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MERGER LAW IS NOT—AND SHOULD NOT BE—IN A TIME CAPSULE

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I. INTRODUCTION

The topic of the 2024 Taft Antitrust Lecture is particularly fitting because 2025 is the 50th anniversary of the Supreme Court's last decision on the merits in a Section 7 case brought by the Government.[1] It is therefore an appropriate time to look back and consider whether—or better yet, to what extent—various aspects of seminal merger decisions from the Supreme Court in the 1960s do—or should—survive today, especially in

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[1] United States v. Citizens & S. Nat'l Bank, 422 U.S. 86 (1975).

light of (1) the evolution of Sherman Act jurisprudence over the intervening decades, and (2) the economic insights of the Chicago School and Post-Chicago School. The topic is also fitting because the 2023 Merger Guidelines rely heavily on Supreme Court cases from the 1960s, with the not-so-implicit message that the 1960s merger cases have not been explicitly overruled, so they are still binding precedent, and we are therefore bound to follow them.

However, that message oversimplifies the situation. First, several ideas from the 1960s cases have already been abandoned, even by the Supreme Court itself. Subsequent Supreme Court decisions, some of which interpret the Sherman Act, clearly indicate that those ideas would not be embraced if they were presented to the Court today.

A notable exception is the structural presumption established in the Supreme Court's 1963 decision in *Philadelphia National Bank*,[2] which continues to play a central role in merger litigation. Although the economic rationale for the structural presumption has legitimately been questioned, there are good reasons to doubt that the Supreme Court would abandon the structural presumption today, notwithstanding the evolution in Sherman Act jurisprudence toward a more nuanced focus on market power and injury to market-wide competition. For reasons I will explain, I believe that the *Philadelphia National Bank* presumption should be affirmed in some form.

Another notable exception is the Supreme Court's rejection of an efficiencies defense in cases like *Procter & Gamble*.[3] Lower courts have struggled for decades to address the critical question of whether and how efficiencies might justify a merger. While there are good reasons to suspect the Court might overturn *Procter & Gamble* if given the chance, it remains unclear in which way the Court would rule. Of course, few would doubt that mergers can have procompetitive efficiencies, so the Supreme Court should take the opportunity to clarify how efficiencies can play a role in merger litigation,

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

[3] Fed. Trade Comm'n v. Proctor & Gamble Co. 386 U.S. 568 (1967).

whether as a defense or as evidence to rebut a prima facie case.

What is clear is that the 1960s merger cases have not been—and cannot and should not be—viewed as locked in a time capsule.

II. Some 1960s Ideas Have Correctly Been Abandoned

I will start with a number of once-prominent ideas from the 1960s merger cases that have correctly been abandoned in contemporary merger enforcement. These now-abandoned ideas were products of a post-war economic boom when concerns about growing market concentration were fueled by the expansion of national firms that grew, in part, by acquiring beloved local mom-and-pop stores. Against this backdrop, the Supreme Court's 1960s merger decisions were shaped by two forces: (1) an express desire to protect small businesses from the perceived threat of more efficient, larger competitors; and (2) academic views that are no longer embraced by mainstream economists.

A. Protection of Small Businesses for Their Own Sake.

One such "abandoned idea" is that small businesses intrinsically deserve protection. A central tenet when evaluating a potential merger in the 1960s was that small businesses needed to be protected. For example, the Supreme Court's opinion in *Brown Shoe* used effusive language about protecting small businesses, which is now largely forgotten or ignored. The Supreme Court wrote that "we cannot fail to recognize Congress'[s] desire to promote competition through the protection of viable, small, locally owned business."[4] A year later, in *Philadelphia National Bank*, the Court was particularly concerned that the merger of two banks may result in small business borrowers having "greater difficulty

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

in obtaining credit," which would disadvantage them when competing with larger businesses.[5] Then, in 1966, the Court in *Von's Grocery* specifically highlighted that the "number of small grocery companies in the Los Angeles retail grocery market had been declining rapidly before the merger and continued to decline rapidly afterwards."[6] The Court identified the culprit as "a large number of significant absorptions of the small companies by the larger ones."[7]

By the time of *Brunswick* in 1977, however, the Supreme Court shifted away from examining whether small businesses needed protection and focused instead on protecting against injuries flowing from an unlawful reduction in competition, even if a merger had negative effects on smaller competitors.[8] *Cargill*, decided in 1986, was even clearer on this point, explaining that "the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition . . . . [C]ompetition for increased market share[] is not activity forbidden by the antitrust laws. It is simply . . . vigorous competition."[9] This sentiment was echoed in *Brooke Group* in 1993, when the Court declared that even though "below-cost pricing may impose painful losses" on its victim, such behavior was "of no moment" if "competition is not injured."[10]

These cases were an important development, and few today would suggest that the U.S. antitrust laws should be applied in a way that protects small businesses purely for their own sake. If given the opportunity, the Supreme Court should clarify that the protection of small businesses ought not play a role in deciding whether a merger violates Section 7.

