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THE NEW THRUST OF THE ANTIMERGER ACT: THE BROWN SHOE DECISION

Bryce J. Jones*

In a landmark antitrust decision, the Supreme Court has upheld the judgment of a federal district court that the 1956 acquisition by Brown Shoe Company of the G. R. Kinney Company violated section 7 of the Clayton Act.¹ The merger between Brown, the nation's fourth largest manufacturer and the third largest retailer of shoes, and Kinney, a partially integrated retailer ranking seventh in the industry, was held to be illegal by the court at two levels: the vertical tie between Brown's manufacturing units and Kinney's retail outlets threatened competition at the manufacturing level, and the horizontal combination of retail outlets posed a threat to competition in the numerous markets in which the two companies have retail outlets.² Section 7 of the Clayton Act, as amended by the Celler-Kefauver Act of 1950, provides:

That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.³

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² Contrary to some opinion, the District Court held that the merger of manufacturing units did not violate the Clayton Act. In view of the high court's approach to the horizontal merger at the retail level, it is likely that the increase in Brown's manufacturing share from 4.0 to 4.5 per cent would also have been declared illegal, had the Government appealed from this determination of the District Court.

Despite the large number of cases brought under section 7, the Brown decision marks the first time that the Supreme Court has fully interpreted the antimerger law; and though it is hazardous to speculate on the extent to which any decision will establish precedent, especially in the field of antitrust where the fact pattern varies so widely from case to case, the thrust of the Brown decision is so unmistakable that it promises to broaden the scope and to alter the standard of illegality of the antimerger law.

The plan of this paper is as follows: sections one and two deal, respectively, with the vertical and horizontal aspects of the Brown-Kinney merger and the Brown Court's approach to these issues as seen against the background of recent merger law; section three discusses the problem of market definition with particular reference to the issues in the Brown case; section four explores the implications for the future of the Brown decision; and the final section summarizes the major issues of the decision.

1. The Vertical Aspect of the Merger

Until 1961, it was settled law that a vertical arrangement that forecloses competitors from a substantial market violates the Clayton Act. Both Standard Oil of California v. United States, involving Standard's exclusive dealer contracts, and the du Pont-General Motors case, involving du Pont's partial stock ownership of General Motors, made it clear that a showing that a substantial market is foreclosed to other firms obviates a demonstration of the anticompetitive effects of a vertical arrangement. The precise meaning of a "substantial market," however, was uncertain. The only relevant precedents were section 3 cases, and these contained both an absolute and relative definition of substantiality: in International Salt Co. v. United States, $500,000 in annual purchases required by a tying contract was deemed substantial; in the Standard Stations case, the share of the market — 6.7 per cent — covered by exclusive dealer contracts was regarded as substantial.

An indication that the so-called quantitative substantiality doctrine of the Standard Stations case would be modified came in Tampa Electric Co. v. Nashville Coal Co., a section 3 case involving requirements contracts. The contracts, calling for the purchase of $128 million of coal per year, were held illegal by the lower courts because the contracts involved substantial sums. In reversing the decision, the Supreme Court profoundly altered the substan-

4 From 1950 to Oct. 1, 1962, 106 cases have been initiated. The disposition of these cases is summarized in Staff of House Select Comm. on Small Business, 87th Cong., 2d Sess., Mergers and Superconcentration, 19-21 (1962).
5 The term vertical arrangement covers tying, requirements, and exclusive dealer contracts and mergers between firms which are in a buying and selling relationship. Tying, requirements, and exclusive dealer contracts are proscribed by section 3 of the Clayton Act, vertical mergers are covered by section 7 of the Clayton Act. Under both section 3 and section 7 these arrangements are illegal if they may "substantially lessen competition or tend to create a monopoly."
6 337 U.S. 293 (1949).
The Court ruled that "a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence." The high Court repeated the *Standard Stations* ruling that such contracts are illegal if competition is foreclosed from a substantial share of the market; but the Court went on to state that to determine substantiality it is necessary to examine the relative strength of the firms, the share of the market involved, and the effects, present and future, which the contracts would have on competition.

The *Brown* Court took a similar approach. It held that the market share foreclosed by a vertical arrangement is seldom determinative of legality: in order to determine whether a market foreclosure is substantial, the vertical arrangement must be viewed in the light of economic and historical forces. Taken as one, the two decisions represent a categorical rejection of the quantitative substantiality doctrine. And if the judiciary employs the approach to substantiality taken by the *Tampa* Court, the legality of vertical mergers will turn on several factors, including a showing of the probable effect of the merger on competition. Such a rule-of-reason approach would meet the major criticism of the quantitative substantiality doctrine: that it fails to discriminate between mergers that harm the competitive process and those that do not.

