

BROWN SHOE: IN STEP WITH ANTITRUST

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I.

Half a century ago, John Bates Clark articulated the meaning of free competition, and suggested some guidelines for its preservation.

In our worship of the survival of the fit under free natural selection we are sometimes in danger of forgetting that the conditions of the struggle fix the kind of fitness that shall come out of it; that survival in the prize ring means fitness for pugilism, not for bricklaying nor philanthropy; that survival in predatory competition is likely to mean something else than fitness for good and efficient production; and that only from a strife with the right kind of rules can the right kind of fitness emerge. Competition is a game played under rules fixed by the state to the end that, so far as possible, the prize of victory shall be earned, not by trickery or mere self-seeking adroitness, but by value rendered. It is not the mere play of unrestrained self-interest; it is a method of harnessing the wild beast of self-interest to serve the common good—a thing of ideals and not of sordidness. It is not a natural state, but like any other form of liberty, it is a social achievement, and eternal vigilance is the price of it.¹

To preserve this “form of liberty”—to reify this “social achievement”—was the central purpose of the antitrust laws. Starting in 1890, and consistently thereafter, Congress expressed the view that competition is the life of trade, that business operates best when left alone, and that government’s natural role is “that of a patrolman policing the highways of commerce. It is the duty of the modern patrolman to keep the road open for all and everyone and to prevent highway robbery, speeding, the running of red lights and other violations that will endanger and hence, in the end, slow down the overall movement of traffic.” By this Congress meant that “occupations were to be kept open to all who wished to try their luck, that the individual was to be protected in his ‘common right’ to choose his calling and that hindrances to equal opportunity were to be eliminated.”² According to the sponsors of the Sherman Act, business transactions were to be regulated so as “to preserve a system in which gain is sought and obtained by efficiency in bargaining with customers, and to discourage

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1. CLARK, *THE CONTROL OF TRUSTS* 200-01 (1914).

2. THORELLI, *THE FEDERAL ANTITRUST POLICY* 226 (1955). See also Hamilton & Till, *Antitrust in Action*, TNEC MONOGRAPH No. 16 (1941) and Stelzer, *The Social Objectives of Antitrust Policy*, 6 ANTITRUST BULL. 595 (1961).

the quest or achievement of market advantage by methods that are unfair or collusive.”³ The New Freedom, said President Wilson, was intended to assure the individual of “fair play” in the market place, because “without the watchful interference, the resolute interference, of the government, there can be no fair play between individuals and such powerful institutions as the trusts.”⁴ If big business was to triumph, it should be forced to do so only through “intelligence and economy.”⁵ The objective of antitrust, therefore, was to devise ground rules—canons of fair play—which would at once “preserve the competitive process and . . . channel it along socially productive lines.”⁶

The implementation of these ground rules was to consist of both general and specific limitations on the “freedom of contract.” The general limitations included prohibitions against all contracts, combinations and conspiracies in restraint of trade;⁷ against all acts of monopolizing;⁸ and against all unfair methods of competition.⁹ The specific limitations proscribed price discrimination,¹⁰ tying arrangements, exclusive dealing,¹¹ corporate mergers and acquisitions,¹² and interlocking directorships¹³—but only where their effect “may be to substantially lessen competition or tend to create a monopoly.” The thrust of these limitations, enacted over a period of sixty years, was to outlaw those forms of business behavior which were inimical to a competitive market structure and, by presumption, to business performance in the public interest. The underlying assumption was that a competitive system, operating through competitive markets, provides the most effective means of promoting economic progress, economic justice and economic welfare—that, conversely, any interference with such a system would automatically cause public injury and therefore be inconsistent with the public interest.

II.

The anti-merger policy of the Clayton Act rests on a specific presumption against growth by combination, and in favor of growth by internal expansion. This presumption, in turn, is based on four major postulates. According to the *first* postulate, firms should grow by

3. DIRLAM & KAHN, FAIR COMPETITION 16 (1954).

4. WILSON, THE NEW FREEDOM 284 (1913).

5. DIRLAM & KAHN, *op. cit. supra* note 3, at 15.

6. *Id.* at 16.

