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A Priori Mechanical Jurisprudence in Antitrust

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I. INTRODUCTION

The persistent concern of the antitrust cognoscenti with defining policy objectives[1] has overshadowed the confusing problem of decisional methodology in the antitrust field. This problem raises important questions concerning the nature of the relationship between operative "facts" and the authority, stability, and coherence of the Supreme Court's findings regarding competitive effects and statutory proscriptive norms.

In the typical legal conflict, the facts,[2] once established, are capable of translation into identifiable effects. The impact of the transformations resulting from "effects" prompts the evolution and imposition of rules or principles which, by the route of classification, determine the rights and duties of the adversaries. When *A* runs a red light at a speed in excess of the legal limit and strikes *B*, smashing his legs, facts exist which have produced an easily discernible effect—an injury to *B*. It has been relatively easy to develop rules of law which take account of the effect of *A*'s negligent actions and which provide *B* with what society considers to be an appropriate remedy.

Antitrust litigation defies the simplicity of this formula.[3] It is possible to obtain and put voluminous factual evidence into the record but identification, much less classification, of resultant effects can be quite difficult, if not impossible.[4] For example, in

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1. For an interesting example of this clash see Bork, Bowman, Blake, & Jones, *The Goals of Antitrust: A Dialogue On Policy*, 65 COLUM. L. REV. 363 (1965).

2. For broader treatments of problems in fact determination and rule ascertainment see J. FRANK, LAW AND THE MODERN MIND (1930), and K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).

3. *See* Bok, *The Relativity of Economic Evidence in Merger Cases—Emerging Decisions Force the Issue*, 63 MICH. L. REV. 1355 (1965); Bok, *Section 7 of the Clayton Act and The Merging of Law and Economics*, 74 HARV. L. REV. 226 (1960); Dixon, *Antitrust Policy: Some "Legal" and "Economic" Considerations*, 14 U.C.L.A.L. REV. 979 (1967); Elman, *The Need for Certainty and Predictability in the Application of the Merger Law*, 40 N.Y.U.L. REV. 613 (1965).

4. Seen in an evidentiary context, "competitive effects" are "ulti-

United States v. Von's Grocery Company,[5] factual data gave a thorough picture of the grocery business in the relevant market area. The facts did not, however, illuminate the impact that the Von's-Shopping Bag merger had, or would "probably" or "possibly" have, on competition. Mr. Justice Black admitted, but discounted, an inability to determine the market effects of the merger.[6] Mr. Justice Stewart, in dissent, candidly confessed to an inability to read effects from the record.[7]

Despite the pronounced inability to establish a readable connection between the facts, effects, and legal norms in the antitrust field,[8] there are several ways in which courts can bridge the gap between "facts" and legal norms. One method is to require proof of primary facts and then mechanically assume the

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mate facts." The ultimate fact of competitive effect is the conclusion drawn from primary or evidentiary facts. Not only is the ultimate fact of competitive effect extremely difficult to ascertain but, to complicate the matter further, the standard of law (the proscription of conduct which "monopolizes," "restrains trade," "may be to substantially lessen competition," or results in "unfair trade practices") "is one which attaches legal consequences not to primary evidentiary facts but to the conclusions and inferences drawn from them." Brown, *Fact and Law in Judicial Review*, 56 HARV. L. REV. 899, 903 (1943). There is present, therefore, the problem of separating effects (ultimate facts) from "law." Viewing the problem from the law side, the question is that of definition; what is the definition of monopolization, lessening of competition, etc.? Viewed from the fact side, the question is whether primary facts lead to a conclusion of adverse competitive effect.

5. 384 U.S. 270 (1966). The business facts of the merger between Von's Grocery and its competitor, Shopping Bag, posed scant problems of proof. In 1960 their sales together were 7.5% of the total 2.5 billion dollars of retail groceries sold in the Los Angeles market each year. *Id.* at 272.

6. *Id.* at 278.

7. I cannot agree that the retail grocery business in Los Angeles is in an incipient or any other stage of a trend toward a lessening of competition, or that the effective level of concentration in the industry has increased.

Id. at 286 (dissenting opinion).

8. This difficulty has been summarized by the "Attorney General's National Committee to Study the Antitrust Laws" in the following language:

> Antitrust law and economics are both concerned with business facts—with individual company activities and relations among companies and their effect upon the market freedom of others and the consuming public. Although these facts are the same whether viewed from a legal or an economic standpoint, unfortunately their effects often are not susceptible of direct proof and hence conclusions as to these effects often must depend upon inferences or conclusions drawn from those facts which are susceptible of direct proof. Thus, it is often impossible to show the precise effect which a given course of conduct may have upon competition.

ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 315 (1955).

existence of adverse competitive effects. Certain forms of conduct, such as price fixing and group boycotts, are presumed to produce anticompetitive consequences within the ambit of the antitrust laws and are therefore proscribed on a per se basis. The per se approach is, however, appropriate in only a limited number of situations.[9]

Another way of spanning the gap is to decrease substantially the burden of proving demonstrable adverse effects. Facts do not have to demonstrate the present reality of an antitrust violation; only the "probability" of a violation must be shown. The fact that Standard Oil Company of California[10] had gross sales of $58,000,000, amounting to 6.7 per cent of a seven-state market, through the use of exclusive dealing arrangements with independent service stations, evidenced what Mr. Justice Frankfurter characterized as a "potential clog on competition"[11] and was enough to justify proscription.[12]

Reliance on elastic standards of proof like "incipiency" and "probability" does not eliminate the problem of proving the imminence of adverse market effects, however. Facts must point to the *probability*—not merely the *possibility*[13]—of the material-

9. The use of the per se rule has not been without controversy. *See* Elman, *"Petrified Opinions" and Competitive Realities*, 66 COLUM. L. REV. 625 (1966); Van Cise, *The Future of Per Se in Antitrust Law*, 50 VA. L. REV. 1165 (1964).

10. Standard Oil Co. v. United States, 337 U.S. 293 (1949). *See also* Elman, *supra* note 9.

11. 337 U.S. at 314. It was in this case that Mr. Justice Jackson expressed doubts as to the Court's ability to deal effectively with economic issues raised under antitrust laws.

> I regard it as unfortunate that the Clayton Act submits such economic issues to judicial determination. It not only leaves the law vague as a warning or guide, and determined only after the event, but the judicial process is not well adapted to exploration of such industry-wide, and even nation-wide, questions.

Id. at 286 (dissenting opinion).

12. To be sure, Frankfurter's words mirror a postwar approach to antitrust which is geared to probabilities instead of certainties. "Congress used the words '*may* be substantially to lessen competition . . .' to indicate that its concern was with probabilities, not certainties." Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962). This view has become, in operative effect, an express term of Clayton 3 and 7, which contain a qualifying clause (proscribing conduct the effect of which "may be substantially to lessen competition, or to tend to create a Monopoly") that already placed a minimal burden of proof on the plaintiff. 15 U.S.C. §§ 14, 18 (1958).

13. "The standard (reasonable probability) was thus more stringent than that of 'a mere possibility' on the one hand and more lenient than that of a 'certainty' on the other." United States v. Von's Grocery Co., 384 U.S. 270, 285 (1966) (dissenting opinion).

ization of an anticompetitive effect. In other words, a less onerous burden of proof has not completely freed the courts from the problem of bridging the gap between facts and legal norms.[14]

There is evidence that the Supreme Court is currently developing a third means of dealing with the problem. The tenets of a priori economic theories are being substituted for conclusions as to probable competitive effects. For example, economists have developed certain a priori conclusions about oligopolistic markets. In such a market setting, assumptions have been made about the nature of intra-industry relationships. From the existence of an oligopolistic market, the Supreme Court adopts the theoretical conclusions of the economists as to market effects. As one commentator notes of antitrust cases, ". . . a rule of law is required to be more consistent with economic theory than with past precedent."[15]

By the nature of the subject matter, antitrust enforcement and decision making is to a large extent dependent upon the work product of the economist. Moreover, the "probability" and "incipiency" heritage of statutory design and interpretation are particularly susceptible to theoretical omniscience. However, in endeavoring to resolve one problem the Supreme Court is simultaneously sowing the seeds of a new and perhaps more perplexing one. A priori theory has an expansive elasticity of its own. Hence the question arises whether economic theorizing injected into the center of the facts-effects-rule equation has not only replaced effect determination but has also absorbed both proof of facts and decisional rule development. Assuming this to be true, the next question is whether effective and reasonable antitrust implementation is possible under this approach.

The issues raised by these questions have not gone unnoticed. "The crux of the matter," complained Professor Handler, "is that

14. It has been suggested that one method by which the problem of defining "probability" and competitive effects can be avoided is by gerrymandering the relevant product or geographic markets. In dissenting to the majority's definition of the product market, Justice Harlan once remarked:

> The bizarre result of the Court's approach is that market percentages of a nonexistent market enable the Court to dispense with "elaborate proof of market structure, market behavior and probable anti-competitive effects."

United States v. Continental Can Co., 378 U.S. 441, 469-70 (1964) (dissenting opinion).

15. Brodley, *Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy*, 19 STAN. L. REV. 285, 298 (1967).

theory is no substitute for proof, and assumption is not the equivalent of fact."[16] An executive of a large diversified company was more succinct: "Reliance on . . . theory is too far out of touch with competitive and business reality to produce dependable results."[17] The problem cuts through the Supreme Court. In *Von's Grocery* Justice Stewart lamented that the majority had "substituted bare conjecture"[18] for statutory standards.

What is the level of credibility of these comments? Has the Supreme Court adopted the theoretical mechanism as an antitrust decisional methodology? The best means of getting at an answer, and the method adopted in this article, involves a four stage inquiry. First, the sources and causative forces behind the trend to abstractionism must be ascertained. The next step is to summarize briefly the economic theories presently available to the courts. Following this, the perspectives and the flow of rationale of the governmental prosecution agencies, as reflected in Supreme Court briefs, will be analyzed. Finally, as a prelude to conclusions, the cases themselves must be examined.

II. THE TREND TO ABSTRACTIONISM

A. THE EARLY PERIOD

Early antitrust doctrine was geared to the demonstrable facts and effects of the marketplace. Sections 1 and 2 of the Sherman Act[19] specifically incorporated identifiable conduct which had a history of case law available for explication. In discussing the law bearing his name, Senator Sherman remarked: "It does not announce a new principle of law, but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government."[20] It did not take abstract reasoning to demonstrate the anticompetitive consequences resulting from the predatory practices of the giant trusts. Facts brilliantly illuminated effects. Louis Brandeis could dogmatically say "that wherever competition has been suppressed it has been due either to resort to ruthless processes,

16. Handler, *The Twentieth Annual Antitrust Review—1967*, 53 VA. L. REV. 1667, 1680 (1967).
17. McDaniel, *Antitrust and the Status Quo in a Changing Society*, in 1967 N.Y. STATE BAR ASS'N ANTITRUST LAW SYMPOSIUM 4.
18. United States v. Von's Grocery Co., 384 U.S. 270, 286 (1966) (dissenting opinion).
19. 15 U.S.C. §§ 1, 2 (1964).
20. Quoted in Letwin, *Congress and the Sherman Antitrust Law—1887-1890*, 23 U. CHI. L. REV. 221, 256 (1956).

or by improper use of inordinate wealth and power."[21] But as the frontiers of geographic expansion closed and as firms began to concentrate on the techniques of internal expansion and on the processes of more efficient production, the traditions of the common law lost their force as a frame of reference. The enactment of the Clayton[22] and Federal Trade Commission Acts[23] reflected the inability of the Sherman Act to keep pace with the changing economy.