[5] *Philadelphia Nat'l Bank*, 374 U.S. at 369–70.

[6] United States v. Von's Grocery Co., 384 U.S. 270, 277 (1966).

[7] *Id.*

[8] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487 (1977).

[9] Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 116 (1986).

[10] Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993).

B. Hostility to Concentration Generally.

This shift away from the concern about small businesses for their own sake leads to the second idea from the 1960s cases that seems to have been largely or completely abandoned, which is the idea that transactions resulting in almost any degree of concentration towards larger enterprises ought to be viewed as inherently suspect or necessarily unlawful. This hostility to concentration is also reflected in language in the 1960s merger cases expressing concern about "trends toward concentration" more generally and in the very low thresholds set out in the 1968 Merger Guidelines.[11]

The Supreme Court's opinion in *Brown Shoe* clearly suggests an opposition to concentration in and of itself. Before launching into its analysis, the Court's recapping of the Clayton Act's legislative history includes a characterization of the 1950 Celler-Kefauver amendments as reflecting "a fear of what was considered to be a *rising tide of economic concentration* in the American economy."[12] In opining on the vertical aspects of the merger, the Court took into account the "trend toward vertical integration" as it was "against this background of continuing concentration that the present merger must be viewed."[13] Turning to the horizontal aspects of the merger, the Court similarly considered the "history of tendency toward concentration in the industry" and stated that the Court could not avoid Congress's mandate that "tendencies toward concentration are to be curbed in their incipiency, particularly when those tendencies are being accelerated through giant steps striding across a hundred

[11] *See* United States v. Phila. Nat'l. Bank, 374 U.S. 321, 369–70 (1962) (blocking a bank merger because it could disadvantage small businesses' funding access and lead to greater business concentration generally); DEP'T OF JUST. ANTITRUST DIV., 1968 MERGER GUIDELINES (1968), https://www.justice.gov/archives/atr/1968-merger-guidelines **[https://perma.cc/M84A-ARTC]**

[12] Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962) (emphasis added).

[13] *Id.* at 332–33.

cities at a time."[14] The next year, in *Philadelphia National Bank*, the Court reiterated this concern and declared that "[a] fundamental purpose of amending s[ection] 7 was to *arrest the trend toward concentration*, the tendency to monopoly, before the consumer's alternatives disappeared through merger."[15]

A few years later, in *Von's Grocery*, the Supreme Court recited yet again that the purpose of the Sherman Act, Clayton Act, and Celler-Kefauver Act was to "*prevent economic concentration* in the American economy by keeping a large number of small competitors in business."[16] The Supreme Court took up this charge, recognizing that "Congress feared that a market marked at the same time by both a continuous decline in the number of small businesses and a large number of mergers would slowly but inevitably gravitate from a market of many small competitors to one dominated by one or a few giants. . . ."[17]

Underlying each of these cases is the structure-conduct-performance paradigm coming out of the Harvard School. That paradigm linked market structure to market performance, the idea being that the more concentrated a given market is, the more likely it is that market power would be exercised. Indeed, this idea was enshrined in the 1968 Merger Guidelines, which stated that "[t]he Department applies an additional, stricter standard in determining whether to challenge mergers occurring in any market, not wholly unconcentrated, in which there is a significant trend toward increased concentration."[18]

Yet, this opposition to concentration in and of itself has not endured. Subsequent Supreme Court cases such as *General Dynamics*[19] in 1974, *Brunswick* in 1977, and *Cargill* in 1986 rebuffed this idea. The Court in *General Dynamics* was

[14] *Id.* at 345–46.

[15] *Phila. Nat'l Bank*, 374 U.S. at 367 (emphasis added).

[16] United States v. Von's Grocery Co., 384 U.S. 270, 275 (1966) (emphasis added).

[17] *Id.* at 278.

[18] U.S. DEP'T OF JUSTICE, 1968 MERGER GUIDELINES §7 (1968).

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

explicit in its rejection of standalone concerns about market concentration, noting that:

> While the statistical showing proffered by the Government . . . [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 affecting the coal industry and the business of the appellees mandated a conclusion that no substantial lessening of competition occurred or was threatened by the acquisition . . . .[20]

In *Brunswick*, the Court declared that plaintiffs must "prove more than injury causally linked to an illegal presence in the market." Instead, the Court held that the "[p]laintiffs [were required to] 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."[21] And in *Cargill*, the Court declared that "to hold that the antitrust laws protect competitors from the loss of profits due to [ ] price competition" resulting from a merger "would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for [i]t is in the interest of competition to permit dominant firms to engage in vigorous competition."[22] *General Dynamics* and *Cargill* thus both relegated claims related to increasing concentration to the background and instead focused on whether there was a tenable relationship between the merger and any resulting antitrust injury.

General Dynamics foreshadowed, and arguably laid the groundwork for, the subsequent development of cases in the lower courts that clearly rejected the idea that all forms of concentration are inherently problematic. Instead, it recognized that it is the potential for an increase in

[20] *Id.* at 497–98.