7. Sherman Anti-Trust Act § 1, 69 Stat. 282 (1955), 15 U.S.C. § 1 (1958).

8. Sherman Anti-Trust Act § 2, 69 Stat. 282 (1955), 15 U.S.C. § 2 (1958).

9. Federal Trade Commission Act § 5, 74 Stat. 200 (1960), 15 U.S.C. § 45 (1958).

10. Clayton Act § 2, 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1958).

11. Clayton Act § 3, 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958).

competition-creating rather than competition-lessening methods—by “building” rather than “buying.” Internal growth, manifesting itself in new plants, or new products, can scarcely avoid intensifying competition, whereas combination, which eliminates an independent unit from the market, tends, on balance, to lessen rather than create competition. Bethlehem’s entry into the Chicago steel market is a case in point. Originally, the company had intended to effectuate entry by merging with Youngstown, in order to be in a better competitive position vis-à-vis the area’s dominant producer, U.S. Steel. Once the merger was blocked,¹⁴ however, Bethlehem decided to proceed with its plans by constructing a new steel mill.¹⁵ Who can doubt that this type of expansion, independent of any other steel company, will provide steel buyers with more alternatives and make for greater rivalry among steel sellers in the Chicago area—that it will create more competition than if Bethlehem had combined with Youngstown into a single decision-making unit and thus destroyed a potential competitor in an industry that is already overconcentrated?

A *second* postulate supporting the anti-merger presumption holds that internal growth stems from success in the market, whereas combination implies the artificial elimination of a going concern. Funds for internal growth can be derived either from retained earnings or the sale of securities, reflecting consumer acceptance of the firm’s products, in the one case, and investor approval of the firm’s financial performance, in the other. In either event, there is a presumption that the firm’s growth has been justified by objective market standards—in contrast to the merger process which implies an artificial short-circuit of an exogenous market judgment. This does not gainsay the possibility that a monopoly, too, may grow by internal means alone, nor that such growth may *in extremis* yield undesirable social consequences. It means only that growth by merger, if permissible without restraint, would facilitate and hasten the structural transformations in industry which the antitrust laws are designed to prevent.

The *third* postulate states that economies of scale, wherever they are indeed significant, can be realized through internal growth as well as through acquisition and merger. To forbid “size” achieved through merger does not condemn a firm, an industry, or society to a loss of economic efficiency. A firm which must be big in order to be efficient may achieve the necessary size through internal growth—without destroying a competitor.¹⁶ It may be argued, of course, that a strict

12. Clayton Act § 7, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

13. Clayton Act § 8, 49 Stat. 717 (1935), 15 U.S.C. § 19 (1958).

14. United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S.D.N.Y. 1958).

15. Bethlehem Steel Corp., Release, “Burns Harbor Plant,” Dec. 3, 1962.

16. Among the economies of scale that may be internally achieved are those of

anti-merger statute is incompatible with the creation of optimum-size firms, because some markets are simply not big enough to accommodate two firms, each operating at maximum efficiency. Whether this reservation is relevant in many industries—or, indeed, any industries—has not yet been demonstrated, except in such public utilities as electric light and power, telephones and gas distribution. In these “natural monopoly” industries, the market is clearly too narrow for duplicate firms of optimum size, but then again these industries are not in the free enterprise segment of the economy, nor are they expected to operate in accordance with the structural model presupposed by the antitrust laws. Their performance in the public interest is not compelled by competition, but controlled by public regulation or public ownership.

The *fourth* postulate states that collective action in restraint of trade—whether among competitors or between suppliers and customers—is incompatible with a competitive free enterprise system. Thus, any agreement to fix prices, regardless of the amount of commerce involved or the power of the conspirators to make the agreement “stick,” is a per se violation of the law.¹⁷ Given this unconditional prohibition of price control by agreement, how can the law permit price control by merger? If it is contrary to public policy for two competitors to fix prices while retaining their nominal independence, how can they be permitted to attain the same objective more neatly, easily and permanently by combining into a single decision-making unit? Obviously, if contracts, agreements and conspiracies in restraint of trade strike at the “central nervous system” of a competitive economy, mergers and combinations have the same effect. Both represent a “denial to commerce of the supposed protection of competition.”¹⁸ Both are inimical to a system which operates through the compulsions that exogenous, untrammelled market forces bring to

management. Too often, it is assumed that merger is the only hope for firms saddled with obsolescent and ineffectual administrators. Yet, these firms seldom make an effort to infuse their organization with better talent by the simple expedient of paying higher salaries, or terminating contracts of unsatisfactory managers.

17. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898).

And the amount of interstate or foreign trade involved is not material . . . since § 1 of the [Sherman] Act brands as illegal the character of the restraint not the amount of commerce affected. . . . Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy. *United States v. Socony-Vacuum Oil Co.*, *supra* at 224-26 n.59.

