308} and to what extent should these determinations influence measurement of market share?

All these considerations can have an important effect on the final computed market share. Moreover, they are complex and raise highly technical questions of economic analysis and interpretation.\textsuperscript{309} The problem has scarcely been recognized in legal decisions. Further work in this area is clearly needed in relating economic theory and analysis to legal decision-making, particularly in connection with the development of presumptive rules of illegality.

5. The relation of potential competition to oligopoly power.

Potential competition has become a key concept in the developing legal policy to control oligopoly power,\textsuperscript{310} for where a market is concentrated, the threat of new entry—or potential competition—is thought to be one of


\textsuperscript{307} See Rosenbluth, supra note 306, at 92–94.

\textsuperscript{308} See, e.g., Joskow, Structural Indicia: Rank-Shift Analysis as a Supplement to Concentration Ratios, 6 Antitrust Bull. 9 (1961).

\textsuperscript{309} See authorities cited note 306 supra.

the few factors that can inhibit oligopoly behavior. At the same time, the identification of particular potential competitors, except in the most obvious cases, is fraught with practical difficulty.

Potential competition and oligopoly power. Although the concept of potential competition has importance in many areas of antitrust, it is in the conglomerate merger case that the concept comes most vitally into play. There it has become the chief vehicle for analysis of market-extension and product-extension mergers (mergers between firms producing the same product in different geographic markets or a functionally closely related product in the same geographical market). The reason for this is not difficult to understand where the relevant market is highly concentrated (as has generally been true in these cases). For in theory, it is hard to quarrel with the proposition that where markets are highly concentrated, potential market entrants should not be permitted to disappear through merger with leading oligopoly firms already in the market. This becomes particularly important if antitrust policy is to put aside any attempt forcibly to break up concentrated oligopoly markets. Then, indeed, potential new entry is one of the few remaining possibilities by which excessive concentration may in the future be reduced. Even if the potential entrant were never actually to enter the market, economic analysis suggests that the concentrated market is more apt to behave competitively with, rather than without, the threat of potential entry.

Passing the extremely difficult problem of identifying particular potential competitors with respect to any market (to be discussed in the next subsection) what kinds of legal rules as to mergers are appropriate to the preservation of potential competition? Three preliminary observations can be made. First, the rules should be aimed primarily at protecting potential competition in tight oligopoly markets or markets approaching that condition. Second, the rules should recognize that the most serious loss of potential competition is the loss of a potential competitor where the number of other potential competitors is small or nonexistent. The difficulty of so demonstrating appears slightly appalling in any but obvious cases. So much so, that a strong case could be made for not attempting to establish the number or identity of other potential competitors (except where it is self-apparent) despite its relevance. Third, to be effective, legal rules in this area will have to utilize presumptions since establishing the future effects of loss of a particular potential competitor in a particular market is an even greater exercise in obscurity than establishing the effect of loss of an actual competitor.

In view, however, of the greater remoteness of the effect on competition caused by a merger resulting in the loss of a potential competitor, as compared to a merger causing loss of an actual competitor, and the relative lack of knowledge of the total economic effect that would follow from further drastic restrictions on conglomerate mergers, a stricter definition of "proscribed oligopoly" could be justified. Thus, for purposes of conglomerate mergers involving possible loss of potential competition, a proscribed oligopoly market might be defined as one in which not eight but perhaps only six or less firms occupy seventy per cent or more of the market, and a proscribed oligopoly firm with respect to such market as one which could be clearly identified as a potential competitor and which seeks to acquire a firm having at least ten per cent of the market. As experience developed in dealing with conglomerate mergers and markets and as the effect of the rules was observed on the growth of horizontal oligopoly, the rate of industrial mergers, technological progress, and the marketability of controlling interests, the definition could be expanded or further contracted.

The differing impact of such an approach can be observed by referring to the FTC's recent decisions in National Tea Co. and General Foods Corp.