[21] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

[22] *Cargill*, 479 U.S. at 116.

concentration to result in harm to competition that raises concerns that should be addressed by antitrust laws. In light of *General Dynamics* and *Cargill*, the Supreme Court would not—and should not—return to the 1960s approach of opposing concentration for its own sake. Those aspects of *Brown Shoe*, *Philadelphia National Bank*, and *Von's Grocery* that opposed concentration in and of itself are unlikely to—and should not—be affirmed today.

C. No Requirement to Define a Market.

Finally, one more idea from the 1960s that appears to have been abandoned is that a plaintiff in a Section 7 case does not need to define a relevant market. Cases such as *Pabst*[23] cast doubt on the idea that a plaintiff must be required to define the relevant product and geographic market. Subsequent cases from the 1970s—like *Marine Bancorporation*[24]—make clear that a plaintiff must do so to prevail.

In *Pabst*, the District Court dismissed a Section 7 case on the ground that the government had failed to prove a relevant geographic market.[25] In reversing the District Court, the Supreme Court flatly rejected the notion that "in order to show a violation of Section 7, it was essential for the Government to show a 'relevant geographic market'"[26] The Court elaborated that the language in Section 7 requiring proof of an effect "in any section of the country" "does not call for the delineation of a 'section of the country' by metes and bounds as a surveyor would lay off a plot of ground."[27] And the Court unambiguously declared that "[c]ertainly, the failure of the Government to prove by an army of expert witnesses what constitutes a relevant 'economic' or 'geographic' market is not an adequate ground on which to dismiss a Section 7 case."[28]

[23] United States v. Pabst Brewing Co., 384 U.S. 546 (1966).

[24] United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974).

[25] *Pabst Brewing Co.*, 384 U.S. at 548.

[26] *Id.* at 549.

[27] *Id.*

[28] *Id.*.

Contrast this with the Supreme Court's equally unambiguous statement eight years later in *Marine Bancorp* that "[d]etermination of the relevant product and geographic markets is 'a necessary predicate' to deciding whether a merger contravenes the Clayton Act."[29] Notably, the District Court in that case did make a finding that

> the relevant geographic market [was] the Spokane metropolitan area, "consisting of the City of Spokane and the populated areas immediately adjacent thereto, including the area extending easterly through the suburb of Opportunity toward the Idaho border. . . ." This area extends approximately five miles to the west and south and 10 miles to the north and east of the center of the city.[30]

Although not quite "metes and bounds,"[31] *Marine Bancorp*'s market definition was impressively precise. Market definition properly continues to be a key element in Section 7 cases to this day, and the language in *Pabst* suggesting otherwise has been abandoned.

These three abandoned ideas demonstrate an important point: one cannot reflexively rely on those 1960s merger cases as precedent just because they have not been explicitly overruled. In light of subsequent Supreme Court cases, protecting small businesses for their own sake, hostility to concentration generally, and rejection of a market definition requirement have all given way to a more nuanced approach that focuses on harms flowing from a reduction in competition, recognizes that increases in concentration are not inherently problematic, and emphasizes a need for rigor in identifying through market definition where competition may be harmed.

III. AN IDEA THAT HAS ENDURED: THE STRUCTURAL PRESUMPTION

[29] *Marine Bancorporation, Inc.*, 418 U.S at 618.

[30] *Id.*

[31] *Cf.* United States v. Pabst Brewing Co., 384 U.S. 546, 549 (1966).

All of that being said, the presumption of illegality set forth in 1963 when the Court decided *Philadelphia National Bank* has survived. The Court declared:

> a merger which produces a firm controlling an undue percentage share of the relevant market and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing the merger is not likely to have such anticompetitive effects.[32]

The Court then continued "[w]ithout attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat."[33] *Philadelphia National Bank* also emphasized that, in addition to surpassing the thirty percent "undue percentage" threshold, the transaction would result in an *increase* in concentration, with the two largest banks controlling forty-four percent of the area's commercial banking before the merger, which would increase to fifty-nine percent after the merger.[34] The Court stated that "[p]lainly, we think, this increase of more than 33% in concentration must be regarded as significant."[35]

An enormous amount has already been written about *Philadelphia National Bank*'s structural presumption, whether it reflects good economics or bad economics, and whether it is right or wrong from a policy perspective.[36] But there is no doubt that, unlike several ideas from the 1960s that have been abandoned, the structural presumption has endured. It has been embraced by the lower courts, including *Baker Hughes*, which cited *Philadelphia National Bank* and embedded the concept of the presumption into the prima facie

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

[33] *Id.* at 364.

[34] *Id.* at 36.