18. *United States v. Aluminum Co. of America*, 148 F.2d 416, 428 (2d Cir. 1945).

bear on numerous and independent centers of initiative—a system which cannot tolerate collective action in any form that seeks to immunize firms from the pressures of the market place.

III.

Given this presumption of our anti-merger policy, the postulates on which it rests and the legislative history of the Celler-Kefauver Act, it is difficult to understand some recent criticisms of section 7 case law. The Federal Trade Commission, says Professor Bork, has shown a face that “is not an attractive one.”¹⁹ The Commission, claims Professor Kalmowski, has handed down decisions that have “sinister implications for the health of our economy.”²⁰ The *Brown Shoe* case, writes Professor Adelman, is infused with “protectionist” thinking: “Translated into intelligible speech, it all means that the merging firms will gain economies which will make life harder for their competitors, and this must be forbidden.”²¹ According to Professor Handler, the *Brown* decision reflects a trend toward “per se illegality” in merger proceedings,²² and, according to *Business Week*, it casts “doubt on the legality of just about any merger.”²³

Unfortunately, the critics do not outline the impending catastrophe in concrete detail. They produce no evidence of the economic loss resulting from unwise administration and naive interpretation of a law they never directly attack. Instead, they seem to assume—implicitly—that the mergers which have been challenged would certainly yield economies of scale, the cost savings of vertical integration, the risk-spreading of conglomerate acquisitions, or a combination of these advantages. If a given merger did not yield such benefits, the critics seem to be saying, why would its promoters have pushed it? The present enforcement mistakes, they claim, could be quickly corrected, if only the Commission and the courts would, on a case-by-case basis,

19. Bork, *Anticompetitive Doctrines Under Section 7 of the Clayton Act*, 39 TEXAS L. REV. 832 (1962).

20. Kalmowski, *Section 7 and Competitive Effects*, 48 VA. L. REV. 827, 850 (1962).

21. Adelman, *The Antimerger Act, 1950-60*, 51 AM. ECON. REV. Proceed. 236, 240-41 (1961).

22. Handler & Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629, 641 (1961).

23. *More Confusion About Mergers*, *Business Week*, June 30, 1962, p. 160. For other unfavorable appraisals of enforcement policy under section 7, see Peterson, *The Case Against Antimerger Policy*, *Business Horizons*, Winter 1961, p. 111 and Lewyn & Mason, *Ten Years under the New Section 7 of the Clayton Act: A Lawyer's Practical Approach to the Case Law*, 36 N.Y.U.L. REV. 1067 (1961). For a more favorable, and possibly more balanced, appraisal, see Dirlam, *The Celler-Kefauver Act* (forthcoming as part of a compendium on administered prices by the Subcommittee on Antitrust & Monopoly, United States Senate, 1963).

pursue a full economic investigation, taking into account "all matters evidencing the acquisition's likely impact on the vigor of competition."²⁴ Decisional calamities could be avoided by a comprehensive and supposedly definitive economic comparison of the "vigor" of competition before the merger with its probable "vigor" after the merger. Presumably, the wisdom of *Pillsbury*²⁵ should be substituted for the policy thrust of Celler-Kefauver.

Without suggesting that section 7 policy in the past has always been elegantly articulated or felicitously applied, we must reject these criticisms. The *Pillsbury* doctrine, requiring "a case-by-case examination of all relevant factors" in order to ascertain probable economic consequences, is administratively not feasible. The standards it suggests are not tied to measurable variables, and tend to invite interminable and equivocal excursions into the unquantifiable. The proposed examination of "all relevant factors" would almost inevitably swamp the proceedings and stultify enforcement.²⁶ Efforts to evaluate "qualitative" changes in the "vigor" of competition, and emphasis on the amount of competition which remains in the market rather than the competition which has been eliminated by a merger, augur—in spite of disclaimers—a substitution of Sherman Act for Clayton Act standards in judging combinations. In the extreme, the *Pillsbury* doctrine means that, even if a merger creates or strengthens an oligopoly, it is not necessarily unlawful; its presumed illegality can be rebutted by pointing to the "vigor" of competition among the oligopolists remaining in the market.²⁷ Paraphrasing the French observer's comment on the charge of the Light Brigade, "c'est magnifique, mais ce n'est pas la guerre," we say "the *Pillsbury* approach may be a wonderful distraction for economists, but it does not constitute enforcement of the anti-merger law."