Despite the decreasing relevance of common law precedent to the nation's commercial world, courts continued to resolve cases on the basis of the facts-effects-rules question. To be sure, before prohibitions were meted out, effects had to be obvious and drastic. Only mergers which had resulted in abusive conduct were proscribed. Thus, to the 1930 Supreme Court the antimerger clause of the Clayton Act dealt "only with such acquisitions as probably will result in lessening competition *to a substantial degree. . . .*"[24] The Court cautioned against inquiry into those forms of behavior which might, depending upon the peculiarity of the market environment, have anticompetitive effects. There was, consequently, no need or desire to resort to economic theory. In the words of Mr. Justice Sutherland, "[t]he existence of competition is a fact disclosed by observation rather than by the processes of logic . . . ."[25]

This is not to say that the Supreme Court was totally immune to theoretical impulses. Laissez faire economics, which had been incorporated into Social Darwinism, was a persuasive force indictating the Court's perspective toward regulation of competition. The business community was the beneficiary of a protective wall, erected through a conservative reading of the fourteenth amendment's due process clause, shielding it from the encroachments of social and welfare legislation.[26]

Two other factors had a bearing on a fundamental and straightforward approach to the facts-effects-rules equation.

21. L. BRANDEIS, THE CURSE OF BIGNESS 115 (1934).
22. 15 U.S.C. §§ 12-27 (1964). The Clayton Act was subsequently amended by the Robinson-Patman Act, 15 U.S.C. § 13 (1964) and by the Celler-Kevauver Antimerger Act of 1950, 15 U.S.C. § 18 (1964).
23. 15 U.S.C. §§ 41-58 (1964). The Act was amended by the Wheeler-Lea Act, 15 U.S.C. § 41 (1964) and by the McGuire Act, 15 U.S.C. § 45 (1964).
24. International Shoe Co. v. FTC, 280 U.S. 291, 298 (1930) (emphasis added).
25. *Id.* at 299.
26. S. FINE, LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE 139 (1956).

First, merger activity, the prime target of antitrust, decreased during the period from 1905 to 1935.[27] Therefore, there was not much occurring, at least on the surface, that would attract the glare of attention. Perhaps more importantly, economic theory was itself still in the early stages of development. Along classical lines the thrust of concern was with the impact and the interrelationships of the pricing of land, labor, capital, and enterpreneurial activity.[28] Significantly, when the factors of market activity were viewed in their total effects, it was through the purifying lens of "pure" competition.[29]

The problem created by the adoption of this model was, in the words of J. K. Galbraith, that "it became not the definition that described reality but the one that produced ideal results."[30] Consequently, there was little incentive to engage in explorations, empirical or theoretical, that went beyond the model. As a result, the emerging tensions and the shifting structural boundaries of the various markets made small imprint on the economist or the courts.

B. THE SCENE CHANGES

The events of the 1930's illustrated just how far removed from reality the above views were. The simplicity of viewing antitrust in quantitative terms of easily discernible "harmful" conduct proscription and of fitting policy objectives into "pure" competition was undermined by the 1929 crash and the following chaos.

The decade spanning the 1930's was the heyday of economic realism.[31] The "facts" of the marketplace made it patent that

27. J. BAIN, INDUSTRIAL ORGANIZATION 194-98 (1968).

28. J. KUHLMAN & G. SKINNER, THE ECONOMIC SYSTEM 15 (rev. ed. 1964).

29. Pure competition is a theoretical model under which the existence of many sellers and buyers, all operating with full knowledge, all selling an essentially identical product, prevented any one seller from exerting control over prices. C. HARRISS, THE AMERICAN ECONOMY 424 (5th ed. 1965).

30. J. GALBRAITH, AMERICAN CAPITALISM 16 (2d ed. 1956). Galbraith adds: "The definition of competition was, in effect, accommodated to the requirements of that model. Its nexus with the competition of the real world, which in turn was in a process of change, was no longer maintained." *Id.*

31. It is interesting to note that it was during the 1930's that legal realism replaced the assumed certainty and predictability of mechanical jurisprudence. One of the best known dissenters of mechanical problem solving is Jerome Frank, who published his controversial LAW AND THE MODERN MIND in 1930.

neither perfect competition nor total monopoly existed; the actual organization and functioning of the market was poised somewhere in that large area between the two poles.[32] Turning to this gray middle area, the economist soon discerned that new, or perhaps formerly ignored, facts of import existed. Specifically, the attainment of mass production on a grand scale made it possible for formerly occupied energies to be channeled into the development of techniques for effectively marketing the output. A consumer oriented society was born.

The twists and turns of an economy moving at break-neck speed towards high consumption are dramatically different from those centered around endeavors to improve the technology of industrialization. The variables of competition changed, making the facts and effects of a consciousness geared to productive expansion largely irrelevant. Price competition and tactical changes in levels of output, the fundamental strategies of the business firm, gave ground to more subtle methods of competition. Contact with the consumer was established through advertising, promotion, and mass distribution techniques. The facts concerning these techniques yield anything but clear and predictable effects. The market impact of other techniques that became prevalent as a result of the increased emphasis on marketing and distribution, such as exclusive dealing, reciprocal trading, and tying arrangements, are likewise difficult to calculate.

The emergence of the consumption ethic had additional impact. The Supreme Court, though still welded to the past, was forced to recognize that a justification for laissez faire economics no longer existed. The onslaught of New Deal legislation assured the demise of Social Darwinism. As a result, the standard of scrutiny followed by the courts in antitrust cases became more searching. The doors were now open for the adoption of new views on antitrust.

Fact-effect-rule analysis was further complicated by the growth of new lobby and pressure groups. Whereas the historical big business versus government confrontation had culminated in clear-cut areas of interest, the emerging demands of agriculture, labor, small business and to a lesser degree the consumer, along with the still influential voice of big business, made it almost impossible for one group to have its total ob-

32. One of the most important studies appearing during this period was Edward Chamberlin's THE THEORY OF MONOPOLISTIC COMPETITION. Chamberlin concluded that most industries combine both monopolistic and competitive impulses.

jective implemented. Not only did these groups have to contend with each other, but they also had to accommodate their activities to the struggle between two other combatants—planners and antitrusters. With each pressure group pressing its claim, it is not surprising that an ambivalence in statutory goals appeared.[33]

C. THE CONTEMPORARY SCENE

The fruition of the movement towards a consumption-directed economy started in the 1930's and, interrupted by the war, was fully realized in the years following 1945. With the existence of massive productive capacity and what has been described as an "Affluent Society,"[34] the focus of concern shifted to the problems of engendering and assuring consumption.

The facts and effects of the mature postwar consumption economy are dramatically complex. The trends and moods of consumer demand cannot be ratified into competitive effects as easily as, for example, the foreclosure consequences of a horizontal merger. During the era of productive expansion the views of the economist dominated the scene; now, in getting at the consumer he must compete with the sociologist, the psychologist, and others. Regardless of the path followed, obtaining meaningful insights into the consumer, his behavior, and the precise impact of his conduct on the market, has become difficult. Is the consumer the master of his purchasing choices, or is he easily manipulated by sophisticated promotional devices? The answer probably rests somewhere between the two extremes

33. Ambivalence in statutory goals is apparent in the following areas: Labor, an obvious monopoly, was successful in getting an exemption from antitrust coverage. Clayton Act, 15 U.S.C. § 17 (1964). Clayton Act, 29 U.S.C. § 52 (1964). Norris-LaGuardia Act, 29 U.S.C. § 104 (1964).

Advertising, a field that was to become a vital force in the consumption economy, was codified into fair trade legislation and placed in the exempt sector in those instances when it culminated in the establishment of brand names. State fair trading laws are exempt under the McGuire Act, 15 U.S.C. § 45 (1964).

Trademarks, a progeny of advertising and therefore possessing many of the persuasive properties of brands, are also protected at common law and under the Lanham Trade-Mark Act, 15 U.S.C. § 1064 (1964).

The statutory waters were further muddied by the Robinson-Patman Act—"one of the most tortuous legislative pronouncements ever to go on the statute books." J. DIRLAM & A. KAHN, FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY 119 (1954).

34. By J. K. Galbraith in a book of the same title published in 1958.

—but exactly where, and with what consequences, no one seems to know.

An important feature of the consumption ethic has been the evolution of new forms of business relationships. Generally speaking, the projection of business entity influence, as it impinges on antitrust, has gone through three stages of emphasis. Each stage represents an adjustment to, and an outgrowth of, the legal impediments placed on previous methods. The aggrandizing efficacy of the trust and holding company, the original instruments of expansion, was rendered obsolete by the pressures of the Sherman Act.[35] The merger—first horizontal, then vertical —dominated the scene until the passage of the amended Clayton 7, when diversification patterns appeared.[36] With the increasing appearance of conglomerate mergers, joint ventures, and franchise arrangements, a third and new stage in the methodology of business expansion has been reached.

The new developments in business relationships have rendered old guidelines to proscription of doubtful vigor. Market share control—the decisive factor in horizontal and vertical merger analysis—becomes less significant when the conglomerate is scrutinized "and indeed," one authority suggests, "may completely vanish"[37] as a measuring tool. The joint venture raises similar problems, as its very existence represents the creation of a new competitive factor. The question is how the market consequences of an arrangement that "usually adds to actual competition"[38] can be meaningfully related to existing antitrust standards. Franchising, a progeny of advertising and mass merchandising,[39] poses problems more subtle and unique than those encountered in the typical vertical integration situation. Considerably less binding and permanent than the merger, yet tighter than the typical producer-distributor relationship, the franchise is essentially a distribution and marketing control device. There are overtones of price control and territorial restrictions. The anticompetitive effects of these features are, however, frequently muted by both private and public advantages flowing

35. *See, e.g.*, Northern Securities Co. v. United States, 193 U.S. 197 (1904).

36. *See* J. NARVER, CONGLOMERATE MERGERS AND MARKET COMPETITION 8-32 (1967).

37. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1316 (1965).

38. Backman, *Joint Ventures and the Antitrust Laws*, 40 N.Y.U.L. REV. 651, 660 (1965).

39. Jones, *The Growth and Importance of Franchising and the Role of Law*, 12 ANTITRUST BULL. 717, 719-20 (1967).

from the relationship.[40]

The emergence of new and complex business relationships, of unmeasureable consumer impulses, of competing pressure groups, and other alterations in the social and economic anatomy of the nation have clearly deposited new stresses on antitrust interpretation.

III. THE AVAILABLE ECONOMIC THEORIES

Policy can be expected to determine the depth of the perimeter of the pursuasive authority that a given theory will exert on administrative and judicial decision making. The influence of a theory decreases as the distance between the objectives of the policy and the conclusions of the theory increase. Thus, it is important to delineate policy goals with precision. Unfortunately, there are obstacles to arriving at a unified and coherent statement of antitrust policy. To conclude that the purpose of antitrust is to provide an environment in which private restrictions on competition are prohibited is to ignore contradictory statutory commitments. Shielding branded and trademarked products from competition (fair trade laws)[41] and protecting one group of market participants from others (Robinson-Patman Act)[42] obviously does not square with a policy of open competition. Hence, to obtain a consistent sense of direction one must go to the foundational statutory corpus of antitrust—the Sherman Act, sections 3 and 7 of the Clayton Act, and the Federal Trade Commission Act. The policy of these laws—the hard core statutes of antitrust—has been summarized as follows:

> The basic premise of the American antitrust laws is that proper allocation of economic resources, efficiency, high quality, low prices, and new developments will best be promoted by the more or less automatic mechanism of competitive markets. Regulation of economic activity is not to be left in private hands, even though at times private regulation might seem to be consistent with the public interest.[43]

A commitment to public regulation does not contradict the operation of automatic checks and balances in the marketplace. It is an acknowledgement that government intervention is necessary to assure the independence of these automatic mechanisms. The primary question is, under what competitive conditions do

40. *Id.* at 723-25.
41. State fair trading laws are exempt under the McGuire Act, 15 U.S.C. § 45 (1964).
42. *See* J. DIRLAM & A. KAHN, *supra* note 33, at 119.
43. Turner, *The American Antitrust Laws*, 18 MODERN L. REV. 244 (1955).

the automatic mechanisms become ineffective? Or, stated in a more relevant context, at what point would the economist deem it necessary to invoke the strictures of external controls?