Although the first case was a market-extension and the second a product-extension merger, each involved a conglomerate merger by a potential market entrant (in the majority view), and each case was decided adversely to the respondent. However, in National Tea Co., the relevant local grocery markets in which the acquisitions by National Tea took place were for the most part not concentrated oligopolies, while in General Foods Corp. the relevant steel-wool market, which General Foods sought to enter through merger, was an extremely tight oligopoly. Contrary presumptions would have been drawn in these two cases under the approach suggested in this Article. (This might or might not have led to a different final result since the presumption is, of course, only a starting point.)

Thus, in general, legal policy would erect a special barrier to conglomerate mergers involving a loss of potential competition (through a presumptive rule) only where (1) the market of the acquired firm was highly concentrated, (2) the acquiring firm was clearly a potential competitor with respect to that market, and (3) the acquired firm had some substantial share of the market (for example, ten per cent). The presumption would be rebuttable to allow a showing by defendants of actual procom-

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312. 3 Trade Reg. Rep. ¶ 17463 (FTC 1966).
314. 3 Trade Reg. Rep. ¶ 17465, at 22695-700. Moreover, new entry remained relatively easy. Id. at 22702.
315. Two firms, including the acquired firm, accounted for 98.6% of relevant market. 3 Trade Reg. Rep. ¶ 17465, at 22726 (FTC 1966) (appeal pending).
petitive consequences, increased economic efficiencies, and achievements in technological innovation. It would be anticipated that the suggested policy would, as in other cases, operate to give increased freedom of action to smaller firms seeking to merge into nonproscribed oligopoly markets.\footnote{316. A similar approach to conglomerate mergers is developed in much more extensive and refined detail by Turner, who would also concentrate the force of legal policy on mergers into highly concentrated industries by potential market entrants. See Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1362-86 (1965). I disagree with Turner chiefly in the means by which I would identify potential competitors and in not making any presumptions conclusive. See Backman, Joint Ventures and the Antitrust Laws, 40 N.Y.U.L. Rev. 651, 669-70 (1965).}

Devising an adequate test for potential competition. Because of the importance of potential competition to the above policy, a test for identifying potential competition must be devised. The difficulty with the concept is not one of legal theory (provided it is not allowed to confuse the problem of market definition), but the very practical difficulty of identifying particular potential competitors with respect to any given market. The problem deepens when it is realized that under no rational economic analysis could some of the most significant recent market entrants have been identified in advance.\footnote{317. See United States v. Penn-Olin Chem. Co., 246 F. Supp. 917 (D. Del. 1965) (remand). See Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1362-64, 1378 (1965).}

The attempt to identify potential competitors can take several possible approaches. It may proceed in terms of intended potential competitors (whether or not recognized as such),\footnote{318. See United States v. Penn-Olin Chem. Co., 246 F. Supp. 917 (D. Del. 1965) (remand). See Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1362-64, 1378 (1965).} recognized potential competitors,\footnote{319. See United States v. El Paso Natural Gas Co., 376 U.S. 651, 660 (1964). Factors listed included "the nature or extent of [the] . . . market," "the nearness of the absorbed company to it," "that company's eagerness to enter that market," and its "resourcefulness."} objectively probable competitors (in the sense that there is a relationship between their existing and potential markets),\footnote{320. 246 F. Supp. 917 (D. Del. 1965).} or some combination of these factors.\footnote{321. 246 F. Supp. 917 (D. Del. 1965).}

Each of such approaches presents serious practical difficulties. The difficulties involved in attempting to identify intended potential competitors are graphically illustrated in the recent decision on remand in United States v. Penn-Olin Chem. Co.\footnote{322. See Backman, Joint Ventures in the Light of Recent Antitrust Developments: Joint Ventures in the Chemical Industry, 10 Antitrust Bull. 7, 13 (1965); Hale & Hale, Potential Competition Under Section 7: The Supreme Court's Crystal Ball, 1964 Supreme Court Rev. 171, 181; Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1384 (1965).} Pursuant to the direction of the Supreme Court that it should reexamine the evidence that one or the other of the corporations involved in the challenged joint venture might have entered the market while the other remained a potential competitor, the district court delved deeply, and I believe obscurely, into the vagaries of corporate decision-making.