[35] *Id.*

[36] *See, e.g.*, Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996 (2018); Peter C. Carstensen, *The Philadelphia National Bank Presumption: Merger Analysis in an Unpredictable World*, 80 ANTITRUST L.J. 219 (2015).

case by using the well-established burden-shifting framework.[37] Lower courts continue to cite *Philadelphia National Bank* and routinely rely on the presumption-based burden shifting framework. Last month, Judge Rochon invoked *Philadelphia National Bank*'s structural presumption in her widely publicized preliminary injunction of Tapestry's acquisition of Capri.[38] And just last week, the District Court in the FTC's challenge to the Kroger/Albertson's merger cited and quoted *Philadelphia National Bank* after noting that the 2023 Merger Guidelines "presume that a merger substantially lessens competition if the merged firm has a market share greater than thirty percent and involved an increase in HHI greater than 100."[39] Those are just two very recent examples.

Why has the structural presumption endured? There are several reasons that can be traced back to the underlying rationales for the presumption.

The Court's first rationale was based on the challenge Section 7 creates by requiring courts to predict the future impacts of mergers. The *Philadelphia National Bank* Court explained that "[c]learly, this is not the kind of question which is susceptible to a ready and precise answer in most cases. . . . Such a prediction is sound only if it is based upon a firm understanding of the structure of the relevant market; *yet the relevant economic data are both complex and elusive*."[40] Notably, the Court cited a 1960 *Harvard Law Review* article by Derek Bok for that proposition.

Second, the Court emphasized the practical implications of a structural presumption for businesses, explaining that

[37] *See* United States v. Baker Hughes Inc., 908 F.2d 981, 983 (D.C. Cir. 1990); *see also* United States v. AT&T Inc., 310 F. Supp. 3d 161, 190 (D.D.C. 2018); Fed. Trade Comm'n v. IQVIA Holdings Inc., 710 F. Supp. 3d 329, 378 (S.D.N.Y. 2024)

[38] Fed. Trade Comm'n v. Tapestry, Inc., 2024 WL 4647809, at *38 (S.D.N.Y. Nov. 1, 2024).

[39] Fed. Trade Comm'n v. Kroger Co., No. 3:24-CV-00347-AN, 2024 WL 5053016 (D. Or. Dec. 10, 2024).

[40] United States v. Phila. Nat'l. Bank, 374 U.S. 321, 362 (1962) (emphasis added) (citing Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV.L.REV. 226 (1960)).

"unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded."[41] This rationale may resonate with many practitioners today who find the presumption helpful to evaluate a potential merger, predict likely outcomes, and explain those potential outcomes to their clients. At the outset of a deal, and usually with a tight timeline, clients require a preliminary assessment of the risks associated with a potential merger. The existence of a well-established presumption can help practitioners quickly and confidently identify whether a transaction will attract scrutiny.

Third, the Court warned of the risks of "subverting congressional intent by permitting a too-broad economic investigation" and explained that when it is possible to "simplify a test of illegality" without "doing violence" to congressional intent, "courts ought to do so in the interest of sound and practical judicial administration."[42] This rationale undoubtedly resonates with judges, most of whom are not antitrust specialists.

Finally, and perhaps most controversially, the Court stated that the presumption was "fully consonant with economic theory,"[43] again citing Derek Bok, as well as Donald Turner and George Stigler. The Court noted that it was "common ground among most economists" that competition "is likely to be greatest when there are many sellers, none of which has any significant market share."[44]

Of these four stated rationales for the structural presumption, the first three may explain why the *Philadelphia National Bank* presumption has endured for so long, even though the fourth (the economic rationale) has been subject to real criticism. These are largely the same rationales

[41] *Id.*

[42] *Id.*

[43] *Id.* at 363 (citing CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS (1959); George Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176, 182 (1955); Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV.L.REV. 226, 308–16, 328 (1960)).

[44] *Id.* at 363.

Judge Posner mentioned when he was interviewed about *Philadelphia National Bank* on the occasion of its fiftieth anniversary. Judge Posner revealed that he drafted the *Philadelphia National Bank* opinion when he was a law clerk to Justice Brennan in 1963, and he was unsure whether Justice Brennan ever even read the draft.[45] In describing the genesis of the opinion, Judge Posner explained that, in the fall of 1960, when he was a member of the *Harvard Law Review*, he was assigned to cite-check a portion of Derek Bok's article, entitled *Section 7 of the Clayton Act and the Merging of Law and Economics*.[46] Judge Posner explained that when he was clerking, Bok's article had stuck in his mind:

> [W]hen I was assigned the *Philadelphia Bank* opinion, I reread [Bok's] article. What particularly struck me was his emphasis on the need to have simple rules for determining the legality of a challenged merger, or at least a simple standard of presumptive illegality, and that made a lot of sense to me . . . . The innovation of the *Philadelphia Bank* opinion was to have a simple standard, one of presumptive illegality plus a short list of possible rebuttal points that the defendant would be allowed to make. I owed the approach to Bok.[47]

When asked whether the presumption should continue to play a role in merger enforcement, Judge Posner forthrightly acknowledged criticism of the presumption as bad economics. But then Judge Posner said:

> [W]e do have to have some relatively simple presumption. Otherwise what are the courts to do? The judges are not well equipped to deal with complex economic and statistical issues, and I'm skeptical about expert witnesses except those appointed by the judge. . . . I don't think turning an antitrust case into

[45] *See* Richard Posner & C. Scott Hemphill, *Philadelphia National Bank at 50: An Interview with Judge Richard Posner*, 80 ANTITRUST L.J. 205, 206 (2015).