If we are to eschew full-scale economic investigations, and the *Pillsbury* version of the ancient rule of reason, what are the alternatives? What economic standards can be used as aids to decision-making under section 7? The central standards, we submit, must focus on defendants' size, rank and market share, because it is these

24. Handler & Robinson, *supra* note 22, at 664.

25. *Pillsbury Mills, Inc.*, 50 F.T.C. 555 (1953).

26. For a discussion of this point with reference to Clayton Act proceedings under section 3, see Mr. Justice Frankfurter's opinion in *Standard Oil Co. v. United States*, 337 U.S. 293 (1949), especially at 314.

27. "There is nothing in the record to indicate that the mergers will at present convert the industry in the southeast from a competitive to a non-competitive pattern. The inference, in fact, must be to the contrary inasmuch as large national distributors, such as General Mills and Quaker Oats, and large regional distributors remain to furnish effective competition to *Pillsbury Mills*." *Pillsbury Mills, Inc.*, 50 F.T.C. 555, 572 (1953). (Emphasis added.)

indicia that best show the probable effect of a merger on the persistence of competition.²⁸ The crucial test must be "structural," and it must be applied in the institutional context of a particular industry. Obviously, the loss of one competitor means little in the knit outerwear industry, but a great deal in steel. A vertical merger by a leading firm in a relatively unconcentrated industry (like shoes) may seem to foreclose only a small market; yet, if duplicated by others, it may seriously limit outlets for smaller manufacturers. Diversification by large firms may have no immediate effect on concentration ratios, but conglomerate mergers may nevertheless increase the power of such firms to exert leverage against their more specialized rivals. In short, the paramount consideration in a merger decision must be the structural transformation that is likely to flow from the combination, but this transformation must be evaluated in the context of the industry in question.

Since 1950 there have been several proposals suggesting specific structural standards for interpreting section 7. According to Kaysen and Turner, for example, "Adverse effects on competition shall be presumed whenever a company that for five years or more has accounted for twenty percent or more of annual sales in a market acquires any competitor in that market, unless such competitor is insolvent or in obviously declining circumstances."²⁹ Acquisitions resulting in less than 20 per cent market control would, under this rule, be forbidden only in case of "severe" limitations on entry, active "influence on prices by the acquired company," or "other factor."³⁰

Similar, but more stringent, structural tests have been proposed by Professor Stigler.³¹ Recognizing that, absent collusion, competition will be effective if the largest firm in an industry "has less than 10% of the output,"³² Stigler suggests that (a) mergers resulting in a combined market percentage of 20 per cent or more be prohibited; (b) mergers resulting in a market share of less than 5 to 10 per cent be allowed—the percentage to be lower, the larger the industry; and (c) mergers between these limits be dependent for their legality on ease of entry, rate of growth, closeness of substitutes, the competitive

28. For an insightful discussion of structural standards in antitrust enforcement, see Lanzillotti, *Market Structure and Antitrust Vulnerability*, Nat'l Indus. Conference Bd. Proceedings (1963).

29. KAYSEN & TURNER, *ANTITRUST POLICY* 99 (1959). If it could be shown that the acquisition would yield "substantial" economies of scale or resource utilization which could not be effected in any other way than through merger, the prima facie case could be rebutted. *Id.* at 133.

30. *Id.* at 133-36.

31. Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176 (1955).

32. *Id.* at 181.

organization of the industries making substitutes and the familiar "other factors."³³ Vertical mergers, under the Stigler rule, would be prohibited if a firm producing 20 per cent or more of an industry's output were to acquire more than 5 or 10 per cent of an industry to which it sells or from which it buys.³⁴

A third set of structural standards for section 7 has been proposed by Professor Bok.³⁵ Disillusioned with the usefulness of more sophisticated economic measures, and in the interest of providing simple rules that would relieve uncertainty and reduce delay in merger cases, Bok argues that (a) a dominant firm should not be allowed to merge if its market share had increased by two or three percentage points over a specified base period;³⁶ (b) large firms other than the industry leader should not be permitted to merge, where the aggregate share of the eight largest in the industry had increased by more than eight or nine percentage points over a specified base period;³⁷ and (c) (vertical) mergers should be proscribed where the acquired firm controls more than 5 per cent of the market.³⁸

These structural tests, though rigid and arbitrary, point in the right direction. While the "escape" clause proposed by Kaysen and Turner is debatable; while the necessary data for Bok's base period may be non-existent; and while Stigler's twilight zone may be a bit nebulous, all three proposals focus on the crucial questions in any merger decision, viz. size, rank and market shares. Nevertheless, these structural tests must be made more flexible. The fixed percentages must be regarded as no more than targets, to be moved up or down in accordance with the economic realities of the industry to which they are applied. In the words of Mr. Chief Justice Warren: "Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry . . ."³⁹

Statistics reflecting the share of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effects of the merger.⁴⁰

33. *Id.* at 182.