It is difficult enough for a court to reconstruct the intent of a specific individual. The determination of what a large corporation acting through
staff agencies, committees, officers, and directors intends to do—not merely
in the present, but at some future time as well—includes the proceedings
in a vast labyrinth of evidence.\textsuperscript{323} Further, once the legal issues are known
to astute corporate counsel, future facts as to corporate intent can be ex-
pected to be shaped under careful legal guidance to negate any inference
that a corporation intended to enter any particular market which it later
enters by merger. A rule which would treat the corporation that is actively
exploring market entry and expansion differently than its more dormant
competitor would seem to be penalizing the very innovation and creative
planning in business that ought to be encouraged.

The attempt to identify potential competitors in terms of which firms
are “recognized” as such involves similar problems. Except in the most ob-
vious case, such as in \textit{United States v. El Paso Natural Gas Co.}\textsuperscript{324} where the
potential competitor had actively and publicly sought to enter the market,
the court must again deal with a question of corporate intent and state of
mind. The test based on recognized potential competitors has the advan-
tage of being a question of \textit{present} state of mind and understanding which
is unaffected by what in fact the potential entrant intends to do in the fu-
ture or has the capacity to do. It has the disadvantage, however, of requir-
ing the ascertainment of the corporate understanding, not of one company
alone, but of several separate firms. There is in addition the risk that such
a rule would tend to encourage secrecy and obscuring of motives and ac-
tions on the part of possible market entrants. This consequence would be
most undesirable since hiding the motives and actions of possible entrants
removes the visible threat of entry which, as previously indicated, may be
the most potent force in restraining oligopolistic behavior. A further dis-
advantage of the test of recognized potential competitors is that it also gives
an incentive to create facts. In this instance the motivation would be differ-
ent—the desire of existing firms in a market to exclude from entry by
merger a firm whose competition they may wish to avoid once merger
plans are announced or suspected.

The objectively probable test for a potential competitor is based on near-
ness of the product and geographical markets, funds available for expan-
sion, technical know-how, past history of market expansion, and related fac-
tors. It also raises problems, as it could involve the court in a most difficult
task of economic and business analysis. Nevertheless, it appears clearly

\begin{footnotesize}
\begin{enumerate}
\item It is a fiction to imagine that a corporation is controlled by a single group will; indeed, “the
operations of a large corporation cover such a wide area and are so complex that they present problems
. . . far beyond the technical scope and comprehension of any one human intelligence.” Conflicting
pressure groups struggle to influence corporate decisions and multiple objectives “press for priority
of recognition.” Timberg, \textit{Corporate Fictions: Logical, Social and International Implications}, 46
\textit{Colum. L. Rev.} 533, 559 (1946); \textit{See Dimok \& Hyde, Bureaucracy and Trusteeship in Large
Corporations} 25-26 (TNEC Monograph No. 11, 1940).
\item 376 U.S. 651 (1964).
\end{enumerate}
\end{footnotesize}
preferable to tests of corporate intent and understanding. At least the analysis would center on past facts of a more or less objective nature, rather than corporate intent and understanding as to future action.

As related to entry by merger into concentrated oligopoly markets, the problem might be further simplified by a presumption. For example, it might be presumed that any firm producing the same product in a different geographical market or a functionally closely related product in the same geographical market, as well as any firm that had publicly announced its intention to enter a market (the El Paso situation), was a potential competitor. The burden would then shift to the defendant to show by objective facts that this was not so. The defendant might prove, for example, lack of available funds or technical know-how or other incapacity precluding his market entry. The presumption, therefore, would cover basically the so-called market-extension and product-extension mergers, and the self-announced market entrant. In all other cases the burden would rest solely on the Government to prove by relatively objective facts that a defendant was a potential competitor.

Protecting potential competition by lowering entry barriers. The difficulty of determining which firms are potential competitors in a particular market could be avoided if legal policy, instead of focusing on preserving existing potential competitors, would concentrate on lowering entry barriers in concentrated markets. As we have already seen, new entry—or the possibility thereof—can modify oligopoly behavior even in concentrated markets. At the same time, the recent economic studies of Professor Bain have shown high barriers to new entry in many concentrated industries. Product differentiation appears to be the most crucial barrier. In general, entry barriers tend to be structural (or permanent) characteristics of many concentrated markets.