A. COMPETITIVE GOALS

Confronted with the dynamics of the consumption culture, the economist departed from the unreal abstractions of perfect competition. Models were developed that recognized market imperfections. It was concluded that advertising, immobility, ignorance, time lags, and many other dissident influences necessitate a competitive model that mirrors a market which is less than "perfect" but not necessarily monopolistic.[44] Imperfect competition, monopolistic competition,[45] workable competition are current and familiar definitional formulations that endeavor to describe economic "reality." The projection of each of these theories is functional; they represent environments that are thought to be competitively realistic in light of the contemporary economy. Workable competition—whose basic characteristic is that "no single seller, or group of sellers acting in concert, has the power to choose its level of profits"[46]—is considered by many to be the antitrust ideal.

Whether it be workable competition, monopolistic competition or another similar term, disagreement abounds as to the accuracy, the attainability, and the overall merit of each formulation. However, the most intense source of friction among economists—and now lawyers and courts—is not in conceptualizing competition. Rather, it is in defining the most effective means of maintaining the desired level of competiton. What tests should be employed to determine whether a particular market has a competitively viable pulse? In the process of debate, several dominant views have surfaced.

1. Behaviorism

To one group of economists known as the "behaviorists," competition can best be maintained through adherence to tests

44. G. HALE & R. HALE, MARKET POWER: SIZE AND SHAPE UNDER THE SHERMAN ACT 89-91, 411-39 (1958).

45. For a discussion of the distinction between "imperfect" and "monopolistic" competition see D. DEWEY, MONOPOLY IN ECONOMICS AND LAW 91-92 (1959). *See also* P. SAMUELSON, ECONOMICS 483-96 (7th ed. 1967).

46. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 320 (1955). *See also* G. STOCKING, WORKABLE COMPETITION 241-72 (1966).

of either conduct or performance. The emphasis is on market behavior. Conduct of a predatory character directed towards the elimination of rivals is, regardless of possible accompanying efficiencies or effects on competition, a symptom of unhealthy monopoly power.[47] But behaviorists believe in factual verification of conduct. This is because

> . . . the accusation of "predatory" or "cutthroat" practices often turns out on examination not to stem from the abuse of significant degrees of market power, but from the uncomfortably active pressures of competition itself.[48]

At the other end of the behavioral spectrum is performance analysis. Criteria such as industry progressiveness, appropriate profit rates, and effectively directed capital flows serve to define desirable competitive levels.[49] It is a test geared to long-run performance patterns and one that covers an infinite variety of dimensions, including such vagaries as "social responsibility."[50]

Behaviorism incorporates elements that make it unattractive to some economists. While "bad" conduct is easy to define, its discovery may necessitate a detailed factual inquiry. More importantly, the existence of harmful conduct does not answer the question—Why? Conduct is merely symptomatic; it ignores causes.[51] Performance, likewise symptomatic, presents serious problems of establishing norms of "good" and "bad" performance. There is also the difficulty in developing universal performance standards that could be applied to all industries.[52]

2. *Environmentalism*

Most of the economist's interest is directed toward those

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> This conception of the problem has necessarily directed the focus of the inquiry away from the rather impersonal economic forces of the market, and focused them, instead, upon the treatment accorded to *competitors* of the alleged monopolist. . . . In other words, the law has directed its concern to the opportunities of *businessmen* to compete for the profits of the market, rather than to any "right" of the *consumer* to buy in a competitive market, at competitive prices.

Mueller, *The New Antitrust: A 'Structural' Approach*, 12 VILL. L. REV. 764, 780 (1967).

48. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 328 (1955).

49. J. CLARK, COMPETITION AS A DYNAMIC PROCESS 419-29 (1961); C. GRIFFIN, AN ECONOMIC APPROACH TO ANTITRUST PROBLEMS xiii (1951); G. HALE & R. HALE, *supra* note 44, at 170-76. *See also* Mueller, *supra* note 47, at 773-79.

50. G. HALE & R. HALE, *supra* note 44, at 171-72.

51. "[T]he most fundamental shortcoming of a 'conduct' approach to antitrust is that . . . it focuses on the symptoms, and not on the underlying disease." Mueller, *supra* note 47, at 782.

52. J. BAIN, *supra* note 27, at 404-05.

factors which are considered to be determinative of market environment. The assumption is that by examining a group of structural elements, predictions can be made concerning performance and conduct. "Market structure is important," writes Professor Caves, "because the structure determines the behavior of firms in the industry, and that behavior in turn determines the quality of the industry's performance."[53] It is, in addition, a view that incorporates the opportunity to utilize preventive remedies; efforts can be made to anticipate and preclude any activity that might interfere with those structural formations which are the most conducive to "good" market conduct and performance.

The existence of a single large firm in the monopolistic sense of the word is no longer typical. Oligopoly concentrations of various dimensions now dominate the scene.[54] The environmentalist is therefore primarily committed to developing assumptions about oligopolistic market formations. He has developed a set of theories that can cope with the new and, for the most part, opaque, tensions of the oligopolistic marketplace. The basic assumption is that oligopolists do not behave in the way that competitors would in an atomistic market. Instead there exists a collective consciousness which is manifested in joint or group profit maximization,[55] resort to non-price competition—particularly product differentiation[56]—and intentional erection of barriers to entry.[57] It is upon this line of reasoning that oligopoly theory can be invoked to justify preclusion of interstructural connections, such as conglomerate mergers and franchise arrangements. New marketing techniques such as the franchise and promotional tactics such as advertising, can be dealt with on the grounds that product differentiation creates barriers to entry which either insulate existing oligopolies or create new ones. The environmentalist has devised an additional weapon to combat oligopoly—potential competition. As long as potential competitors are poised at the edge of the market, the oligopolist will presumably maintain a more competitive posture than otherwise would be the case.[58]

53. R. CAVES, AMERICAN INDUSTRY: STRUCTURE, CONDUCT, PERFORMANCE 17 (2d ed. 1967).

54. *Id.* at 10-12.

55. *Id.* at 40-45.

56. *See* G. HALE & R. HALE, *supra* note 44, at 132 and authorities collected in n.7.

57. J. BAIN, BARRIERS TO NEW COMPETITION (1965).

58. Brodley, *supra* note 15, at 354-57.

3. *External Controls and Environmentalism*

The views espoused by environmentalists are generally compatible with the dictates of antitrust policy. The only possible point of departure is the strong emphasis that the environmentalist places on instituting anticipatory measures. Governmental controls should, so it is theorized, be invoked early, regardless of how innocuous the activity may appear, to assure the existence of an environment in which "the more or less automatic mechanisms of competitive markets" can flourish. Acknowledging the difficulty of concretely proving demonstrable or even probable harmful effects, the economist prefers to rely on what Professor Macklup labels "preventative intervention" to assure a competitive market environment.

> It is difficult to prove that particular actions, say, certain mergers . . . create oligopoly positions; it is much easier to prove that such actions may potentially be a factor in the creation of oligopoly positions. Assume that there are fifteen suppliers serving a given market; a merger between two of them would hardly change the competitive situation substantially, but three or four such mergers could; hence, to be on the safe side, one may prohibit even the first of the mergers.[59]

There is, therefore, a discernible difference separating the preventive form of control advocated by the environmentalist from the statutory approach of nipping, in its "incipiency," anticompetitive conduct or of proscribing activity when it will "probably" result in a lessening of competition.

B. Critical Reaction

As might be expected, the a priori flavor of these assumptions has provoked debate. Critics contend that the environmentalist cannot empirically demonstrate that the theory of oligopoly reflects reality.[60]

> The unreal atmosphere which surrounds our current theories of oligopoly may be ascribed to the fact that the assumptions are

59. Machlup, *Oligopoly and the Free Society*, 1 Antitrust Law & Economic Rev. 11, 28 (1967).

60. It has been suggested that the strong contemporary commitment to theory has clouded objectivity in factual inquiry. In an analysis of an FTC study on gasoline marketing, Professor Dixon concluded that the effort to describe the industry in terms of modelistic oligopoly was unsupported by the facts—which in fact pointed to different conclusions. He also noted that "theoretical constructions seem to be employed more as a justification for preconceived views than as a means of reaching an understanding of industry events." Dixon, *The FTC Report on Gasoline Marketing: A Comment*, 13 Antitrust Bull. 105, 126 (1968).

> too often chosen for their analytical convenience, rather than for their actual relevance to the real world of today.[61]

It is, for example, difficult to verify collective pricing behavior. A firm's pricing policy, even without taking into account the ramifications of mutual interdependence, is reflective of a myriad of unidentifiable pressures. Geographical location and managerial perspective are factors that vary from firm to firm. Differences in costs, demand schedules, the lack of homogeneous products and uniformity in services, are all obstacles to parallel action. Interfirm organization[62]—the existence of circumstances in which "each firm is conscious of being in very close rivalry with only a portion of the other firms"[63]—can preclude uniform price responses. Likewise, the juxtaposition of economically powerful buyers often forces individualized, competitively responsive pricing.[64]

Even assuming that the effects of oligopoly are as inevitable and deleterious as contended, the question still to be answered is: How can an oligopolistic structure be distinguished from other structural shapes? The usual method of identification, the concentration ratio—whereby firms are ranked in order of "size" and the ratio of an industry is determined by adding up the percentages of the "top" firms—has serious defects. It is not clear what concentration percentage is required for mutual behavior to prevail.[65] It is also unclear whether sales, assets, or number of employees, or some other measure provides the most meaningful barometer of size.[66] The impact of foreign trade is ignored.[67] These criticisms, along with others,[68] make it clear

61. R. TRIFFIN, MONOPOLISTIC COMPETITION AND GENERAL EQUILIBRIUM THEORY 78 (1949).

62. Heflebower, *Parallelism and Administered Prices*, in PERSPECTIVES ON ANTITRUST POLICY 104 (A. Phillips ed. 1965).

63. *Id.*

64. For criticism of various oligopoly theory assumptions see J. CLARK, *supra* note 49, at 471-77; G. HALE & R. HALE, *supra* note 44, at 134-37; C. HARRISS, *supra* note 29, at 443-46; A. KAPLAN, BIG ENTERPRISE IN A COMPETITIVE SYSTEM 50-53 (rev. ed. 1964).

65. *See* C. KAYSEN & D. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 27 (1965). Bok says: "Unfortunately, as any economist would concede, there is no ascertainable magic size or number of firms which divides competition from oligopoly or any other less desirable form of market 'behavior.'" Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 241-42 (1960).

66. F. MACKLUP, THE POLITICAL ECONOMY OF MONOPOLY 475-87 (1967).

67. R. CAVES, *supra* note 53, at 8.

68. Bain notes that "a given aggregate is often chosen as a basis

that decisive conclusions on identification of oligopoly structure are difficult and criteria for judgments depend primarily upon "arbitrary" classifications and "rest in subjective attitudes incapable of precise measurements."[69]

Equally elusive are barriers to entry and product differentiation. Barriers to entry refer to the long run ability of firms to maintain prices "above the average costs of production and distribution . . . without inducing potential entrants to enter the industry."[70] Between the "zero pole" of complete ease of entry to absolute blockaded entry resides a sea of variables. The price variable, influenced by shades of product differentiation and other interfirm differences, makes it difficult to measure barrier heights.[71] Moreover, when are barriers "low" or "high"? Would prices of 10 per cent above minimum average costs erect a "high" barrier?[72] Another variable is the impact of successive entrants. Closely connected with this problem is the fact that the distance from the edge of the market, and the power, of potential entrants defies uniform or mechanical classification. Perhaps the most perplexing variable is that of identifying potential entrants. The problem has been described as follows:

> The difficulty with the concept is not one of legal theory . . . but the very practical difficulty of identifying particular potential competitors with respect to any given market. The problem deepens when it is realized that under no rational economic analysis could some of the most significant recent market entrants have been identified in advance.[73]

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for measuring concentration simply because it is the one for which the most adequate statistical data are available." J. BAIN, *supra* note 27, at 81. *See also* W. FELLNER, MODERN ECONOMIC ANALYSIS 382 (1960).

69. G. HALE & R. HALE, *supra* note 44, at 136.

70. J. BAIN, *supra* note 27, at 252.

71. Professor Caves says:

> Unlike seller concentration, barriers to entry cannot be measured by looking up a few numbers in a government publication. For anything better than a broad impression, we have to make a close study industry by industry.