In determining the substantiality of the foreclosure, the *Brown* Court considered three economic and historical factors: the size of the foreclosure, industry trends, and the nature and purpose of the vertical arrangement.

The Kinney market share which was acquired in the merger was small enough — 1.2 per cent of national retail sales by dollar volume and 1.6 per cent of total pairage — that even by the *Standard Stations* test the merger would have been permitted. Kinney, however, was the largest nonintegrated retailer in the nation, and the Court noted that "no merger between a manufacturer and an independent retailer could involve a larger potential market foreclosure." The record shows that in 1955 Kinney purchased shoes from 66 suppliers and at least five of these were independent manufacturers who sold more than 40 per cent of their output to Kinney; and the evidence clearly indicated that even though Brown supplied only 8 per cent of Kinney’s needs it intended to increase its share of the Kinney market. The weakness of this argument is pointed up in the *Brown* decision: Chief Justice Warren’s fear that Kinney retail outlets would be foreclosed to Brown’s manufacturing rivals was neatly matched by Justice Harlan’s fear that some of Kinney’s rivals would be precluded by the merger from buying shoes from Brown.

Instead of emphasizing the size of the merger or its competitive impact, the Court used its broadened approach to substantiality to raise the small share acquired by Brown to a higher power — an illegal power — by viewing it in the light of a “trend toward concentration.” In effect, the Court ruled that a small share foreclosed achieves an anticompetitive effect if similar small shares...
have been foreclosed by industry members in the past, and the dynamics of the
process indicate that other shares will be foreclosed in the future.

It is to be noted that this version of incipient trends differs from the more
widely discussed version: the case of minute acquisitions by a single firm. Both
versions were present in the lower court's decision, but the latter version is not
prominent in the Supreme Court decision.

It is not intuitively clear how an industry trend toward vertical integration
can damage competition. In the case of a series of horizontal or vertical mergers
by a single firm, it is clear enough that if the process is repeated often enough
competition will ultimately be harmed.16 This is not necessarily true in the
case of a multi-firm vertical integration movement: if 500 shoe manufacturers
acquire all of the retail outlets, competition will still thrive at both the retailing
and manufacturing level.17

Presumably, then, the danger lies not in a trend toward vertical integration
as such but rather in a trend which is restricted to only a few members of the
industry. The theory appears to run as follows: if a few manufacturers obtain
an increasing share of the retail market, nonintegrated manufacturers will
gradually be frozen out of these markets as the retailers become increasingly
dependent upon the parent firm for supplies; thus the integrated producers
will use their ownership of forward markets to increase their market share at
the manufacturing level.

Actually, there is little factual evidence in the Brown decision to support
the inference that an integration trend threatens the competitive process at the
manufacturing level. The record discloses that, in the period 1950-1956, 1,114
retail stores became subsidiaries of large manufacturers and became increasingly
dependent upon these firms for supplies. Nevertheless, the percentage of shoe
sales of all shoe outlets—not just shoe stores—accounted for by chains of
eleven or more units remained constant from 1948 to 1954.18 The record shows
that from 1947 to 1958 the number of manufacturers declined from 1,077 to
872; but in the period 1948-1954 there also occurred a substantial decline in
the share of the market held by the top four, eight, and fifteen firms in the
industry. Finally, there is nothing in the record to indicate that only the
largest firms have been integrating forward or that the decline in number of
manufacturing firms is causally connected with the increase in number of out-
lets owned by the manufacturers. If past foreclosures have contributed to an
incipient trend toward oligopoly, they have done so in arcane ways unspecified
by the record.

Though the Brown Court placed special emphasis on trends in its judg-
ment that the merger was illegal, it can be argued that the Court would have
reached a similar conclusion even in the absence of trends. The Court held
that one of the economic and historical forces to be considered is the nature

16 See Handler & Robinson, A Decade of Administration of the Celler-Kefauver Antimerger
18 Though the term shoe stores includes separately operated shoe departments of general
stores, it does not include shoe departments of general stores which are not operated as separate
departments; thus the total sales of shoe outlets exceed the total sales of shoe stores. U. S.
Bureau of Census, Retail Trade, Single Units and Multunits, BC58-RS3, at 1.
and purpose of a vertical arrangement. The Court declared that tying con-
tracts are so inherently anticompetitive that even a small share foreclosed vio-
lates section 3; but certain vertical mergers, the Court argued, may serve a
useful purpose and these Congress wished to immunize from the law.\textsuperscript{19} The
Court held, however, that the Brown merger did not fall into one of the immune
categories; thus it can be inferred that the foreclosure of the Kinney market
would have been judged illegal even if trends had not been present. Moreover,
the Court likened the merger to a permanent tying contract because Brown
was forcing its shoes on Kinney. Since the Supreme Court has on two occasions
taken what amounts to a per se approach to such contracts,\textsuperscript{20} the Court's
comparison of vertical mergers and tying contracts may suggest that all vertical
mergers falling outside the immune categories will be judged illegal.