If such barriers could be lowered and kept lowered, one might expect that the industry would perform better, and perhaps eventually become less concentrated as new entrants were attracted. Yet a legal policy of lowering entry barriers, though desirable in principle, also presents practical and other difficulties.

First, the particular barriers that are most potent in any industry must be discovered through careful investigation because they vary greatly.

326. See notes 254, 285 supra and accompanying text.
327. See ibid.
330. Lowering of entry barriers is not a proper substitute for a policy proscribing mergers involving loss of actual competition. See notes 289–90 supra and accompanying text.
Thus, Bain found in a study of entry barriers in twenty industries that in the steel industry forward integration (largely through joint ventures) into iron ore was a potent barrier and that in the gypsum industry patent blockage had been important. In the liquor industry, on the other hand, the crucial entry barriers were product differentiation and high capital requirements.\footnote{332. Id. at 256-60.}

Second, once the barriers are discovered, both effective and authorized legal action must be taken. But it will frequently be true that the legal action that would be effective is not authorized, and that authorized action is not effective. Thus, as a general proposition, one might agree that it would be desirable to lower product-differentiation barriers. Yet, the means of accomplishing this objective do not appear to be at hand. Such barriers rest most importantly on advertising, and it is unclear how advertising expenditures can be decisively altered except by direct limitations on advertising activities of firms in concentrated industries where product differentiation is high.\footnote{333. But see Turner, Advertising and Competition, 26 Fed. B.J. 93 (1966), where it is suggested that limitations be placed on promotional expenses in Sherman Act decrees in order to restore competitive conditions in cases involving findings of excessive market power. Turner also suggests active Government policy to secure to consumers disinterested advice on the relative merits of consumer products and thereby to offset some of the effects of the massive advertising that causes high product differentiation. Id. at 97; accord, Auerbach, Quality Standards, Informative Labeling and Grade Labeling as Guides to Consumer Buying, 14 L. & Contemp. Prob. 362 (1949).}

Moreover, such limitations would have to be discriminatory in character to allow advertising by new market entrants attempting to establish new brands against the resistance of accepted brands. More feasible, although probably less effective, would be restrictions on distributor integration through ownership or contract and mandatory grade labeling, which has been suggested as means for making consumers less brand-conscious.\footnote{334. J. Bain, Barriers to New Competition 217 (1956).}

There would seem to be a greater possibility of directly affecting entry barriers by the removal of absolute cost advantages of existing firms, such as patent blockage and control of strategic raw materials in those cases where a basis for antitrust jurisdiction could be established, and by direct assistance to small business to remove capital advantages. At the same time, however, Bain’s study showed these to be the least important of the three types of barriers.\footnote{335. Id. at 155-56.}

It seems probable that the protection and promotion of potential competition by lowering entry barriers will have to proceed, if at all, by the slow and burdensome route of market-by-market analyses. Here industry-wide studies in depth by the FTC, as Commissioner Elman has suggested,\footnote{336. See National Tea Co., 3 Trade Reg. Rep. ¶ 17463, at 22712-13 (FTC 1966) (dissenting opinion); Elman, The Need for Certainty and Predictability in the Application of the Merger Law, 1967 Trade Reg. Rep. ¶ 17463, at 22712-13 (FTC 1966).} might have their most appropriate use. There would be no assur-
ance, however, that, once identified, such entry barriers could be effectively removed.

6. The uncertain relation of conglomerate size to oligopoly power.

A firm has conglomerate size relative to other firms as a result of a combination of functions and operations which do not give it significant horizontal power in any market and which are not vertically related. Within the scope of this Article, it is pertinent to inquire whether there is any relationship between mere conglomerate size and oligopoly power, and what if anything antitrust policy should do about it. I have defined a conglomerate firm as one not having significant market power in any market. A closely related problem exists where a firm that does have horizontal market power in at least one market seeks to grow through conglomerate acquisitions. Excluded from consideration in this section are the undesirable aspects of conglomerate mergers resulting from a loss of potential competition (market- and product-extension mergers), which have been discussed in the preceding section.