34. *Id.* at 183.

35. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226 (1960).

36. *Id.* at 308.

37. *Id.* at 315-16.

38. *Id.* at 328-32.

39. *Brown Shoe Co. v. United States*, 370 U.S. 294, 321-22 (1962).

40. *Id.* at 332 n.38.

It was in the much maligned and widely misinterpreted doctrine of "quantitative substantiality," first announced by Mr. Justice Frankfurter in the *Standard Stations* case,⁴¹ that the proper balance between structural tests and industry environment was neatly summarized. Interpreted against the backdrop of Congressional intent and the economic postulates underlying anti-merger legislation, "quantitative substantiality" steers a middle course between the rigid percentage formulas of Kaysen and Turner, Stigler and Bok, on the one hand, and the cornucopia of escape hatches provided by the *Pillsbury* approach, on the other. "Quantitative substantiality" represents a preponderant reliance on structural considerations in arriving at merger decisions; it represents a refusal to be trapped into fanciful and unproductive excursions into "all relevant factors"; yet it also embodies the recognition that structural standards must be calibrated to fit particular industries and particular market. Thus, a merger involving 1 per cent of the market may mean little in an industry which is already over-concentrated and where structural relief may be obtained only by Sherman Act measures, but it may mean a great deal in a relatively unconcentrated industry where a substantial lessening of competition or a trend toward monopoly may yet be stopped in their incipiency. The same 1 per cent, in other words, may have a different significance in different industries, and may call for different policy postures. As Einstein put it, in explaining relativity, "When you sit with a nice girl for two hours, you think it's only a minute. But when you sit on a hot stove for a minute, you think it's two hours."

IV.

In the light of these standards, does the *Brown Shoe* decision make economic sense? Is it in the grain of antitrust policy? Is it likely to promote effective competition or become a cloak for anticompetitive protectionism?

At the time of the trial, Brown operated 30 shoe factories. It was the fourth largest shoe manufacturer in the United States, accounting for about 4 per cent of domestic shoe production, and ranked 223d on Fortune's list of the 500 largest industrials. Its control over manufacturing facilities had been established, in part, at least, by the acquisition between 1951 and 1956 of seven companies engaged solely in shoe manufacturing. Its purchase of Kinney raised Brown's manufacturing percentage to 4.5 per cent, and made it the third largest shoe producer in the country. Brown was part of a relatively unconcentrated industry in which the four largest producers—International, Endicott-Johnson, Brown (including Kinney) and General Shoe—

41. *Standard Oil Co. v. United States*, 337 U.S. 293 (1949).

accounted for approximately 23 per cent of the output, and the largest 24 manufacturers for about 35 per cent.⁴²

In addition to its manufacturing plants, Brown also controlled a total of 1,230 retail outlets, some owned or leased, and some operating under its franchise plans. 845 of these outlets were obtained between 1951 and 1956—many by buying, not building. Among these were Wohl Shoe Company, the nation's largest operator of leased shoe departments, which controlled 250 outlets in department stores throughout the country, and the Regal Shoe Corporation which not only had 110 retail stores, but also owned a manufacturing plant making men's shoes. These vertical acquisitions, it should be noted, reflected a general trend in the shoe industry.⁴³

Kinney, though it was the twelfth largest shoe manufacturer (accounting for 0.5 per cent of national production), was primarily an operator of "family" retail shoe stores. Its 360 stores sold about 1.2 per cent of the nation's shoes (by value) and 1.6 per cent (by volume), or slightly more than Brown's two major retail chains.⁴⁴ In a number of communities, the combined Kinney-Brown share of the retail shoe business ranged from 5.1 to 57.7 per cent in women's shoes, 5 to 51.8 per cent in children's shoes, and 5.1 to 24.8 per cent in men's shoes.⁴⁵ Kinney's strength (and profitability) was due largely to store location—reflecting the company's imaginative response to the suburbanization trend and its innovation of "free standing" stores in shopping centers. At the time of the merger, Kinney bought no shoes from Brown.

