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LAW IN A TIME CAPSULE: SHOULD THE 1960S MERGER CASES BE AFFIRMED TODAY?

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INTRODUCTION

The 2024 Taft Lecture addressed the recent trend in antitrust enforcement of relying on U.S. Supreme Court merger decisions from the 1960s and early 1970s. The Biden Administration's record of litigated cases showcased this approach, and the 2023 Merger Guidelines it developed direct enforcers to rely on these precedents when evaluating horizontal mergers, merger efficiencies, and more.1 The Trump Administration has committed to the 2023 guidelines as well, signaling that enforcers may continue the trend.2 The renewed prominence of these 1960s and 1970s cases has reinvigorated debate over their vitality and their support for a "structural presumption" against mergers that increase market concentration. This debate is about the law as well as the economics underpinning these decisions—and it

[1] *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES §§ 2.1, 3.3. (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf [https://perma.cc/95XJ-AQTL] (citing United States v. Phila. Nat'l Bank, 374 U.S. 321, 364–65, 371 (1963); Fed. Trade Comm'n v. Procter & Gamble Co., 386 U.S. 568, 580 (1967)).

[2] Memorandum from Chairman Andrew N. Ferguson to FTC Staff (Feb. 18, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-memo-re-merger-guidelines.pdf [https://perma.cc/A9VU-BUZ9] ("By and large, the 2023 Merger Guidelines are a restatement of prior iterations of the guidelines, and a reflection of what can be found in case law. That is good reason to retain them."); Responses from Abigail Slater, Nominee to be the Assistant Att'y Gen. for the Antitrust Div. of the Dep't of Just., to Sen. Peter Welch's Questions for the Record (Feb. 12, 2025), https://www.judiciary.senate.gov/imo/media/doc/2025-02-12_-_qfr_responses_-_slater.pdf [https://perma.cc/83JZ-LN4L] (agreeing with previous statements by Chairman Ferguson that "much of what is in the current merger guidelines simply restates longstanding law.").

illustrates the uncertainty about where the Supreme Court is likely to head in any future merger analysis.

To some, these 1960s and 1970s decisions belong to the past; they are artifacts "frozen in amber" that lack economic justification and the support of modern courts.3 Others believe these precedents remain controlling in both their law and economics, even meriting a broader reading by courts and enforcers in some situations.4 Where merger enforcement

[3] Alexander Raskovich, *Conflict or Continuity? An Analysis of the 2023 Merger Guidelines*, 31 GEO. MASON L. REV. 1043, 1045–47, 1050 (2024). *See also* Jonathan Skrmetti, Tenn. Att'y Gen., Comments on 2023 Proposed Merger Guidelines 6 (Sept. 18, 2023), https://www.regulations.gov/comment/FTC-2023-0043-1566 [https://perma.cc/47VT-KGNL] ("Past Guidelines wisely deemphasized Supreme Court precedent that was revealed over time to have been based on questionable economics," referring to the Supreme Court's 1960s-era cases); Daniel Francis, Comments on the 2023 Draft Merger Guidelines 19 (Sept. 12, 2023), https://www.regulations.gov/comment/FTC-2023-0043-1358 [https://perma.cc/Q3R7-5RET] (explaining that the 2023 Draft Merger Guideline's thirty percent threshold for prohibiting mergers "has been repeatedly endorsed by courts, at least in principle" even though "it is economically mistaken."); Geoffrey A. Manne et al., Comments on the FTC & DOJ Draft Merger Guidelines 67 (Sept. 18, 2023), https://www.regulations.gov/comment/FTC-2023-0043-1555 [https://perma.cc/8PAU-KEBS]; Dennis Carlton, *The Draft Merger Guidelines Demote Economics to Justify Aggressive Antitrust Enforcement*, PROMARKET (Sept. 12, 2023), https://www.promarket.org/2023/09/12/dennis-carlton-the-draft-merger-guidelines-demote-economics-to-justify-aggressive-antitrust-enforcement/ [https://perma.cc/HE95-83ZS] ("[M]any of those cases cited in the draft Guidelines are old, their principles have often been rejected in subsequent court decisions, and those cases are often based on economic reasoning that would be rejected today."); Glob. Antitrust Inst., Comment on the 2023 Draft Merger Guidelines' Emphasis on Structural Antitrust 9–10 (Sept. 8, 2023), https://www.regulations.gov/comment/FTC-2023-0043-1397 [https://perma.cc/ZX8U-EFGF] ("The second most cited case is *Philadelphia National Bank*, which likely provides the basis for the thirty percent market share threshold in Guideline 1. There is no theoretical or empirical basis for the use of the thirty percent market share threshold for a structural presumption. Indeed, as Hovenkamp notes, the court in *Philadelphia National Bank* imported the thirty percent threshold from a conduct case.").

[4] *See* Mark Glick et al., *The Efficiency Rebuttal in the New Merger Guidelines: Bad Law and Bad Economics*, 38 ANTITRUST 20, 20, 22–23 (2024) (arguing that the 2023 Merger Guidelines "fall short" by

goes from here depends on addressing these multifaceted legal and policy questions.

This introduction probes the underpinnings of this debate and explores whether reliance on the 1960s and 1970s merger cases is appropriate. First, we look at the text and legislative history of Clayton Act Section 7 and its amendments, considering whether a structural presumption or a particular analytical framework was required by Congress. Then we consider the "time capsule" cases—the prominent Supreme Court merger decisions from this era that established the structural presumption still debated today. We then explore whether the Supreme Court's recent silence on the analytical framework for merger cases should be interpreted as endorsement, or whether other factors better explain the

maintaining—albeit in a narrower fashion—merging parties' ability to rebut the structural presumption with evidence of the merger's cost-reducing efficiencies); *see also* Public Comments of Att'ys Gen. of 19 States and Territories in Response to the July 2, 2023 Request for Comments on the Draft Merger Guidelines 15 (Sept. 18, 2023), https://www.regulations.gov/comment/FTC-2023-0043-1568 [https://perma.cc/G7G5-RYJR] (arguing that "[i]n amending Section 7 in 1950, Congress sought to prevent trends toward concentration . . . . Supreme Court precedent underscores the importance of stopping these trends in their incipiency and before consumer choice is curtailed" and citing *Philadelphia National Bank* and other cases from the 1960s); HERBERT HOVENKAMP, THE 2023 DRAFT MERGER GUIDELINES: A REVIEW 13 (Sept. 8, 2023), https://www.regulations.gov/comment/FTC-2023-0043-1280 [https://perma.cc/25JS-XG6U] ("[T]he *Philadelphia Bank* decision explicitly relied on several economists, who concluded on the basis of technique available at the time that a merger creating a firm with a market share in the 20% to 25% range should be challenged. Little has changed since then to suggest that this particular presumption is incorrect."); Carl Shapiro, *How Would These Draft Guidelines Work in Practice?*, PROMARKET (Sept. 1, 2023), https://www.promarket.org/2023/09/01/carl-shapiro-how-would-these-draft-guidelines-work-in-practice/ [https://perma.cc/2LRL-LJXC] ("Herb Hovenkamp and I have called for strengthening the structural presumption that has applied to horizontal mergers for 60 years under the Supreme Court's *Philadelphia National Bank* decision. The structural presumption is critical in practice because the Agencies typically prevail in merger litigation by using it to establish their *prima facie* case. I welcome efforts by the Agencies to utilize the structural presumption more effectively.").

scarcity in the Supreme Court's substantive merger jurisprudence since 1974. Finally, we look at the development of other areas of antitrust law since the "time capsule" merger cases and reflect on how those principles may bear on any future merger case reviewed by the Supreme Court. This Article thereby sets the stage for the Taft lecturers' arguments about how practitioners should incorporate the "time capsule" decisions into modern merger analysis.

I. THE HISTORY OF CLAYTON ACT SECTION 7 AND ITS 1950 AMENDMENT

Congress originally passed the Clayton Act in 1914 as "an act to supplement existing laws against unlawful restraints and monopolies, and for other purposes."[5] This summary suggests that the Act's purpose was an update to the Sherman Act.[6] However, an overview of the legislative history suggests that Congress's animating concerns were diverse and even conflicting at times. The same can be said about the 1950 amendment to Section 7—the Celler-Kefauver Act. For some, the amendment merely closed a loophole; for others, it revived the original Section 7 from the dead. This section explores the Clayton Act's history and changes to Section 7 through the Celler-Kefauver Act—changes that may have influenced the Supreme Court's approach to merger analysis in the 1950s and 1960s.

A. *The Original Section 7 of the Clayton Act*

As relevant here, the original Section 7 prohibits any "acquisition" of the "stock or other share capital of another corporation . . . where the effect of such acquisition may be to

[5] Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 12).

[6] *See, e.g.*, Transamerica Corp. v. Bd. of Governors of Fed. Rsrv. Sys., 206 F.2d 163, 166 (3d Cir. 1953) ("The avowed purpose of the Clayton Act was to supplement the Sherman Act, 15 U.S.C.A. §§ 1–7, 15 note, by arresting in their incipiency those acts and practices which might ripen into a violation of the latter act.").

substantially lessen competition between the corporation . . . acquired and the corporation making the acquisition," "restrain . . . commerce," or "tend to create a monopoly of any line of commerce."7 The legislative history suggests a multiplicity of views about how the 1914 Act aimed to update or alter the antitrust status quo under the Sherman Act.

Some legislators believed that the new law would promote competition beyond existing antitrust laws by better stopping monopolies without hindering productive economic conduct. For instance, Senator Cummins supported the bill because of its ability to prevent monopolies.8 The Senate Committee on the Judiciary's report on the legislation stated that the Clayton Act "seeks to prohibit and make unlawful certain trade practices, which, as a rule, singly and in themselves, are not covered by the Act of July 2, 1890, or other existing antitrust acts."9

Others disagreed that the Clayton Act should have such broad application and feared that Section 7 would prevent procompetitive, economically beneficial conduct among firms. For instance, Senator Overman expressed concern that the Act would make every horizontal acquisition illegal.10 Legislators like Senator Overman did not want the law to

[7] Clayton Act, ch. 323, 38 Stat. 730, 731–32 (1914) (current version at 15 U.S.C. § 18).

[8] *See* 51 CONG. REC. 14460 (1914) (statement of Sen. Cummins) ("When you prohibit the substantial lessening of a competition by the acquisition of stock, of course you prohibit a monopoly, because monopoly is the suppression of competition."); *see also* 51 CONG. REC. 15830 (1914) (statement of Sen. Reed) ("You do not lessen competition until you have put your competitor into a position where he can no longer do business; but so long as he is there and can do business, you have not lessened competition, because all the men are competing who were originally competing. You may have restrained trade, you may have restrained the commercial liberty of the man who was forced to sign the contract, and you may have restrained the opportunity of the competitor to get that trade, but you need not have 'substantially lessened competition in that line of commerce.'").

[9] S. REP. NO. 63-698, at 1 (1914).

[10] *See* 51 CONG. REC. 14316 (1914) (statements of Sen. Overman and Sen. Cummins).

prevent combinations or joint ventures that may help small firms compete.11

And a third group seemed to think that the Clayton Act would not change the status quo much at all.12

The main tension in the 1914 Congress seemed to concern Section 7's core language—i.e., what it meant for an acquisition "to substantially lessen competition."13 Senator Poindexter proposed amending the bill to remove "the indefinite and uncertain measure of what constitutes a substantial lessening of competition."14 Discussing this standard as well, Senator Weeks claimed that "[t]he best lawyers of this body and of the House of Representatives are in entire disagreement as to what the effect of this bill will be," and that even "those who framed the bill [do not] know what motives are behind this legislation."15 Further, without

[11] 51 CONG. REC. 15935 (1914) (colloquy between Sen. Overman and Sen. Nelson regarding whether the elimination of a single small competitor would be caught); *Hearings Before the H. Comm. on the Judiciary*, 63d Cong. 983 (1914) (statement of Rep. McCoy) ("I think there are restraints of competition which are beneficial."). *See also id.* at 979 (antitrust practitioner Mr. Noble felt that a prohibition on "restrictions in trade" might, for example, preclude two low-quality competing stage lines from forming a partnership that would improve service, stating "there are many restraints of competition which do not amount to restraints of trade.").

[12] *See* 51 CONG. REC. 15861 (1914) (statement of Sen. Reed) ("I hold that that the words 'substantially lessen competition' have no other meaning than 'restraint of trade[.]'"); 51 CONG. REC. 15856 (1914) (statement of Sen. Walsh) ("[T]he Judiciary Committee was not impressed with the difference between 'lessening competition' and 'substantially lessening competition' sufficiently even to excite discussion upon the subject."); 51 CONG. REC. 16002 (1914) (statement of Sen. Chilton) ("If a competitor takes one customer away, it is lessening, and possibly 'substantially' lessening competition; because when one customer shall be secured by one of the competitors[,] to that extent there may be no competition.").

[13] Clayton Act, ch. 323, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 18).

[14] 51 CONG. REC. 14464 (1914).

[15] 51 CONG. REC. 15988 (1914). *See also* 51 CONG. REC. 15936 (1914) (statement of Sen. Nelson) ("What is a 'substantial' lessening of competition? That phrase has been injected into this bill ex industria in a great many points, and it tends greatly to weaken it, to lead to confusion, and to further hairsplitting arguments.").

clearer language from Congress, some feared that lawyers and judges would have practical control over the Act's meaning.16 These legislators may have been especially concerned that courts would adopt a broad reading of the standard that would harm businesses and the economy.17

The legislative history may suggest that Congress actively sought a balance among these positions. The final standard for Section 7 (though still controversial) looked like the product of a compromise between the House and the Senate. The Senate wanted the law to read "where the effect may be to lessen competition," whereas the House pressed for "where the effect is to eliminate or substantially lessen competition."18 They ultimately adopted "may be" instead of "is," keeping "substantially" but removing "eliminate," and adding "or to restrain such commerce in any section or community or tend to create a monopoly of any line of commerce."19 Senator Chilton remarked that "the language

[16] H.R. REP. NO. 63-627, pt. 2, at 6–7 (1914). (expressing objection that "[t]he new law introduces now phrases which would necessarily be the subject of judicial interpretation for years to come" and criticizing the bill as "new, untried, and indefinite phraseology"); 51 CONG. REC. 15936 (1914) (statement of Sen. Nelson) ("You will find that in many instances-the phrase 'substantially lessen competition.' You will find that time and again. That leaves a new question for the future corporation lawyer and for the judges over their midnight oil to determine[:] What is the meaning of the word 'substantial' or 'substantially'?").

[17] 51 CONG. REC. 16047 (1914) (statement of Sen. Clapp) ("I want to say to you that by the time this word ['substantially'] runs the course of the courts and winds its weary way through the various avenues of attack and defense under our judicial practice and procedure and finally reaches the Supreme Court and receives an adjudication, it will have accomplished its purpose and ruined thousands of honest business men."); 51 CONG. REC. 16282 (1914) (statement of Rep. Volstead) ("Under the evidence in almost any case it may be held that there is no substantial lessening of competition. One court may find no substantial lessening of competition, while another, just as honest, might say there is.").

[18] EARL W. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAW AND RELATED STATUTES 2628–29 (1978) (emphasis added) (citing 51 CONG. REC. 16002).

[19] *Id.* (citing 51 CONG. REC. 16002). The full language of the original Section 7 standard thus read:

of the conferees is much better than the language adopted by either House; the definition is clearer, and gets at the evil intended to be corrected."20

B. Amending Section 7: The 1950 Celler-Kefauver Act

Despite Congress's attempt at compromise, Section 7's language may have created the very uncertainties and problems some feared. Indeed, the courts struggled with the meaning and breadth of Section 7's core "may be to substantially lessen competition" standard.[21] One commentator in 1928 identified the development of "two distinct views of the meaning of Section 7"—one that "liberally construe[d]" the law to make antitrust "more rigorous and effective," and another that stuck narrowly to the "technical

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That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce." Clayton Act, ch. 323, § 7, 38 Stat. 730, 731–32 (1914) (current version at 15 U.S.C. § 18).

[20] 51 CONG. REC. 16002.

[21] *See Corporate Consolidation and the Concentration of Economic Power: Proposals for Revitalization of Section 7 of the Clayton Act*, 57 YALE L.J. 613, 618–21 (1948) (explaining that courts felt "[h]andicapped by the lack of a clear expression of Congressional intent" regarding Section 7 and discussing how courts tried to grapple with the language); *"Substantially to Lessen Competition . . .": Current Problems of Horizontal Mergers*, 68 YALE L.J. 1627, 1628–30 (1959) (discussing the sometimes conflicting interpretations of Section 7's original language by the courts).

form" of Section 7.[22] This divide led to "disagreement and uncertainties expressed in and resulting from" Supreme Court interpretations of Section 7's original language, especially when lower courts limited the law's application to horizontal mergers and stock (as opposed to asset) acquisitions.[23] For this and other reasons, enforcers and the public increasingly felt that Section 7 had failed to stem substantial and increasing concentration throughout the U.S. economy.[24]

In this context, Congress passed the 1950 Celler-Kefauver Act.[25] The amendment made two important textual changes to Section 7. First, it added language so that Section 7 applied to acquisitions of assets; the original law only referred to "stock or other share capital."[26] This closed what was known as the asset loophole—companies had been avoiding Clayton Act enforcement by acquiring the assets rather than the stock of a target firm.[27] Second, it broadened the scope of focus from

[22] Ralstone R. Irvine, *The Uncertainties of Section 7 of the Clayton Act*, 14 CORNELL L.Q. 28, 30 (1928).