R. CAVES, *supra* note 53, at 28.

72. Calling barriers to entry high because they permit a mark-up of price more than 10 per cent above costs including normal profits does not prove that entry is actually or nearly blockaded. It could be that some of these industries would permit enormous rates of short-run profit, if the present sellers had no concern about entry. We seldom have any idea, even an approximate one, what the maximum short-run profit rate for an industry would be.

Id. at 29 n.8. Another economist concludes that entrenched large firms may be at a disadvantage in repelling new entrants. "[B]ig companies are at times less flexible and imaginative than smaller firms—and very large firms face governmental scrutiny which may inhibit the use of their economic power." C. Harriss, THE AMERICAN ECONOMY 130 (5th ed. 1965).

73. Brodley, *Oligopoly Power under the Sherman and Clayton Acts*

Much of the literature concerning condition of entry is devoted to the concept of product differentiation.[74] Through the use of sales promotion efforts, advertising, branding, and other consumer preference building techniques, a firm can insulate its products from the competition of existing rivals and simultaneously discourage potential market entrants. Since the reasons underlying consumer preference are not easily identifiable, subjective judgments play a dominant role in product differentiation theory. Attacks on advertising are usually grounded in sociological perspective. Advertising is said to be persuasive, built primarily on a nonrational or emotional basis, through the efforts of the "ad-man"[75] and hence a waste of resources. Drawing conclusions about a concept that cuts through the nation's social fabric has been disquieting to the economist. One writer has commented that ". . . economists *qua* economic theorists—as distinct from moral philosophers—have nothing to say about the social disutility of product differentiation."[76] Another economist complained that the problem of analyzing product differentiation is that one must go beyond economics to questions of human psychology, aesthetics, and ethics.[77] In short, insights into the anticompetitive effects of product differentiation are as yet too theoretical to be conclusive.[78]

Finally, it has been charged that the theory of oligopoly is analytically immobile, a static concept made obsolete by constant

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—*From Economic Theory to Legal Policy*, 19 STAN. L. REV. 285, 357 (1967). Handler raises the following questions:

> Is the mere fact that a company enters a market by acquisition sufficient to denominate it a potential competitor? If not, is it sufficient that the acquiring company is engaged in a diversification program? Need the industries be related? As a practical matter, how can a defendant effectively negate a claim that it was present in the wings and that such presence affected market behavior?

Handler, *The Twentieth Annual Antitrust Review—1967*, 53 VA. L. REV. 1667, 1675 n.40 (1967).

74. The most prominent works are J. BAIN, *supra* note 57; E. CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION (8th ed. 1965).

75. J. BAIN, *supra* note 27, at 215.

76. D. DEWEY, MONOPOLY IN ECONOMICS AND LAW 98 (1966).

77. R. BRANDEIS, ECONOMICS: PRINCIPLES AND POLICY 100 (rev. ed. 1963).

78. Chamberlin acknowledged that:

> "The Differentiation of the Product" is by all odds the most difficult subject of all, and the reason is not far to seek. It contains, not a technique, but a way of looking at the economic system; and changing one's economic *Weltanschauung* is something very different from looking into the economics of the individual firm or adding new tools to one's kit.

E. CHAMBERLIN, *supra* note 74, at 204-05.

changes. Schumpeter argued that it is misleading to draw automatic conclusions from the immediate fact of oligopolistic structure.[79] Price maximization and output restrictions that might prevail at a given instant of time do not take into account the competition "from the new commodity, the new technology, the new source of supply, [and] the new type of organization"[80]—forms of competition which to Schumpeter affected the existence or the very life of the firm, and ultimately the industry. The problem is not how capitalism administers existing structures but rather how it creates and destroys them.[81] Schumpeter's thesis is that this destructive process, springing from the awesome inevitability of innovation, rendered structural anticompetitive consequences temporary. Technological innovation plays a strong role in a recent attack mounted by Professor Galbraith against conventional notions of oligopoly.[82] He argues that it is meaningless to speak of instituting controls over oligopoly in the face of the *fait accompli* of concentration.[83] Responding to the imperatives of technology, the New Industrial State now shapes its own environment. The net effect is that the concentrates of planning have virtually eliminated the influence of traditional competitive forces.[84] To Galbraith, the real problem is how to achieve the most meaningful distribution, in terms of public welfare, of the fruits of the New Industrial State.[85]

IV. GOVERNMENT RESPONSE TO A PRIORI ABSTRACT REASONING

How have the Justice Department and the Federal Trade Commission—the governmental agencies permanently concerned with the problems of connecting anticompetitive effects to stat-

79. J. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 84 (3d ed. 1962).

80. *Id.*

81. *Id.*

82. J. GALBRAITH, THE NEW INDUSTRIAL STATE *passim* (1967).

83. To Professor Galbraith, there is a basic contradiction in condemning oligopoly effects on one hand and then praising the efficiency and productivity of the economic system. *Id.* at 183.

84. Including consumer sovereignty. Thus Galbraith takes the position that persuasive product differentiation is an effective instrumentality of the "New Industrial State." *Id.* at 211-18.

85. Another dissent is predicated on the concept of "managerial enterprise"—the continuity of operation, keyed on the creation of constant demand, and which, despite monopolistic attributes, results in public benefits. For a discussion of this view and other dissents, see W. BALDWIN, ANTITRUST AND THE CHANGING CORPORATION 164-74 (1961).

utory standards—responded to the increasing complexity of the market place and to the economist's a priori abstract reasoning? The most declaratory method of answering this question is through a survey of the briefs submitted by these two agencies to the Supreme Court. Unlike advisory opinions, speeches, and "policy" pronouncements,[86] the brief, responsive as it is to the adversarial delineation of specific issues, manifests a finality of perspective and commitment to specific lines of argumentation. This is not to suggest that the conclusions advanced in the briefs are static; indeed an important dividend of such a survey is the opportunity to trace the manner in which the government has adjusted its prosecution approach to new problem situations. Moreover, because of a perpetual responsibility to enforce the trade regulation laws, it is inevitable that the two agencies have evolved, in the briefs, a form of *Weltanschauung* towards the interplay of economic theory, competition, and antitrust proscription. Finally, there is a pragmatic reason for surveying the briefs: the continuous and repetitious exposure of these two arms of the government before the Supreme Court constitutes a built-in conditioning effect which, however subtle, cannot be discounted.[87]

A. Anticipatory Prevention Emerges

The first case to reach the Supreme Court under amended Clayton 7—*Brown Shoe Company v. United States*[88]—is the most appropriate point at which to begin the survey. Terms such as "reasonable probability" and "incipiency," which dominated the legislative dialogue preceeding the enactment of the amendment,[89] received their initial construction by the Government in the *Brown Shoe* brief. This brief is, in essence, an early position paper on the problem of relating the anticipatory thrust of "incipiency" to discernible indicia of reduced competition. "The

86. *See* Jacobs, *Merger Clearance Problems*, 2 Antitrust Bull. 187 (1956); Comment, *Trade Rules and Trade Conferences: The F.T.C. and Business Attack Deceptive Practices, Unfair Competition, and Antitrust Violations*, 62 Yale L.J. 912 (1953).

87. A necessary assumption is that the oral arguments emphasized the main points of the briefs. The respective influences of oral arguments and briefs on the appellate process is open to debate. *See* Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?* 41 Cornell L. Rev. 6 (1955).

88. 370 U.S. 294 (1962).

89. For the legislative history of the amended Clayton 7 see D. Martin, Mergers and The Clayton Act 221-53 (1959); Bok, *supra* note 65, at 233-38.

essential issue in this case," the Government suggested, "is thus a simple but significant one: at what stage in a developing process of industrial concentration . . . does Section 7 of the Clayton Act step in to call a halt?"[90]

In 1961 the Government argued that this question could best be answered by quantitative inquiry. Empirically oriented standards defining "reasonable probability" and "incipiency" were recommended. Does the acquisition eliminate "a substantial competitive factor in a significant market?"[91] Is the consequence of the merger an accretion "of power jeopardizing the capacity of the smaller companies in the market to compete?"[92] Another standard considered to be relevant was the acquisition record of the alleged violator and the history of the industry in general. Under the "small bite theory," a history of acquisitions or an obvious trend toward concentration constitutes strong evidence that the consequences of the immediate merger would be anticompetitive.[93]

Thus, in 1961, to anticipate and prevent meant to take statistical measurement of foreclosure, to delineate the relevant geographic and product markets, and to scrutinize past conduct. True, the Government avoided refined factual analysis of the economics of the market—Congress "made clear its intent to avoid the necessity for any such analysis."[94] It is also true, however, that a priori economic theory was similarly avoided. Effort was made to support conclusions as to probable effects with quantitative data. Tests and standards were connected with prior decisions in the tradition of stare decisis methodology.[95] Oligopoly was mentioned not in terms of its assumed theoretical implications but as one of the possible detrimental results of concentration.[96] The argument proceeded from a point of refer-

90. Brief for Appellee at 84, Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

91. *Id.* at 97.

92. *Id.* at 97, *citing* Bok, *supra* note 65, and Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176 (1955).

93. Brief for Appellee at 88-89, 118, Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

94. *Id.* at 131.

95. The Court cited four lower court cases: United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S.D.N.Y. 1958); American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958); Hamilton Watch Co. v. Benrus Watch Co., 114 F. Supp. 307 (D. Conn.), *aff'd*, 206 F.2d 738 (2d Cir. 1953); Crown Zellerbach Corp. v. FTC, 1961 Trade Cas. 78, 142 (9th Cir. (1961).

96. The closest the Government came to theory was in the final

ence that was classical in perspective. Perfect competition had to be preserved.

B. Anticipatory Prevention: Increasing Need for A Priori Theory

In 1964 the Government filed briefs condemning two forms of conduct that did not fit into *Brown Shoe's* quantitative formula.[97] In *United States v. Penn-Olin Chemical Company*[98] a joint venture was attacked, and in *United States v. Continental Can Company*[99] the Government challenged an interindustry merger between manufacturers of glass and metal containers. Significant extensions in the doctrine of anticipatory prevention were made in both briefs.

A joint venture, as a new market entrant, would presumably inject additional competitive pressures into a market.[100] If, on the other hand, both members of the joint venture entered the market separately, competition would be enhanced by the activities of two new competitors rather than the single joint venture. Another possibility is that one of the firms might have entered while the other remained at the edge of the market as a potential competitor. The readiness of a potential competitor, the Government pointed out, "to enter the market whenever the existing manufacturers charge excessive prices, limit production, or fail to exploit . . . opportunities . . . can act as a spur to insure the competitive vigor of those already in the market."[101]

Confronted with a situation in which market shares, fore-

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paragraph:

> In short, this is the case . . . to call a halt to a trend that is otherwise certain to convert the shoe industry into one of those oligopolistic industries in which a few large concerns exercise decisive control over the market structure and the smaller companies that are able to survive continue on sufferance only so long as they follow the leaders.

Brief for Appellee at 138-39, Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

97. The *Philadelphia Nat'l Bank* brief, filed in 1962 and involving a horizontal merger, was quantitatively oriented. The Government drew heavily from case precedent, building its case around three points: (1) a substantial foreclosure of competition, (2) a trend towards concentration, (3) the criteria laid down in the *Brown Shoe* decision. Brief for Appellant, United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

98. 378 U.S. 158 (1964).

99. 378 U.S. 441 (1964).

100. *See* note 38 *supra*, and accompanying text.

101. Brief for Appellant at 25, United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964).

closure and the other traditional standards for ascertaining effects were unavailable, the Government invoked the doctrine of potential competition. As a practical matter, the impact that potential competition can exert on a market is extremely difficult to calculate. The Government admitted that "it is . . . impossible to demonstrate the precise effects upon prices and production of the elimination of either Pennsalt or Olin as a potential competitor. . . ."[102] It is, nevertheless, possible to posit theoretical effects. The Government's brief proceeded to this end via a three stage argument.