An evaluation of the various factors considered by the Court points unmis-
takably to one conclusion: the Court did not replace the quantitative substan-
tiality standard of illegality with a rule-of-reason approach to vertical mergers.
The competitive effect of the acquisition (or of past acquisitions) was not
thoroughly analyzed, the small Kinney foreclosure was magnified by being linked
with trends, and the effect of the merger was likened to an inherently anti-
competitive contract. In holding that a market share is seldom determinative,
the Brown Court meant only that other factors such as trends and the purpose
of the merger must be taken into account. This does not imply, however, that
a merger foreclosing a share of the order of magnitude of the \textit{Standard Stations}
case would be approved; for few foreclosures of this magnitude will fall into
the immune categories of mergers, especially if there is a hint that trends are
at work.

The Brown decision represents a Pyrrhic victory for those who have battled
against quantitative substantiality: a substantial market share foreclosed was
once considered a sufficient condition of illegality under section 7; under the
Brown approach, a substantial share foreclosed is no longer a necessary condi-
tion of illegality.

The Brown-Kinney vertical tie was also found to threaten the competitive
process at the retail level: Chief Justice Warren stated that vertically integrated
outlets have a competitive advantage over their rivals because they can bypass
the wholesaler and purchase in such quantity that they can undersell indepen-
dents; Justice Harlan suggested that manufacturer-owned outlets can sell at a
lower profit margin.

Even if it is granted that there are economies of vertical integration in the
shoe industry—and this writer expresses no opinion on the matter—it is
not likely that these economies are based on the factors cited by the court.\textsuperscript{21}
Bypassing the wholesaler does not eliminate the wholesaling function or its
costs; a vertically integrated retailer will purchase no more or less a quantity

\textsuperscript{19} See section 4 \textit{infra}.
\textsuperscript{21} Economies of vertical integration are discussed in \textit{BAIN, INDUSTRIAL ORGANIZATION} 155-59 (1959).
of shoes than a nonintegrated retailer; and lower costs and profit margins are the means of invigorating competition, not necessarily eliminating it.

The approach taken by the Court suggests that the ban on vertical integration is virtually complete: if the foreclosure effect is too small to support a violation and there are no concentration trends, the merger can still be disallowed on the grounds that the cost advantage of a vertically integrated firm represents a threat to competition in the forward market.22

2. The Horizontal Aspects of the Merger

When Professor Markham surveyed merger cases in 1957, he found that most of the mergers involved firms whose combined market share exceeded 25 per cent.23 In 1961, Frederick Rowe’s study of merger complaints suggested that mergers achieving a 15 per cent share of a market where market entry barriers are high might be in jeopardy.24 If the Brown decision is a reliable yardstick, horizontal mergers involving a firm with a 5 per cent share of the market or several firms with a combined share of 5 per cent can now be attacked under the Clayton Act.25

Prior to the merger (1956) Brown owned 470 shoe stores and controlled under its franchise system 660 independently owned outlets. At that time, the acquisition of the 350 Kinney stores gave Brown control of approximately 1600 shoe outlets, or 7.2 per cent of the nation’s 22,000 shoe stores and 2.3 per cent of the nation’s total retail shoe outlets, making it the second largest shoe retailer in the country. Regardless of how impressive, or unimpressive, these figures are, they are largely irrelevant; for it is the local market, not the nation as a whole, which is the relevant market for measuring the size and impact of a merger of retail shoe firms.

The lower court found that there were at least 141 cities of 10,000 or more population in which Brown and Kinney stores were in competition with one another. The Supreme Court clearly implied that in 118 of these cities the merger violated the Clayton Act. In these 118 cities, the combined market share of Brown and Kinney in one (or more) of the three relevant lines of commerce ranged from a high of 57.7 per cent to a low of 5 per cent, depending upon the product line and city. The size of the Kinney market share acquired by Brown ranged from a high of 36.6 per cent to a low of 1.0 per cent, but in all cases the combined Brown-Kinney share totaled at least 5 per cent of one or more of the relevant product lines.

Actually, the Brown market share figures include the sales of the 760

22 The possibility is partly illustrated in the Reynolds Metals Co. vertical merger with Arrow Brands, Inc., though here the FTC found that competition was actually damaged at the forward level due to the low prices charged by a firm made powerful by its tie with Reynolds. Reynolds Metals Co. v. FTC, 309 F.2d 223 (D.C. Cir. 1962).
23 Markham, Merger Policy under the New Section 7: A Six-Year Appraisal, 43 Va. L. Rev. 489, 519 (1957).
outlets which were independently owned but operated under a Brown franchise system. The Supreme Court agreed with the lower court's findings that these outlets were so closely affiliated with Brown that it was appropriate to include them as Brown stores. There is no information in the decision as to the relative importance—in terms of market share figures—of these independently owned outlets. It is reasonable to assume, however, that the sales of the outlets not owned by Brown were sizeable. If this assumption is correct, it must be concluded that the market shares of the two firms which were legally merged fell below the 5 per cent figure in some of the markets.