[23] *Id. See* Arrow-Hart & Hegeman Elec. Co. v. Fed. Trade Comm'n, 291 U.S. 587 (1934) (holding that the original Clayton Act does not bar any acquisitions through asset purchases); *see also* Fed. Trade Comm'n v. W. Meat Co., 272 U.S. 554 (1926).

[24] *See* FED. TRADE COMM'N, THE MERGER MOVEMENT: A SUMMARY REPORT 68 (1948) ("[N]o great stretch of the imagination is required to foresee that if nothing is done to check the growth in concentration, either the giant corporations will ultimately take over the country, or the Government will be impelled to step in and impose some form of direct regulation in the public interest.").

[25] Celler-Kefauver Act, ch. 1184, 64 Stat. 1125 (1950) (current version at 15 U.S.C. § 18).

[26] Clayton Act, ch. 323, § 7, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 18).

[27] Hearings Before a Subcomm. of the S. Comm. on the Judiciary on Corp. Mergers and Acquisitions, 81st Cong. 126 (1950) ("What [the Celler-Kefauver Act] does is to put all corporate mergers on the same footing, whether the result of the acquisitions of stock or the acquisition of physical assets."); H.R. REP. NO. 81-1191, at 8–9 (1950) ("The bill retains language of the present statute, which is broad enough to prevent evasion of the central purpose. It covers not only purchase of assets or stock but also any other method of acquisition, such as, for example, lease of assets. It forbids not

competition between the "corporation whose stock is so acquired and the corporation making the acquisition" to "any line of commerce in any section of the country," clarifying that Section 7 also applied to vertical and conglomerate mergers.[28]

The Celler-Kefauver Act maintained Section 7's core prohibition against mergers where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[29] The amended version removed the "restrain . . . commerce" clause but otherwise did not change or add to the standard.[30]

As we did for the original Clayton Act, we will examine the Celler-Kefauver Act's legislative history. With the amendment, however, we can also look through the lens of a more contemporaneous secondary source: the next section considers how the Supreme Court decisions in the 1950s and 1960s surveyed the Act's legislative history.

II. "TIME CAPSULE" CASES: THE SUPREME COURT'S SECTION 7 LEGACY

In the Celler-Kefauver legislative history, the Supreme Court saw a broader Congressional intent to revive a dead-letter Section 7 and stem a rising tide of economic concentration in the U.S. For the Court in the 1960s, this meant that the amendment had an impact on merger analysis

only direct acquisitions but also indirect acquisitions, whether through a subsidiary or affiliate or otherwise.").

[28] *See* Frederick M. Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511, 1523 (1984) (explaining how the Celler-Kefauver Act "implicated all mergers—horizontal, vertical, or conglomerate—that threatened to lessen competition 'substantially' within a 'line of commerce' in any 'section of the country.'"). *Compare* Clayton Act, ch. 323, § 7, 38 Stat. 730, 731–32 (1914) (current version at 15 U.S.C. § 18), *with* Celler-Kefauver Act, ch. 1184, 64 Stat. 1125 (1950) (current version at 15 U.S.C. § 18).

[29] Celler-Kefauver Act, ch. 1184, 64 Stat. 1125 (1950) (current version at 15 U.S.C. § 18).

[30] *Compare* Clayton Act, ch. 323, § 7, 38 Stat. 730, 731–32 (1914) (current version at 15 U.S.C. § 18), *with* Celler-Kefauver Act, ch. 1184, 64 Stat. 1125 (1950) (current version at 15 U.S.C. § 18).

beyond the textual changes to Section 7. The three "time capsule" cases from this period discussed below relied on market concentration evidence to block a series of mergers, applying a structural presumption that ascribes anticompetitive effects to "undue" concentration without carefully assessing the effects themselves. The justices found support for this structuralist approach in part from Section 7's legislative history and its elaboration through the Celler-Kefauver Act.

But was this a fair reading of Section 7, even as amended? As pointed out above, the actual changes implemented by the Celler-Kefauver Act did not materially affect the language describing what makes a merger illegal. The Court's structuralist approach in the "time capsule" cases discussed below finds no purchase in the text of the amendment, and it may even stretch the legislative history of the Clayton Act—both in its original form and as amended by Celler-Kefauver—past its breaking point. With each case, we highlight recent commentators trying to answer one question: is this good law or a "time capsule" representing the antitrust of days past?

A. United States v. E.I. du Pont de Nemours & Co.

Even before the 1950 amendment technically went into effect, the Supreme Court began taking a broader view of Section 7's purpose and applying a presumption against concentration. In *United States v. E.I. du Pont de Nemours & Co.*, the Supreme Court reversed a vertical deal between du Pont and General Motors because it allowed du Pont to unduly foreclose competitors in the sale of automotive finishes and fabrics.[31] The Court adopted this broad interpretation in part based on its understanding of the *original* Clayton Act's purpose and history.

The Court stated that "[t]he Clayton Act was intended to supplement the Sherman Act. Its aim was primarily to arrest apprehended consequences of inter-corporate relationships

[31] 353 U.S. 586, 607 (1957). The government brought this case in 1949 before the Celler-Kefauver Act was in effect.

before those relationships could work their evil, which may be at or any time after the acquisition, depending upon the circumstances of the particular case."[32] The Court declared further that "Section 7 is designed to arrest in its incipiency not only the substantial lessening of competition" from stock acquisitions, but also "restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result."[33] As discussed above, the Court was correct that some drafters of the original Clayton Act expressed a desire to enhance existing antitrust law and prevent anticompetitive mergers at their "incipiency."[34] But it is not clear that the text of Section 7 actualized these goals.

Perhaps because the Celler-Kefauver Act's effective date was after the case began, the opinion does not discuss the 1950 amendment to support its broad reading. The Court did, however, lean on Celler-Kefauver's legislative history, which itself promotes a broader reading of the original Section 7. Specifically, the Court pointed to the House Report on the amendment which described the original Clayton Act's purpose as "to make it clear that the bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal . . . ."[35] Applying this understanding of Section 7, the Court held that "du Pont's acquisition of a 23% stock interest in General Motors during the years 1917[–]1919

[32] *Id.* at 597.

[33] *Id.* at 589.

[34] S. REP. NO. 63-698, at 1 (1914) ("Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the Act of July 2, 1890 [the Sherman Act], or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency, and before consummation."); H.R. REP. NO. 63-627, at 1 (1914) (describing the Clayton Act's goal "to supplement existing laws against unlawful restraints and monopolies, and for other purposes"). *See also* S. REP. NO. 63-583, at 3 (1914) (Conf. Rep.). The House Report from the Celler-Kefauver Act claimed the same motivation for the original Act. H.R. REP. NO. 81-1191, at 3464 (1950) ("Section 7 of the Clayton Act, passed in 1914, was intended to prevent monopolies in their incipiency.").

[35] *du Pont*, 353 U.S. at 590 (quoting H.R. REP. NO. 81-1191, at 11 (1950)).

violates § 7 of the Clayton Act because . . . there [was] a reasonable probability that the acquisition [was] likely to result in the condemned restraints."[36]

The Court did not decide *du Pont* by applying any legal presumptions. Since the relevant acquisition occurred more than 30 years before the Court decided *du Pont*, the Court examined evidence that it interpreted as actual, substantial foreclosure as a result of du Pont's acquisition.[37] As "plainly revealed by the record," the Court concluded that "du Pont purposely employed its stock to pry open the General Motors market to entrench itself as the primary supplier of General Motors' requirements for automotive finishes and fabrics."[38] In other words, the Court's *du Pont* analysis may have involved examining actual anticompetitive effects rather than just market concentration statistics.

Whether *du Pont* employed a legal presumption is still debated today. In discussing the 2023 draft merger guidelines, one former FTC commissioner refuted that *du Pont* "articulates a presumption of illegality" for vertical mergers and argues that recent caselaw confirms there is no such

[36] *Id.* at 609–10.

[37] *Id.* at 605 ("The fact that sticks out in this voluminous record is that the bulk of du Pont's production has always supplied the largest part of the requirements of the one customer in the automobile industry connected to du Pont by a stock interest. The inference is overwhelming that du Pont's commanding position was promoted by its stock interest and was not gained solely on competitive merit.").

[38] *Id.* at 606.

presumption at all.[39] Though the draft guidelines cited *du Pont* for this proposition, the final guidelines did not.[40]

B. Brown Shoe Co. v. United States

In *Brown Shoe Co. v. United States*, the Court examined the horizontal and vertical aspects of a merger between shoe companies.[41] The Court picked up right where it left off in *du Pont* by detailing and applying what it saw as Section 7's history and purpose. Now writing after Congress enacted Celler-Kefauver, the Court incorporated the amendment's legislative history into its analysis at greater length.[42] It began by describing the original Section 7 as dead letter and invoked the 1950 amendment to support an analysis focused on the level of concentration in the relevant market.[43]

The Court reported that many viewed the 1950 amendment as necessary "to secure revision of a section of the

[39] Joshua Wright, *Courts Make Legal Presumptions, Not the Agencies*, PROMARKET (Aug. 8, 2023), https://www.promarket.org/2023/08/08/joshua-wright-courts-make-legal-presumptions-not-the-agencies/ [https://perma.cc/3WT8-W2S5] (citing United States v. AT&T, Inc., 916 F.3d 1029, 1032 (2019) (unlike horizontal mergers, the government cannot use a short cut to establish a presumption of anticompetitive effect through statistics about the change in market concentration, because vertical mergers produce no immediate change in the relevant market share) and Fed. Trade Comm'n v. Microsoft Corp., 681 F. Supp. 3d 1069, 1084 (N.D. Cal. 2023)).

[40] *Compare* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, DRAFT MERGER GUIDELINES 17 (July 18, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf [https://perma.cc/SHL3-XXJA] (claiming a vertical merger resulting in a market share of fifty percent or greater is presumed to violate Section 7 and citing United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957)), *with* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES 15–16 (Dec. 18, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf [https://perma.cc/95XJ-AQTL] (articulating a standard for analyzing vertical mergers without reference to a market share-based presumption of illegality).

[41] Brown Shoe Co. v. United States, 370 U.S. 294, 297 (1962).

[42] *Id.* at 311–23.

[43] *Id.* at 311–15.

antitrust laws considered by many observers to be ineffective in its then existing form."[44] Discussing the original act, the Court agreed that Section 7 (and judicial interpretations of it) did not "bar the acquisition by one corporation of the assets of another."[45] The decision explains that, although some suggest this was an innocent "accident" in the drafting, the Clayton Act's legislative history shows this prohibition was discussed and rejected.[46] Indeed, Senator Cummins tried and failed to introduce language precluding "any other means of control or participation in the control" of a competitor into the original Section 7.[47] Further, the Court asserted that the original Section 7 had a narrower scope than its stated purpose, suggesting it was "directed primarily at the development of holding companies and at the secret acquisition of competitors through the purchase of all or parts of such competitors' stock."[48]

The Court then described what it saw as "[t]he dominant theme pervading congressional consideration of the 1950 amendments [to Section 7]" as a "fear of what was considered to be a rising tide of economic concentration in the American economy."[49] Though the fact of these fears may have been real, whether this "intense congressional concern" reflected real economic dangers is subject to debate. Former Federal Trade Commission ("FTC") Chair Timothy Muris explained in a law review article from 1980 that a major source of these concerns about rising concentration came from data reported by the

[44] *Id.* at 311.

[45] *Id.* at 313 (citations omitted).

[46] *Id.*

[47] 51 CONG. REC. 14315–16 (1914).

[48] Brown Shoe Co. v. United States, 370 U.S. 294, 314 (1962) (citing, among other excerpts, 51 CONG. REC. 9073–74 (1914)) (describing the trend towards states allowing "holding companies" which can "pool" the stock of competitors and thus facilitate a trust or monopoly).

[49] *Id.* at 315.

FTC in 1948[50]—but these data were later revealed to paint an incorrect, or at least incomplete, picture.[51]

In any case, the Celler-Kefauver Act did not implement any textual changes to Section 7 that explicitly incorporated this desire to stem rising concentration. But the legislative history cited in *Brown Shoe* does describe a "merger movement" seen by some in Congress as impacting the economy broadly as well as a desire to reinstate a broader purpose of stopping monopolies "in their incipiency."[52]

Relatedly, the Court read the 1950 amendment's history as creating a different and perhaps more stringent standard than the Sherman Act.[53] The Court relied on this support in framing its merger analysis under the amendment. This history, sourced from the Senate Report on the Celler-Kefauver Act, stated that "the bill is not intended to revert to the Sherman Act test" but to "cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act

[50] *See supra* note 24.

[51] Timothy J. Muris, *The Efficiency Defense under Section 7 of the Clayton Act*, 30 CASE W. RSRV. L. REV. 381, 395 n.53 (1980) (citing John Lintner & J. Keith Butters, *The Effect of Mergers on Industrial Concentration, 1940–1947*, 32 REV. ECON. & STAT. 30 (1950)).

[52] *See, e.g.*, H.R. REP. NO. 81-1191, 81st Cong., 1st Sess.at 3 (1950) ("That the current merger movement [during the years 1940-1947] has had a significant effect on the economy is clearly revealed by the fact that the asset value of the companies which have disappeared through mergers amounts to 5.2 billion dollars, or no less than 5.5 percent of the total assets of all manufacturing corporations—a significant segment of the economy to be swallowed up in such a short period of time."); S. REP. NO. 81-1775, 81st Cong, 2d Sess. 3–4 (1950) ("it is the purpose of this legislation to assure a broader construction of the more fundamental provisions that are retained than has been given in the past. . . . The intent here . . . is to cope with monopolistic tendencies in their incipiency and well before they . . . would justify a Sherman Act proceeding . . . framing a bill which . . . reaches far beyond the Sherman Act.").

[53] *Brown Shoe*, 370 U.S. at 318 (citing, among other sources, H.R. REP. NO. 80-596, 80th Cong., 1st Sess. 7 (1947); 96 CONG. REC. 16502 (statement of Sen. Kefauver) (discussing how the decision in United States v. Columbia Steel Co., 334 U.S. 495 (1948) indicated a need for more stringent merger review standards).

proceeding."[54] The Court also recognized a "vigorous minority" who disagreed that harsher standards were needed.[55]

This interpretation is perhaps surprising given the limited and targeted textual changes to Section 7. Ultimately, the Court concluded that, individually, both the vertical and horizontal aspects of the deal were sufficient to condemn the shoe company merger.[56] Focusing on the horizontal side, the Court held that the combined firm's market shares of at least five percent in cities across the U.S. violated Section 7.[57] Citing *du Pont*, it explained that "market share which companies may control by merging is one of the most important factors to be considered when determining the probable effects of the combination on effective competition."[58] The Court concluded that allowing a "merger achieving 5% control" or more would risk creating an "oligopoly" like those "Congress sought to avoid."[59]

The Congressional reports indeed called out a desire for Celler-Kefauver to better "limit further growth of monopoly and thereby aid in preserving small business as an important competitive factor in the American economy."[60] The Court also acknowledged that "fragmented industries and markets" may

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[54] S. REP. NO. 81-1775, at 4–5 (1950). *See also id.* ("[The] various additions and deletions—some strengthening and others weakening the bill—are not conflicting in purpose and effect. They merely are different steps toward the same objective, namely, that of framing a bill which . . . reaches far beyond the Sherman Act."); H.R. REP. NO. 81-1191, at 3464 (1949) (explaining that acquisitions "have a cumulative effect" and the 1950 bill was "intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize.").

[55] *Brown Shoe*, 370 U.S. at 318 n.33 (citing H.R. REP. NO. 80-596, at 11–17 (1947)).

[56] *Id.* at 334, 346.

[57] *Id.* at 343–44.

[58] *Id.* at 343.

[59] *Id.* at 343–44.

[60] S. REP. NO. 81-1775, at 1–2 (1950); H.R. REP. NO. 81-1191, at 3462–63 (1949) (describing "the broad economic problem of high and increasing concentration with which this legislation is concerned.").

sometimes create "higher costs and prices" for consumers but concluded that, with the Celler-Kefauver Act, Congress "resolved these competing considerations in favor of decentralization."[61]

On the horizontal case, the Court in *Brown Shoe* condemned the merger based on potential market share in an industry the Court saw as trending "towards concentration."[62] In reaching this structural conclusion, the Court relied heavily on an understanding of Section 7 that arguably goes beyond its original and amended text. In its citations to the legislative history and purpose, the Court appears to be echoing concerns expressed publicly by Congress and others about economic concentration during this period.

Some recent commentators agree with this reasoning and support the broader reading of the amended Section 7. A group of state enforcers argue that *Brown Shoe*'s "less stringent" test for Section 7 violations match the goals and purpose of the Clayton Act.[63] Other supporters emphasize that *Brown Shoe* has never been overruled by the Supreme Court and seek to ground merger analysis more squarely in *Brown Shoe*'s reasoning.[64]

The attacks are also fierce. Some find fault with its focus on "market concentration without regard to prices"—an "indefensible" practice if one cares about "competitive market performance and innovation."[65] Others point out that the

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[61] Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962)

[62] *Id.* at 345.