The first stage provided the theoretical foundation: the three firm market under consideration was oligopolistic. Secondly, the effects of oligopoly are, under a priori theory, automatically incompatible with competition. According to the Government's summary of the theory, there is "little incentive for sellers to compete in price or innovation for each firm can anticipate that its efforts will quickly be met by offsetting action of its rivals. . . ."[103] Theoretical symmetry was maintained by the concluding contention that potential competition would prevent the existence of such a condition and serve as a spur to product innovation.[104]

Accompanying the increasing reliance on theory was a shift in goals. Perfect competition was discarded, to be replaced by workable competition. And workable competition "depends entirely upon . . . readily available"[105] potential competition.

The *Continental Can* form of interindustry merger—metal container manufacturer with a glass container producer—also presented formidable problems in competitive effect determination. Statistical data on the percentages of market control exercised by the merging firms in their respective industries would shed little light on the ultimate competitive consequences of the merger. Moreover, it is meaningless to construct a relevant product market designed to encompass the "competing" products of the two firms. The volume and intensity of competition that each company's product attracts from direct competitors in their respective product lines dilutes the accuracy and relevance of such a determination.[106]

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102. *Id.* at 51.
103. *Id.* at 49.
104. *Id.* at 52-53.
105. *Id.* at 49.
106. The Government advanced two additional reasons for discarding the market share test for illegality:

The Government's solution was a test that was manifest in its environmental heritage. The lessening of competition standard is satisfied when: (1) substantial interindustry competition exists, (2) there is a high degree of concentration in either industry, and (3) both firms occupy dominant positions in their industries.[107] The test focuses on the existence of oligopoly. One need only demonstrate oligopoly plus cross-elasticity of demand—which is itself a theoretical concept[108]—and leave the rest to theory. The rationale for this position, expressed in language of possibilities, ran as follows:

> The appearance of a substantial interindustry competitor on this scene introduces a new firm, with resources and staying power *probably* unavailable inside the industry, and without the history of mutual accommodation that *may* characterize those presently in the industry. Acquisition of such a firm by one of the industry leaders *may* be motivated by the latter's desire to protect itself against competition of substitute products, and would have precisely such an insulating effect. Consequently, it is of concern to the antitrust laws, because such mergers *may* well help to preserve and extend the unsatisfactory market structure of the concentrated industry.[109]

C. STRUCTURAL RELIEF AND ECONOMIC PROPHECY

The sweeping elasticity of the environmentalist approach was made clear in the *Federal Trade Commission v. Consolidated Foods Corporation*[110] brief. It has been noted that effect measurement or prognosis can be dispensed with under theoretical environmentalism. It is also true that under this approach, conduct that is inaccessible and difficult, if not impossible, to prove can be successfully attacked. For example, the Govern-

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> Second, the particular merging firms may not presently compete *inter sese* in all the particular submarkets which would probably be affected by their merger. Since the merger forecloses the potential interindustry competitor's entry into submarkets in which the acquiring firm is active, its anticompetitive impact cannot be evaluated simply by adding present market shares. Third, the larger the merging firms are the more likely is it that they produce a diversity of products with a multiplicity of end uses. It would be most unrealistic to appraise the impact of a merger between the country's largest industrial companies . . . by focusing only on one or several specific product lines and attaching conclusive effect to the percentage totals in such lines. . . .

Brief for Appellant at 23-24, United States v. Continental Can Co., 378 U.S. 441 (1964).

107. *Id.* at 22.

108. C. HARRISS, THE AMERICAN ECONOMY 380-84 (5th ed. 1965).

109. Brief for Appellant at 20-21, United States v. Continental Can Co., 378 U.S. 441 (1964) (emphasis added).

110. 380 U.S. 592 (1965).

ment argued in *Consolidated Foods* that given the reality of certain structural alterations, it should be unnecessary to prove the actual existence of the condemned conduct—accommodative reciprocity. The problem in proving accommodative reciprocity is that it results from a unilateral decision.[111] A company may order supplies from a large potential customer in hopes of getting return business. Or, it might be fearful that a present large customer will withdraw its business if reciprocal purchases are not made. Instead of focusing on the complex problems of proving specific instances of reciprocal trading, the Government pressed for an environmental preventative theory:

> If a merger changes the structure of an industry in such a manner as to have the probability of increasing substantially the volume of reciprocal buying or enhancing the opportunities for such reciprocity, it obviously has the required anticompetitive effect. To preserve competition, it is essential to prevent any merger which creates such a market environment. . . .[112]

If the use of theory can be justified because of difficulties in measuring and predicting competitive effects and because of obstacles in proving certain forms of conduct, there is no reason why the same technique cannot be extended to primary fact elicitation. By characterizing facts as elusive in source and as nebulous in content, the foundation is laid for what might be labeled a priori fact elicitation. This was precisely the form of argument advanced in *United States v. Pabst Brewing Company*[113]—a horizontal merger case.

It has been traditional in horizontal mergers to evaluate the impact of the acquisitions on the basis of two guidelines: (1) the existence of a geographical locus of competition and a relevant product market, and (2) the control exercised by the two firms in this locus as reflected in sales percentage figures (market shares). It was the Government's contention in the *Pabst* case that the facts composing these guidelines are, for practical purposes, devoid of meaningful content. They do not indicate whether or not the merging firms are selling exclusively to dif-

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111.
> Reciprocal purchasing by firms may be simply the result of tacit "mutual-dependence-recognized" behavior. It is possible, however, that if the buyer is both large in general and is a large purchaser of the particular products of another (especially a smaller) firm, the latter may feel "compelled" to purchase, if at all possible, from the large customer.

J. Narver, Conglomerate Mergers and Market Competition 112 (1967).

112. Brief for Petitioner at 25, FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965).

113. 384 U.S. 546 (1966).

ferent buyers in different parts of a single market. Or, assuming direct competition between the merging firms, the market might be so accessible to firms of geographical distance so as to make sales figures worthless in evaluating power.[114] The opaqueness of facts in this situation, so the Government contended, necessitates the use of shorthand abstracted standards. It argued that to define the relevant geographical market satisfactorily, the plaintiff need only show that both firms made "substantial sales"[115] in a given area and that "there is reason to believe that sellers whose sales were not included in the market suffer from some disadvantage in competing with those whose sales were included."[116]

The second standard expressly incorporates what Professor Bain calls the "fairly complex"[117] theory of condition of entry. It is also a test that makes reliance on factual inquiry unnecessary. Moreover, under the Government's formula, it is not necessary to prove conclusively the existence of barriers to other sellers, nor to demonstrate the height of the barriers.[118] The plaintiff's burden is simply to prove that sellers within a given area "enjoy *some* leeway to price without regard"[119] to outside competition. In this case the Government argued that some leeway to price existed because of product differentiation. Advertising and promotion had been utilized by the defendant so as to erect a shield around Wisconsin-brewed beer—resulting in a geographic market that followed state boundaries.[120]

The doctrine of product differentiation is a prosecution weapon of immense range. Under the Government's formula in

114. Brief for Appellant at 15, United States v. Pabst Brewing Co., 384 U.S. 546 (1966).

115. *Id.*

116. *Id.* at 16.

117. J. BAIN, INDUSTRIAL ORGANIZATION 252 (1968).

118. Brief for Appellant at 34, United States v. Pabst Brewing Co., 384 U.S. 546 (1966). The Government explained that:

> Such a burden could not be met without a prohibitively time-consuming and complex inquiry into the particular costs and competitive capabilities of all the members of an industry and would ill accord with the statute's emphasis on "probabilities, not certainties."

119. *Id.*

120. The Government contended that four factors supported the conclusion that barriers to entry had been erected around Wisconsin: (1) not all members of the beer industry sold in Wisconsin at the time of the merger; (2) the identity of those selling in Wisconsin remained constant over the length of the court record—seven years; (3) the pattern of marketing in the beer industry is primarily regional; (4) different prices were charged in different regions for the same brand of beer. *Id.* at 36-38.

Pabst, the burden of proving primary facts is slight. A price disparity between "similar" products, along with a discernible commitment to advertising and promotion, raises a presumption of differentiation. However, the most significant advantage of product differentiation is that it exists in almost every commercial environment. There are few industries that do not contain obvious manifestations of product differentiation.

The Government has found this doctrine to be a particularly effective means of getting at conglomerate mergers. The argument advanced in *Federal Trade Commission v. Procter & Gamble Company*[121] was that the advertising capacity of the acquiring firm would be channeled through the acquired firm to raise internal and external market barriers to entry. The difficulty of new entry was increased

> [b]y conferring on Clorox substantial new competitive advantages in the area that matters most in the bleach industry—"preselling" the consumer, by heavy advertising and sales promotions, on the real or supposed virtues of the manufacturer's particular brand.[122]

Product differentiation was but part of a wider theoretical scheme advanced by the Government in the *Procter* case, however. Indeed, the brief reads like a primer in theoretical environmentalism. The usual structure a priori assumptions of oligopoly[123] were cited as the justification for the preservation of potential competition. Other than pointing out the high concentration ratios of the liquid bleach industry,[124] the Government supplied little factual evidence to support its a priori conclusions. The assumptions on the presence and effects of potential competition were particularly speculative, as the following quote illustrates:

> The present case *may* indeed be a classic instance of the efficacy of potential competition. Procter was clearly interested in entering the bleach industry, but Clorox *apparently* refrained from making conditions in the industry attractive enough to induce Procter to take the step; *evidently*, Clorox's price was low enough to discourage entry by a firm, like Procter, which *undoubtedly* has a high target rate of return. This important restraint has been removed by the merger. Other prospective entrants *doubtless* remain; but, surely, not many

121. 386 U.S. 568 (1967).
122. Brief for FTC at 26, FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).
123. "[A]ctual competition ceases to be a vital force; by mutual consent, it is abandoned in favor of parallel behavior and the 'easy life.'" *Id.* at 31.
124. Two firms accounted for 65% of sales; six firms controlled 80% of sales. *Id.* at 35.

> that would be likely to challenge a firm as well entrenched as Clorox; and none so likely as Procter. Moreover, other large multi-product manufacturers, who *might well* have entered if the principal competitor was Clorox, *probably* have much less enthusiasm for the industry now that they must pit their competitive efforts against a firm with Procter's market power and advantages.[125]

It has been noted that one of the most formidable problems in utilizing modelistic oligopoly theory is classification.[126] What is the structural composition, in terms of number of firms and firm size that will, in a given industry, produce oligopolistic effects? What formula determines the existence of an oligopolistic market? How are the boundary lines between "loose," "mild" and "tight" oligopoly ascertained? The Government's method of handling this problem, promulgated in *United States v. Von's Grocery Company*,[127] is to stretch the boundaries of proscription to the point of "tendencies" and "prophecy," thereby making classification unnecessary. Predicting the effects of a horizontal merger "calls more for an economic prophecy than for a conventional legal judgment."[128] The test is one of "evidence of oligopolistic tendencies."[129] It is, in practical effect, a standard totally divorced from the rigors of concentration classification and indeed competitive effect measurement in the barest form. The rationale for such a view is to be found in the following comment from the Government's brief in *Von's Grocery*:

> It is no answer to say that a merger need not be forbidden unless it actually creates oligopoly. For there is no magic point at which oligopoly springs full-blown into existence. Between the highly fragmented and the tightly concentrated market structure there is a middle area, one broad part of which is certainly a danger zone. No one can say—at least not without an inquiry far broader and deeper than practical law enforcement permits—at precisely what point a particular market will exhibit oligopolistic behavior. It is thus meaningless to speak of allowing firms to merge up to the lower limit of oligopoly; practically speaking, that limit is unascertainable.[130]

D. Summary

The briefs are a clear chronicle of the adoption by the Justice Department and the FTC of theoretical environmentalism. The

125. *Id.* at 51 (emphasis added).
126. *See* notes 65-69 *supra*, and accompanying text.
127. 384 U.S. 270 (1966).
128. Brief for Appellant at 23, United States v. Von's Grocery Co., 384 U.S. 270 (1966).
129. *Id.* at 25.
130. *Id.* at 27-28.

functional and particularistic standard of the *Brown Shoe* brief has been replaced with the a priori mechanism. Proof of probable effects on competition is no longer seriously attempted. Instead the emphasis is on the universal abstractions of oligopoly, barriers to entry, potential competition, and product differentiation. Moreover, the use of theory is not restricted to the inscrutables of antitrust such as conglomerates and reciprocity—witness the call to "economic prophecy" sounded in the *Von's Grocery* brief, where the argument was directed toward a horizontal merger. Each brief now contains the prefatory ritual of a description of the theoretical anticompetitive consequences of oligopolistic market structures.