In some of the cities, the merger joined dominant retailers: for example, in Dodge City, Kansas, Brown outlets accounted for 34.4 per cent of total city sales of women's shoes in 1955, and Kinney store sales came to 23.3 per cent. In other markets the shares were small: in St. Paul, Minnesota, Brown outlets sold 2.5 per cent and Kinney stores 2.7 per cent of total city sales of children's shoes in 1955. But the Court stated that in a fragmented industry control of substantial shares—shares of 5 per cent or more—could have a significant effect on competition, especially in view of industry trends and the competitive strength of the Brown-Kinney combine.

The Supreme Court affirmed that the industry was in the midst of a trend toward concentration, a vertical trend which also tended to increase concentration in retailing. Curiously, though, little evidence was adduced to support the existence of a trend other than data on the number of outlets acquired in recent years by the leading shoe manufacturers, including Brown; in fact, as pointed out above, some of the evidence flatly contradicted the existence of a concentration trend. At any rate, the Court was fearful that if it approved a merger which would push Brown into second place (in terms of retail outlets) in the industry it might be under pressure to approve other shoe mergers: the end of such a process would be oligopoly. Thus in the light of concentration trends, the Brown-Kinney merger, large and small market share alike, achieved the taint of illegality.

The Court also feared that the combination of even small shares might threaten the competitive process because of the competitive strength of a "large national chain." The lower court had held that manufacturer-owned outlets possessed many advantages: advantages in buying and credit, advertising, insurance, inventory control and price control. The Supreme Court noted simply that a national chain can protect certain outlets against the "vagaries of competition" and also alter style sufficiently to present an inventory problem to the independents. And as pointed out in the previous section, the Court argued that a vertically integrated shoe firm has several advantages over a nonintegrated firm.

The Court's approach to horizontal mergers is vulnerable to criticism on two counts. There is, first of all, the almost complete neglect in the Brown decision of any analysis of market structure at the retail level. It is true that in many of the geographic markets involved, the combined market share of the

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26 370 U. S. at 337-38 n.66.
merging firms was sufficiently high to make a detailed market analysis superfluous; this was hardly the case in the numerous markets in which the market share, if judged in terms of previous merger cases, was quite low. The Supreme Court itself noted with regret the lack of information on concentration and firm rank in the individual retail markets;\textsuperscript{28} moreover, evidence concerning changes in concentration, ease of entry, and the competitive importance of nonchain outlets would have been relevant and material. It is also regrettable that the market share figures attributed to the Brown and Kinney outlets refer to a narrower geographic area than that which was accepted by the court as the relevant geographic area.\textsuperscript{29}

In its appeal to the Supreme Court, Brown objected to the District Court's findings concerning the horizontal aspect of the merger on the ground that no attention was given to the impact of the merger in each product line in each city (the product and geographic markets which the Court found relevant); for instance, to the anticompetitive effect on the sale of women's shoes in St. Paul, men's shoes in Council Bluffs, etc. To have required a market analysis of every product line in every city would have been absurd; to have required a careful analysis of market structure in several representative markets, including, of course, a market involving a small merger share, would have been perfectly reasonable.\textsuperscript{30} The casual approach taken to the most elementary facts concerning market structure makes the Brown case unique among litigated horizontal merger cases. And if the Brillo Mfg. Co. case illustrates the difficulties involved in analyzing market structure characteristics and firm conduct,\textsuperscript{31} the Brown case points up the crudity of an approach that neglects the basic market structure.

The second criticism of the Brown decision is directed at the argument that a merger, horizontal or vertical, poses a threat to competition because of the increased efficiency or enhanced strength of the merged firm. This argument has come to be known as the competitive advantage theory,\textsuperscript{32} and it is well on its way to becoming an integral part of the standard of illegality under section 7. Professor Adelman found that of the 76 merger complaints issued under section 7 by November 1960, 56 of them emphasized that the merger would enhance the competitive position of the merging firm or divert trade from other firms.\textsuperscript{33} The Brown decision guarantees the survival of the competitive advantage theory.