[63] Public Comments of Att'ys Gen. of 19 States and Territories in Response to the July 2, 2023 Request for Comments on the Draft Merger Guidelines 15 (Sept. 18, 2023), https://www.regulations.gov/comment/FTC-2023-0043-1568 [https://perma.cc/G7G5-RYJR] ("Ideally, however, merger enforcement should 'nip monopoly in the bud.'" (citations omitted)).

[64] Mark Glick et al., *The Efficiency Rebuttal in the New Merger Guidelines: Bad Law and Bad Economics*, 38 ANTITRUST 20, 22 (2024) ("The *Brown Shoe* analysis leaves no room for an efficiency rebuttal. And no subsequent merger case decided by the Supreme Court has overturned this precedent.").

[65] Herbert Hovenkamp, *Did the Supreme Court Fix "Brown Shoe"?*, PROMARKET (May 12, 2023), https://www.promarket.org/2023/05/12/did-the-supreme-court-fix-brown-shoe/ [https://perma.cc/8YPG-MV5A].

courts (including the Supreme Court) have understood this shift towards "certain kinds of harm to the welfare of market participants" and cabined *Brown Shoe* accordingly.[66] For some, "no court would justifiably reach the same result today" as the Court in *Brown Shoe* since a merger like that "would likely lead to *lower* prices that would *benefit* consumers and competition."[67]

C. United States v. Philadelphia National Bank

In *United States v. Philadelphia National Bank*, the Court blocked the merger of two banks which combined would have held at least thirty percent share in Philadelphia's commercial banking market.[68] In doing so, the Court explicitly adopted a structural presumption, imputing anticompetitive effects to an acquisition based on increased concentration in the market. The Court justified this reasoning through its interpretation of the Clayton Act's history and purpose as well as its understanding of prevailing economic thinking at the time.

As in the opinion in *Brown Shoe*, the Court highlighted what it viewed as the limited nature of the original Clayton Act. It saw Section 7 as "refer[ring] only to corporate acquisitions of stock and share capital" to specifically prevent "corporations [from] secretly acquir[ing] control of their competitors by purchasing the stock of those companies."[69] The original Act's legislative history certainly shows that

[66] Daniel Francis, Comments on the 2023 Draft Merger Guidelines 13–15 (Sept. 12, 2023), https://www.regulations.gov/comment/FTC-2023-0043-1358 [https://perma.cc/Q3R7-5RET] (discussing this shift and the "string of federal appeal courts" that "have made the point that the 1960s merger cases cannot be taken at undiscounted face value today.").

[67] Jonathan Skrmetti, Tenn. Att'y Gen., Comments on 2023 Proposed Merger Guidelines 8 n.15 (Sept. 18, 2023), https://www.regulations.gov/comment/FTC-2023-0043-1566 [https://perma.cc/47VT-KGNL].

[68] 374 U.S. 321, 364 (1963).

[69] *Id.* at 337–38 (emphasis added).

nonpublic acquisitions were the principal concern for some legislators.[70]

At the same time, the Court in *Philadelphia National Bank* clearly saw the original Clayton Act as reaching beyond a narrow prohibition on clandestine, stock purchase mergers. It described the 1914 act as infused with an "overriding congressional purpose to control corporate concentrations tending to monopoly."[71] The Court highlighted statements from certain legislators supporting this broader view of the original Act even as they sought to amend it in 1950.[72] Despite this strong "purpose," the Court explained that "[Section] 7 became largely a dead letter" and cited enforcers and legislators who agreed.[73] This included a statement by

[70] *See* 51 CONG. REC. 14255 (1914) (statement of Sen. Cummins) (expressing concerns over the law's language focusing on stocks); *id.* at 14316 (highlighting a principal concern of some lawmakers that secretive acquisitions were the main problem to fix and expressing concern that enforcing the Clayton Act beyond stock acquisitions would prevent productive mergers between small businesses); *see also* 96 CONG. REC. 16443 (1950) (statement of Sen. O'Mahoney) (calling the assets loophole an "innocent defect" in the original drafting and arguing that the Supreme Court widened the hole in subsequent decisions).

[71] United States v. Phila. Nat'l Bank, 374 U.S. 321, 337–38 (1963).

[72] 95 CONG. REC. 11495 (1949) (statement of Rep. Bryson) ("In the face of this trend toward more and more mergers which suppress competition, increase the outside control of local enterprise, and cause higher prices and instability of employment, every effort should be made to strengthen our antitrust laws. Foremost among such steps should be the passage of this bill H.R. 2734 to close the loophole in the Clayton Act to prevent monopolistic mergers which substantially lessen competition or tend to create a monopoly."); *id.* at 11495–96 (statement of Rep. Boggs) ("The bill is aimed at preventing only those mergers which substantially lessen competition or tend to create a monopoly. Obviously, these mergers which enable small companies to compete more effectively with giant corporations generally do not reduce competition, but rather, intensify it. Small business should have nothing to fear and everything to gain from this bill."); *id.* at 11489 (statement of Rep. Keating) ("Unless the bill is enacted, there is every reason to believe that, like the steel and copper industries, these traditionally small business fields of which I am speaking will also come under the control of a few large corporations.").

[73] *Phila. Nat'l Bank*, 374 U.S. at 339–40. *See also "Substantially to Lessen Competition . . .": Current Problems of Horizontal Mergers*, 68 YALE

Representative Boggs who expressly referred to the original Section 7 as a "dead letter" and discussed examples where acquiring companies turned their stock purchases into assets to avoid the FTC's jurisdiction.[74]

By contrast, the Court emphasized that the 1950 amendment "would bring the entire range of corporate amalgamations . . . within the scope of [Section] 7."[75] The Court also took note of how Celler-Kefauver expanded the FTC's powers over mergers: "Congress in 1950 clearly intended to remove all question concerning the FTC's remedial power over corporate acquisitions, and therefore explicitly enlarged the FTC's jurisdiction."[76] This was more evidence for the Court that the amendment's "dominant congressional purpose" was to broaden the Clayton Act's reach regarding acquisitions and mergers.[77]

The Court then established the principle that mergers may be presumed illegal based on a substantial increase in market share concentration:

> [A] merger which produces a firm controlling an undue percentage share of the relevant market, and

L.J. 1627, 1629–30 (1959) (citing TEMP. NAT'L ECON. COMM., FINAL REPORT AND RECOMMENDATIONS, S. REP. NO. 77-35, at 38–40 (1941) ("[Section 7] has fallen short of gaining its objective, in part because the law does not prohibit the acquisition of assets . . . thus affording a convenient way of circumventing" the law); FED TRADE COMM'N, THE MERGER MOVEMENT: A SUMMARY REPORT 1, 3–6 (1948), (discussing how the Clayton Act was meant to "nip [monopoly] in the bud" as an addition to the Sherman Act); GERARD C. HENDERSON, THE FEDERAL TRADE COMMISSION 40 (1924) (discussing how the Clayton Act promised to "go beyond the Sherman" Act but was of questionable use given the assets loophole); *Section 7 of the Clayton Act: A Legislative History*, 52 COLUM. L. REV. 766, 768 (1952) (describing the Clayton Act as "an ineffective restraint on corporate integrations" since its "purpose . . . was to restrain the formation of holding companies" and secret takeovers via "stock acquisitions" rather than act as a broader deterrent to concentration). *See also* 81 CONG. REC. 16453 (1950) ("the *Columbia Steel Co.* case is a vivid illustration of the necessity for the proposed amendment of the Clayton Act"); 51 CONG. REC. 14456 (1914).

[74] 95 CONG. REC. 11497 (1949).

[75] *Phila. Nat'l Bank*, 374 U.S. at 342.

[76] *Id.* at 348.

[77] *Id.*

> results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[78]

Though no changes in the text of Section 7 called for such a presumption, the Court saw this structural approach as flowing directly from Congress's purpose in passing the 1950 amendment. The Court explained that an "intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects."[79] Interestingly, the concern for "the trend toward concentration" on which *Philadelphia National Bank* rested its presumption of illegality may have been empirically unjustified, according to a recent economic review of the relevant studies and data.[80]

As discussed above with respect to *Brown Shoe*, none of the Celler-Kefauver legislative history discussed by the Court or its cited secondary sources expressly indicate a need to "lighten[] the burden of proving illegality" through a structural presumption.[81] However, some have argued that the broad range of concerns arising from mergers Congress aimed to curb with the 1950 amendment indicated as much.[82]

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[78] *Id.* at 363 (citing United States v. Koppers Co., 202 F. Supp. 437 (W.D. Pa. 1962)).

[79] *Id.*

[80] TIMOTHY J. MURIS, AMER. ENTER. INST., NEO-BRANDEISIAN ANTITRUST: REPEATING HISTORY'S MISTAKES 55–61 (2023), https://www.aei.org/wp-content/uploads/2023/06/Neo-Brandeisian-Antitrust-Repeating-Historys-Mistakes.pdf?x85095 [https://perma.cc/3XAD-YGR9].

[81] United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963).

[82] Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 255 (1960) (Congress "did not mean to impose some precise and inapposite statistical union, but only to convey a middle ground between sheer speculation and a rigorous and exacting prediction" in determining illegality.). *See also id.* at 247 ("Underlying the legislative deliberations was the conviction that small business and the dispersion of economic power are salutary and should be encouraged by the

And lawmakers frequently discussed their view that unchecked corporate mergers were negatively impacting the country and economy in the lead up to passing Celler-Kefauver.[83] As further support, the Court asserted this presumption was "fully consonant with economic theory," citing several papers that advocated for this structuralist approach to merger review.[84]

For the Court in *Philadelphia National Bank*, the structuralist approach aligned with Congress's "fundamental purpose of amending [Section] 7" to "arrest" concentration before it became entrenched monopoly, even if conservative in allowing mergers.[85] Parts of Celler-Kefauver's legislative history appear to reflect concerns about the permanence of mergers, but again this is not part of the amendment's changes to Section 7.[86]

new section 7. This premise clearly suggests reliance upon a structural theory of competition which stresses the advantages of large numbers of small-sized firms.").

[83] 95 CONG. REC. 11500–07 (1949) (discussing a variety of American industries experiencing and threatened by consolidation through mergers); 96 CONG. REC. 16443 (1950) (discussing the 1938 Temporary National Economic Committee report that recommended a bill to halt the trend towards mergers in the economy); *id.* at 16444 (surveying retail, grocery, mining, and other industries experiencing consolidation); *id.* at 16457 (discussing how study purporting to support mergers misrepresented the results and hid menial gains from acquisitions).

[84] *Phila. Nat'l Bank*, 374 U.S. at 363 (citing *"Substantially to Lessen Competition . . .": Current Problems of Horizontal Mergers*, 68 Yale L. J. 1627, 1638–39 (1959) ("[C]ompetition is likely to be greatest when there are many sellers, none of which has any significant market share"); George J. Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176, 182 (1955) (suggesting that mergers by firms "which possesses one-fifth or more of an industry's output after the merger shall be presumed to violate the statute."); Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 315–16 (1960) ("[I]f section 7 is to play an effective role in preserving competition, its prohibitions must be applied before a significant rise in concentration has occurred and before some marked change in behavior has become imminent.")).

[85] *Phila. Nat'l Bank*, 374 U.S. at 367.

[86] *See* 96 CONG. REC. 16505 (1950) (statement of Sen. O'Conor) ("Paradoxical as it may seem, the weaker, less effective cooperative methods of eliminating competition are definitely prohibited both by section 1 of the

The Court took its cues regarding what level of market share should "raise an inference" from past decisions applying other sections of the antitrust laws.[87] In doing so, it invoked the House Report for Celler-Kefauver, which indicates that the amended Section 7 illegality test was "intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act."[88]

In analogizing to other decisions, the Court relied on cases condemning exclusionary conduct by firms controlling twenty to forty percent of their markets in already highly consolidated sectors.[89] These decisions arguably applied a similar structural presumption, relying on the defendants' market share to infer their conduct *may* "substantially lessen competition."[90] Those decisions, however, related to Section 3 of the Clayton Act, whose interpretation has moved toward a

Sherman Act and by section 5 of the Federal Trade Commission Act; but the permanent and more effective method of consolidation under a single management is permissible"); *id.* at 16443 (statement of Sen. O'Mahoney) ("When the authors of the Clayton Act and the Congress which passed it enacted the bill into law they thought they were giving the Federal Trade Commission administrative authority to prevent monopolistic mergers, so as to save the people and the competitive system from the danger and the sad results of having to go through the long procedure of correcting the evil after it had transpired.").

[87] *Phila. Nat'l Bank*, 374 U.S. at 365.

[88] *Id.* (quoting H.R. REP. NO. 81-1191 (1950)).

[89] *Id.* at 365–66 (citing Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 357 (1922); Standard Oil Co. v. United States, 337 U.S. 293, 295 (1949); Fed. Trade Comm'n v. Motion Picture Advert. Serv. Co., 344 U.S. 392, 395 (1953)).

[90] *Standard Fashion*, 258 U.S. at 357 (concluding that under Clayton Act Section 3 defendants' exclusive agreements would "tend to facilitate further combinations" because the defendant already possessed ~twenty percent market share); *Standard Oil*, 337 U.S. at 314 (Section 3 "is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected"); *Motion Picture*, 344 U.S. at 395 (agreeing under the separate but related standard of section 5 of the FTC Act that the FTC could limit defendant's exclusive contracts to one year where those contracts gave defendant exclusive control over forty percent of the market).

Section 1 rule of reason assessment that focuses more on market power than on market share.[91]

Extrapolating towards a structural approach, the Court held that an "increase of more than 33% in concentration" here "raise[s] an inference that the effect of the contemplated merger . . . may be substantially to lessen competition" and thus violates Section 7.[92] Further, the Court explained that "nothing in the record of this case . . . rebut[s] the inherently anticompetitive tendency manifested by these percentages."[93] The *Philadelphia National Bank* decision, which extended the Court's prior emphasis on limiting concentration in its incipiency that was expressed in *du Pont* and *Brown Shoe*, thus established this structural presumption against "undue" increases in concentration effected by mergers. That structural presumption remains at the center of every Section 7 litigation to this day.

Advocates of *Philadelphia National Bank*'s reasoning point out that, unlike *du Pont* and *Brown Shoe*, the "decision explicitly relied on several economists" who used "technique[s] available at the time," and that "[l]ittle has changed since then to suggest that this particular presumption is incorrect."[94] Perhaps whether the economics justify the decision is beside the point: "Some experts say yes, some say no. In court, it doesn't matter. There is a sufficiently large chance that that merger will harm competition, the merging parties are the ones with best access to the facts, and, for

[91] *See Standard Oil*, 337 U.S. at 297–315 (analyzing whether the alleged conduct was violative of Section 3 of the Clayton Act); *Standard Fashion*, 258 U.S. at 353 ("The principal question in this case, and the one upon which the writ of certiorari was granted, involves the construction of [S]ection 3 of the Clayton Act."). Analysis of Section 3 of the Clayton Act has since been interpreted in line with the rule of reason analysis under Section 1 of the Sherman Act, and the older Section 3 cases have been superseded by the qualitative substantiality test outlined in Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961). For more on this shift, see *infra* Part IV.E.

[92] United States v. Phila. Nat'l Bank, 374 U.S. 321, 365 (1963).

[93] *Id.* at 366.

[94] HERBERT HOVENKAMP, THE 2023 DRAFT MERGER GUIDELINES: A REVIEW 13 (2023), https://www.regulations.gov/comment/FTC-2023-0043-1280 [https://perma.cc/25JS-XG6U].

efficiency in litigation, it is convenient and wise to shift the burden."[95] Others argue that this long-standing precedent "is critical in practice" for enforcers establishing their *prima facie* case in merger challenges.[96]

But others see *Philadelphia National Bank* as failing on economics and the law. Some question whether a "share-based presumption" has a place in merger analysis since it is unclear how a firm's share correlates with increased risks of harmful coordination or unilateral effects.[97] Relatedly, some worry that emphasizing presumptions like the Court did in *Philadelphia National Bank* "demote[s] economic evidence" more generally and entrenches "economic reasoning that would be rejected today."[98]

Much as with *Brown Shoe*, others argue that enforcement and the law in lower courts has evolved significantly since the decision, shifting away from presumptions "to a fulsome analysis of the relevant market."[99] And some question the

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[95] Eleanor Fox, *Tackling the Critics of the Draft Merger Guidelines*, PROMARKET (Sept. 5, 2023), https://www.promarket.org/2023/09/05/eleanor-fox-tackling-the-critics-of-the-draft-merger-guidelines/ [https://perma.cc/BS8U-4ECW].

[96] Carl Shapiro, *How Would These Draft Guidelines Work in Practice?*, PROMARKET (Sept. 1, 2023), https://www.promarket.org/2023/09/01/carl-shapiro-how-would-these-draft-guidelines-work-in-practice/ [https://perma.cc/KR23-VBWN].

[97] Daniel Francis, Comments on the 2023 Draft Merger Guidelines 19 (Sept. 12, 2023), https://www.regulations.gov/comment/FTC-2023-0043-1358 [https://perma.cc/Q3R7-5RET].