Brown wanted to acquire Kinney because Brown's traditional customers, independent retailers, located in downtown areas, were not taking leases in the new suburban centers. [Brown] did not have the personnel to create from its own ranks a retail organization in the popular price field capable of moving into the new . . . centers [I]t was . . . more practical to buy an organization that was a successful retailer [A]s Kinney moved into new suburban locations, Kinney would find it desirable to . . . [add] some higher grade lines and that would give

Brown "an opportunity . . . to sell them in that category."⁴⁶ In 1955, the president of Brown stated that "one of our principal objectives in acquiring retail stores is to *protect* and *guarantee* distribution of our products in areas where independent retailers could

42. *Brown Shoe Co. v. United States*, 370 U.S. 294, 300 (1962).

43. *Id.* at 302.

44. *Id.* at 303.

45. Appendices A, B and C, *id.* at 347-53.

46. Brief for Appellant, pp. 100-01, *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

not give our brands adequate distribution because of their affiliations with other branded manufacturers."⁴⁷

Brown bought Kinney, therefore, in order to enjoy a captive market for shoes, and to avoid the expense of building from scratch its own retail outlets in the shopping centers and suburban areas. Its decision to buy rather than build undoubtedly reduced Brown's marketing risks, but it also entailed economic consequences for the shoe industry which the enforcement agencies could not, given anti-merger law and policy, afford to ignore. The merger tended not only to inhibit potential competition at the retail level, but, more important, to foreclose a segment of the market (Kinney) from free and equal access by other manufacturers. Since both the purpose and the effect of the merger was exclusion, the only remaining question under the law was whether the exclusion was so trifling that it could be dismissed as *de minimis*—i.e. lacking in "quantitative substantiality."

The courts, of course, answered both the foreclosure and substantiality questions in the affirmative. In doing so, they rejected defendants' reliance on rigid percentage tests, and the contention that Kinney's share of the retail market was admittedly microscopic and Brown's share of shoe manufacturing only slightly larger. Despite the observations of some critical commentators, we submit the courts were right—for a number of reasons. *First*, the courts were correct in defining the "relevant market." For estimating the competitive effect of this merger, the relevant market did not comprise all retail shoe establishments, but only those to whom Brown shoes appealed—just as the relevant market for gauging the importance of duPont's control over General Motors did not include all fabrics and finishes, but only those firms (mostly G.M.) for whose custom duPont considered it worthwhile to compete.⁴⁸ Brown did not try to buy Sears Roebuck; it bought Kinney. It was not concerned about selling shoes to mail-order houses, but to independent retailers located in suburban areas. And Kinney, as the largest family shoe chain—remembering that family shoe stores account for an increasing proportion of all retail shoes sales—was an important element in this market. If, in order to secure an outlet, Brown considered it desirable to buy up \$48,000,000 worth of this market, can the resulting foreclosure be dismissed as lacking "substantial" antitrust consequences?

Second, and perhaps more important, the Kinney acquisition was only one step in Brown's vigorous pursuit of vertical integration. With no retail outlets of its own prior to 1951, Brown "had acquired 845

47. Quoted in Brief for the United States, p. 110, *Brown Shoe Co. v. United States*, *supra* note 46. (Emphasis supplied.)

48. *United States v. E. I. duPont de Nemours*, 353 U.S. 586 (1957).

such outlets by 1956.”⁴⁹ Judge Weber’s simile, therefore, though ridiculed by some, is extraordinarily *à propos*: “We can only eat an apple a bite at a time. The end result of consumption is the same whether it be done by quarters, halves, three-quarters, or the whole, and is finally determined by our own appetites. A nibbler can soon consume the whole with a bite here and a bite there. So, whether we nibble delicately, or gobble ravenously, the end result is, or can be, the same.”⁵⁰ And, it is the clear intent of the Celler-Kefauver Act to deal with gradual accretions of power, achieved through a series of small acquisitions, in their incipiency—*i.e.* long before they have become full-blown Sherman Act violations.⁵¹

Third, Brown’s acquisition of Kinney was part of a “definite trend” toward vertical integration by large shoe manufacturers. Thus, the Court found that

International Shoe Company had no retail outlets in 1945, but by 1956 had acquired 130; General Shoe Company had only 80 retail outlets in 1945 but had 526 by 1956; Shoe Corporation of America, in the same period, increased its retail holdings from 301 to 842; Melville Shoe Company from 536 to 947; and Endicott-Johnson from 488 to 540 Moreover, between 1950 and 1956 nine independent shoe store chains, operating 1,114 retail shoe stores, were found to have become subsidiaries of these large firms and to have ceased their independent operations.⁵²

Between 1945 and 1956, the six largest shoe manufacturers had more than doubled their ownership of retail outlets—much of it by acquisition—so that by 1956 they owned 3,830 retail stores, or more than 10 per cent of the total.⁵³ The unmistakable trend was partly slowed down when General Shoe signed a self-limiting consent decree.⁵⁴ Had

49. *Brown Shoe Co. v. United States*, 370 U.S. 294, 301 (1962).