As far as the Brown-Kinney merger is concerned, this writer is not competent to judge whether the merger would increase or decrease the efficiency or

\textsuperscript{28} 370 U. S. at 346 n.74.
\textsuperscript{29} As pointed out in the next section, the court held that the relevant market was every city of 10,000 population or more and its immediate contiguous territory in which Brown and Kinney stores operated. The market share figures cited above are based on city sales alone. See 370 U. S. at 341-42 n.69.
\textsuperscript{30} The lack of supporting data on industry trends and the failure to use several market samples attest to the embryonic development of statistical evidence in antitrust cases. The topic is explored in Massel, Competition and Monopoly ch. ix (1962).
\textsuperscript{32} Bork, supra note 15, at 838.
competitive strength of the firm. But there are a number of objections (pre-
scinding entirely from the facts of the Brown case) to making the increased
competitive strength of the merged firm an essential part of the standard of
illegality of section 7. In the first place, some of the merger advantages cited
in some of the merger complaints — the opportunity to price discriminate, for
example — turn out to be putative violations of other laws — the Robinson-
Patman Act, for example — and these should be attacked by laws specifically
aimed at such practices rather than by the antimerger law. 34 Secondly, though
there may be genuine efficiencies gained from a merger, the evidence to support
the alleged advantages tends to be unreliable: the testimony of small business-
men can be counted on to exaggerate the advantages possessed by integrated
units and genuine cost studies are usually unavailable. At best, then, the evi-
dence can only be suggestive.

A more fundamental objection to the competitive advantage theory, grant-
ing that some integrations increase efficiency, is that a finding of violation on
grounds of competitive advantages will not for long protect the nonintegrated
smaller firm: sooner or later these firms must integrate or succumb to those
firms which become more efficient by nonmerger integration. It is simply futile
to attempt to preserve competition by protecting firms from competitive pres-
sures exerted by more efficient firms.

Finally, the too ready acceptance of the competitive advantage theory
will tend to deflect the attention of the prosecuting agencies and the judiciary
from other matters, matters more related to the substance of the problem.
Why bother to define the market, to calculate shares, to compute past and
present concentration ratios, or to analyze entry problems. These are difficult
matters to handle, all the more because of the tentativeness of merger theory
and the scantiness of the data; and these matters are largely irrelevant if com-
petitive advantage is itself considered anticompetitive. The temptation will be
to side-step these issues, to avoid them because of the messiness of the analysis,
particularly since the whole matter can be resolved so simply on the basis of
an approach that is so readily accessible and believable. The easy victories will
have their long run costs, however: support for the antitrust laws, a fragile
support at best, will surely be weakened if one of the laws is centered on the
idea that reduced costs, improved services, or lower profit margins constitute
the essence of an antitrust violation.

Undoubtedly, the most significant aspect of the Brown decision is that
the antimerger law has been expanded to encompass small horizontal mergers.
The key question is whether the merger of firms each of which has a small
market share, say two or three per cent, represents a threat to competition. It
is doubtful that one can demonstrate in economic theory that the elimination
of such a small part of the market significantly reduces the number of seller
alternatives or gives the combined firm any power to set industry price. Perhaps
this difficulty accounts for the important role which is given, in the Brown
decision, to industry trends and the competitive advantages of mergers. Be

34 See, e.g., In the Matter of the Borden Co., Complaint (mimeographed) at 7-8. (FTC
that as it may, it would be unfortunate, and certainly a break from past precedents, if in expanding the scope of the law to cover small mergers the focus of the law is shifted from market structure to industry trends and competitive advantage.

3. The Relevant Market

The most unsettled issue in antitrust case law is market definition. The approach to the market has varied from court to court, case to case, merger type to merger type, and antitrust law to antitrust law. The Brown decision, unfortunately, does not resolve the thorny legal and economic issues.

Product definitions based on reasonable interchangeability, peculiar characteristics and uses, and production flexibility have been tirelessly submitted, rejected, ignored, distinguished, and equated; and a review of the decisions reveals a singular absence of pattern in the treatment of substitute products. In the du Pont-General Motors case, the Court held, however, that a product—in this case automobile paints and fabrics—having peculiar characteristics or uses represents a line of commerce under the Clayton Act; subsequently, in United States v. Bethlehem Steel Corp. it was suggested that the existence of substitutes may be ignored in a Clayton Act case, even though they are germane in a Sherman Act proceeding. The final stage in this line of reasoning occurred in two recent cases: products (Census coarse paper and polyethylene film) were found to have peculiar characteristics and uses on the grounds that consumers indicate the distinctiveness of the product by purchasing it. If carried to extremes, this approach becomes a Chamberlinian nightmare in which every firm is a pure monopolist and every nonvertical merger is conglomerate.

The approach to the geographic market has been no less disturbing: the Bethlehem Court found relevant markets within relevant markets; a Federal Trade Commission complaint alleged that a merger between steel fabricators threatened to lessen competition in several markets, including Maricopa County, Arizona; and in a recent case, it was argued that the market consisted of eight unconnected semicircles, six with a radius of twelve miles and two with a radius of five miles.