[98] Dennis Carlton, *The Draft Merger Guidelines Demote Economics to Justify Aggressive Antitrust Enforcement*, PROMARKET (Sept. 12, 2023), https://www.promarket.org/2023/09/12/dennis-carlton-the-draft-merger-guidelines-demote-economics-to-justify-aggressive-antitrust-enforcement/ [https://perma.cc/HE95-83ZS]. *See also* Geoffrey A. Manne et al., Comments on the FTC & DOJ Draft Merger Guidelines 67, INT'L CTR. L. & ECON. (Sept. 18, 2023), https://www.regulations.gov/comment/FTC-2023-0043-1555 [https://perma.cc/8PAU-KEBS] (arguing that *Philadelphia National Bank* and other "mid-20th century cases . . . are widely decried as being out of tune with modern economics and social science").

[99] Jonathan Skrmetti, Tenn. Att'y Gen., Comments on 2023 Proposed Merger Guidelines 16 (Sept. 18, 2023), https://www.regulations.gov/comment/FTC-2023-0043-1566 [https://perma.cc/47VT-KGNL].

legal underpinnings of *Philadelphia National Bank* itself, claiming (perhaps fairly, as noted above) that the Court "imported the 30% threshold from a conduct case."[100] The upshot, however, is that the structural presumption set at thirty percent guides all Section 7 cases and that the merging parties often are required to rely on testimony from competitors and customers to rebut the presumption. Of course, neither competitors nor customers are typically inclined to assist the merging parties.

D. The Structural Presumption after Philadelphia National Bank

Debated even now, how did *Philadelphia National Bank* and its fellows fair in their era? As discussed above, the structuralist approach is not evident in the text of the original Clayton Act Section 7 or its language as amended in 1950.

The Court's structuralist approach arguably parallels developments in economics at the time and may contribute in part to our understanding of the above cases. As early as 1953, Alfred Kahn had identified a distinctive current in academia advocating for a structuralist approach to merger review.[101] The Court itself cited a string of prominent economists—Joe Bain, Betty Bock, Carl Kaysen, Fritz Machlup, Edward Mason, Donald Turner, and George Stigler—to support its structural presumption in *Philadelphia National Bank*.[102] An FTC economist, Matthew Panhans, recently described the structuralist approach as "the core framework of industrial

[100] Glob. Antitrust Inst., A Comment on the 2023 Draft Merger Guidelines' Emphasis on Structural Antitrust 9–10, (Sept. 8, 2023), https://www.regulations.gov/comment/FTC-2023-0043-1397 [https://perma.cc/ZX8U-EFGF] (citing Herbert Hovenkamp, *Competitive Harm and the 2023 Draft Merger Guidelines,* PROMARKET (July 27, 2023), www.promarket.org/2023/07/27/herbert-hovenkamp-competitive-harm-and-the-2023-draft-merger-guidelines/ [https://perma.cc/5PQT-6WDW]).

[101] Alfred E. Kahn, *Standards for Antitrust Policy*, 67 HARV. L. REV. 28 (1953).

[102] United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963).

organization for two decades, and had a significant impact on competition policy from the 1950s through the 1970s."[103]

The Supreme Court continued to apply the structural presumption throughout its 1960s merger decisions.[104] The Court, however, did not always appear unified in this approach. In one Section 7 case, *United States v. Von's Grocery Co.*, the Court condemned a merger that created a firm with a 7.5 percent share of a competitive L.A. grocery market.[105] Remarking on the structuralist approach that was evident in *Von's Grocery* and remains at the heart of Section 7 litigation today, Justice Potter Stewart famously noted in dissent, "the sole consistency that I can find is that in litigation under [Section] 7, the Government always wins."[106]

Further to that skepticism, by the 1970s a new consensus was building around the insight that concentrated markets might be the result of superior performance, not a cause of inferior performance.[107] There was also an emerging appreciation that even high market share was not always practically synonymous with market power, especially after properly incorporating supply-side responses from existing firms.[108] The Supreme Court's approach to Section 7 and

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[103] Matthew T. Panhans, *The Rise, Fall, and Legacy of the Structure-Conduct-Performance Paradigm*, 76 J. HIST. ECON. THOUGHT 337, 337 (2023).

[104] *See* United States v. Cont'l Can Co., 378 U.S. 441 (1964) (holding potential merged firm's market share of twenty-five percent illegal); United States v. Aluminum Co. of Am., 377 U.S. 271 (1964) (holding that merger increasing firm's share by small percentage (1.3 percent) unlawful where industry already "oligopolistic"—nine firms controlled 95.7 percent of the market); United States v. El Paso Nat. Gas Co., 376 U.S. 651 (1964). *See also* Fed. Trade Comm'n v. Procter & Gamble Co., 386 U.S. 568, 580 (1967) (echoing the Court's analysis of Section 7 in *Philadelphia National Bank*: "Congress was aware that some mergers which lessen competition may also result in economies, but it struck the balance in favor of protecting competition.").

[105] 384 U.S. 270 (1966).

[106] *Id.* at 301 (Stewart, J., dissenting).

[107] *See generally* Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1 (1973).

[108] *See, e.g.*, Bruce A. Karsh, *The Role of Supply Substitutability in Defining the Relevant Product Market*, 65 VA. L. REV. 129, 143–46 (1979)

merger challenges appears to have briefly paralleled this changing understanding as well. For example, the 1974 *General Dynamics* case was the first time since Section 7 was amended where the Court credited non-structural evidence to reject allegations of a substantial lessening of competition based solely on market shares.[109] Specifically, the Court held that market shares were an unreliable indicator of market power in the coal industry where long-term requirements contracts were the norm.[110] The Court agreed with the district court that the merging parties "did not have the power to compete on a significant scale" for these contracts in the future.[111] The Court thus affirmed the decision allowing two coal companies to merge.[112]

The *General Dynamics* decision represented a new "unwillingness to jump from market structure to a holding" and a "partial retreat from its strong-form use of the structure-conduct-performance approach."[113] Afterwards, both the lower courts and the agencies increasingly moved away from a purely structural approach, by permitting, in addition to the three-step framework introduced by *United States v. Baker Hughes Inc.*,[114] defendants to rebut a finding of post-merger market shares in excess of thirty percent.[115] The Supreme Court issued two more decisions substantively interpreting or applying Section 7: *United States v. Marine Bancorporation*[116] and *United States v. Citizens & Southern*

(explaining the trend towards courts successfully incorporating supply-side responses in their analyses of market definition and power).

[109] United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974).

[110] *Id.* at 499.

[111] *Id.* at 503–10.

[112] *Id.* at 511.

[113] Jonathan L. Diesenhaus, *Innovation, Uncertainty, and Stability in Antitrust Law*, 16 BERKELEY TECH. L.J. 729, 762 (1987). *See also* Thomas A. Piraino, *A New Approach to the Antitrust Analysis of Mergers*, 83 B.U. L. REV. 785, 800 (2003) (the Supreme Court "open[ed] up merger analysis to a consideration of factors other than market share concentration statistics.").

[114] 908 F.2d 981 (D.C. Cir. 1990).

[115] *See* Phillip A. Proger, *Merger Law Update: Introductory Remarks*, 53 ANTITRUST L.J. 323, 325 (1984).

[116] 418 U.S. 602, 631 (1974).

National Bank.[117] Like *General Dynamics*, both decisions emphasized the defendants' ability to rebut any structural market share presumption.[118]

III. III.SUPREME COURT MERGER REVIEW WANES

Today, the debate over these 1960s and 1970s cases still roils. Around the same time that the Supreme Court began to move away from a fully structuralist approach, the Court also stopped reviewing Section 7 cases. In fact, the cases discussed in the previous section were the last Supreme Court decisions addressing the substance of Section 7.119 There are many potential reasons for this decline, including amending the 1903 Expediting Act, which until 1974 facilitated accelerated Supreme Court review for antitrust enforcement actions. Congress also enacted the Hart-Scott-Rodino Act in 1976, further changing the mechanics and timing of merger challenges. Whatever the full explanation, we are left with a 50-year drought in Supreme Court Section 7 jurisprudence.

A. The Rise and Fall of the 1903 Expediting Act

[117] 422 U.S. 86, 120 (1975).

[118] *Marine Bancorp.*, 418 U.S. at 631 (after the government established a prima facie case, "the burden was then upon appellees to show that the concentration ratios, which can be unreliable indicators of actual market behavior, did not accurately depict the economic characteristics of the [relevant] market.") (citation omitted) (emphasis added); *Citizens & S. Nat'l Bank*, 422 U.S. at 120 (after the government established a prima facie case, "it was . . . incumbent upon [the defendant] to show that the market-share statistics gave an inaccurate account of the acquisitions' probable effects on competition.") (emphasis added).

[119] Note that the Supreme Court issued an additional decision on Section 7 but focused on its jurisdictional requirements rather than the antitrust standards applied when evaluating mergers. *See United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271, 283 (1975) (holding that "the phrase 'engaged in commerce' as used in § 7 of the Clayton Act means engaged in the flow of interstate commerce, and was not intended to reach all corporations engaged in activities subject to the federal commerce power.").

Many Supreme Court decisions on Section 7 and other antitrust laws were enabled by the Expediting Act of 1903. This law aimed to "expedite the hearing and determination" of suits brought under the antitrust laws.[120] The act accomplished this in two ways. First, Section 1 of the act allowed the United States to expedite government antitrust suits of "general public importance" before a district court constituted of three judges.[121] The three judges designated then had to "assign the case for hearing at the earliest practicable date . . . and to cause the case to be in every way expedited."[122] Second, and regardless of whether the Section 1 procedure is used, Section 2 of the Expediting Act provided that appeals from a final district court judgment in any government civil antitrust suit will go directly to the Supreme Court.[123] This gave the government the ability to prioritize certain litigation and receive accelerated Supreme Court review without intervening circuit court review.

The passage of the Expediting Act was motivated by the government's desire to ramp up antitrust enforcement, starting with the Theodore Roosevelt Administration.[124] The administration and Congress were concerned that "the Sherman Act was not being enforced," and revitalizing antitrust enforcement would require raising novel issues that would need to be decided speedily and (hopefully) uniformly.[125] And since the courts of appeals were barely a decade old, large business organizations threatened to take

[120] Act of Feb. 11, 1903, ch. 544, 32 Stat. 823 (codified as amended at 15 U.S.C. § 28 (1958)).

[121] Act of Feb. 11, 1903, ch. 544, § I, 32 Stat. 823 (codified as amended at 15 U.S.C. § 28 (1958)).

[122] *Id.*

[123] Act of Feb. 11, 1903, ch. 544, § 2, 32 Stat. 823 (codified as amended at 15 U.S.C. § 29 (1958)). This section also applies to government civil cases arising under the Interstate Commerce Act. Act of Feb. 4, 1887, ch. 104, 24 Stat. 379 (codified as amended at 49 U.S.C. §§ 1, 8, 12, 13, 19 (1958)).

[124] Robert C. Bonges, *The Antitrust Expediting Act—A Critical Reappraisal*, 63 MICH. L. REV. 1240, 1241 (1965).

[125] *Id.* at 1241–42 (citing Brown Shoe Co. v. United States, 370 U.S. 294, 364 (1962); 109 CONG. REC. 11911 (1963) (statement of Sen. Johnston)).

advantage of circuit inexperience and tie up cases in court long enough to make enforcement ineffective.[126]

The Expediting Act addressed these concerns effectively. From 1903 to 1974 (when the Expediting Act was amended), many DOJ antitrust cases were appealed directly to the Supreme Court.[127] The DOJ also participated as *amicus curiae* in some private cases. Thus, the DOJ had a steady stream of opportunities to propose rules of antitrust law. Hundreds of cases were appealed directly to the Supreme Court using the Expediting Act, including the Section 7 cases discussed at length above.

Empowering the Court to build a coherent antitrust jurisprudence did, however, come with costs.[128] In *Brown Shoe*, for example, Justice Clark complained that the Act "deprives the parties of an intermediate appeal and this Court of the benefit of consideration by a Court of Appeals,"[129] while Justice Harlan grumbled that there was "much to be said in favor of relieving this Court of the often arduous task of searching through voluminous trial testimony any exhibits to determine whether a single district judge's findings of fact are supportable."[130]

In 1974, Congress amended the Act, allowing direct appeal only if the district court certifies that "immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice."[131] The amended act also explicitly gives the Supreme Court the option to "deny the direct appeal and remand the case to the

[126] *See, e.g.*, Richard A. Solomon, *Repeal of the Expediting Act - A Negative View*, 1961 N.Y. STATE BAR ASS'N ANTITRUST L. SYMP. 94 (1961).

[127] Under the Federal Trade Commission (FTC) Act of 1914, the DOJ generally took charge of FTC cases in the Supreme Court. Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255 (1994).

[128] *See generally* Bonges, *supra* note 124; W. Wallace Kirkpatrick, *Antitrust to the Supreme Court: The Expediting Act*, 37 GEO. WASH. L. REV. 746, 748 (1969).

[129] *Brown Shoe*, 370 U.S. at 355 (Clark, J., concurring).

[130] *Id.* at 364 (Harlan, J., concurring in part and dissenting in part).

[131] Act of Dec. 21, 1974, Pub. L. No. 93-528, § 5, 88 Stat. 1709 (codified at 15 U.S.C. § 29(b)).

court of appeals."[132] President Ford's signing statement noted that the change would "halt the practice of clogging the Supreme Court docket by taking all antitrust appeals directly to that tribunal, thus denying it the wisdom and advice of the U.S. Circuit Courts of Appeals."[133] This effectively ended the expediting function of the law.

B. After the Amended Expediting Act

The Court's last substantive merger decision was in 1975, closely coincident with the amendment of the Expediting Act.134 Without the steady stream of direct appeals, the Supreme Court has not decided any case that elaborates on market concentration standards in the merger context.135

A separate probable cause of the drought of Section 7 cases seeking Supreme Court review was the passing of the Hart-Scott-Rodino ("HSR") Act in 1976, which required parties to submit premerger filings reviewed by the antitrust agencies.136 This ex-ante regime—merger review before closing rather than post-closing—had two effects. First, it made merging parties more unlikely to continue to pursue their unconsummated merger in court past the district- or circuit-court level; deal financing may no longer be available and the parties' business interests may have shifted over the prolonged period of delay caused by the pre-closing merger review litigation. Second, it provided the government considerable negotiating leverage to resolve (often via consent decree) anticompetitive concerns before mergers are consummated.137 Thus, the HSR Act led to fewer merger

[132] *Id.*

[133] Statement on Signing the Antitrust Procedures and Penalties Act, 2 PUB. PAPERS 371 (Dec. 23, 1974).

[134] United States v. Citizens and Southern Nat'l Bank, 422 U.S. 86, 86 (1975).

[135] United States v. Gen. Dynamics Corp., 415 U.S. 486, 501 (1974).

[136] Pub. L. No. 94-435, 90 Stat. 1390 (1976) (codified at 15 U.S.C. § 18a).

[137] Christina C. Ma, *Into the Amazon: Clarity and Transparency in FTC Section 5 Merger Doctrine*, 87 ST. JOHN'S L. REV. 953, 966 (2013); A. Douglas Melamed, *Antitrust: The New Regulation*, 10 ANTITRUST 13, 14 (1995)

challenges being fully litigated, fewer sustained appeals, and far fewer petitions to the Supreme Court for certiorari.138

Taking these developments together: the Supreme Court has not been completely denied opportunities to update its merger jurisprudence post-1975, but its choice set of cases for doing so has dwindled considerably. District courts have seldom used their certification powers under the amended Expediting Act. Only three cases have been certified by district courts for direct appeal to the Supreme Court.139 In two of those cases, the Supreme Court affirmed the district court's decision without engaging in any additional analysis of the case.140 The third case was the famous Microsoft litigation, which the Supreme Court declined to hear and remanded to the court of appeals.141 Justice Breyer dissented, acknowledging the advantages of having an appeals court "narrow, focus, and initially decide the legal issues" presented but reasoning that the "speed" and "legal

(observing how the HSR Act led to a heavy reliance on consent decrees and a dearth of merger litigation decisions).

[138] William J. Kolasky, Jr. & James W. Lowe, *The Merger Review Process at the Federal Trade Commission: Administrative Efficiency and the Rule of Law*, 49 ADMIN. L. REV. 889, 892 (1997) ("The HSR Act has caused a sea of change in the merger review process. Prior to the Act's passage, during the fifteen year period from 1956 to 1971, the government filed an average of just over eleven merger challenges a year, less than one-third of which were preliminary injunction actions. A substantial number of these cases were fully litigated, and over the same period, the Supreme Court alone decided thirty-two merger cases, almost all in favor of the government. By contrast, in 1996, the FTC alone challenged twenty-four mergers, all prior to consummation, and resolved all but one of these either by consent settlement or by the parties abandoning the transaction. The last time the Supreme Court issued a substantive decision in a government merger case was 1975, prior to the passage of the HSR Act.").

[139] *See* Maryland v. United States, 460 U.S. 1001 (1983) (affirming district court entering a settlement decree between the parties); California v. United States, 464 U.S. 1013 (1983) (affirming district court's approval of a plan of reorganization agreed upon by the parties); United States v. Microsoft, 530 U.S. 1301 (2000).

[140] *Maryland*, 460 U.S. at 1001 and *California*, 464 U.S. at 1013.