A shift in vocabulary has accompanied this trend. The Government apparently felt that the term "concentration," employed in the original standard to profile an unhealthy competitive environment, lacked sufficient descriptive connotation. Its proscriptive semantical punch is weak; "concentration" evokes no automatic and clearly definable a priori assumptions as to market effects. There is, therefore, no advantage in relating the complained of activity to "concentration" since the task of identifying adverse effects would still remain. By shifting to oligopoly orientation and utilizing the mechanical conclusions associated with this term, the Government avoids this problem.

Parenthetically, it might be noted that theoretical environmentalism has been expressly adopted by the Justice Department as a point of reference for attacking mergers under Clayton 7.[131] In essence, the merger guidelines reflect an effort to codify the theoretical conclusions of the doctrines of oligopoly, condition of entry, potential competition, and product differentiation. The parallel between the argumentation of the briefs and the directives of the guidelines is close. For example, conglomeration that eliminates potential competition (the *Procter & Gamble* argument), that creates a danger of reciprocity (*Consolidated Foods*), or tends to raise barriers to entry (again *Procter & Gamble*), invites proscription. Following the lead of the *Pabst* brief, language was used which makes it possible to define the geographically relevant market along the lines of barriers to entry and product differentiation.[132] Both in substance and effect the guideline standards are, as were the briefs, closely keyed to the

131. U.S. Dep't of Justice, Merger Guidelines, in ANTITRUST DEVELOPMENTS 1955-1968 (A Supplement to THE REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS), app. A (May 30, 1968).
132. *Id.* at 313.

assumptions of oligopoly theory.[133]

The crucial question which remains is: How much of the Government's perspective has been absorbed by the Supreme Court?

V. THE CASES

The *Brown Shoe* opinion contains two views of the facts-effects-rules equation. The first view appears in Chief Justice Warren's endeavor to trace the legislative purpose behind the passage of the amended version of Clayton 7. The second view emanates from the specific issue confronting the Court—the legality of a horizontal and vertical merger.

The design of the statute was clearly to inject an "incipiency" standard into merger analysis. Although discounting any intent to incorporate a specific test, quantitative or qualitative, by which "incipiency" could be related to anticompetitive effects, Warren nevertheless felt that the statute evidenced a congressional intent that a discernible nexus between facts, effects, and sanction should be proved. The amendment was designed to prevent "all mergers having demonstrable anticompetitive effects."[134] The "primary index of market power"[135] comes from the statistics of market share control. Significantly, the Court read Congress' intent as refusing to tie the judiciary down to broad abstracted standards that would have universal and mechanical application. Instead, Congress intended that each merger be "functionally viewed, in the context of its particular industry."[136] Moreover, the Court felt that the present existence of concentration, recent trends toward domination by a few, foreclosure, and barriers to entry, were relevant factors. The significance of each factor would vary "in importance with the merger under consideration. . . ."[137]

In recommending an "incipiency" or "probability" interpre-

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133. A concentrated market structure, where a few firms account for a large share of the sales, tends to discourage vigorous price competition . . . and to encourage other kinds of conduct . . . of an economically undesirable nature.

ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 312 (1955).

134. Brown Shoe Co. v. United States, 370 U.S. 294, 319 (1962).

135. *Id.* at 322, n.38. Warren qualified this position by adding: "but only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable effect of the merger." *Id.*

136. *Id.* at 321-22.

137. *Id.* at 322.

tation of section 7, Congress meant to lower the plaintiff's burden of proof from the high and unrealistic standards imposed by the Sherman Act.[138] The extent to which the burden was to be lessened was left to judicial interpretation. In analyzing the vertical merger between Brown and Kinney, the Court struck a position that leaned towards the Sherman Act requirements of proof. The primary standard utilized by Warren in *Brown Shoe* to gauge the evidence came from pre-amendment merger cases in combination with Clayton 3 cases.[139] Although the importance of market foreclosure was minimized,[140] the Court did in fact relate much of the factual evidence to this standard. Analogies to tying arrangements, exclusive dealing and requirements contracts, were invoked to set up a level of proscriptive foreclosure. Anticompetitive "economic purpose" motivation—long held relevant in antitrust cases—was considered crucial in foreclosure analysis. That Brown was the fourth largest manufacturer of shoes, while Kinney was the nation's largest operator of independent retail outlets, prompted the conclusion that "in this industry, no merger between a manufacturer and an independent retailer could involve a larger potential market foreclosure."[141]

Oligopoly was very much a part of Warren's analysis. He was not, however, concerned with the theoretical implications or mechanical assumptions which accompany the term; to him oligopoly connoted nothing more than an undesirable level of concentration. While the Sherman Act was monopoly-oriented, the new Clayton 7 was directed toward a classification of concentration known as oligopoly. The amendment had, in other words, focused its attention on the more prevalent condition.[142] This meant that notions of the predictability of competitive effects had to be geared to a new standard. Thus, in a horizontal

138. D. MARTIN, *supra* note 89, at 240-53.

139. Warren analogized the proscriptive standard of Clayton 3 with the amended Section 7.

> Congress not only indicated that "the tests of illegality [under § 7] are 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," but also chose for § 7 language virtually identical to that of § 3 of the Clayton Act . . . which had been interpreted by this Court to require an examination of the interdependence of the market share foreclosed by, and the economic purpose of, the vertical arrangement.

370 U.S. at 329.

140. *Id.*

141. *Id.* at 331-32.

142. At one point oligopoly was recognized as a danger to "local control of industry and upon small business." *Id.* at 333.

merger where the market is atomistic and it is oligopoly that is sought to be prevented, the level of market share control that invites proscription is lower than under the Sherman Act.

The move to a lower market share proscriptive standard was confirmed one year later in *United States v. Philadelphia National Bank.*[143] The Court adopted a shorthand test of presumptive illegality in horizontal mergers that was predicated on the creation of a firm "controlling an undue percentage share of the relevant market . . . [which] results in a significant increase in the concentration of firms in that market . . . ."[144] The test was ostensibly framed along the lines of discernible market share absorption and foreclosure; strong vibrations of economic theory were perceptible, however.[145]

The Court adopted a new mode of precedent interpretation with regard to market foreclosure. Percentage figures of foreclosure were quoted, but for the first time they were related to the stucture of the particular market. In each case the market structure could be classified as oligopolistic: In *Standard Oil Company v. United States,*[146] six firms accounted for 65 per cent of the market; in *Federal Trade Commission v. Motion Picture Advertising Service Company*[147] four firms foreclosed 75 per cent of the market. In addition, an emerging effort to accommodate legal conclusions with economics is apparent. The Court noted that the presumptive rule was "fully consonant with economic theory."[148]

A presumptive rule assumes adverse competitive effects. Although the Court did not indicate the degree of influence that economic theory exerted, nor expressly posit theoretical effects, it did set in motion the move to the a priori mechanism.

Two years subsequent to *Brown Shoe,* in *United States v. Aluminum Company of America*[149] the theoretical consequences of oligopoly were, in a casual manner, posited. A merger that added only 1.3 per cent of the relevant product market to the ac-

143. 374 U.S. 321 (1963).
144. *Id.* at 363.
145. Brodley says that in *Philadelphia Bank,* "Modern economic theory was brought directly into judicial policy-making, not gradually but almost suddenly and with decisive results." Brodley, *Oligopoly Power Under the Sherman and Clayton Acts—from Economic Theory to Legal Policy,* 19 STAN. L. REV. 285, 301 (1967).
146. 337 U.S. 293 (1949).
147. 344 U.S. 392 (1953).
148. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963).
149. 377 U.S. 271 (1964).

quiring firm's share was condemned because of, among other things, the theoretical effects of oligopoly. Justice Douglas reasoned that as oligopoly develops, the likelihood increases that parallel policies of mutual advantage rather than competition will emerge.[150] That same year the doctrine of potential competition was welded to oligopoly theory. In laying down criteria for joint venture analysis in *Penn-Olin*,[151] the Court followed closely the approach taken by the Government's brief. It pointed out that potential competition, in light of the pro-competitive pressures that are implicit in the doctrine (here the Court used a quote from the Government's brief),[152] is an influence that should be preserved when the market is oligopolistic. Potential competition is a neutralizing agent, or more specifically, a device through which workable competition can be attained. Stated differently, the assumptions of one theory—potential competition—are used to combat the a priori anticompetitive effects of another theory—oligopoly.[153]

In *Consolidated Foods*,[154] *Von's Grocery*,[155] and *Pabst*,[156] reliance on economic theory by the Court is barely, if at all, discernible. Despite the fact that each of the decisions was decided against the defendants, none of them can be said to be directly responsive to the arguments raised by the Government. At the same time, none of the cases reflects a repudiation of economic theory.

In the *Consolidated Foods* brief, the Government contended that where proof of anticompetitive conduct—accommodative reciprocity—is difficult, the plaintiff can meet the burden by demonstrating the existence of a structural environment that

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150. *Id.* at 280.

151. United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964). In United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964), decided several months prior to the *Penn-Olin* case, the Court struck down a merger between El Paso and Pacific Northwest on the grounds that the acquisition eliminated Pacific Northwest as a potential competitor. There was, however, much in the record to indicate that Pacific was more an actual, than potential, competitor.

152. 378 U.S. at 174; *see* Brief for Appellant at 47, United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964).

153. The existence of an agressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated.

United States v. Penn-Olin Chem. Co., 378 U.S. 158, 174 (1964).

154. 380 U.S. 592 (1965).

155. 384 U.S. 270 (1966).

156. 384 U.S. 546 (1966).

might tempt firms to engage in such practices.[157] Justice Douglas, never reaching this point, instead stressed the demonstrable and coercive manifestations of reciprocity pressures. His treatment was primarily conduct and effect oriented. He considered the consequences of reciprocity anticompetitive because the practice furnishes the acquired company with "a protected market, which others cannot penetrate despite superiority of price, quality, or service . . . ."[158] On the other hand, environmentalism was not totally ignored. Conduct was viewed in terms of its effect on the structure of the industry in which the acquired firm participated. The Court stated that "[i]f it is desirable to prevent a trend toward oligopoly it is *a fortiori* desirable to remove . . . obstacles to the creation of genuinely competitive conditions in an oligopolistic industry."[159]

Not even tinges of economic theory, structural or otherwise, appeared in *Pabst* or *Von's Grocery*. *Pabst* is notable for its apparent relegation of proof of the relevant geographical market to inconsequential status. The Government argued that a barrier-to-entry formula is the most appropriate method of establishing an area of effective competition. It was, as has been pointed out, a formula that imposed upon the plaintiff a burden of proof that could hardly be characterized as heavy. Justice Black, who authored both *Pabst* and *Von's Grocery*, seemingly removed any relevant geographical market burden whatsoever from the plaintiff, stating that

> [p]roof of the section of the country where the anticompetitive effect exists is entirely subsidiary to the crucial question in . . . every § 7 case which is whether a merger may substantially lessen competition anywhere in the United States.[160]

In his treatment of the merits of the case, Black avoided the problems of competitive effect analysis. Neither theory nor effort at effect ascertainment was employed to bridge the gap between facts and antitrust decisional principles. Primary statistical facts, reflecting a trend toward concentration, were extended into a proscriptive holding.