Conglomerate size has been attacked both negatively and positively. Thus, employing a negative attack, Professor Walter Adams asserted that precisely because of the lack of relation among its functions, the large conglomerate firm cannot justify its existence by achievement of any efficiencies or economies of scale. At the same time, both Professor Adams and Professor Corwin Edwards have attacked conglomerates on the basis of positive evils resulting from undue market advantages accruing to the large conglomerate. These have been thought to include the ability to outspend rivals, the power of reprisal in the same or a different market, the power to become self-sufficient as to any particular input through vertical integration, the ability to engage in reciprocity, "freedom" to allocate costs from less profitable to more profitable activities and thus to "immunize" itself from market discipline in particular markets, more favorable access to credit (prime rate), and nonmarket advantages such as greater political strength and ability to support protracted litigation. Furthermore, where the conglomerate has market power in one market, it may be able to utilize such power to gain advantages in another market by such means as tie-in sales and reciprocal buying pressures. In addition, though it may or may not be a market advantage, it is claimed that the growth of conglomerates

339. Id. at 340–45.
decreases the number of people who exercise decision-making in business.\textsuperscript{340}

Assuming that some or all of these advantages may exist for firms of conglomerate size, is there any relationship between them and oligopoly power? It has been suggested that close analysis would reveal that all of these claimed advantages, to the extent they actually exist, are based either on the leverage of monopoly or oligopoly power or simply reflect superior efficiencies of scale or large size.\textsuperscript{341}

Thus, it can be urged that predatory price cutting by a conglomerate in one market may imply the ability to charge a monopoly or oligopoly price either in that market at some later time, or in another market at the same time, since it is not rational economic behavior willingly to lose money without opportunity to recoup. The FTC majority thought it detected such a pattern of predatory price cutting and subsequent recoupment by a conglomerate with differing market shares in various regional markets in \textit{National Tea Co}. It found that while respondent grocery chain engaged in below-cost selling in 141 cities where it held less than ten per cent of the local food market, in other cities where it had larger market shares (thirty-five per cent and over) there was a "striking correlation" between the larger market position and increased profitability. The difference in return was unrelated to the sales volume in a particular city.\textsuperscript{342}

On the other hand, some of the claimed advantages of conglomerates may be no more than efficiencies inherent in scale. Thus, a company that is large enough to utilize a computer efficiently may achieve advantages over noncomputerized rivals that have equal or larger shares of one particular market.\textsuperscript{343} That kind of advantage clearly does not involve oligopoly power and is probably not objectionable on any grounds.

The plain fact that emerges from an attempt to analyze the relationship between conglomerate size and oligopoly power—when we put to one side the special situation of potential entrants into oligopoly markets—is that very little is known. This suggests that public policy should move slowly in this area in prohibiting or restricting activities by conglomerates.

At the same time, it would appear highly desirable to learn more about the activities of conglomerates. For the very reason that the conglomerate firm is engaged in many seemingly unrelated activities, the published figures as to such firms reveal far less about their business operations than the

\textsuperscript{340} Id. at 357.
\textsuperscript{342} \textit{National Tea Co.}, 3 \textit{Trade Reg. Rep.} \textsuperscript{n} 77463, at 22700–01 (FTC 1966).
\textsuperscript{343} Computer manufacturers have recently testified, however, that computers are becoming readily available to smaller companies through leasing and sharing programs. \textit{Hearings on Economic Concentration Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary}, 89th Cong., 1st Sess., pt. 4, at 157–81 (1965).
figures of less diversified firms. It simply cannot be determined in many cases whether a conglomerate is "subsidizing" below-cost selling in one product by high profits in another (this practice should not necessarily be condemned, but it should be known). It would seem desirable, therefore, for there to be new legislation in this area in the nature of a "Conglomerate Disclosure Act." Pursuant to the provisions of such an act, each conglomerate firm larger than a certain size (perhaps 100 million dollars in annual sales) might be required to disclose or publish annually an operating statement for each product line, showing (1) net sales, (2) cost of goods sold (itemized to show individually the cost of goods purchased from affiliates, the cost of goods purchased from outside firms, and labor costs), (3) operating overhead, (4) net profit or loss from such product line, and (5) area of geographical operations.