[141] *Microsoft*, 530 U.S. at 1301.

certainty" a Supreme Court decision provides would be useful for this "important sector of the economy."142

The Supreme Court's opportunities to grant certiorari on merger cases appealed through the normal process have also been meager since 1975. Interestingly, it seems that the government is not just reticent to expedite an appeal, it is reticent to appeal to the Supreme Court at all. For example, the government lost and could have appealed United States v. Waste Management Inc.143 One of the government's primary arguments on appeal was that establishing ease of entry was not dispositive evidence in support of a merger, which the Second Circuit rejected.144 It is possible the government chose not to appeal because its own 1982 Horizontal Merger Guidelines conveyed that ease of entry should preclude challenging a transaction.145 In Fruehauf Corporation v. Federal Trade Commission, the Second Circuit Court of Appeals found scale economies in the manufacture of heavy duty truck wheels were a procompetitive factor in favor of the acquisition.146 The court concluded that the parties did not violate Section 7 as the opportunity to enter all three relevant markets existed.147 The government may have seen this fact question as ill-suited for a Supreme Court appeal, despite the potential to make law on the relative importance of efficiencies.

[142] *Microsoft*, 530 U.S. at 1301 (Breyer, J., dissenting).

[143] 743 F.2d 976 (2d Cir. 1984).

[144] *Id.* at 982.

[145] DEP'T OF JUST., MERGER GUIDELINES 15–16 (1982), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11248.pdf [https://perma.cc/FW35-VG3Z] ("If entry into a market is so easy that existing competitors could not succeed in raising price for any significant period of time, the Department is unlikely to challenge mergers in that market.").

[146] 603 F.2d 345, 360 (2d Cir. 1979) (the court notes that "Fruehauf had a pro-competitive effect on the market through its collaborative efforts to develop new types of heavy duty wheels by virtue of its ability to draw new entrants into production of conventional wheels by offering to deliver its patronage.").

[147] *Id.* at 361.

Some of these forgone government opportunities to further appeal merger decisions influence merger analysis today. Significant among such decisions is United States v. Baker Hughes Inc.148 In this case, the government appealed the dismissal of its Section 7 claim against manufacturers and sellers of hard-rock hydraulic underground drilling rigs. The court upheld the dismissal, explaining that the defendants had successfully rebutted the structural presumption of anticompetitive effects stemming from market concentration.149

The Baker Hughes decision also discussed how the Supreme Court had "cut . . . back sharply" its application of Section 7 as articulated in Philadelphia National Bank.150 Though the Supreme Court had not repudiated Philadelphia National Bank's presumption of illegality with thirty percent market share, Baker Hughes observed that the Supreme Court had "discarded Philadelphia Bank's insistence that a defendant 'clearly' disprove anticompetitive effect" when rebutting the government's structural prima facie case.151 According to Baker Hughes, "General Dynamics and its progeny" established a lower rebuttal burden for defendants—a simple "showing" or "demonstration" refuting the merger's anticompetitive effects suffices.152 Now Baker Hughes is often cited as the governing burden-shifting standard for merger challenges despite its lack of express Supreme Court approval.153

[148] 908 F.2d 981 (D.C. Cir. 1990).

[149] *Id.* at 987.

[150] *Id.* at 990–91.

[151] *Id.* at 991 (citing United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974); United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974); United States v. Citizens & S. Nat'l Bank, 422 U.S. 86 (1975)) (explaining that past decisions "lightened the evidentiary burden on a [S]ection 7 defendant.").

[152] *Id.* at 991–92 (citing California v. Am. Stores Co., 872 F.2d 837, 842 (9th Cir. 1989); United States v. Waste Mgmt., Inc., 743 F.2d 976, 981 (1984)).

[153] *See, e.g.*, United States v. U.S. Sugar Corp., 73 F.4th 197, 203 (3d Cir. 2023) (citing United States v. Baker Hughes Inc., 908 F.2d 981 (D.C. Cir. 1990)). It is worth noting that the *Baker Hughes* panel is unusually

The dearth of Supreme Court review of merger challenges despite government losses has continued through today. Though perhaps one reason that the government appeals few merger challenges is that the agencies have historically had a strong track record in district court. A recent paper examined merger outcomes for transactions between 2001 and 2020 that received a second request or were challenged after being consummated. The authors report that the agencies won approximately sixty-five percent of their litigated challenges of pending mergers during this period (seventeen wins and nine losses).154 For the government's nine losses in court, judges accepted the parties' proposed remedies in two—so the government arguably received a partial win and did not have reason to appeal.155 None of the other government losses reached the Supreme Court.156

influential; the D.C. Circuit's decision was written by Clarence Thomas and joined by Ruth Ginsburg.

[154] Logan Billman & Steven C. Salop, *Merger Enforcement Statistics: 2001-2020*, 85 ANTITRUST L.J. 1, 6 (2023).

[155] Referring to Fed. Trade Comm'n v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004) (court accepting parties' proposed divestiture remedy and denying FTC's preliminary injunction request) and United States v. AT&T Inc., 310 F. Supp. 3d 161 (D.D.C. 2018) (court accepting parties' arbitration commitments in conjunction with denying permanent injunction), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019)). Note that some of the cases encompassed in the statistics cited here may have ultimate dispositions more complicated than suggested by the descriptions or categorization used by Billman and Salop.

[156] In two cases, the government dropped their challenges after losing at the circuit court level. *See* Fed. Trade Comm'n v. Foster, 2007 U.S. App. LEXIS 25368 (10th Cir. May 31, 2007) (denying FTC's emergency motion for an injunction pending appeal); Paul L. Foster, 2007 FTC LEXIS 131, Dkt. No. 9323 (F.T.C. Oct. 2, 2007) (statement dismissing the administrative complaint); *see also* Fed. Trade Comm'n v. Thomas Jefferson Univ., 505 F. Supp. 3d 522 (E.D. Pa. 2020) (rejecting request for preliminary injunction to block merger of two hospital systems in Philadelphia); Robert Kidwell et al., *FTC Abandons Appeal of Philadelphia Hospital Merger, Allowing Jefferson and Einstein to Proceed with Creation of 18-Hospital System*, JDSUPRA (Mar. 3, 2021), https://www.jdsupra.com/legalnews/ftc-abandons-appeal-of-philadelphia-5665311/ [https://perma.cc/G2RQ-HMPD].

The government did not appeal four losses at the district court level. *See* United States v. SunGard Data Sys., 172 F. Supp. 2d 172 (D.D.C. 2001)

The same study also looked at government challenges to consummated mergers between 2001 and 2020. For the forty-four government challenges during this time, parties won two of those cases at trial and entered into a consent decree in thirty-five more.157 In this context, the government appealed neither of the two losses past a circuit court.158 The parties, who were not straining under the timing provisions of a merger agreement halted by the HSR Act, were incentivized to save their completed mergers and did appeal two of the seven losses all the way to the Supreme Court; but in both cases the Court denied certiorari.159

There were another five merger challenges between 2021 and 2024 that the agencies lost after litigating the merits or a preliminary injunction.160 But the government has not

(denying the DOJ's request to permanently enjoin acquisition of certain assets through bankruptcy proceeding); United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004) (denying the DOJ's request to block merger of leading enterprise resource planning software companies); Fed. Trade Comm'n v. Steris Corp., 133 F. Supp. 3d 962 (N.D. Ohio 2015) (rejecting request for preliminary injunction to block acquisition of X-ray sterilization company); Fed. Trade Comm'n v. Rag-Stiftung, 436 F. Supp. 3d 278 (D.D.C. 2020) (denying the FTC's request for a preliminary injunction to block chemical company merger).

In the last case, the parties won at the district court but abandoned the deal after the U.K.'s Competition and Markets Authority blocked the proposed transaction. United States v. Sabre Corp., 452 F. Supp. 3d 97 (D. Del. 2020) (refusing to enjoin proposed acquisition of airline IT solutions company after bench trial), *vacated as moot*, 2020 U.S. App. LEXIS 26973 (3d Cir. July 20, 2020).

[157] Billman & Salop, *supra* note 154.

[158] The government lost one circuit appeal and decided not to petition the Supreme Court. *See* Fed. Trade Comm'n v. Lundbeck, Inc., 650 F.3d 1236 (8th Cir. 2011). The FTC gave up the other case after the district court denied its request for an injunction pending appeal. *See* Fed. Trade Comm'n v. Lab. Corp. of Am., 2011 U.S. Dist. LEXIS 29144 (C.D. Cal. Feb. 25, 2011).

[159] Polypore Int'l, Inc. v. Fed. Trade Comm'n, 686 F.3d 1208 (11th Cir. 2012) (affirming FTC's decision to order divestiture of competitor in battery separators); ProMedica Health Sys. v. Fed. Trade Comm'n, 749 F.3d 559 (6th Cir. 2014) (upholding FTC judge's decision ordering divestiture of a hospital), *cert. denied*, 575 U.S. 996 (2015).

[160] *See* Stipulation of Voluntary Dismissal, United States v. Booz Allen Hamilton Holding Corp., No. 1:22-cv-01603 (D. Md. Dec. 23, 2022), ECF No.

sought Supreme Court review of any loss during this period as well.

Though we have not looked at every potential appeal when merging parties lose in court, generally we would not expect parties to have incentives to appeal a loss.161 These challenges entail steep additional costs.162 And under the HSR Act regime that has been in place since the approximately the same time as the amendment to the Expediting Act, appeals may be fruitless because they delay the transaction—parties may find that the economics or politics of the deal no longer make sense or that delay pushes the deal past the outside/termination date, which allows one or both parties to walk away.163

240 (DOJ voluntarily dismissing case after loss in United States v. Booz Allen Hamilton Inc., 2022 U.S. Dist. LEXIS 198013 (D. Md. Oct. 31, 2022)); United States v. U.S. Sugar Corp., 73 F.4th 197 (3d Cir. 2023) (affirming the district court's decision to reject DOJ's blocking of Imperial Sugar's acquisition by United States Sugar Corporation); Stipulation of Voluntary Dismissal, United States v. UnitedHealth Grp. Inc., No. 22-5301 (D.C. Cir. March 20, 2023), ECF. No. 1990806 (DOJ voluntarily dismissed its appeal to the D.C. Circuit after losing a trial on the merits, *see* United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118 (D.D.C. 2022))); Order Returning Matter to Adjudication and Dismissing Complaint, *In re* Meta Platforms, Inc., (Feb. 24, 2023), Dkt. No. 9411, available at: https://www.ftc.gov/system/files/ftc_gov/pdf/d09411commorderdismisscomplaint.pdf [https://perma.cc/C85V-KEQ8] (FTC opted not to appeal loss in Fed. Trade Comm'n v. Meta Platforms Inc., 654 F. Supp. 3d 892 (N.D. Cal. 2023)); Fed. Trade Comm'n v. Microsoft Corp., 681 F. Supp. 3d 1069 (N.D. Cal. 2023) (FTC lost challenge to Microsoft's acquisition of Activision Blizzard, which closed in Oct. 2023), *aff'd*, Fed. Trade Comm'n v. Microsoft Corp., 2025 U.S. App. LEXIS 10988 (9th Cir. May 7, 2025).

[161] Alexander Raskovich, *Conflict or Continuity? An Analysis of the 2023 Merger Guidelines*, 31 GEO. MASON L. REV. 1043, 1046 (2024) ("Since the Act's repeal in 1974, however, merging parties are typically unwilling to undergo the years-long appellate process that would be required to bring a current merger challenge to the Supreme Court.").

[162] *See, e.g.*, Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CALIF. L. REV. 1582, 1673 n.308 (noting that "many mergers do not go to a full trial or appeal" and discussing the high costs associated with litigating merger challenges from a business perspective).

[163] *See, e.g.*, Steven C. Salop, *The Goals of Antitrust: Merger Settlement and Enforcement Policy for Optimal Deterrence and Maximum Welfare*, 81

Even though the Supreme Court has not revisited the substance of Section 7 since the Expediting Act's amendment, the Supreme Court has revisited and revised its understanding of other Clayton Act provisions in both private and government enforcement actions. This includes developing the law related to Section 2 and Section 3, which both contain similar references to substantial lessening of

FORDHAM L. REV. 2647, 2655 (2013) (explaining how litigation causes "delays [that] increase the likelihood that the merger will fail to be consummated at all" which "put the entire value of the transaction at risk" and "provide strong incentives to settle quickly"); Farrell J. Malone & Ian C. Thresher, *Leaving Time to Litigate: Lessons from Recent Merger Challenges*, 18-2 ANTITRUST SOURCE 1 (2024) (discussing prominent examples of deals abandoned by parties after antitrust review or litigation delayed deals past their outside dates).

competition.164 The Court has also revisited Section 4,165 Section 8,166 and Section 16.167 We ask the question in the

[164] Section 2: Abbott Lab'ys v. Portland Retail Druggists Ass'n, Inc., 425 U.S. 1 (1976) (holding that the Robinson-Patman Act does not exempt a nonprofit's conduct that does not advance its nonprofit mission); Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) (holding that Clayton Act § 2(b) is a limited defense or exclusion and does not preempt state laws that prohibit conduct falling within that exclusion); United States v. U.S. Gypsum Co., 438 U.S. 422, 423 (1978) (holding that the Section 2(b) defense requires only a good faith belief, not absolute certainty, that a price concession is given to meet an equally low price from a competitor); Great Atl. & Pac. Tea Co. v. Fed. Trade Comm'n, 440 U.S. 69, 86 (1979) (holding that liability under Section 2(f) requires finding price discrimination prohibited by Sections 2(a) and 2(b)); J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 557–58 (1981) (holding that even where a plaintiff proves price discrimination in violation of Section 2(a), the plaintiff still needs to show that discrimination actually resulted in antitrust injury under Section 4); Jefferson Cnty. Pharm. Ass'n, Inc. v. Abbott Lab'ys, 460 U.S. 150 (1983) (holding that the sale of pharmaceutical products to state and local government hospitals for resale in competition with private pharmacies is not exempt from the Clayton Act as amended by Robinson-Patman); Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428 (1983) (holding that the meeting-competition defense under Section 2(b) only requires the defendant to show that the lower price was made in good faith to meet a competitor's equally low price); Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284 (1985) (holding that Clayton Act Section 13(b) does not exempt conduct illegal under the Sherman Act or provide a broad mandate for industry self-regulation); Texaco Inc. v. Hasbrouck, 496 U.S. 543, 544 (1990) (holding that Clayton Act Section 2(a) prohibits functional discounts completely untethered to a supplier's savings or wholesaler's costs); Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 209–10 (1993) (holding that primary-line price discrimination requires a showing that seller had a reasonable prospect of recovering its losses from the below-cost pricing), *reh'g denied*, 509 U.S. 940 (1993); Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 165 (2006) (holding that there is no liability under Clayton Act Section 2 where plaintiff cannot show discrimination in a competitive bidding process).

Section 3: Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 45–46 (2006) (holding that patents do not automatically confer market power to a patentee; also holding that a plaintiff must prove that the defendant actually has market power in the tying market for tying claims under the antitrust laws, including Clayton Act Section 3).

[165] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485–86, 489 (1977) (recovering treble damages under Clayton Act Section 4 requires

Taft Lecture as to whether the Supreme Court should revisit and revise its understanding of Section 7 of the Clayton Act in

that parties prove more than a Section 7 violation; the injury must reflect anticompetitive effects created by unlawful conduct); Ill. Brick Co. v. Illinois (*Illinois Brick*), 431 U.S. 720, 729 (1977) (only direct purchasers injured by overcharge are "injured in his business or property" under Clayton Act Section 4); Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 308 (1978) (foreign nation is a "person" who can recover treble damages under Clayton Act Section 4); City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 389 (1978) (cities and municipalities are "persons" under the antitrust laws, whether as plaintiffs seeking damages or defendants acting as operators); Reiter v. Sonotone Corp., 442 U.S. 330, 330 (1979) (consumers who pay a higher price for goods purchased for personal use as a result of antitrust violations sustain an injury in their "property" within the meaning of Section 4); Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 630 (1981) (no right to contribution remedy under Clayton Act Section 4); Blue Shield of Va. v. McCready, 457 U.S. 465, 465 (1982) (group health plan subscriber had standing to sue for treble damages under Clayton Act Section 4); Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 519 (1983) (union was not a person injured within the meaning of Section 4 of the Clayton Act); California v. ARC Am. Corp., 490 U.S. 93, 93–94 (1989) (under *Illinois Brick*, federal antitrust recoveries are limited to direct purchasers under Clayton Act Section 4, but that does not prevent indirect purchaser recovery under state laws); Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 328 (1990) (harm qualifies as an antitrust injury only when it is attributable to an anticompetitive aspect of conduct under scrutiny); Kansas v. UtiliCorp United, Inc., 497 U.S. 199, 199–200 (1990) (no exception to *Illinois Brick* direct purchaser requirement in situation where energy suppliers overcharge utilities who pass on costs to consumers); Apple Inc. v. Pepper, 587 U.S. 273, 273 (2019) (consumers who bought smartphone apps from AppStore were "direct purchasers" under Clayton Act).

[166] Bankamerica Corp. v. United States, 462 U.S. 122, 122 (1983) (Clayton Act Section 8 does not bar interlocking directorates between a bank and a competing insurance company).

[167] Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 623–24 (1977) (Clayton Act Section 16 is not an "expressly authorized" exception to the Anti-Injunction Act and thus cannot stay state court proceedings); Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 104 (1986) (private plaintiff seeking injunctive relief under § 16 must show a threat of injury "of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful."); California v. Am. Stores Co., 495 U.S. 271, 271 (1990) (holding divestiture is a form of "injunctive relief" authorized by Section 16).

light of developments in other areas of the Sherman Act, to which we now turn.