The Brown Court held that reasonable interchangeability or cross-elasticity of demand marks off the outer boundaries of a product market; but within these boundaries there may be submarkets or subproducts based on peculiar characteristics or uses, distinct customers, or distinct prices, inter alia, and these submarkets may, in themselves, constitute relevant lines of commerce for antitrust purposes.

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37 Crown Zellerbach Corp. v. FTC, 296 F.2d 800 (9th Cir. 1961); Union Carbide Corp., 3 TRADE REG. REP. (1961 FTC Cas.) ¶ 15503, at 20372 (FTC Order, Sept. 25, 1961).
38 United States v. Bethlehem Steel Corp., 168 F. Supp. at 603; see Adelman, supra note 33, at 237.
40 Erie Sand & Gravel Co. v. FTC, 291 F.2d 279 (3d Cir. 1961).
The Court agreed with the District Court that the broad product “shoes” should be divided into three lines of commerce: men’s, women’s, and children’s shoes. Such a division, the Court stated, was dictated by each category’s peculiar characteristics and distinctive customers and the evidence concerning factory specialization. Brown argued that this classification ignores differences in quality and price, ignores the fact that the shoes it manufactures are in the medium price brackets and the shoes Kinney sells are in the low price brackets. The Supreme Court refused to admit that such price/quality sub-markets exist within each category: to agree that shoes selling at a price below $8.99 do not compete with shoes selling for $9.00 or more. The Court pointed out, however, that in some cases price and quality differences may have to be recognized in defining a market. Some will note the inconsistency between the Court’s refusal to accept quality submarkets and the decision in *Spalding & Bros. v. FTC*, where higher priced baseballs were held to constitute a separate line of commerce. Of course, there is no necessary inconsistency: it is simply a question of fact as to whether competition does or does not exist among given products.

The decision may revive interest in the production flexibility approach to market definition. According to this approach, the relevant market should be defined broadly enough to include capacity capable of switching from one product to another; thus if plants turning out men’s shoes can easily be converted to women’s shoes, the relevant line of commerce should not be restricted to men’s shoes. In two previous cases, a production flexibility approach to the definition of the market was rejected because the facts did not show that plant flexibility actually occurred; moreover, both courts strongly intimated that production flexibility is not relevant in a horizontal merger case.

In the *Brown* decision, the Supreme Court noted that production flexibility may be an important factor in defining a market in vertical integration cases; though the evidence in the case at bar indicated a lack of flexibility. Unfortunately, it is not clear whether the Court intended to restrict the relevance of the flexibility theory to vertical merger cases, a restriction suggested in the *Bethlehem* case. Such a restriction can be defended only if the focus of the law is to be centered on the fortunes of the producers. If the task, though, is to define a market in which the impact of the merger on competition is to be judged, the exclusion of capacity which can easily be converted will tend

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43 United States v. Bethlehem Steel Corp., 168 F. Supp. at 592-93 n. 34; Crown Zellerbach Corp. v. FTC, 296 F.2d at 813 (9th Cir. 1961).
44 See 370 U. S. at 325 n.42. But Justice Harlan argued in his separate opinion that, in fact, the production flexibility of Brown’s manufacturing plants, e.g., that a plant may be shifted without undue difficulty from the production of children’s shoes to men’s shoes, supports the conclusion that the shoe market as a whole, rather than the separate product lines, represents the relevant line of commerce with respect to the vertical aspects of the merger. Brown Shoe Co. v. United States, 370 U. S. at 366-68.
to understate the relative size of the market. To gauge the true relative size of a merger, the market must be realistically defined, and this may require recognition of the existence of flexible capacity in horizontal as well as vertical merger cases.

The definition of the relevant section of the country involved in Brown also raised problems. All parties agreed that the country as a whole represented the relevant geographic market for judging the anticompetitive effect of the vertical aspect of the merger and of the horizontal merger of Brown's and Kinney's manufacturing facilities. The relevant geographic market in which to examine the horizontal aspects at the retail level was not so easily determined. The lower court had held that the relevant market was every city of 10,000 population or more (Kinney didn't operate in any cities under 10,000) and its immediate contiguous surrounding territory in which Brown and Kinney retail outlets competed. In its appeal, Brown argued that the geographic markets should be determined individually according to the peculiar, varying circumstances of retailing in each locality; that in some cases the market should be restricted to the central business area, and in other cases the market should be expanded to cover a "standard metropolitan area." The Supreme Court ruled that the record supported the lower court's broad findings: shoe stores in the outskirts of a city do compete with downtown stores but the competition between these stores and stores located beyond the outskirts is not significant.