The need for additional information about conglomerates seems particularly crucial in view of the growing tendency for mergers to take the conglomerate route as antitrust policy raises higher obstacles to horizontal and vertical mergers. Further, aside from the ordinary mixture of motives that leads to corporate diversification, there is a special incentive for conglomerate merger to a company identified in the public mind as being in a "glamour industry." Such a company is apt to enjoy a high price-earnings ratio on its stock. By acquiring more mundane firms with high earnings potentials, it may be able at one and the same time to raise earnings and stock values without adversely affecting the company's price-earnings multiplier. For all these reasons more information about conglomerates appears highly desirable.

7. The encouragement of economic incentive and technological innovation.

The encouragement of economic incentive and technical innovation are keystones of our free enterprise system. If the results of an antitrust policy were to discourage economic incentive or technical innovation, clearly the policy would have miscarried. The use of simplified rules of illegality to control oligopoly power raises some risks in these directions.

Economic incentive. Concern has been voiced by supporters of vigorous antitrust that if antimerger enforcement is carried too far it will have an
inhibiting effect on economic incentive in that it will tend to destroy the
market for capital assets.\textsuperscript{345} Put another way, if exit is made too difficult,
entry may be discouraged because of the frequent desire of owners of
smaller firms, or their heirs, to sell businesses in order to realize the capi-
tal gain they have built up.\textsuperscript{346} However, it would appear that such an in-
hibiting effect has not yet occurred.\textsuperscript{347}

The question is then raised as to whether the suggested rules discussed
in this Article will have such an incentive-reducing effect. They would no
doubt tend to block mergers by “proscribed” oligopoly firms. However, at
the same time, the proposed policy would make for greater freedom in
mergers by other firms, particularly in the case of nonhorizontal mergers.
The proposed policy would also lead to greater competitive freedom for
nonoligopoly firms in contract integration, and possibly other areas, and
thereby might facilitate faster growth of such firms. These advantages
might in turn provide a powerful incentive to smaller firms, offsetting any
loss of incentive from reduced marketability of controlling interests.

A policy alternative that would make the problem of exit less acute
would be a further lowering of individual income tax rates to permit the
entrepreneur more easily to withdraw his profits through salary and divi-
dends. To some extent, indeed, the “wave of mergers” about which Gov-
ernment authorities express such continuing concern may be, at least on
the seller’s side, largely the natural and obvious reaction to tax policies un-
duly favoring the sale of businesses by a successful entrepreneur.

\textit{Technological innovation.} A fundamental premise behind our antitrust
laws would appear to be a belief in the value and fruitfulness of permitting
free experimentation in business endeavor. Free experimentation may be a
higher value than the prevention of concentrated oligopoly markets in the
limited cases in which the two goals conflict. Specifically, it has been urged
above that vertical mergers and joint ventures which can be adequately
justified on grounds of technological experimentation and creativity be
permitted in spite of possible market concentration risks.\textsuperscript{348} A good deal
more than mere economies of scale or increased efficiency is involved. A
possible example of a combination which could be justified as promoting
innovation might be the recent union of the technologies of electronics and
book publishing to create a new industry and technology of programed
education\textsuperscript{349} (assuming, as it would superficially appear, that neither indus-

\textit{Notes.}

345. See Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 \textit{Harv. L. Rev.}
1313, 1317 (1965).
347. See Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 \textit{Harv. L. Rev.}
Mergers (1966) (questionnaire survey of 100 large companies showed 180 mergers in last 5 years).
348. See notes 250–52 supra and accompanying text.
349. See \textit{N.Y. Times}, Feb. 6, 1966, § 3 (Financial), at 1, col. 5.
try alone possessed the technical resources or know-how to create the new technology).