IV. POST 1960S DEVELOPMENTS IN ANTITRUST JURISPRUDENCE OTHER THAN MERGER LAW

The primary development in the decades following the 1960s outside of merger law was the broad embrace of market power and injury to market-wide competition as essential elements to most antitrust violations other than those under the per se rule. The fuller understanding of market power and injury to competition also yielded a gradual but marked movement away from the irrebuttable presumptions of illegality under the per se rule and a disinclination to grant rebuttable presumptions under what has emerged as the so-called "quick look" analysis. The Court has preferred the rule of reason framework that is tailored to the needs of the case, always with a view of assessing whether the practice at issue has, or is likely to, restrict output and raise price throughout the relevant market.

Market power is the ability to reduce the total output in the relevant market and thus to raise price throughout the relevant market for a durable (i.e., non-transitory) period of time.[168] Demonstrating that power is the plaintiff's burden under the rule of reason and requires accounting for supply responses primarily from other competitors in the relevant market. Neither a defendant's market share nor concentration in the relevant market, at least at levels similar to those accepted in the 1960s, is on its own typically sufficient to raise a presumption of illegality.[169] Rather, the plaintiff

[168] Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1335 (7th Cir. 1986) ("Market power comes from the ability to cut back the market's total output and so raise price.").

[169] *See, e.g.*, Acad. of Allergy & Asthma v. Allergy & Asthma Network, No. 5:14-CV-35-OLG, 2017 WL 11824765, at *15 (W.D. Tex. Sept. 29, 2017) ("[T]he existence of market power cannot be reduced to a determination of a firm's market share."); *cf.* United States v. Visa U.S.A., Inc., 344 F.3d 229, 239–40 (2d Cir. 2003) (affirming the district court's finding of market power

must demonstrate that competitors would not, or would not be likely to, respond to defeat a market-wide reduction in output and increase in price by the defendant.

An injury to competition consists in the effect caused by a durable exercise of market power—a reduction in output or increase in price *throughout the relevant product and geographic market*. An injury to competition is not the elimination of even one's closest competitor or archrival if other competitors remain present in the relevant market and are likely to expand output to produce competitive conditions that are substantially similar to those that preceded the attempted exercise of market power.

The assessment of market power and likely injury to competition must occur within a relevant market whose fundamental criteria for definition were provided by *Brown Shoe Co. v. United States,* the first Supreme Court case in the 1960s to apply Section 7, to which we now turn.

A. Market Definition: Interchangeability, Practical Indicia, and Submarkets

Brown Shoe contributed three elements to market definition: interchangeability of end use and, by way of a footnote, interchangeability of production facilities.[170] Brown Shoe also adopted the concept of "submarkets" [171] that could be defined by enumerated practical indicia[172]. The emphasis on interchangeability of end use and/or demand has survived the development of antitrust law under the Sherman Act. Post

based on the lower court's holding that it "may be presumed if [a firm] controls a large enough share of the relevant market.").

170 Brown Shoe Co. v. United States, 370 U.S. 294, 325 n.42 (1962) ("The cross-elasticity of production facilities may also be an important factor in defining a product market within which a vertical merger is to be viewed.").

171 *Id.* ("However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.").

172 *Id.* at 325 ("[I]ndustry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.").

1960s Sherman Act cases, however, have shown a solicitude toward supply-side substitutability in defining market boundaries, in some cases rejecting proposed narrow markets on the ground that suppliers of other products would begin producing the proposed relevant product in response to a sustained increase in price.[173] That solicitude is indicative of a greater appreciation of the reality and importance of dynamic competition than was evident among 1960s merger cases.

Brown Shoe introduced the second element of market definition, practical indicia, as relevant to the definition of the third element, "submarkets," that may exist within the "outer boundaries" of a "broad" product market that were defined by reasonable interchangeability of use. As presented, practical indicia were factors that would not necessarily refine the interchangeability assessment but identify a venue of competition among products that share common characteristics, perhaps even if other products that were excluded from the submarket were interchangeable with those with the common characteristics within the submarket.[174]

[173] *See, e.g.*, Ohio v. Am. Express Co., 585 U.S. 529, 543 (2018) (noting that markets are defined as the area where "significant substitution in consumption or production occurs"); Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1436 (9th Cir. 1995) ("A reasonable market definition must also be based on 'supply elasticity.'"); Virtual Maint. Inc. v. Prime Comput., Inc., 957 F.2d 1318, 1327 (6th Cir. 1992) ("Defining a market . . . on the basis of demand considerations alone is erroneous because such an approach fails to consider the supply side of the market.").

[174] *Brown Shoe*, 370 U.S. at 325 ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. Because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition 'in *any* line of commerce' (emphasis supplied), it is necessary to examine the

That framework for market definition could be used to propose narrow markets limiting the competitors and products that could respond to a hypothetical exercise of market power, thereby increasing the likelihood that such an exercise would be successful. For example, in *Whole Foods*, the district court found that a relevant market of food stores offering premium natural and organic produce was too narrow given the ease with which other food stores could offer similar produce.[175] The U.S. Court of Appeals for the District of Columbia Circuit reversed, applying *Brown Shoe*'s submarket conceptual structure—even if not expressly, then in substance.[176] The 2023 Merger Guidelines also follow the *Brown Shoe* market-definition structure by offering numerous ways to define a market other than reasonable interchangeability of use and supply.[177]

effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition." (citations omitted) (footnotes omitted)).

[175] Fed. Trade Comm'n v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1039, 1041 (D.C. Cir. 2008) ("In short, a core group of particularly dedicated, "distinct customers," paying "distinct prices," may constitute a recognizable submarket;" "The FTC's evidence delineated a PNOS submarket catering to a core group of customers who "have decided that natural and organic is important, lifestyle of health and ecological sustainability is important;" "I cannot agree with the district court that the FTC would never be able to prove a PNOS submarket."); *id.* at 1045 (Tatel, J., concurring) (relying on evidence of distinct characteristics, common core customers, and other practical indicia, concluding that "'industry or public recognition of the submarket as a separate economic' unit matters because we assume that economic actors usually have accurate perceptions of economic realities") (quoting Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 218 n.4 (D.C. Cir. 1986)).

[176] *See supra* note 8. *See also id.* at 1041 ("In sum, the district court believed the antitrust laws are addressed only to marginal consumers. This was an error of law, because in some situations core consumers, demanding exclusively a particular product or package of products, distinguish a submarket."); *id.* at 1042 (Tatel, J., concurring) ("Specifically, I believe the district court overlooked or mistakenly rejected evidence supporting the FTC's view that Whole Foods and Wild Oats occupy a separate market of 'premium natural and organic supermarkets.'").

[177] U.S. DEP'T OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES § 4.3 (2023),

Sherman Act cases have criticized the submarket concept as either redundant of the market concept or, if not, then an excessively narrow definition of the venue within which possible market power and competitive effects can be assessed.[178] The practical indicia may be relevant to the interchangeability assessment, but, apart from interchangeability, they have generally not been found sufficient to define a market outside the Section 7 context.[179] To properly test the current or prospective presence of market power and the likelihood of an injury to competition, all products that could be substituted for the relevant product and all sellers that could supply those products, all within a

https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf [https://perma.cc/95XJ-AQTL] (outlining four ways to identify a relevant market, the first three of which do not utilize interchangeability of supply).

[178] *See, e.g.*, Allen-Myland, Inc. v. Int'l Bus. Machines Corp., 33 F.3d 194, 208 n.16 (3d Cir. 1994) ("The use of the term 'submarket' is somewhat confusing, and tends to obscure the true inquiry."); Satellite Television & Associated Res., Inc. v. Cont'l Cablevision of Va., Inc., 714 F.2d 351, 355 n.5 (4th Cir. 1983) ("The use of the term 'submarket' is to be avoided; it adds only confusion to an already imprecise and complex endeavor. For antitrust purposes a product group or geographic area either meets the listed criteria, in which case it is a relevant market; or it does not, in which case it is irrelevant for purposes of analysis. No fiddling with nomenclature will change the analysis or result."); Geneva Pharms. Tech. v. Barr Laby's, 386 F.3d 485, 496 (2d Cir. 2004) ("The term 'submarket' is somewhat of a misnomer, since the 'submarket' analysis simply clarifies whether two products are in fact 'reasonable' substitutes and are therefore part of the same market.").

[179] *See, e.g.*, *In re* Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. 14-md-02503, 2018 WL 563144, at *8 (D. Mass. 2018) ("Even in the pharmaceutical market, however, cross-elasticity must be demonstrated between products to establish a market definition that includes them."); United Food & Com. Workers Loc. 1776 v. Teikoku Pharma USA, 296 F. Supp. 3d 1142, 1172 (N.D. Cal. 2017) ("Consistent with the bulk of the case law, something *more* than mere therapeutic equivalency is required to define the relevant antitrust product market. There must be some showing of cross-elasticity."); Mylan Pharm. Inc. v. Warner Chilcott Pub. Ltd. Co., 838 F.3d 421, 437 (3d Cir. 2017) (affirming the lower court's market definition based on "the high degree of interchangeability and cross-elasticity demonstrated in the record").

reasonable time frame for durability, would be included in the relevant market in most Sherman Act cases.[180]

The merger guidelines have long used the hypothetical monopolist test ("HMT") to define relevant markets. This test asks whether consumers would switch to an alternative product if a hypothetical monopolist over the proposed relevant product were to impose a small but significant and non-transitory increase in price or worsening of terms.[181] The HMT test is designed to assess reasonable interchangeability of end use on the demand side.

However the 2023 Guidelines offer, pursuant to the practice of 1960s case law, market-definition criteria other than the HMT test and reasonable interchangeability of end use.[182] The enforcement agencies have also attempted to focus on the competition that will be eliminated by the proposed merger—the rivalry between closest competitors, for

[180] PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 530 (5th ed. 2023) (stating that a properly defined market takes into account both demand-side and supply-side substitutability); Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 65 F.3d 1406, 1410 (7th Cir. 1995) ("[T]he definition of a market depends on substitutability on the supply side as well as on the demand side.").

[181] U.S. DEP'T OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES, MERGER GUIDELINES § 1.12 (1992), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11250.pdf [https://perma.cc/HM3K-FK3F]; U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 4.1.1 (2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010 [https://perma.cc/5HLM-6ZEG]; U.S. DEP'T OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES § 4.3.A (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf [https://perma.cc/95XJ-AQTL].

[182] U.S. DEP'T OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES § 4.3–4 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf [https://perma.cc/95XJ-AQTL] (offering the use of observed market characteristics to define a relevant market, as espoused by the Court in *Brown Shoe*, along with concepts from United States v. Cont'l Can Co., 378 U.S. 441, 449 (1964), referencing the need for markets to exclude some substitutes given the potentially infinite range of substitutes).

example—as that which can constitute the "substantial lessening of competition" under Section 7.[183]

The question arises whether the Supreme Court would approve the definition of "submarkets," or similarly narrow markets, according to practical indicia or closest-competitor criteria *apart from reasonable interchangeability* to assess whether a proposed merger may substantially lessen competition.

B. Shift from Concentration to Market Power

Once the venue of competition has been defined, the issue of competitive effect arises. Perhaps the most significant development in 1960s merger law was the presumption of illegality based solely on "undue concentration," as set forth in *Philadelphia National Bank*.[184] That concentration-based presumption has provided the framework for every merger litigation since *Philadelphia National Bank* and has made the definition of the relevant market (or submarket) of dispositive importance in many, if not most, merger cases. The presumption is also important in assessing whether the FTC or the Antitrust Division has met the standard for a preliminary injunction,[185] which, if granted, often results in

[183] *See, e.g.*, Fed. Trade Comm'n v. Staples, Inc., 970 F. Supp. 1066, 1082–83 (D.D.C. 1997) (highlighting the impact on competition that would result from Staples acquiring and thus eliminating its most significant competitor); U.S. DEP'T OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES § 4.3 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf [https://perma.cc/95XJ-AQTL] ("Direct evidence of substantial competition between the merging parties can demonstrate that a relevant market exists in which the merger may substantially lessen competition and can be sufficient to identify the line of commerce and section of the country affected by a merger, even if the metes and bounds of the market are only broadly characterized.").

[184] 374 U.S. 321, 363 (1963); *see supra* discussion at pages 12–17.

[185] *See, e.g.*, Fed. Trade Comm'n v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1041–42 (2008) (Tatel, J., concurring) (noting that a preliminary injunction should be issued if the FTC raised "questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the

the parties' abandoning their transaction for the reasons discussed above.

Since the 1960s, antitrust law has moved away from both a focus on concentration and presumptions of illegality. We cover the shift from concentration to market power in this section and the shift from presumptions to the rule of reason in the next. The two trends are related. As the economics that informs antitrust analysis has become more attuned to dynamic competition and more focused on market power rather than static concentration measures, the law has also required plaintiffs to present evidence of actual or likely anticompetitive effects throughout the relevant market before any burden shifts to the defendant.[186] This stands in marked contrast to the concentration-based framework ushered in by the "time capsule" merger cases.

However, early indications of the shift towards market power arrived in the last substantive Section 7 case to be decided before the enactment of the HSR Act in 1976 in *United States v. General Dynamics Corp.*[187] As discussed above, that merger involved the combination of two companies that would become the fifth-largest coal producer in the United States.[188] The government relied heavily on past production statistics to show that the contested combination would substantially increase the acquiror's market share and thus exacerbate the trend toward increased concentration that had been observed within certain geographic markets.[189]

In 1974, the *General Dynamics* Court affirmed the lower court's decision to look beyond market shares as the sole indicator of market power and anticompetitive effects. [190] The Court explained:

FTC in the first instance and ultimately by the Court of Appeals." (quoting Fed. Trade Comm'n v. H.J. Heinz Co., 246 F.3d 708, 714–15 (D.C. Cir. 2001)).

[186] Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 96–97 (2021) (internal citation omitted).

[187] United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974).

[188] *Id.* at 489; *see supra* discussion at pages 17–19.

[189] *Id.* at 491.

[190] *See id.*

> Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger.[191]

The Court ultimately concluded that, although the government's proffered market shares were sufficient to support a finding of undue concentration absent other considerations, important factors regarding the coal industry and the businesses of the defendants indicated that the combination did not threaten a substantial lessening of competition.[192]

Just three years later in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[193] the Court introduced the concept of antitrust injury in the Section 7 context. Although antitrust injury is a concept specific to private litigation and not government enforcement, *Brunswick* placed new emphasis on the importance of an injury to competition, in contrast to an injury to a competitor, as the core of antitrust law, including that under Section 7 of the Clayton Act.[194] The Court thus found

[191] *Id.* at 498.

[192] *Id.* at 497–98 ("While the statistical showing proffered by the Government in this case . . . would . . . have sufficed to support a finding of 'undue concentration' in the absence of other considerations, the question before us is whether the District Court was justified in finding that other pertinent factors mandated a conclusion that no substantial lessening of competition occurred or was threatened by the acquisition of United Electric.").

[193] 429 U.S. 477 (1977).

[194] *Id.* at 489 ("We therefore hold that the plaintiffs to recover treble damages on account of [Section] 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiff must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be

that an injury flowing to a competitor from a stronger, even if larger, competitor, and even if in a more concentrated market, that took the form of lower prices and increased output was not the type of injury that the antitrust laws were meant to prevent.[195]

Brunswick presaged a similar development in monopolization law under Section 2 of the Sherman Act. In the 1980s and after, the Supreme Court emphasized that the exercise of monopoly power must be assessed not only in its possession and impact on competitors but also on consumers, prices, and output. In 1945, for example, in *United States. v. Aluminum Company of America*,[196] the Second Circuit condemned as exclusionary and unlawful such pro-consumer conduct by a monopolist defendant as anticipating "increases in the demand for [the relevant product," preparing to supply them, "doubling and redoubling its capacity before others entered the field," embracing "each new opportunity as it opened," and "fac[ing] every newcomer with new capacity."[197]

Some fifty years later, the Supreme Court stated in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* that "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws."[198] *Brooke Group* identified consumer impact as central to Section 2 monopoly law in confirming that recoupment is an element of a Section 2 violation on a claim of predatory pricing.[199] Without the defendant's recouping its losses incurred in predatory pricing, the predation "is in general a boon to consumers" and not unlawful.[200]

likely to cause.'" (citing Zenith Radio Corp. v. Hazeltine Rsch., Inc., 395 U.S. 100, 125 (1969))).

[195] *Id.* at 488–89.

[196] 148 F. 2d 413 (2d Cir. 1945)

[197] *Id.* at 431.

[198] 509 U.S. 209, 225 (1993).

[199] *Id.* at 224–27; *see id.* at 224 ("Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced.")

[200] *Id* at 224; *see also* Aspen Skiing Co. v. Aspen Highlands Skiing Co,, 472 U.S. 585, 605 (1985) ("The question whether Ski Co.'s conduct may

A decade later, the Supreme Court emphasized that

> [t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.201

Illegality is thus not presumed under the Sherman Act even when *monopoly* power is possessed. Further proof of exclusionary conduct and harm to competition are necessary. The steady shift away from presumptions involving concentration and toward a searching inquiry of outcomes thus seems clear.