Unfortunately, the Brown decision does not provide the courts with clear-cut guidelines governing the question of market definition. On the one hand, the Court distinguished the outer from the inner boundaries of a market and stated that a merger is illegal if there is an anticompetitive impact in any submarket; on the other hand, the Court refused in the case at bar to divide the three lines of shoes into quality or type submarkets and stated that the market must be drawn broadly enough "to recognize competition where, in fact, competition exists." These dicta are not necessarily inconsistent: the Court may merely be saying that competitive realities determine the boundaries of the product and geographic market, that in some cases quality differences or locational differences may serve to separate markets but in other cases such differences may not be significant.

The problem is that some courts will find in the former dictum an authorization to approve of any submarket definition provided there is some evidence that the submarket is distinctive. Other courts, however, may require the proposer of a narrow submarket definition to demonstrate, according to the latter Brown dictum, that the submarket is not drawn in such a way as to

47 The Bureau of Census defines a standard metropolitan area as the integrated economic area centered around a city of 50,000 population or more. See II U. S. BUREAU OF THE CENSUS, UNITED STATES CENSUS OF BUSINESS: 1954, at 3.
48 370 U. S. at 326.
49 The Court of Appeals for the District of Columbia, relying on the Brown criteria, held in a recent case that florist foil represented the relevant line of commerce. The court ruled that florist foil has distinct prices and customers and is recognized as a distinct entity, even though the evidence did not show that florist foil had qualities or uses which distinguished it from other decorative foil products. Reynolds Metal Co. v. FTC, 309 F.2d 223 (D.C. Cir. 1962).
exclude competitive products and suppliers. There is no escape from the conclusion that either interpretation is tenable in terms of the *Brown* decision.

A recent article defended the use of a narrow approach to market definition under the Clayton Act on the ground that this represents one of the means by which the judiciary can implement the clear desire of Congress to prevent mergers that would be legal under the Sherman Act. Others may argue that a narrow approach to markets is justified in terms of the incipiency doctrine: to prevent eventual damage in the broad market each submarket must be defended regardless of whether the submarket is meaningful in itself. Of course, this is one way of tightening the antitrust laws, but at the expense of inconsistency, uncertainty and the charge of gerrymandering. These problems can be avoided or at least minimized if the market is defined realistically in terms of all effective product and supplier substitutes. Thus the problem of choosing a broad or narrow definition of the market, from either the demand or supply side, should be resolved, however difficult it may be, by a consideration of the facts of the market. As Professor Adelman put it: "It is a pathetic illusion that the market is whatever the courts choose to call it. The market, like the weather, is simply there..."

The lowering of the merger-achieved market share which is vulnerable under section 7 serves to make the market definition less crucial in one respect and more crucial in another. Since the law now proscribes mergers involving only a small share, there is no longer a necessity on the part of the prosecution to fashion or contrive a market definition — product or geographic — that makes the merger-achieved share loom large; on the other hand, since the law now applies to even small merger shares, it is all the more imperative in terms of justice that the market be defined in realistic and defensible terms.

4. *The Eye of the Needle*

It is tempting to urge that the Brown case is *sui generis:* to say that the case is a curio because it involves the combination of a vertical and a horizontal merger of two large chains which operate in numerous retail markets. Such a unique combination, it can be argued, will hardly serve as precedent. There are important reasons, however, for believing that the approach taken by the Supreme Court foreshadows an even stricter judicial posture toward mergers than in the past.

The *Brown* Court pointed out, not once but several times, that there are three types of mergers which Congress wished to immunize from section 7: mergers of *de minimus* proportions, mergers involving a failing company, and mergers involving small firms whose purpose in merging is to compete better

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51 Justice Harlan pointed out that the phrase "in any line of commerce" in the Clayton Act is not an authorization to the government to define the market as narrowly or broadly as suits its case. *Brown Shoe Co. v. United States,* 370 U. S. at 367-68 & n.3.

52 Adelman, *supra* note 33, at 297.

53 Lucile Keyes suggested that lowering the market share would be one way of getting around the reasonable interchangeability of substitutes test of the Cellophane case (*United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956)) in section 7 cases, *supra* note 25, at 646.
with larger rivals. The implication is unmistakable that all other mergers are presumed to violate the law. Apparently, the Court regards an increase in concentration, resulting from a merger involving a substantial share, as tantamount to a substantial lessening of competition or tendency to monopoly.

The emphasis on concentration rather than damage to the competitive process is evident throughout the decision. In brushing aside Brown's argument that the many-firm shoe industry is competitive, the Court stated that "remaining vigor cannot immunize a merger if the trend in that industry is toward oligopoly." Again, the Court observed, "We cannot avoid the mandate of Congress that tendencies toward concentration in industry are to be curbed in their incipiency. . . ." And in another passage the Court declared that Congress desired "to promote competition through the protection of viable, small, locally owned businesses." The ineluctable conclusion is that tendency toward concentration has become the gravamen of section 7.