50. *United States v. Brown Shoe Co.*, 179 F. Supp. 721, 740 (E.D. Mo. 1959).

51. Under the Sherman Act, an acquisition is unlawful if it creates a monopoly or constitutes an attempt to monopolize. Imminent monopoly may appear when one large concern acquires another, but it is unlikely to be perceived in a small acquisition by a large enterprise. As a large concern grows through a series of such small acquisitions, its accretions of power are individually so minute as to make it difficult to use the Sherman Act tests against them. . . . Where several large enterprises are extending their power by successive small acquisitions, the cumulative effect of their purchases may be to convert an industry from one of intense competition among many enterprises to one in which three or four concerns produce the entire supply. S. REP. No. 1775, 81st Cong., 1st Sess. 8. (Quoted by Mr. Chief Justice Warren, *Brown Shoe Co. v. United States*, 370 U.S. 294, 329 n.48 (1962)).

52. *Brown Shoe Co. v. United States*, *supra* note 51, at 301.

53. Brief for the United States, p. 18, *Brown Shoe Co. v. United States*, *supra* note 51.

54. *United States v. General Shoe Co.*, 1956 Trade Cas. ¶ 68,271 (M.D. Tenn. 1956).

the Government lost the *Brown* case, however, the number of mergers following the decision would, according to a trade journal, "make your eyes pop."⁵⁵ Moreover, if the Government had not attempted to stop Brown's drive for vertical foreclosure, could it have stopped other large manufacturers from corralling retail outlets by buying existing retail chains? That is, could the Government have prevented the substantial foreclosure, though gradual, of the retail market, and the consequent denial of free and equal access to independent manufacturers? It is doubtful. Hence the Court correctly diagnosed the structural transformations, and their probable effects, which would flow from approval of the Brown-Kinney merger.

Fourth, the "definite trend" toward vertical integration in the industry was accompanied by a concomitant trend "for the parent-manufacturers to supply an ever increasing percentage of the retail outlets' needs, thereby foreclosing other manufacturers from effectively competing for the retail accounts. Manufacturer-dominated stores were . . . 'drying up' the available outlets for independent producers."⁵⁶ While the latter might be expected to turn "elsewhere"—to the outlets possibly vacated by Brown (or other integrating manufacturers)—there is no reason to assume that, simply because a firm acquires a captive market, it will withdraw from a corresponding share of the competitive market. Moreover, as Brown pointed out in its brief, shoe manufacturing, in spite of the free access to leased machines, is not a highly flexible business: "shoe factories tend to specialize in the manufacture of a particular type and grade of shoes."⁵⁷ For this reason, small manufacturers had repeatedly lost markets to their integrated rivals. "Eight experienced executives . . . described their experiences in losing business when one of the large manufacturers purchased or otherwise selected control of retail outlets with which they had previously done business."⁵⁸ "[A]t least five of Kinney's suppliers . . . each relied upon Kinney to purchase more than 40% of its total production . . ."⁵⁹ Given the shoe industry's trend toward vertical integration by acquisition, therefore, small manufacturers increasingly found themselves in the position of sprinters who lost the competitive race because they were denied access to the starting blocks.

55. Footwear News, June 28, 1962, p. 1.

56. *Brown Shoe Co. v. United States*, 370 U.S. 294, 301 (1962).

57. Brief for Appellant, p. 127, *Brown Shoe Co. v. United States*, *supra* note 56.

58. Brief for the United States, p. 112, *Brown Shoe Co. v. United States*, *supra* note 56.

59. *Brown Shoe Co. v. United States*, 370 U.S. 294, 370 (1962) (Harlan, J., concurring). See also the concurring opinion by Mr. Justice Clark at 355-57.

V.