A distinguished antitrust scholar has recently argued against making technological innovation a standard for decision in antitrust cases, in part because no "meaningful criteria" exist by which a court can decide how much competition to sacrifice in order to promote a particular innovation. There is merit to this argument if a court were to be required to balance precisely the loss of competition against the expected values to be gained from a particular technological innovation. However, if one begins with the assumption that antitrust, or at least antitrust policy directed against further growth of oligopoly power, ought not to bar technological progress not otherwise obtainable, such extensive balancing is not required.

The court would still have to determine whether a particular merger or joint venture involved some element of creative innovation and whether the innovation could be obtained by a less restrictive practice or method, but once these facts are established it would not be necessary to weigh the value of the innovation against the loss of competition. It would simply be presumed that the innovation should be permitted. Such a rule would seem reasonable in view of the fact that we are, except in the case of horizontal mergers and joint ventures, not talking about a direct horizontal addition to market power, but at most an indirect effect upon competition and market concentration.

There is no avoiding the fact, however, that in ruling on questions of technological innovation, courts would be required to enter an area where they are likely to have little experience and no special competence. There appears no way of averting such an inquiry. The most that can be done, therefore, is to simplify the court's task insofar as possible by not requiring more than a judicial determination that an innovation is present and that it has substantial value.

An additional means of simplifying the problem would be to encourage joint ventures in lieu of mergers as the preferred method of combining technical skills and know-how. The joint venture appears to be a sufficient business device for bringing together new combinations of technology in many, if not most, cases and seems generally a superior alternative to merger for the reasons discussed earlier. Channeling developments in the direction of the joint venture would permit a limitation on the assets and functions to be combined in the new undertaking to those that were necessary to achieve the particular innovation.

The strong recognition of the goal of fostering technological advance as recommended here seems fully adequate to prevent a policy of control-


351. See notes 214-52 supra and accompanying text.
ling oligopoly power, although vigorously applied, from imposing on industrial experimentation and innovation. In fact, the risk is probably in the other direction—the possibility that these defenses might become loopholes for escaping antitrust sanctions. Yet such a risk seems worth taking given the present velocity of economic and technological change, the importance to our national welfare of leadership in such change, and a certain amount of humility concerning the belief that any single method of industrial organization (even one based on free competition) will always be adequate to achieve optimum innovation.\footnote{352} Although the showing of innovation would have to be clear, it would seem unwise, and probably even foolish, to carry the principle of limitation of oligopoly power and promotion of competition so far as to preclude or substantially retard the development of new combinations of technology and the creative industrial evolution.

\textbf{Conclusion}

With growing uniformity economic theory has identified the concentrated oligopoly market as being inherently anticompetitive. Although the courts neglected this economic view until 1962, the decisions of the Supreme Court since that year have with increasing clarity reflected the recognition of oligopoly theory as an economic premise for legal reasoning. As a result, rules of law appear to be emerging that focus on concentrated oligopoly markets as objects of particular antitrust concern. This has been similar to the earlier focus on monopoly markets.

This development has posed difficult questions for judicial administration in view of the necessary limitations of the judicial process in dealing with complex economic facts and in view of the need for maximum certainty in business planning. These considerations require simplification of legal rules with respect to oligopoly power insofar as possible. Analysis indicates possibilities for further extension of presumptive rules of illegality of the type employed in \textit{Philadelphia Bank}. Despite such possible simplifications, at least three areas of unavoidable economic complexity remain: (1) definition of the market, (2) identification of potential competition, and (3) recognition of possibilities of technological innovations. The formulation and development of an explicit legal policy toward oligopoly power represents no change in underlying antitrust values, however, but only a more effective means to the achievement of such values. The ultimate goal of antitrust remains the preservation, to the greatest extent possible, of the conditions of open competition and free economic experimentation.

\footnote{352. The policy could of course be reviewed periodically (with the benefit of hindsight) to determine whether it had indeed become an escape hatch or was otherwise not effective.}