Although the term "market power" had been used in antitrust cases in the 1960s, concentration was considered—as in *Philadelphia National Bank*—a sound indicator of such power. In 1984, in the tying context, however, market power took on new importance as a necessary element in assessing the power of a defendant to impose a tying arrangement on unwilling buyers. In *Jefferson Parish Hospital District No. 2 v. Hyde*,[202] the Court condemned tying arrangements, which had been governed by the per se rule,[203] only "when the seller has some special ability—usually called 'market power'—to force a purchaser to do something that he would not do in a competitive market."[204]

properly be characterized as exclusionary cannot be answered by simply considering its effect on Highlands. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way.") (footnote omitted).

[201] Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP, 540 U.S. 398, 407 (2004).

[202] 466 U.S. 2 (1984).

[203] *See, e.g.*, *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

[204] *Jefferson Parish*, 466 U.S. at 13–14 (citations omitted).

In determining the manner in which the per se standard should be applied to tying, the Court asked "whether [the] arrangement involve[d] the use of market power to force patients to buy services they would not otherwise purchase."[205] The Court determined that the hospital's thirty percent market share "do[es] not establish the kind of dominant market position that obviates the need for further inquiry into actual competitive conditions."[206]

Although *Jefferson Parish* made no reference to the presumption of illegality arising from a market share of thirty percent that *Philadelphia National Bank* established some twenty years earlier, two aspects of the holding are notable. First, the Court modified what had been an irrebuttable presumption of illegality for tying arrangements and required a showing of market power in the tying product.[207] Second, the thirty percent share level that *Philadelphia National Bank* had found sufficient evidence of market power to raise a presumption of illegality was insufficient evidence of market power for the *Jefferson Parish* Court, at least under the Sherman Act.[208] The Court subsequently extended its holding in *Jefferson Parish* to patent law, holding that patents do not alone raise a presumption of market power but must be supported by an independent showing of the ability to raise price and restrict output throughout a properly defined antitrust market.[209]

Numerous lower courts—including federal courts of appeals—followed the Court's newly developed focus on market power, especially in rule of reason cases under the Sherman Act.[210] For example, in *Ball Memorial Hospital v. Mutual Hospital Insurance, Inc.*, the Seventh Circuit, per Judge Easterbrook, identified market power as a necessary element of the rule of reason. *Ball Memorial* stated:

[205] *Id.* at 25.

[206] *Id.* at 26–27.

[207] *Id.* at 25.

[208] *Id.* at 26–27.

[209] Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 44–46 (2006).

[210] *See* Mark R. Patterson, *The Role of Power in the Rule of Reason*, 68 ANTITRUST L. J. 429, 433–36 (2000).

> The analysis of the adoption of the PPO plan must begin with an assessment of market power. Market power is a *necessary ingredient* in every case under the Rule of Reason. Unless the defendants possess market power, it is unnecessary to ask whether their conduct may be beneficial to consumers. *Firms without power bear no burden of justification*. The Hospitals say that the Blues have a large share of the market for medical insurance in Indiana, and that this establishes market power.[211]

The court then defined "market power" as "the ability to cut back the market's total output and so raise price; consumers bid more in competing against one another to obtain the smaller quantity available."[212] Under that standard, the U.S. Court of Appeals for the Seventh Circuit found that the defendants lacked market power and thus were entitled to adopt the PPO plan without further antitrust scrutiny. The court noted in agreement that "other cases . . . *have said that market share is simply an indication of power and possesses no other significance* . . . and almost every other circuit has a similar holding."[213] The court's observation and holding suggest that, as the 1980s and the following decades ensued, market concentration was no longer a synonym for

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[211] Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1334–35 (7th Cir. 1986) (emphasis added) (internal citations omitted). The court determined that, despite losing market share in Indiana over the past few years prior to the case, the defendant still held a "large share" of patients, noting that, at some hospitals, more than eighty percent of all patients were covered by the defendant and that, throughout Indiana, about fifty percent of hospital revenues were derived from payments made by the defendant. The court ultimately held that "[j]ust how 'large' the [defendant is] turns out not to matter[.]" In finding that (1) consumers, who were extremely price sensitive, were able to readily switch "on the basis of price from one company or form of financing to another" and (2) the "entry barriers into the market for health care financing are extremely low," the court concluded that the defendant "cannot exclude competitors, cannot raise prices without losing business quickly" and therefore its size "indicates only their success in offering the package of price and service that customers prefer, not any market power." *Id.* at 1330–33.

[212] *Id.* at 1335.

[213] *Id.* at 1336 (emphasis added)

market power or, within the range that raised presumptions of illegality throughout the 1960s,[214] perhaps even a good indicator of the latter.[215]

Returning to the Supreme Court level, more recent cases reflect a continuing emphasis on market power as a necessary element of an antitrust violation. For example, in *Ohio v. American Express Co.*,[216] a case involving a two-sided transactional platform, the Court required the plaintiffs to prove, *before any burden shifted to the defendant*, an anticompetitive exercise of market power through "reduced output, increased prices, or decreased quality in the relevant market."[217] Similarly, in *National Collegiate Athletic Association v. Alston*, the Court required "a fact-specific assessment of market power and market structure aimed at assessing the challenged restraint's actual effect on competition—especially its capacity to reduce output and increase price."[218]To be sure, market structure and concentration have not become irrelevant to an assessment of market power. But market structure and concentration are no longer synonymous with market power, and, at *post-merger* share levels that resulted in the prohibition of numerous mergers in the 1960s based on *Philadelphia National Bank*'s presumption of illegality, market structure, and concentration are not good indicators of market power.

Antitrust case law in areas other than government merger litigation has thus moved over the last 40 years to an

[214] *See* United States v. Pabst Brewing Co., 384 U.S. 546, 552–53 (1966); United States v. Von's Grocery Co., 384 U.S. 270, 277–78 (1966).

[215] *See* Allen-Myland, Inc. v. Int'l Bus. Machines Corp., 33 F.3d 194, 209 (3d Cir. 1994) (holding that market share is only one type of evidence to prove sufficient market power but that the true indication of market power is the power to reduce output and raise prices); United States v. Baker Hughes Inc., 908 F.2d 981, 992 (D.C. Cir. 1990) (refusing to allow the government to rest its case "simply by presenting market concentration analysis" because doing so "would grossly inflate the role of statistics in actions brought under section 7.").

[216] 585 U.S. 529 (2018).

[217] *Id.* at 542.

[218] Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 70 (2021) (citation omitted) (internal quotation marks omitted).

increasing emphasis on proof of market power beyond market shares and concentration measures. The question posed is whether the Supreme Court would do the same under Section 7 of the Clayton Act today, or at least moderate the current reliance on market share and structure as the sole elements required for raising a presumption of illegality against the proposed transaction.

C. Move from Presumption to Required Proof of Economic Power and Effects

In concert with the shift in antitrust law toward a dynamic assessment of market power and away from a primary reliance on static concentration, the Court also gradually replaced irrebuttable presumptions of illegality under the per se rule with a rule of reason analysis. Some of those per se rules were either established or affirmed in the 1960s when market structure and the presence of a restraint on free trade were found to displace the need to evaluate the dynamics of competition.

Although the *Philadelphia National Bank* presumption is rebuttable, unlike the irrebuttable presumption of illegality imposed by the per se rule, the Court generally has not substituted a rebuttable presumption for the per se rule. Rather, it has adopted a rule of reason approach with no presumptions. In recent decades, the Court has resisted requests by plaintiffs and defendants alike for presumptions of illegality or legality under the rule of reason.

Importantly, under the rule of reason as adopted by the Supreme Court in recent cases, the plaintiff has the burden of proving actual or likely anticompetitive effects net of supply responses based on evidence. The Court has hesitated to infer those effects based solely on market structure or market shares, particularly at share levels that were considered presumptively illegal under 1960s merger law. In addition, as discussed below, even as the Court has acknowledged the flexibility in the rule of reason that should be tailored to the needs of the case, the focus remains on assessing actual or likely anticompetitive effects based on market dynamics, including supply responses to any attempted reduction in output.

The harbinger of the trend toward the rule of reason and against presumptions arrived in 1977 with *Continental T.V., Inc. v. GTE Sylvania Inc.*[219] and its emphasis on interbrand competitive effects rather than on a single firm's market position or practices. In the thirty years following *GTE Sylvania*, the application of the rule of reason replaced the per se rule in numerous vertical and horizontal contexts, significantly narrowing the role of presumption in Sherman Act litigation.

GTE Sylvania overruled *United States v. Arnold, Schwinn & Co.*[220]—decided just ten years before in 1967—in which the Supreme Court applied the per se rule to condemn non-price exclusive marketing territories without the need to assess competitive effects. The *Schwinn* decision came just four years after *White Motor Co. v. United States*,[221] in which the Court declined to adopt a per se rule against territorial market division given the Court's inexperience in assessing the competitive effects of the practice.[222] As the 1960s progressed, perhaps in line with the economic thinking of the time,[223] the Court became increasingly confident that it could predict competitive effects from restrictive practices or relatively low market concentration.[224]

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[219] 433 U.S. 36 (1977).

[220] 388 U.S. 368 (1967).

[221] 372 U.S. 253 (1963).

[222] *Id.* at 261–64.

[223] *See* discussion of economic analyses *supra* notes 59, 69, 71 and accompanying text.

[224] *See* Albrecht v. Herald Co., 390 U.S. 145, 151–52 (1968) (establishing that maximum resale price maintenance is per se illegal); *Schwinn*, 388 U.S. at 379 (determining that vertically imposed "territorial restrictions upon resale" of goods, as well as "restrictions of outlets with which . . . distributors may deal and . . . restraints upon retailers to whom . . . goods are sold" were per se violations of the Sherman Act); United States v. Pabst Brewing Co., 384 U.S. 546, 550–53 (1966) (applying a presumption of illegality to combined shares of 4.5 percent); United States v. Von's Grocery Co., 384 U.S. 270, 272–79 (1966) (blocking a merger between two grocery

In *GTE Sylvania*, the Court acknowledged that vertical restraints were "widely used in our free market economy" and that "there is substantial scholarly and judicial authority supporting their economic utility" that had "relatively little authority to the contrary."[225] *GTE Sylvania* required "departure[s] from the rule-of-reason [to be] based *upon demonstrable economic effect* rather than—as in *Schwinn*—upon *formalistic line drawing*."[226] That analytical perspective marked a significant departure from the economic basis for the 1960s' frequent condemnation of mergers resulting in modest levels of concentration based upon the structural presumption of illegality in *Philadelphia National Bank*.[227]

The trend continued in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* (*BMI*).[228] There, Columbia Broadcasting System (CBS) accused the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) of Section 1 and Section 2 violations by way of the blanket licensing of copyrighted compositions.[229] While CBS invoked three forms of per se illegal restraints—price fixing, unlawful tying arrangement, and a concerted refusal to deal[230]—the Court rejected the application of the per se rule

chains with a combined share of 7.5 percent because of concerns about increasing "concentration of economic power in the hands of a few").

[225] *GTE Sylvania*, 433 U.S. at 57–58.

[226] *Id.* at 58–59 (emphasis added).

[227] *See*, *e.g.*, United States v. Aluminum Co., 377 U.S. 271, 279 (1966) (relying on *Philadelphia National Bank*'s presumption to find that a 29.1 percent post-merger market share would substantially lessen competition under Section 7 of the Clayton Act); United States v. Cont'l Can Co., 378 U.S. 441, 461 (1964) (finding that a twenty-five percent post-merger market share "approaches [what was] held presumptively bad in *United States v. Philadelphia National Bank*").

[228] 441 U.S. 1 (1979).

[229] *Id.* at 6.

[230] *Id.* at 6 ("CBS argued that ASCAP and BMI are unlawful monopolies and that the blanket license is illegal price fixing, an unlawful tying arrangement, a concerted refusal to deal, and a misuse of copyrights. The District Court, though denying summary judgment to certain defendants, ruled that the practice did not fall within the *per se* rule. 337 F. Supp. 394, 398 (S.D.N.Y. 1972). After an 8-week trial, limited to the issue of liability, the court dismissed the complaint, rejecting again the claim that the

as an inappropriate "literal" approach to antitrust law,[231] thereby echoing *GTE Sylvania's* eschewing "formalistic line drawing."

The *BMI* Court noted that "easy labels do not always supply ready answers"[232] and determined that the blanket licenses and associated price restraints were not naked and possessed redeeming virtue. The licenses "accompan[ied] the integration of sales, monitoring, and enforcement against unauthorized copyright use."[233] In highlighting the importance of evaluating the business context and economic realities of the relevant market and the restraint, the Court cautioned that "[n]ot all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints."[234]

As noted above, five years later, the Court modified the per se rule against tying arrangements in *Jefferson Parish* to include a market power test in the tying product that could not be satisfied by a thirty percent market share alone. Because the economic evidence did not show an "actual adverse effect on competition," the restraint in *Jefferson Parish* survived the Court's scrutiny that was conducted effectively under the rule of reason.[235]

In 1985, the Court limited the scope of the per se rule's application in refusal-to-deal cases in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*,[236] a case in which the plaintiffs sued for being expelled from a purchasing cooperative. The Court noted that refusal-to-deal

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blanket license was price fixing and a *per se* violation of § 1 of the Sherman Act, and holding that since direct negotiation with individual copyright owners is available and feasible there is no undue restraint of trade, illegal tying, misuse of copyrights, or monopolization. 400 F. Supp., at 781–783.").

[231] *Id.* at 8.

[232] *Id.* at 8.

[233] *Id.* at 20 (citing LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 154 (1977)).

[234] *Id.* at 23.

[235] Jefferson Par. Hosp. Dist. No. 2 v. Hyde ,466 U.S. 2, 28–29, 31 (1984).

[236] Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284 (1985).

cases typically involved joint efforts by several firms to disadvantage competitors by cutting off suppliers or customers that were essential for competitors to compete.[237] Yet, the *Northwest Wholesale Stationers* Court limited the per se rule to agreements that were likely to produce anticompetitive exclusion rather than simple agreements not to deal with a competitor: "Unless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted."[238] A presumption of market power and harm to competition were again replaced by a requirement that both be demonstrated with evidence.

During the next two decades, the Court reduced and then eliminated the application of the per se rule against all forms of vertical price fixing. That trend began in 1988 in *Business Electronics Corp. v. Sharp Electronics, Corp.*,[239] which required an agreement on a specific price or price level for the application of the per se prohibition.[240] The Court identified the growing preference for rule of reason analysis and the restriction of presumptions of illegality to circumstances where anticompetitive effects were manifest and demonstrable without inquiry.[241]An agreement between a supplier and distributor to eliminate a competing price cutter did not meet that standard.[242]

[237] *Id.* at 294.

[238] *Id.* at 296.

[239] 485 U.S. 717 (1988).

[240] *Id.* at 723–31.

[241] *Id.* at 723 ("Ordinarily, whether particular concerted action violates § 1 of the Sherman Act is determined through case-by-case application of the so-called rule of reason – that is, 'the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.' . . . Certain categories of agreements, however, have been held to be per se illegal, dispensing with the need for case-by-case evaluation. We have said that per se rules are appropriate only for 'conduct that is manifestly anticompetitive,' that is, conduct 'that would always or almost always tend to restrict competition and decrease output.'" (internal citations omitted)).

[242] *Id.* at 731–35.

In 1997, *State Oil v. Khan*[243] overturned the Court's expansion of the per se rule in the 1968 decision of *Albrecht v. Herald Co.*[244] In *Albrecht*, the Court found, in accord with the economic thinking of the time and the Court's willingness to employ presumptions of illegality, that any scheme to maintain *maximum resale prices* was "without more, an illegal restraint of trade under [S]ection 1 of the Sherman Act."[245] In *Khan*, when the Court revisited the basis for *Albrecht's* assumption of anticompetitive effect, it "conclude[ed] that there is insufficient economic justification for per se invalidation of vertical maximum price fixing."[246] Further, the Court cautioned that the per se rule established in *Albrecht* could "exacerbate problems related to the unrestrained exercise of market power by monopolist-dealers," which in turn "may actually harm consumers and manufacturers."[247]

In 2006, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[248] overruled the per se rule against minimum vertical price-fixing that had been established almost 100 years earlier in *Dr. Miles Med. Co. v. John D. Park & Sons Co.*[249] The *Leegin* Court concluded that "[v]ertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed."[250] Noting that *Dr. Miles* had "justified its decision based on 'formalistic' legal doctrine rather than 'demonstrable economic effect,'"[251] the

[243] 522 U.S. 3 (1997).

[244] Albrecht v. Herald Co., 390 U.S. 145, 152 (1968), *overruled by* State Oil Co. v. Khan & Assocs., Inc., 522 U.S. 3 (1997).

[245] *Id.* at 153.

[246] *Khan*, 522 U.S. at 18.

[247] *Id.*

[248] 551 U.S. 877 (2007).

[249] 220 U.S. 373 (1911).

[250] *Leegin*, 551 U.S. at 894.

[251] *Id.* at 887–88 (quoting Continental Television, Inc. v. GTE Sylvania, Inc. 433 U.S. 36, 58–59 (1977)).