[46] **Derek C. Bok,** *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 **HARV. L. REV.** 226 (1960).

[47] Posner & Hemphill, *supra* note 45, at 206.

> a graduate economic seminar is feasible. I think we'll have to continue to rely, to a considerable extent, on structural factors. I don't mean that the short discussion of presumptive illegality in the *Philadelphia Bank* opinion is adequate. We have learned things in 50 years, and in the academic writing I've done on antitrust I've suggested a number of factors that one ought to consider besides market shares. But I think they should continue to play a big role.[48]

It is truly remarkable to have a law clerk to a former Supreme Court Justice on the record explaining the genesis of a decision as foundational as *Philadelphia National Bank*, much less a law clerk who went on to become a central figure in the Chicago School and a renowned federal judge. His remarks also provide some insight into the question whether the *Philadelphia National Bank* presumption would be affirmed if the question were presented to the Supreme Court today.

The *Philadelphia National Bank* presumption likely would—and should—be affirmed in some form, for three reasons.

First, three of the rationales provided in the opinion itself are still valid today. The first is practicality. The presumption has the potential to improve predictability and reduce uncertainty for businesses (and their lawyers) when assessing potential transactions, streamline the government's case by "lighten[ing] the initial burden of proving illegality,"[49] and improve judicial administration by providing a simplified test of illegality. Even Justice Harlan noted in his *Philadelphia National Bank* dissent that the judiciary can use this "simple yardstick in order to alleviate the agony of analyzing economic data."[50]

Second, the structural presumption has become the cornerstone of the government's prima facie case. It is the starting point of the burden-shifting framework articulated in

[48] *Id.* at 207.

[49] *See Phil. Nat'l Bank*, 374 U.S. at 363

[50] *Id.* at 373 n.27 (Harlan, J., dissenting).

Baker Hughes, which has been embraced by many district courts and courts of appeals over the years. The Supreme Court should reasonably view the lower courts' extensive experience with the presumption and the *Baker Hughes* framework as an important datapoint in evaluating whether the presumption should survive. Notably, there are a number of other structural presumptions upon which courts often rely, including the inference of market power and monopoly power from market share.[51]

Third—and this bears separate emphasis—the presumption is rebuttable, and courts do often find that the presumption has been rebutted. The Supreme Court's 1974 decision in *General Dynamics* can be read as the first case where the presumption was rebutted.[52] But there have been many more examples, as the D.C. Circuit's decision in *Baker Hughes* noted:

> In the wake of *General Dynamics*, the Supreme Court and lower courts have found Section 7 defendants to have successfully rebutted the government's prima facie case by presenting evidence on a variety of factors. . . . Indeed, that a variety of factors can rebut a prima facie case has become hornbook law.[53]

The Supreme Court should find this to be compelling evidence that *Philadelphia National Bank*'s rebuttable presumption provides a workable standard that generalist judges can apply in a flexible and practical way.

But what about the Court's economic rationale for the structural presumption? It has been heavily criticized by commentators, including Judge Douglas Ginsburg and Joshua Wright, who wrote:

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[51] *See, e.g.*, United States v. Google LLC, No. 1:23-cv-00108 (E.D. Va. Jan. 24, 2023); United States v. Alcoa, 148 F.2d 416 (2d Cir. 1945).

[52] *See* United States v. Gen. Dynamics Corp., 415 U.S. 486, 510 (1974) ("By determining that the amount and availability of usable reserves, and not the past annual production figures relied on by the government, were the proper indicators of future ability to compete, the District Court wholly rejected the Government's prima facie case.").

[53] United States v. Baker Hughes, Inc., 908 F.2d 981, 985 (D.C. Cir. 1990).

> The problem for today's courts in applying this semicentenary standard is that the field of industrial organization has long since moved beyond the structural presumption upon which the standard is based. The point is not that 30 percent is an outdated threshold above which to presume adverse effects upon competition; rather, it is that market structure is an inappropriate starting point for the analysis of likely competitive effects. Market structure and competitive effects are not systematically correlated.[54]

Of course, concentration in and of itself is not inherently bad, and concentrated markets can sometimes be the result of superior performance.[55]

Ginsburg & Wright's position is certainly a valid criticism of the structural presumption. A too-rigid focus on market structure rather than actual competitive effects would be problematic and would risk deterring potentially beneficial transactions. It is also true that the Supreme Court's Sherman Act jurisprudence in the decades since the 1960s has moved away from a rigid emphasis on market structure towards an increased focus on market power and actual competitive effects. Indeed, in *Jefferson Parish*, the Supreme Court expressly agreed that East Jefferson Hospital's thirty percent market share "alone was insufficient to infer market power," and then proceeded to modify (or, some might say, eliminate) the rigid *per se* rule against tying.[56]

But what do post-1960s developments in Sherman Act jurisprudence really tell us about whether the Supreme Court should affirm *Philadelphia National Bank*'s structural presumption? They may not tell us much. While it is certainly true that a number of cases since the 1960s have refined or narrowed the application of the *per se* rule, and that evolution has been informed by a focus on more careful economic

[54] Douglas H. Ginsburg & Joshua D. Wright, *Philadelphia National Bank: Bad Economics, Bad Law, Good Riddance*, 80 ANTITRUST L.J. 377, 380 (2015).