Again in the *Von's Grocery* case, Black glossed over theory and competitive effect analysis. Perhaps the Court felt that neither method would have been satisfactory in light of the record. At best the market was not even a loose oligopoly. At

157. *See* note 112 *supra*, and accompanying text.
158. FTC v. Consolidated Food Corp., 380 U.S. 592, 599 (1965). The Court adopted the conclusion of the FTC.
159. *Id.* at 597, again adopting the Commission's conclusions.
160. United States v. Pabst Brewing Co., 384 U.S. 546, 549-50 (1966).

the time of their merger, there were 3,818 single-store grocery firms operating in Los Angeles. Competition was vigorous, with frequent entry and exits. Perhaps, as one commentator suggests, the factual description of the market environment might have been too inadequate for anything but superficial analysis.[161] Whatever the reason, the fact remains that Justice Black based his decision on two rather nebulous grounds. The first basis was the existence of a trend away from a proprietorship-dominated market to a market composed of chain stores—the "Mom and Pop Store" argument. The second ground was the joining of "two highly successful, expanding and aggressive competitors that created the second largest grocery chain in Los Angeles. . . ."[162]

Whether the reasoning of *Pabst* and *Von's Grocery* is explained in terms of "populism,"[163] as over-simplification, or as the work product of a result-oriented court, these decisions represent little more than a hiatus of short duration in the Supreme Court's increasing commitment to economic theory. Justice Douglas, who had somewhat off-handedly introduced the oligopoly theoretical mechanism in *United States v. Aluminum Company of America*,[164] forcefully thrusts a broad scheme of theories back into Supreme Court cognition in *Federal Trade Commission v. Procter & Gamble Company*.[165] In the Clayton 7 action, Douglas invoked at least three a priori approaches—oligopoly, potential competition, and barriers to entry.[166]

At the time of the merger, 1957, both Procter & Gamble—the acquiring firm—and Clorox—the acquired company—occupied positions of dominance in their respective industries. Procter functioned on a diversified basis, with one-half of its sales coming from soaps, detergents, and cleansers. In packaged detergents Procter controlled 54.4 per cent of the market. Eighty per cent of the market was controlled by a combination of three manufacturers—Colgate-Palmolive, Lever Brothers, and Procter. Because Procter dealt in quick turnover consumer goods, it advertised heavily; in 1957 it was the nation's largest advertiser. Clorox produced only liquid bleach. In the household bleach industry six firms accounted for 80 per cent of sales; Clorox led

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161. Brodley, *supra* note 145, at 308.
162. United States v. Von's Grocery Co., 384 U.S. 270, 272 (1966).
163. Brodley, *supra* note 145, at 308.
164. 377 U.S. 271 (1964); *see* note 150 *supra*, and accompanying text.
165. 386 U.S. 568 (1967).
166. Actually four theories were invoked if product differentiation is separated from barriers to entry.

with 48.8 per cent. After the top six firms, the market was occupied by over 200 small regional manufacturers.

The use of oligopoly theory made it possible for the Court to move simultaneously in three closely related directions. First, by invoking oligopoly doctrine, a favorable background was created against which additional theoretical conclusions could be introduced. Potential competition, barriers to entry and product differentiation are, in application, accessories of oligopoly theory. Secondly, theory was utilized to adduce facts, and, thirdly, theory was used to abstract and describe anticompetitive effects.

From a classification assumption that the liquid bleach industry was oligopolistic (which the record supported), an additional fact was assumed via the a priori route: "price competition was certainly not as vigorous as it would have been if the industry were competitive."[167] An a priori description of competitive effect which is basic to oligopoly theory—that firms always resort to non-price competition such as product differentiation—is cloaked in this statement. The inter-firm anticipatory gamesmanship and price leadership elements of oligopoly were not overlooked. The Court stated that

> [t]here is every reason to assume that the smaller firms would become more cautious in competing due to their fear of retaliation by Procter. It is probable that Procter would become the price leader and that oligopoly would become more rigid.[168]

In its brief the Government devoted considerable effort toward building a "barrier to entry" argument. With some precision the efficacy of product differentiation precipitated by advertising and the resultant a priori effects on condition of entry were hypothesized.[169] Douglas embraced product differentiation, but with considerably less analysis and with no effort to relate the assumed barriers to entry to adverse competitive effects. Noting the size of Procter's advertising budget, the importance of advertising to a product that is chemically indistinguishable from those of rivals, and citing an example of Clorox's success in a regional advertising battle, Douglas capsuled barrier-to-entry effects into a few terse and cloudy words. He stated that ". . . a new entrant would be much more reluctant to face the giant Procter than it would have been to face the

167. FTC v. Procter & Gamble Co., 386 U.S. 568, 578 (1967). The Court cited nothing from the record in support of this.

168. *Id.*

169. Brief of FTC at 38-48, FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).

smaller Clorox."[170]

Potential competition was handled in the same pre-emptory fashion as oligopoly and condition of entry. Assuming the sensitivity of the oligopolist to internal and external competitive pressures, the maintenance of a force capable of operating as a governor on pricing became crucial. Procter, prior to the merger, supplied this pressure. However, while the Court concluded "that the existence of Procter at the edge of the industry exerted considerable influence on the market,"[171] it failed to explain how this influence would have been manifested, particularly as it related to probable adverse competitive effects.

In summary, *Brown Shoe*, which advocated functional analytics and a particularistic case-by-case application of Clayton 7, and which viewed oligopoly as nothing more than a structural culmination to be considered along with the "history and probable future" of the particular industry under scrutiny, is no longer authority. It has been stated that "[t]oday, these *Brown Shoe dicta* are little more than quaint relics, about as pertinent to the law of Section 7 as the *Palsgraf* case."[172]

Following dictum from *United States v. Philadelphia National Bank*,[173] the Court has adopted a mechanical abstractive methodology in antitrust problem solving. Whether *Procter & Gamble* represents a permanent mood remains to be seen. Certainly the opinion reflects the type of analysis that emanates from the briefs prepared by the Government.

The move to abstractionism has produced a corollary—a dearth of explanation and analysis. The abruptness and terseness of the *Pabst* and *Von's Grocery* opinions furnish meager substance for the development of meaningful ground rules. The vacuum left by the *Procter & Gamble* decision is even more serious. The skeletal manner in which the economic theories were

170. FTC v. Procter & Gamble Co., 386 U.S. 568, 579 (1967). Harlan complained that:

> Economic theory would certainly indicate that a heightening of such barriers has taken place. But the Court does not explain why it considers this change to have significance under § 7, nor does it indicate when or how entry barriers affect competition in a relevant market.

Id. at 584-85 (concurring opinion).

171. *Id.* at 581.

172. Adler, *Merger Rules and Supreme Court Economics*, 36 A.B.A. ANTITRUST L.J. 4 (1967).

173. "[I]n any case in which it is possible, without doing violence to the congressional objective embodied in § 7, to simplify the test of illegality, the courts ought to do so. . . ." United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362 (1963).

presented and the off-hand manner in which they were applied was made manifest by the failure to touch on important questions of fact and effect. What, for example, was the complexion of pricing in the liquid bleach industry? Were prices rigid—as they would be under oligopoly theory? Did the 200 "fringe" firms exert, as a matter of fact, competitive pressures on the market, or were they, as theory posits, ineffective, fearful of retaliation, and disciplined to follow the leaders? In terms of evidence, what was the height of the entry barriers facing Procter and other similarly situated firms? A determination of whether prices were at a profit-maximizing level would have revealed much about the conditions of entry and about the attractiveness of the industry to potential competitors. Evidence supporting the conclusion that the efficacy of advertising-inspired product differentiation is dependent solely upon the size of the budget would have been helpful.

Instead of answering these questions, Douglas followed the a priori route. The usual mechanical assumptions of oligopoly theory—price leadership, a lack of price competition, and a disciplined non-competitive industry—were equationalized, along with product differentiation and potential competition, into the inevitable decision for the Government.

VI. CONCLUSIONS

The dominant feature of the *Procter & Gamble* type of decisional methodology is that through the economy of the theoretical mechanism, facts, competitive effects and rules are combined under the shelter of an abstract norm. Oligopoly theory encompasses conclusions as to both effects and standards of violation. By classifying markets as oligopolistic—either as presently existing or as a potential result of the practices being scrutinized—assumptions as to adverse competitive consequences automatically follow. The oligopolistic classification also sets a proscriptive norm—in a sense the term oligopoly, with its concomitant theoretical assumptions, is a shorthand description for a structural per se rule. The doctrines of potential competition, barriers to entry and product differentiation evoke the same presumption.

A. Advantages

There are advantages attendant to the a priori mechanical technique. The obvious advantage, and the one upon which much of this article has focused, is that present anticompetitive effects, or their imminent appearance, are conclusively assumed. The complex problem of convincingly relating concrete factual events of the past and present to the future is therefore avoided. The decisions demand only a sparse factual foundation to support the use of theory. Thus, there is a light burden on the plaintiff to produce, and on the court to analyze, relevant facts. Both of these factors are particularly attractive to courts confronted with situations such as reciprocal trading and conglomerate mergers, where traditional factual predictors of competitive impact are of little value.

The conclusion that the theoretical mechanism possesses strains of per se proscription is inescapable. By making minimal factual soundings and enveloping these efforts in a priori conclusions, as Douglas did in *Procter & Gamble*, the Court approaches per se reasoning. This is undoubtedly what Harlan had in mind when he complained that the majority in *Procter & Gamble* had applied "a kind of *res ipsa loquitur* approach. . . ."[174]

B. PROBLEMS

The theoretical mechanism generates serious problems. At the expense of being tautological, theory is, after all, theory. To maintain symmetry, the creator of the a priori model frequently "selects for main emphasis certain features which its analytical tools can handle, thus introducing a selective bias into its standard of judgment."[175] This is perhaps fine for the economist, who is accountable only to his craft and to the criticisms of his colleagues. It is not, however, compatible with a legal system which must make judgments that have concrete ramifications affecting the actual operations of the litigants and the market in which they participate. Antitrust decisions should incorporate, so far as practicable, points of reference which have validity in reality. It was just this point that prompted Mr. Justice Harlan to raise the following query:

> At the outset, it seems to me that there is a serious question whether the state of our economic knowledge is sufficiently advanced to enable a sure-footed administrative or judicial determination to be made *a priori* of substantial anticompetitive effect in mergers of this kind. It is clear enough that Congress desired that conglomerate and product-exten-

174. FTC v. Procter & Gamble Co., 386 U.S. 568, 582 (1967) (concurring opinion).
175. J. CLARK, COMPETITION AS A DYNAMIC PROCESS 61 (1961).

sion mergers be brought under § 7 scrutiny, but well versed economists have argued that such scrutiny can never lead to a valid finding of illegality.[176]

The fact that sharp differences of opinion exist among economists themselves as to the "best" theory or as to the weight to be given specific elements in a theory lends credence to Harlan's comment. Indeed the Court's a priori shorthand methodology prompted one member of the antitrust bar to complain that the Supreme Court is actually *misreading* economic theory. Protesting exclusive reliance by the Court on the percentage figures of increased concentration—specifically in the *Alcoa, Von's Grocery*, and *Pabst* decisions—he said: "The economics literature, including works cited by the Court itself, makes clear that recent merger decisions do not rest on accepted economic theory."[177]

Another problem created by the theoretical mechanism is the imposition of a heavier and unfamiliar burden on the defendant. A defense constructed along traditional lines[178]—disputing facts, arguing against conclusions as to probable competitive effects, and sifting through case precedent—is simply not responsive to the a priori style. Whatever course of argumentation he follows, the defendant will have to get into the elusive and esoteric field of economic theory. He can argue against the validity of the theory—questioning either its empirical foundation or its relevance to the case at hand—and urge the court to return to the facts-effects-rules equation. Another possibility for the defendant is to contend that the Government's underlying theory is inappropriate and suggest a replacement. Oligopoly theory could, for example, be countered by Shumpeter's "creative destruction" concept. But, by responding in this fashion the defendant has committed himself to a battle of theories. Since such theories as oligopoly, barriers to entry, and product differentiation totally dominate the present scene, the defendant's chance of convincing a court to accept a different theory is extremely remote.[179]

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176. FTC v. Procter & Gamble Co., 386 U.S. 568, 587 (1967) (concurring opinion).

177. Adler, *supra* note 172, at 6.

178. *See* Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 253-56 (1960).

179. There is a final problem of greater subtlety. The close analogy between theoretical mechanism and per se proscription raises the complaint of a lack of procedural due process. *See* Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139 (1952).