Finally, there is the case itself: small merger shares, trends, and competitive advantage. This formula is sufficiently elastic to cover most mergers. How many industries are there which have not experienced a trend toward concentration, especially if a trend is variably defined in terms of a decrease in the number of firms or an increase in the share of the market held by the top 10, 50, or 100 firms in the last 5, 25, or 60 years? And even if trends are not discernible, the merger can be disallowed to prevent a chain reaction toward concentration; moreover, the competitive advantage of a merging firm will appear to be even more dangerous if the other firms have not availed themselves, in the past, of the benefits of expansion or integration. The competitive advantage doctrine can also be applied to conglomerate mergers if the adopted industry includes small or nonintegrated firms. Thus if future courts employ the combination of trends or competitive advantage and small merger shares in a narrowly defined market, few mergers, outside the immune categories, will pass muster.

Conclusion

The Brown decision will provoke heavy criticism. In holding that the combination of small horizontal shares and the foreclosure of an even smaller share violate the Clayton Act, the Supreme Court is vulnerable to the charge that it did not rest its findings on probable damage to competition. It will be argued that trends are irrelevant: that if the firm at bar is relatively small, it will not have the power to set prices; thus whatever the trends, the merger

54 370 U. S. at 333.
55 Id. at 346.
56 Id. at 344.
57 The Brown case provides a tailor-made precedent for a number of pending complaints against the dairy and grocery industries. There is one major difference: the problem of relief will be more troublesome since these cases involve a series of mergers rather than a single acquisition. This difficulty was not faced in the recent Foremost Dairy case since the FTC refused to condemn the entire series of acquisitions by Foremost. See Foremost Dairies, Inc., 3 TRADE REG. REP. (1962 FTC Cas.) ¶ 15877 (April 30, 1962).
of small firms will not harm competition. According to some, it is unlikely that a market share below, say, 20 per cent confers any economic power, especially if market entry barriers are low. Moreover, if integration increases the efficiency of the Brown-Kinney firm, this will serve to strengthen, not damage, the competitive process at both the manufacturing and retailing level. The Court will be accused of protecting competitors rather than competition and of attempting to secure a political goal — large numbers of independent firms — by means of a law which specifically condemns only those mergers that impair the competitive process.

The above view will be held by many lawyers and economists and there is much in the Supreme Court decision to support the interpretation. But such an interpretation may be too harsh. A merger law which prevents only those mergers achieving a 20 per cent control would serve well to debar a firm from using the merger route to achieve economic power; it would not prevent the formation of oligopoly by merger. And on the whole a case can be made that the greater the number of seller alternatives the more potentially competitive the market. According to this view, the antimerger net must be sufficiently broad to prevent the creation of oligopoly, an objective clearly intended by the Congress. It follows, then, that substantial market shares and changes in concentration ratios are highly relevant matters to a consideration of whether competitive markets are being transformed into oligopolies. To ignore such factors would leave society vulnerable to a further increase in the already substantial level of industry concentration.

The Brown decision, nevertheless, offers some unfortunate precedents: vertical mergers were treated as an essentially anticompetitive arrangement; concentration trends were accepted without the benefit of probative data; and analysis of market structure was neglected in favor of trends and competitive advantage. Though the Court denied that the Clayton Act was intended to protect individual competitors from hard competition, the Court's approach came perilously close to doing just that.

The Brown decision is important law. The decision expanded the scope of section 7 to encompass small mergers, rejected the quantitative substantiality test in vertical arrangement cases, sanctioned the relevance of trends and competitive advantage, and shifted, however subtly, the gravamen of section 7 from damage to competition to tendency toward concentration.

The essential question, however, remains to be answered: will the basic structure of industry and the level of concentration be significantly influenced by an effective antimerger law?

59 In framing a test to outlaw mergers that create market power or increase it, Kaysen and Turner argue that horizontal mergers with a combined share of 20 per cent and substantial vertical acquisitions by a firm with a 20 per cent share of the market should be held prima facie illegal. They suggest that the legality of smaller mergers should turn on other factors, such as high barriers of entry. They are, of course, not necessarily identified with the view presented above. KAYSEN & TURNER, op. cit. supra note 46, at 132-33.

60 Recent studies on industry concentration in the U. S. include the following: STAFF OF SUBCOMM. ON ANTITRUST AND MONOPOLY, SENATE JUDICIARY COMM., 85TH CONG., 1ST SESS., CONCENTRATION IN AMERICAN INDUSTRY (1957); Collins & Preston, The Size Structure of the Largest Industrial Firms, 1909-1958, 51 Am. Econ. Rev. 986 (1961); STAFF OF THE HOUSE SELECT COMM. ON SMALL BUSINESS, op. cit. supra note 4.

61 370 U. S. at 344.