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

[56] Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 27 (1984).

analysis of the actual competitive effects of restraints, the Supreme Court has not abandoned the *per se* rule altogether, despite having many opportunities to do so.

In *Texaco v. Dagher*, for example, the Court confirmed that *per se* liability is still appropriate for "those agreements that are 'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'"[57] In *Ohio v. American Express Co*., the Court reiterated the basis for the per se rule: "A small group of restraints are unreasonable per se because 'they always or almost always tend to restrict competition and decrease output.'"[58] A more recent example is the Court's opinion in *NCAA v. Alston*, which again confirmed that "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."[59] Thus while the application of the *per se* rule to certain types of restraints has been refined and narrowed, the core *per se* rule itself is not going anywhere. The evolution of the *per se* rule does not necessarily suggest that the Supreme Court would overrule or abandon *Philadelphia National Bank*'s structural presumption.

And there is a fundamental difference between the tasks imposed on courts by the Sherman Act and by Section 7 of the Clayton Act that suggests that we cannot automatically assume that all cases interpreting the former can reliably inform the interpretation of the latter.

For example, under Section 1 of the Sherman Act, courts are asked to determine whether a particular type of restraint is unreasonable or whether certain business practices are exclusionary.[60] The result can be a decision that impacts not only the litigants in that particular case, but that can have far-reaching impacts and determine future business practices throughout the economy for years to come. The Supreme

[57] Texaco Inc. v. Dagher , 547 U.S. 1, 5 (2006) (quoting Nat'l Soc. of Pro. Eng'rs v. United States, 435 U. S. 679, 692 (1978)).

[58] Ohio v Am. Express Co., 585 U.S. 529, 540 (2018).

[59] Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 89 (2021).

[60] Standard Oil Co. v. United States, 221 U.S. 1 (1911); Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

Court's decision in *Broadcast Music, Inc. v. CBS, Inc.*,[61] which held that the blanket licenses for public performance of musical works issued by BMI and ASCAP were not per se unlawful price fixing, is just one example—that decision impacted not only that subset of the music industry, but has guided the development of joint ventures and other competitor collaborations across the economy ever since.

But merger cases under Section 7 of the Clayton Act are different. Courts are asked to predict whether the effect of a particular transaction "may be substantially to lessen competition in any line of commerce in any section of the country,"[62] and they must ordinarily do so on an expedited schedule and under extreme time pressure. Moreover, the decisions are usually fact- and industry-specific, and the market participants and industries can evolve so quickly that the ultimate conclusion whether a particular merger may violate Section 7 may have less of a lasting impact on future mergers, whether in the same industry or outside of it. The District Court in the Spirit/JetBlue case recently recognized this in denying the Government's request to issue a broad injunction that would prevent not only the proposed merger, "but also any future merger of the two companies."[63] Judge Young rejected the Government's proposal, because

> to rule in such a way . . . would be to prospectively interfere with the free market with unknown and perhaps harmful effects. Indeed, the Defendant Airlines and others in the market, in the context of the unique and dynamic market forces of the airline industry may decide to take another run at a merger at any time.[64]

The upshot is that the exigencies and immediate consequences of merger litigation differentiate it from typical Sherman Act cases that can last for decades and have far-

[61] 441 U.S. 1 (1979).

[62] United States v. Phila. Nat'l. Bank, 374 U.S. 321, 362 (1962).

[63] United States v. JetBlue Airways Corp., 712 F. Supp. 3d 109, 163 (2024).

[64] *Id.* at 163–64.

reaching implications for a broad range of business practices. As a result, a rebuttable structural presumption that provides a workable (even if imperfect) framework for analyzing mergers can be beneficial for businesses, litigants, the courts, and the economy as a whole. Sherman Act cases narrowing the *per se* rule in favor of a more searching economic analysis under the Rule of Reason therefore may not foreshadow what the Supreme Court would do if asked to reconsider the *Philadelphia National Bank* presumption. The Supreme Court may very well conclude that, to paraphrase Judge Posner, turning every merger case "into a graduate economic seminar" simply is not feasible.[65]

If the Supreme Court does reconsider the *Philadelphia National Bank* presumption, it should also take the opportunity to refine it in light of subsequent experience. It might consider, for example, relaxing the somewhat arbitrary thirty percent threshold. It might also consider requiring the Government to show, as part of its prima facie case, that current market shares are likely to be durable, taking into account potential supply-side responses by competitors to price changes, because such a showing would require information that the merging parties may have difficulty in obtaining from their competitors if they bear the burden.