In view of all these considerations, was the Court correct in concluding that the effect of the Brown-Kinney merger "may be to substantially lessen competition"? We think so. Although Brown's share of shoe manufacturing was small, in absolute terms, the context of the industry—the trends to vertical integration, the consequent foreclosure from captive retail outlets, the specialization and lack of flexibility of small manufacturers and the relative size of Brown and Kinney in their respective markets—was such as to make the loss of competition of unquestionable "quantitative substantiality." Hence, the merger was contrary to the statute and, just as clearly, contrary to the premises of anti-merger policy.⁶⁰

Contrary to the view of some critics, the *Brown* decision did not imply a condemnation of the economies of integration. It held only that a foreclosure from a substantial market as a consequence of vertical acquisition serves to demonstrate illegality. Nor was the opinion animated by a "protectionist" philosophy. The Court was protectionist only in the sense that it sought to safeguard, in full accord with Congressional intent, the right of small manufacturers to compete on substantially free and equal terms for an existing market. While the Court seemed to frown on artificial foreclosure, it said nothing to discourage low-cost producers from asserting their ostensible superiority in a competitive, non-captive market. Finally, the Court—contrary to some critics—never came close to suggesting that "almost any merger is subject to challenge."⁶¹ It merely found that, *in the context of the shoe industry*, Brown's acquisition of Kinney, despite the seemingly small percentages involved, constituted a foreclosure of substantial proportions. And this finding, we submit, is in full accord with an economic analysis of the shoe industry's anatomy and physiology.

A final word about the "welfare" impact of the Supreme Court decision. What, if anything, has the consumer lost as a result of Brown's separation from Kinney? That Brown is large enough to achieve all the economies of scale in shoe manufacturing is easily

60. The effect of the merger on the retail market may be dismissed; the case turned on the exclusionary elements in the merger. In this connection, Kinney's purpose in merging was said to be the impossibility of raising capital for expansion by public offering without "seriously diluting the equity of the common stockholder." Brief for Appellant, p. 101, *Brown Shoe Co. v. United States*, *supra* note 59.

The stockholders would not approve a dilution. Ergo, merger! One might well ask why public policy should be governed by stockholders' unwillingness to approve sale of new stock at a fair value!

61. *Business Week*, Oct. 13, 1962, p. 58.

demonstrable.⁶² The optimum shoe manufacturing establishment is small. Advantages from vertical integration into retailing—alleged by the Government to be of some importance in this industry—can certainly be achieved without combination and without elimination of Kinney as a market for independent manufacturers. Finally, no one can justify mergers of the Brown-Kinney variety on the ground that the market for shoes is so narrow that an enforced separation of Brown and Kinney, and their operation as independent units, would result in excess capacity.

The Government's brief did allege that dealers associated with manufacturers secured "great competitive advantages in advertising, insurance, discounts on purchases, and financial, architectural and store site assistance."⁶³ And the Supreme Court opinion hazarded a guess that some aspects of vertical integration (*e.g.*, elimination of wholesaling costs)⁶⁴ might prove beneficial to consumers. These matters, however, were never adumbrated with quantitative evidence. It was never demonstrated, for example, that retail chains with 100 or more stores—organizations which are playing an increasingly significant role in the shoe business—could not realize similar economies. On the contrary, it would appear that Sears-Roebuck, Montgomery-Ward, Edison Brothers, Kinney itself and thousands of independent retailers, including discount shoe stores, have been able to establish economical relations with manufacturers—without resort to integration by ownership or, for that matter, such alternative foreclosure techniques as exclusive dealing or requirement contracts. Distribution economies—in the shoe industry, at least—can be achieved without an artificial lessening of competition.

Be that as it may, these considerations played an only subordinate role in the decision. The Supreme Court placed primary stress, and rightfully so, on the foreclosure of competition from a significant market by means of combination. The presumption against such means to achieve the demonstrated foreclosure was not overcome; and it is difficult to see how—given the structural impact of the Brown-Kinney merger on the shoe industry—any full-scale economic investigation could ever have reversed the decision, even if the proceedings had allowed for an extended inquiry into the future "vigor" or "workability" of competition in the shoe industry. Could we have said with any assurance that consumers would pay higher prices or that their

62. BAIN, BARRIERS TO NEW COMPETITION 230 (1956); MACK, CONSUMPTION AND BUSINESS FLUCTUATIONS 18 (1956).

63. Brief for the United States, p. 134, *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

64. *Brown Shoe Co. v. United States*, *supra* note 63, at 344.

style choices would be appreciably curtailed, because the Government wanted to break asunder what Brown and Kinney had illegally joined together? It seems improbable. It seems even more improbable that the potential loss resulting from a divorcement order could possibly outweigh the clear decline in competitive opportunities for independent shoe manufacturers resulting from Brown's foreclosure of a "quantitatively substantial" retail outlet.