All of the preceding difficulties complicate the ultimate question of whether the theoretical mechanism is compatible with a legal system committed to a decisional ideal of "regularity, reckonability and justice."[180] The Court's reliance on a priori reasoning makes it unlikely that the business community will be able to extract from the opinions decipherable guidelines around which future conduct can be oriented. The circumstances under which such assumptions as oligopoly and barrier to entry drop down to proscribe specific types of business conduct remains shrouded in the rarified atmosphere of theoretical antitrust jurisprudence.

C. Alternative Methodologies

> How far must we search for economic truth in a particular case when the economic facts may be obscure at best, when the relevant economic theories may be controversial or indefinite, and when the statute does not give us a clear-cut value choice?[181]
>
> The problems connected with the collection and analysis of facts sufficient to serve as a base for decisions as to the probable competitive consequences of an acquisition are so complex that there is strong temptation to look for simple tests. Simple formulae are, however, untrustworthy indices of competitive consequences.[182]
>
> Legal requirements are prescribed by legislatures and courts, not by economic science.[183]

Given the intricacies of accurately profiling, the connection between the commercial facts of a dynamic marketplace and probable competitive effects, the indeterminate statutory guidelines set down by Congress, and the Supreme Court's employment of theoretical mechanism with its attendant inadequacies, the question logically turns to the availability and feasibility of alternative decisional methods. There are three additional methods of handling the problem—theory as a point of departure, the functional and particularistic method, and hierarchical guidelines.

1. *Theory as a Point of Departure*

Theory can be employed as a point of reference for localizing the problem areas and for guiding factual inquiry. If the factual

180. K. Llewellyn, The Common Law Tradition 183 (1960).
181. P. Areeda, Antitrust Analysis: Problems, Text, Cases 5 (1967).
182. FTC, Report on Corporate Mergers and Acquistions 174 (1955).
183. Att'y Gen. Nat'l Comm. Antitrust Rep. 316 (1955).

evidence tends—in terms of "a reasonable probability"—to support the foundational hypothesis, proscription would follow. For example, the theory of oligopoly posits specific actions and reactions among rivals that are considered detrimental to competition. The court would then examine the record to determine if the activity under scrutiny would lead to the structure that gives rise to the a priori assumptions, and whether the facts indicate that the firms have conducted, or are likely to conduct, business as the theory hypothesizes. Or, if the barriers-to-entry doctrine were applied, effort would be made to ascertain whether the facts indicated that barriers would, or did, exist and that the conduct under investigation was a prime contributor.

Economic theories would establish antitrust norms. There would be a known and consistent framework of argumentation within which litigants would be expected to operate. Certain prespecified economic facts would be relevant in a given controversy. Conversely, those facts outside the perimeter of the controlling theory could be ignored. Substantiation—the nexus between facts and a priori judgments—would not have to be conclusive; a reasonable probability would be sufficient.

The departure methodology presupposes more than a casual familiarity with the subtleties of pure theory. The court would thus be burdened with learning the esoterica of economic theory. This could prove burdensome; it takes more than a novice to determine if the theory to be applied actually coincides with the problem at hand. Another potential difficulty is that the determination of which facts fall within the ambit of inquiry would be heavily influenced by that group with the greatest expertise in economic fact sifting—the economist—rather than counsel.

2. *Functional Particularism*

In many respects functional particularism has rule-of-reason overtones. This methodology is essentially the *Brown Shoe* type of functional, factor by factor, case by case, analysis.[184] The options open to the court are obviously wide, all pertinent areas of inquiry—conduct, structure, performance, "Mom and Popism"—are subject to analysis. Presumably the opportunity for effect analysis, either in terms of probabilities or actualities, would be great. On the other hand, it is equally likely that the wide choice in direction and the absence of indicators could bog down the court with irrelevancies.

184. *See* notes 134-41 *supra*, and accompanying text.

It was specifically this form of open-end decisional methodology that spawned the theoretical mechanism. The indefiniteness of functional particularism as a consistent guide to proscription and the opportunity that it provides for a myriad of defensive postures has made it unattractive to enforcement agencies and courts—sufficiently unattractive to prompt a search for simplified, and mechanical, tests of illegality.

3. *Hierarchical Guidelines*

The final alternative assumes the existence of an economic court, composed of specialists, who would implement published proscriptive guidelines. These guidelines could be either in statutory form or promulgated through a method similar to that presently followed by the FTC and the Justice Department.[185] The Supreme Court would be relieved of the heavy burden of dealing with the *Gestalt* of antitrust. The assumption is that by placing the decision-making responsibility in the hands of experts, greater consistency and analysis in opinions could be achieved.[186]

Another advantage of this method is that areas of competing interests and objectives—performance versus behavior, behavior versus structure, economies versus concentration—would be resolved into hierarchical levels, with the results being incorporated into the guidelines. In the majority of cases application of the guidelines would be automatic. Moreover, the lack of predictability and the inability to anticipate proscription—of which the businessman so bitterly complains—would be reduced. At the same time the unique situation which inevitably occurs could be covered by appropriately worded caveats.

Perhaps the chief feature of the hierarchical guideline approach is that it does not focus on competitive effect analysis. This problem is by-passed by the development of predetermined criteria of evaluation which either assume adverse effects or deem their existence irrelevant.[187]

However, the architectural problems of reducing the guidelines to actual practice are indeed formidable. There is the

185. *See* Merger Guidelines, *supra* note 131.
186. Elman, *The Need for Certainty and Predictability in the Application of the Merger Law*, 40 N.Y.U.L. Rev. 613 (1965).
187. *See, e.g.*, C. Kaysen & D. Turner, Antitrust Policy: An Economic and Legal Analysis 98 (1965).

practical problem of convincing Congress that an economic court is desirable. If statutory guidelines are utilized, a drafting problem appears. The legislative process is not the ideal environment for the intricacies of economic objectives to be organized into a neatly structured proscriptive hierarchy. The conflicting views of economists, the efforts of pressure groups, and the compromise *modus operandi* of legislative enactment, would all serve to distort the final product. It is also apparent that by enacting broadly-worded statutes, and leaving the task of filling in to the courts and the FTC, Congress has already indicated a disinclination to come to grips with the specifics of antitrust. There is justification for Congress's attitude. If the guidelines are too specific in relating to the contemporary commercial scene and to the economic dogma of the day, they contain a built-in impermanence and inflexibility factor.

Non-statutory guidelines present the opposite problem. They are subject to instant change without prior notice. Other than as indicators of decisional intent they would have no binding force.[188]

D. RECOMMENDED METHODOLOGY

The relevance of economics to antitrust cannot be seriously disputed. The substantive vocabulary of modern antitrust traces its origin to economics. The measuring techniques of the economist and the sense of direction provided by his pertinent questions have made possible a sophisticated level of insight into problem areas heretofore unattainable. The problem is clearly not that the two fields possess no mutual relevance or that no affinity of doctrine exists. Quite the reverse, the problem is that the Supreme Court has undiscerningly over-absorbed economics. The consequence of wholesale and indiscriminate absorption has been the failure to individualize and tailor theory to the given fact situation. The superficiality of the *Procter & Gamble* decision forcefully illuminates the inappropriateness of the theoretical mechanism as a decisional tool.

The best means of neutralizing the theoretical mechanism and at the same time bringing the patterns of antitrust decision making closer to traditional standards of predictability, is through the *Theory as a Point of Departure* methodology. Two reasons prompt this judgment. First, the other alternative

188. For an enthusiastic view of the non-statutory rule-making process, see Elman, *Rulemaking Procedures in the FTC's Enforcement of the Merger Law*, 78 HARV. L. REV. 385 (1964).

methodologies, *Functional Particularism* and *Hierarchical Guidelines*, pose serious problems of implementation. The first method is too vague and loose; the second method, assuming legislative acceptance, would be too inflexible in application. Secondly, it is assumed that the theoretical models discussed in this article establish a reasonable and valid perimeter for inquiry into the applicability of antitrust statutes: A "reasonable" perimeter in the sense that the examination can be accomplished through the traditional evidential framework of the courtroom; a "valid" perimeter in that the models are predicated upon assumptions that have general credence and acceptability among economists and lawyers.[189]

The *Point of Departure* method pulls antitrust interpretation back to a "reasonable probability" perspective. Facts, after a sifting dictated by the imperatives of the applicable theory, are channeled towards predetermined niches. The emphasis is on proving a reasonable—or probable—connection between facts and a priori competitive effects. The adoption of a facts-effects equation keyed to clearly identified economic theory would hopefully inspire "regularity, reckonability, and justice." An important by-product would be deeper analysis and explanation.

The candid use of economic theory calls for an appreciation and familiarity of economics that the Supreme Court has thus far not as a group exhibited.[190] It is this point that constitutes the major obstacle to the *Point of Departure* method. It is not, however, an insurmountable barrier. There are two possible ways to eliminate this difficulty. Economists could be employed as law clerks for individual justices either on a permanent basis or on a "big case" basis. There is precedent for this in Judge Wyzanski's use of Professor Carl Kaysen in the *United States v. United Shoe Corporation*[191] trial litigation. The other

189. *See* notes 53-59 *supra*, and accompanying text. *See also* J. BAIN, BARRIERS TO NEW COMPETITION (1965); R. CAVES, AMERICAN INDUSTRY: STRUCTURE, CONDUCT, PERFORMANCE (rev. ed. 1967); W. FELLNER, COMPETITION AMONG THE FEW (1960); C. KAYSEN & D. TURNER, *supra* note 188; M. LINDAHL & W. CARTER, CORPORATE CONCENTRATION AND PUBLIC POLICY (1959); Brodley, *supra* note 145.

190. One outstanding exception is Mr. Justice Harlan. His concurring remarks in the *Procter & Gamble* case are reflective of his sensitivity to the delicate balance between law and economics.

191. 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). For a summary of his findings see C. KAYSEN, UNITED STATES v. UNITED SHOE MACHINERY CORP. (1956). The economist-law clerk idea has been criticized by Massel: "It provides neither adversary with an opportunity to present evidence and arguments to counter the advice which is given to the judge in private." Massel adds that

possibility is the creation of a permanent economic advisory committee which would be responsible for the entire Court. The advantage of the latter arrangement is that by being responsive to the entire Court, dialogue among the justices would be encouraged.[192] On the other hand, the intimacy that would prevail under the first plan would be more likely to kindle a greater degree of expertise in the individual justices.[193]

The above recommendations should not be construed as a proposal that the courts in general and the Supreme Court in particular abdicate or delegate decision-making responsibilities.[194] It is a recognition that on a defined and controlled basis, economic theory is a necessary instrument to enlightened antitrust enforcement. It is also a recognition that the theoretical mechanism is not in the best interests of a legal system which prides itself on maintaining rapport with the worthwhile social and economic vibrations of the community.

> if each side knows that a judge will hear such ex parte advice, lawyers will feel compelled to present every facet of a market situation instead of covering only as much as they feel is needed to counter the presentation of their opponents.

M. MASSEL, COMPETITION AND MONOPOLY 173 (Anchor ed. 1964). Restricted to the trial court level this *may* be a valid criticism. The Attorney General's report agreed, stating that the "place of an economic expert in antitrust trials is no higher than an expert in any field, namely, as a witness on the stand . . ." ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 366 (1955). At the appellate level, where the issues have already been defined, it is not valid.

192. One gets the unhappy feeling that there is no dialogue in the Court between the majority and minority. Although the fact must be otherwise, it almost seems that a dissent is not even read by the author of the prevailing opinion.

Handler, *The Twentieth Annual Antitrust Review—1967*, 53 VA. L. REV. 1667, 1698 (1967).

193. The overall resources of the Supreme Court are non-existent when compared with those available to the legislature and executive branches. *See* Lewis, *The High Court: Final . . . But Fallible*, 19 CASE W. RES. L. REV. 528 (1968).

194. The advice of Roscoe Pound on this point is relevant:

> [Courts] cannot delegate their task of decision according to law either to legal or to non-legal experts. Economists can help in the process of application of law by giving us a more assured grasp of the goals to be attained and by helping in the choice of starting points for legal reasoning which must go on in the interpretation and application of legal precepts. But decision must be according to law and not according to the economic theory of the moment. . . .

Pound, *Foreward* to C. GRIFFEN, AN ECONOMIC APPROACH TO ANTITRUST PROBLEMS at vii (1951).