IV. An Open Question: Efficiencies

While some concepts from the 1960s merger cases have been clearly rejected or abandoned, and while the *Philadelphia National Bank* structural presumption has withstood the test of time, there are other aspects from the 1960s cases that remain open questions. One of the most important open questions is the role of efficiencies. This is particularly problematic because the lower courts and the enforcement agencies have largely ignored the more strident language from the 1960s merger cases, creating unnecessary uncertainty in merger law and litigation that the Supreme Court should address.

[65] Posner & Hemphill, *supra* note 45, at 207.

The Supreme Court's 1960s position on efficiencies is clear. In *Procter & Gamble*, the Supreme Court declared explicitly that "[p]ossible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."[66]

But lower courts have not all agreed. In *Heinz*, the D.C. Circuit acknowledged this, explaining that "[a]lthough the Supreme Court has not sanctioned the use of efficiencies as a defense in a section 7 case, the trend among lower courts is to recognize the defense."[67] Ultimately, the D.C. Circuit in *Heinz* dodged the question, as many courts have, explaining that in any event, the high market concentration levels presented by that merger would have "require[d], in rebuttal, proof of extraordinary efficiencies, which the [defendants] failed to provide."[68]

The D.C. Circuit's most extensive discussion of efficiencies came in 2017, in its decision regarding the proposed merger of Anthem and Cigna. The majority opinion, authored by Judge Rogers, observed that a number of courts have recognized that efficiencies may be offered as evidence to rebut a prima facie

[66] Fed. Trade Comm'n v. Procter & Gamble Co., 386 U.S. 568, 580 (1967). Similarly, in *Philadelphia National Bank,* the Supreme Court flatly rejected the defendants' argument that Philadelphia "needed a larger bank than it now has in order to bring business to the area and stimulate its economic development." In a now-famous phrase, the Court said "[w]e are clear, however, that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence." *Phila. Nat'l Bank*, 374 U.S. at 371.

[67] Fed. Trade Comm'n v. H.J. Heinz Co., 246 F.3d 708, 720 (Fed. Cir. 2001).

[68] *Id.* In a footnote, the court acknowledged the Supreme Court's clear language in *Procter & Gamble*, but said "the issue is not . . . a closed book" and quoted Areeda and Turner for the proposition that the Supreme Court's "brief and unelaborated language . . . cannot reasonably be taken as a definitive disposition of so important and complex an issue as the role of economies in analyzing legality of a merger." *Id.* at 720 n.18 (quoting PHILLIP AREEDA & DONALD TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 154 (1980)).

case but noted that such approach "is not invariably the same" as recognizing an efficiencies defense to Section 7 illegality.[69]

In a long and forceful dissent, then-Judge Kavanaugh, argued that the Supreme Court's "landmark decisions" in the 1970s, including *General Dynamics* and *Sylvania*[70]—a Sherman Act case—embraced a "modern" approach to antitrust analysis that "focuses on the effects on the consumers of products, not the effects on competitors" and thereby "shifted away from the strict anti-merger approach" that the Court has employed in the 1960s cases, including in *Philadelphia National Bank*.[71] Judge Kavanaugh asserted that the court was "bound by the modern approach taken by the Supreme Court" and therefore "must take account of the efficiencies and consumer benefits that would result from this merger."[72] Judge Rogers responded at length in the majority opinion, dismissing Judge Kavanaugh's "wishful assertion that *Procter & Gamble* can be disregarded" simply because it preceded the "modern approach" adopted in *General Dynamics* and *Sylvania*.[73]

Despite all the "*Sturm and Drang* over efficiencies"[74] in *Anthem*, the question remains unresolved. Lower courts continue to grapple with whether efficiencies can be a defense to Section 7 claims; whether they should be considered as evidence to rebut a prima facie case; and, if either, what level of proof is required. Just last year, the district court's decision in *Kroger* addressed this very question, noting that, while "[t]he merger of two firms may lead to procompetitive efficiencies," the Supreme Court "has never recognized efficiencies as a defense to a Section 7 claim and, on the

[69] United States v. Anthem, Inc., 855 F.3d 345, 355 (D.C. Cir. 2017) ("[T]he circuit precedent that binds us allowed that

evidence of efficiencies could rebut a prima facie showing, , which is not invariably the same as an ultimate defense to

Section 7 illegality.").

[70] Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

[71] *Anthem, Inc.*, 855 F.3d at 376 (Kavanaugh, J. dissenting).

[72] *Id.* at 377 (Kavanaugh, J. dissenting).

[73] *Id.* at 354.

[74] *Id.* at 369 (Millet, J., concurring).

contrary, has suggested that efficiencies cannot be a defense," citing *Procter & Gamble.*[75] Like so many other courts, the district court nonetheless went on to consider the evidence of efficiencies and concluded that the defendants had failed to rebut the presumption of anticompetitive effects.