Supreme Court established a new rule that "[v]ertical price restraints are to be judged according to the rule of reason."[252]

Both *Khan* and *Leegin* confirmed and expanded the Court's continued preference for the rule of reason over presumptions of illegality and the limitation of presumptions to circumstances where the anticompetitive effect would be reliably manifest and demonstrable. Although the presumptions at issue in the cases above had been irrebuttable pursuant to the per se rule, *no rebuttable presumption* was adopted in its place. Rather, the Court required a rule of reason assessment that would ascertain the actual or likely competitive effects of the practice at issue with the burden remaining on the plaintiff to make that showing.

D. The Court's Preference for Rule-of-Reason Assessments and Proof of an Actual or Likely Anticompetitive Effect over "Quick-Look" Presumptions.

The Court's increasing preference for fact-specific, substantive analysis was applied even where plaintiffs sought a *rebuttable* presumption of illegality under a so-called quick-look analysis. In *California Dental Association v. Federal Trade Commission*, the Court rejected an abbreviated competitive analysis—opting for full economic evaluation tailored to the specific needs of the case—based on the prospect of legitimate business or consumer benefits.[253] In *Cal. Dental*, the FTC proposed a quick look competitive analysis that would allow someone "with even a rudimentary understanding of economics [to] conclude that the arrangements in question have an anticompetitive effect on

[252] *Id.* at 907; *see id.* at 888 ("[T]he Sherman Act's use of "restraint of trade" "invokes the common law itself, . . . not merely the static content that the common law had assigned to the term in 1890." *Business Electronics, supra,* at 732, 108 S.Ct. 1515."); *see id.* at 901 ("In more recent cases the Court, following a common-law approach, has continued to temper, limit, or overrule once strict prohibitions on vertical restraints.")

[253] Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756 (1999).

customers and markets."[254] Unlike the per se rule, however, a quick look determination of likely anticompetitive effects would allow the defendant to justify the restraint, though the burden of justification would shift to the defendant upon the plaintiff's presentation of only a prima facie case.[255]

The Court in *Cal. Dental* acknowledged that such an abbreviated assessment had been used in the past,[256] but nonetheless rejected its application of the presumption to the facts at issue. Rather, the Court held that a rule of reason analysis must be conducted to identify the likely or actual competitive effects—although the Court invited the lower court or FTC to tailor the rule of reason in scope and application to the needs of the case.[257]

The Court reached the same outcome in *FTC v. Actavis, Inc.*, in which the Court rejected the FTC's request for a rebuttable presumption of illegality against reverse-payment pharmaceutical settlements.[258] In *Actavis*, the Court noted its reluctance to shift the burden to the defendants to justify a practice that becomes presumptively illegal upon a prima facie showing of its existence:

> The FTC urges us to hold that reverse payment settlement agreements are presumptively unlawful and that courts reviewing such agreements should proceed via a "quick look" approach, rather than applying a "rule of reason." See California Dental, 526 U. S., at 775 n.12 ("Quick-look analysis in effect" shifts to "a defendant the burden to show empirical evidence of procompetitive effects."); Phillip E. Areeda &

[254] *Id.* at 770.

[255] *Id.* at 775–76 (explaining that even the circuit court, which accepted a quick look analysis, still discussed the procompetitive justifications of the restraint).

[256] *Id.* at 770

[257] *Id.* at 781 (emphasizing that the quick look analysis's application should "meet for the case," evaluating whether "the circumstances, details, and logic of restraint" along with the "experience of the market" have "been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look.").

[258] 570 U.S. 136, 158–59 (2013).

> Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 1508 (3d ed. 2010). We decline to do so . . .
>
> That is because the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification. The existence and degree of any anticompetitive consequence may also vary as among industries. These complexities lead us to conclude that the FTC must prove its case as in other rule-of-reason cases.[259]

The *Actavis* Court expressly considered the allocation of burdens in a fact-specific case where the effects of the challenged restraint may be complex. This approach would seem to bear on the future durability of the *Philadelphia National Bank* presumption of illegality against mergers with post-closing shares of thirty percent where the factual setting is often ambiguous, intensively contested, and nuanced.

Even in cases where *defendants* request a quick look analysis to raise a presumption of legality, the Supreme Court has preferred a substantive rule of reason analysis. In *Alston*, the NCAA (defendant) argued that its restriction on players' education-related benefits only warranted a "quick look" because precedent "expressly approved [the NCAA's] limits on student-athlete compensation" and thus "foreclose[d] any meaningful review of those limits today."[260] The Court rejected an abbreviated review of the NCAA's compensation restrictions and said the following about reviews of a challenged restraint in the "twinkling of an eye":

> Admittedly, the amount of work needed to conduct a fair assessment of these questions can vary. As the NCAA observes, this Court has suggested that sometimes we can determine the competitive effects of a challenged restraint in the "'twinkling of an eye.'"

[259] *Id.*

[260] Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 87, 91 (2021).

> Board of Regents, 468 U.S. at 110 n.39 (quoting Phillip Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37–38 (Fed. Jud. Ctr., June 1981)); American Needle, Inc. v. National Football League, 560 U.S. 183, 203 (2010). That is true, though, only for restraints at opposite ends of the competitive spectrum. For those sorts of restraints—rather than restraints in the great in-between—a quick look is sufficient for approval or condemnation.
>
> At one end of the spectrum, some restraints may be so obviously incapable of harming competition that they require little scrutiny. In Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986), for example, Judge Bork explained that the analysis could begin and end with the observation that the joint venture under review "command[ed] between 5.1 and 6% of the relevant market." Id. at 217. Usually, joint ventures enjoying such small market share are incapable of impairing competition. Should they reduce their output, "there would be no effect upon market price because firms making up the other 94% of the market would simply take over the abandoned business."261

Although *Rothery Storage* would not apply to the NCAA's market position, the *Alston* Court's endorsement of Judge Bork's observation that a firm with a six percent share of a market is "incapable of impairing competition" itself runs directly counter to some merger prohibitions in the 1960s that *presumed* such an impairment by post-merger shares within the range of six percent.[262] Alston's restriction of presumptions to the opposite ends of the competitive spectrum raises the question of whether a thirty percent merger would fall on the anticompetitive end of that spectrum.

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[261] *Id*. at 88–89.

[262] *See* United States v. Pabst Brewing Co., 384 U.S. 546, 550–53 (1966) (applying a presumption of illegality to combined shares of 4.5 percent) and United States v. Von's Grocery Co., 384 U.S. 270, 272–79 (1966) (blocking a merger between two grocery chains with a combined share of 7.5 percent because of concerns about increasing concentration).

With respect to that end of the spectrum, the *Alston* Court continued:

> At the other [anticompetitive] end [of the spectrum], some agreements among competitors so obviously threaten to reduce output and raise prices that they might be condemned as unlawful per se or rejected after only a quick look. Recognizing the inherent limits on a court's ability to master an entire industry —and aware that there are often hard-to-see efficiencies attendant to complex business arrangements—we take special care not to deploy these condemnatory tools until we have amassed "considerable experience with the type of restraint at issue" and "can predict with confidence that it would be invalidated in all or almost all instances." *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886–87 (2007); Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 975 (1986) (noting that it can take "economists years, sometimes decades, to understand why certain business practices work [and] determine whether they work because of increased efficiency or exclusion").[263]

The Court held that the NCAA's restraint falls on neither end of the spectrum and that "even if the NCAA is a joint venture, then, it is hardly of the sort that would warrant quick-look approval for all its myriad rules and restrictions."[264]

The Court has also rejected a presumption of market power in contexts where the facts may seem amenable to a uniform approach, such as when the defendant has a right to exclude as protected by patent law. In *Illinois Tool Works*, the Court declined to apply a quick look inquiry and rather required a full rule of reason analysis for tying arrangements involving patented products: "[T]ying arrangements involving patented products should be evaluated under the standards applied in

[263] *Alston*, 594 U.S. at 89.
[264] *Id*. at 90.

cases like . . . *Jefferson Parish*."[265] Any finding of illegality "must be supported by proof of power in the relevant market *rather than by a mere presumption thereof*."[266] Notably, the Court overturned the presumption of market power for patents, agreeing with "a vast majority of literature" as well as "Congress, the antitrust enforcement agencies, and most economists" that "a patent does not necessarily confer market power upon the patentee."[267]

E. The Rule of Reason as the Presumptive Mode of Analysis

The above review reflects a shift in preference by the Court for the rule of reason over either the per se rule or a quick look analysis that has developed since the era in which the "time capsule" cases were decided. Indeed, the Court has emphasized that the rule of reason is the presumptive standard of analysis cases under Section 1 of the Sherman Act.[268] As confirmed by the review above, the rule of reason

[265] Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 29 (2006).

[266] *Id*. at 43 (emphasis added).

[267] *Id*. at 44–45.

[268] Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006) ("Section 1 of the Sherman Act prohibits '[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.' 15 U. S. C. §1. This Court has not taken a literal approach to this language, however. *See, e.g*., *Khan*, 522 U. S. at 10 ("[T]his Court has long recognized that Congress intended to outlaw only unreasonable restraints" (emphasis added)). Instead, this Court presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful."); Bus. Electr. Corp. v. Sharp Electr. Corp., 485 U.S. 717, 726 (1988) ("Our approach to the question presented in the present case is guided by the premises of *GTE Sylvania* and *Monsanto*: that there is a presumption in favor of a rule-of-reason standard; that departure from that standard must be justified by demonstrable economic effect, such as the facilitation of cartelizing, rather than formalistic distinctions; that interbrand competition is the primary concern of the antitrust laws; and that rules in this area should be formulated with a view towards protecting the doctrine of *GTE Sylvania*"). *See also* Giordano v. Saks Incorp., 654 F. Supp. 3d 174, 196 (E.D.N.Y. 2023); Lumber Liquidators, Inc. v. Cabinets To

requires plaintiffs to meet the burden of demonstrating actual or likely anticompetitive effects, not by way of a presumption or on a prima facie basis, but through admissible evidence that includes the possible impact of supply responses.

The Court has also insisted upon an evidentiary showing of anticompetitive effects through the *entirety of the relevant market*, not only in one portion of a market or as to a subset of market participants. In *Ohio v. American Express Co.,* the Court applied the rule of reason analysis to a two-sided transactional market.[269] The Court first eliminated the application of the per se rule and proceeded to apply the rule of reason based on "a fact-specific assessment of market power and market structure to assess the restraint's actual effect on competition."[270] The Court emphasized the importance of economic analysis that accurately reflects "market realities" and noted, with respect to the application of the rule of reason, the need for "an accurate definition of the relevant market."[271] "Without a definition of the [relevant] market there is no way to measure the defendant's ability to lessen or destroy competition."[272]

Regarding the two-sided transactional market at issue there, the Court observed:

> Due to indirect network effects, two-sided platforms cannot raise prices on one side without risking a feedback loop of declining demand. And the fact that two-sided platforms charge one side a price that is below or above cost reflects differences in the two sides' demand elasticity, not market power or anticompetitive pricing. Price increases on one side of the platform likewise do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services.

Go, LLC, 415 F. Supp. 3d 703, 711 (E.D. Va. 2019); *In re* Blue Cross Blue Shield Antitrust Litig., 308 F. Supp. 3d 1241, 1258–59 (N.D. Ala. 2018).

[269] Ohio v. Am. Express Co., 585 U.S. 529, 530 (2018).

[270] *Id.* at 541 (internal quotation marks omitted).

[271] *Id.* at 542–43.

[272] *Id.* at 543 (quoting Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965)) (internal quotation marks omitted).

> Thus, courts must include both sides of the platform—merchants and cardholders—when defining the credit-card market.273

In addition to including both sides of the transactional platform in the relevant market, the Court also required that the competitive assessment account for effects on both sides of the platform.[274] Using this standard, the Court did not find that the antisteering provisions in question had given the defendant power to charge anticompetitive prices or restrict market-wide output. While there was evidence of raised prices on one side of the market, the Court did not find that increase to be dispositive evidence of an antitrust violation. The Court affirmed that it "will not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level."[275]

Importantly, given that the plaintiffs had not proven an anticompetitive effect *throughout the relevant market*, the burden of justification *never shifted* to American Express, and the Court affirmed the dismissal of the plaintiffs' case.[276]

The same preference for a full rule of reason analysis has developed under Section 3 of the Clayton Act. In *Tampa Electric Co. v. Nashville Coal Co.*, the Court held that, in order to determine whether a market foreclosure in an exclusive-dealing arrangement case is "substantial," courts must consider not only the quantitative aspect of the foreclosure,

[273] *Id.* at 544 (emphasis added).

[274] *Id.* at 547 ("Accordingly, we will analyze the two-sided market for credit-card transactions as a whole to determine whether the plaintiffs have shown that Amex's antisteering provisions have anticompetitive effects.").

[275] *Id.* at 549 (the Court found that there was no evidence that output was restricted, but rather, the opposite: "The output of credit-card transactions grew dramatically from 2008 to 2013, increasing 30%. 'Where . . . output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand.'") (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 237 (1993)).

[276] *Id* at 552 ("In sum, the plaintiffs have not satisfied the first step of the rule of reason. They have not carried their burden of proving that Amex's antisteering provisions have anticompetitive effects.").

but also the *qualitative* conditions of the particular market.[277] Over time, the standard that courts apply to Section 3 cases has become indistinguishable from the standard applied to cases under Section 1 of the Sherman Act.[278] For example, the Third Circuit has held that the "standard for Clayton Act Section 3 claims differs very marginally, if at all, from the fact-intensive rule-of-reason analysis that applies to [cases] under Section 1 of the Sherman Act."[279]

Other courts, and the DOJ, have also observed that the standards for liability under cases invoking Section 3 of the Clayton Act and Section 1 of the Sherman Act are now the same. [280] That interchangeably has evolved notwithstanding

[277] Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 329 (1961) (courts should look at "the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which preemption of that share of the market might have on effective competition therein.").

[278] Sheridan v. Marathon Petrol. Co., 530 F.3d 590, 592 (7th Cir. 2008) ("Though some old cases say otherwise, the standards for adjudicating tying under [the Sherman Act and the Clayton Act] are now recognized to be the same.").

[279] ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 327 n.26 (3d Cir. 2012). *See also* First Sales, LLC v. Water Right, Inc., No. 1:18-CV-22-WCL-PRC, 2018 WL 4611028, at *2 (N.D. Ind. 2018) ("With no party arguing for a different determination on this issue, the Court assumes for the purpose of ruling on the present motion that the standards for [the Clayton Act and Sherman Act] claims are identical"); *In re* EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig., No. 17-MD-2785-DDC-TJJ, 2017 WL 6524839, at *8 n.4 (D. Kan. Dec. 21, 2017) ("Although *Tampa Electric* involved a Clayton Act claim, courts also apply its analysis to exclusive dealing claims asserted under the Sherman Act."); McCoy v. Gamesa Tech. Corp., Inc., No. 11 C 592, 2013 WL 2636365, at *9 (N.D. Ill. 2013) ("The standards for adjudicating a tying violation under Section 1 of the Sherman Act and Section 3 of the Clayton Act are the same.").

[280] *See, e.g.*, Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp., 592 F.3d 991, 996 (9th Cir. 2010) ("Under the antitrust rule of reason, an exclusive dealing arrangement violates Section 1 only if its effect is to foreclose competition in a substantial share of the line of commerce affected") (internal quotation marks omitted) (citation omitted). *See also* Jefferson Par. Hosp. Dist. No. 2 v. Hyde ,466 U.S. 2, 44–45 (1984) (O'Connor, J. concurring) ("Exclusive-dealing arrangements are independently subject to scrutiny under § 1 of the Sherman Act, and are also analyzed under the

that Section 3 of the Clayton Act, like Section 7 of the Act, prescribes liability upon a finding that the relevant practice "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."[281] As described above, "competition" since the 1960s has come to be understood dynamically and in the context of a factual assessment of supply and demand dynamics that cannot be inferred solely from market shares or concentration in the range of those that supported liability under Section 7 in the 1960s Supreme Court cases.

The question is thus posed as to whether the Supreme Court, in light of developments under the Sherman Act and Section 3 of the Clayton Act reviewed above, would affirm the *Philadelphia National Bank* presumption of illegality based solely upon a post-merger market share of thirty percent *without regard to possible supply responses and in a submarket defined by practical indicia apart from reasonable interchangeability of demand or supply*. Put differently, would the Supreme Court today relieve merger plaintiffs of the obligation to prove likely *market power or an anticompetitive effect* of a transaction in a relevant market defined by interchangeability of demand and supply before shifting the burden to defendants to rebut a presumption of illegality based only upon market share or concentration?

V. CONCLUSION

Our discussion of the legislative history of Section 7 of the Clayton Act; the amendment of the Expediting Act; the enactment of the HSR Act; and developments under the Sherman Act and Section 3 of the Clayton Act regarding market definition, market power, and a growing preference

rule of reason.") (citing *Tampa Elec. Co.*, 365 U.S. at 333–35); U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INT'L ENFORCEMENT & COOPERATION 7 (2017) ("In evaluating transactions, courts use the same analysis employed in the evaluation of tying under Section 1 of the Sherman Act to assess a defendant's liability under Section 3 of the Clayton Act.") (citing *Sheridan*, 530 F.3d at 592).

[281] 15 U.S.C. § 14.

for the rule of reason pose the question for the 2024 William Howard Taft Lecture: Law in a Time Capsule: Should the 1960s Merger Cases Be Affirmed?