In short, the status of efficiencies as a defense—or even as a rebuttal to a prima facie case—remains uncertain, and some courts remain skeptical.[76] Would the Supreme Court affirm *Procter & Gamble* if given the opportunity today? The answer is not entirely clear. As the Ninth Circuit in *Saint Alphonsus* astutely observed, "[i]t is difficult enough in § 7 cases to predict whether a merger will have future anticompetitive effects without also adding to the judicial balance a prediction of future efficiencies."[77] The Ninth Circuit pointed out that "even then-Professor Bork, a sharp critic of Clayton Act enforcement actions . . . rejected the efficiencies defense [in *The Antitrust Paradox*], calling it 'spurious' because it 'cannot measure the factors relevant to consumer welfare, so that after the economic extravaganza was completed we would know no more than before it began.'"[78]

Similarly, Judge Posner, who has expressed strong views about the ability of judges to deal with complex economic and statistical issues and is skeptical about expert witnesses, wrote that "there should be no general defense of efficiency. . . . It is rarely feasible to determine by the methods of litigation

[75] Fed. Trade Comm'n v. Kroger Co., No. 3:24-cv-00347, 2024 WL 5053016, at *21, (D. Or. Dec. 10, 2024) (citing Fed. Trade Comm'n v. Proctor & Gamble Co. 386 U.S. 568 (1967)).

[76] *See, e.g.*, Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 790 (2015) ("We remain skeptical about the efficiencies defense in general and about its scope in particular."); *see also id.* ("[N]one of the reported appellate decisions have actually held that a § 7 defendant has rebutted a prima facie case with an efficiencies defense; thus, even in those circuits that recognize it, the parameters of the defense remain imprecise.").

[77] *Saint Alphonsus Med. Ctr.-Nampa Inc.*, 778 F.3d at 790.

[78] *Id.* (quoting ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 124 (1978)).

the effect of a merger on the costs of the firm created by the merger."[79]

At the same time, we also know that Justice Kavanaugh would vote to overturn *Procter & Gamble*, given his dissent in *Anthem* and his reference to the "modern approach"[80] to antitrust reflected in *General Dynamics* and corresponding developments in Sherman Act jurisprudence like *Sylvania*. Justice Thomas may vote to overturn as well. In *Baker Hughes*, then-Judge Thomas wrote that "it has become hornbook law" that "a variety of factors other than ease of entry can rebut a prima facie case," and he went on to cite commentators who specifically identified "efficiency" as one such factor, including Phillip Areeda, Herbert Hovenkamp, and Lawrence Sullivan.[81] So perhaps the so-called "modern approach" to efficiencies[82] would prevail in the Supreme Court after all.

But what should the Supreme Court do? If given the opportunity, it should overrule the language in *Procter & Gamble* and recognize that efficiencies can and should play a role in Section 7 cases, whether as a defense or as rebuttal evidence. Either way, the law of the land should be clear on this point.

V. Conclusion

So, what does all of this mean for the 1960s merger cases? They certainly have not been in a time capsule, and they should not be treated that way. Some of the ideas in the 1960s

[79] RICHARD A. POSNER, ANTITRUST LAW 133 (2d ed. 2001); *see also* RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 112 (1976) ("I would not allow a generalized defense of efficiency."); *cf.* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 39 (1984) ("[N]either judges nor juries are particularly good at handling complex economic arguments").

[80] United States v. Anthem, Inc., 855 F.3d 345, 377 (D.C. Cir. 2017).

[81] United States v. Baker Hughes Inc., 908 F.2d 981, 985 (D.C. Cir. 1990) (citing PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 813–23 (Supp.1989)).

[82] *Anthem, Inc.*, 855 F.3d at 377.

Supreme Court cases have clearly been abandoned, and some continue to be embraced. Others—such as the broad pronouncements about efficiencies in cases like *Procter & Gamble*—have been neither abandoned nor embraced. On this occasion, when we are looking at nearly fifty years without any Supreme Court merger decisions, one might reasonably ask why that is the case.

The answer is clear: until 1974, appeals in antitrust cases went directly to the Supreme Court under the Expediting Act, which was amended in 1974 to provide that these appeals go to the Circuit Courts unless the district court certifies that immediate Supreme Court review is of "general public importance in the administration of justice."[83] Even if that certification occurs, the Supreme Court can still decline to hear the appeal.[84] Few (if any) pending mergers can realistically endure the time it takes for a government investigation, a trial on the merits, a trip to the Court of Appeals, and then the lengthy Supreme Court certiorari petition and review process.

The time has come for Congress to amend the Expediting Act, at least with respect to Section 7 cases, so that the Supreme Court can once again have the opportunity—or better yet, the obligation—to guide the development of this important area of antitrust law.

[83] 15 U.S.C. §29(b).

[84] *See* R. Hewitt Pate, Assistant Att'y Gen., U.S. Dep't of Just., Antitrust Law in the U.S. Supreme Court, Brit. Inst. of Int'l and Compar. L. Conf. 6-7 (May 11, 2004) (transcript available at https://www.justice.gov/atr/file/517986/dl [https://perma.cc/2XPJ-VR6B]) (noting that "[d]istrict courts have certified only three such cases for direct appeal," which remains true today; none of those were merger cases).