Economic and Legal Philosophies Relating to Conglomerate Mergers

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The topic of this paper, originally entitled "Recent and Dynamic Changes In Economic and Legal Philosophies Relating to Mergers," has many facets. We shall try to identify the current merger trends, relying on legal and economic analysis. Our theme is a thin trail through an incredibly overgrown thicket. We seek to identify: (1) the existence of a merger problem; (2) the change in this movement starting in 1968; (3) the legal framework under which existing regulating policy is directed; (4) current interpretations of Section 7 of the Clayton Act as it relates to the conglomerate movement; (5) actions taken by two enforcement agencies to stem the rising tide of the current movement; and (6) possible changes that would best achieve a sound antitrust policy.

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1. An earlier version of this paper was delivered at the Pennsylvania Conference of


I. MERGER PROBLEM: THE DATA

The current merger wave, which has yet to crest, is one of the most awesome tides of economic consolidation ever to hit the American economy. It is rising unabated, even growing, yet hardly noticed by the American public. The effect of this movement should not be understated. The results of the current wave will last for generations, for the entire structure of American industry is becoming more concentrated. A review of data for the past few years will illustrate the problem.

The current wave began around 1955. Its acceleration can be illustrated by following the absolute increase as well as the rate of increase in mergers. From 1955 to 1968 a total of 13,672 mergers were recorded in the manufacturing and mining sectors, and if our estimate for 1969—2,500 mergers—is included, the total for a fourteen year period will exceed 16,000. (Table 1) The number of mergers occurring in all sectors from 1960 to 1968 totaled 18,038, and if a conservative estimate of 5,000 is included for 1969, the total activity involving mergers in all sections will exceed 23,000 for a nine year period. (Table 2) This number is even more significant if one looks at the rate of increase in merger activity. The absolute increase as well as the rate of increase indicates reason for concern over current merger phenomena. Sixty percent (60%) of the merger activity since 1960 has occurred in the last half of this period. There was a fifty percent (50%) increase in activity from 1966 to 1967 and a one hundred percent (100%) increase in activity from 1967 to 1968.

On the basis of these figures the current movement is considerably
TABLE 1
NUMBER OF MANUFACTURING AND MINING CONCERNS ACQUIRED, 1940-1968 AND
ACQUIRED ASSETS* OF MANUFACTURING AND MINING CONCERNS, 1948-1968

<table>
<thead>
<tr>
<th>Period</th>
<th>Number3</th>
<th>Acquired Assets4 ($Billions)</th>
<th>Period</th>
<th>Number3</th>
<th>Acquired Assets* ($Billions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1940</td>
<td>140</td>
<td></td>
<td>1954</td>
<td>387</td>
<td>$ 1.425</td>
</tr>
<tr>
<td>1941</td>
<td>111</td>
<td></td>
<td>1955</td>
<td>683</td>
<td>2.129</td>
</tr>
<tr>
<td>1942</td>
<td>118</td>
<td></td>
<td>1956</td>
<td>673</td>
<td>2.037</td>
</tr>
<tr>
<td>1943</td>
<td>213</td>
<td></td>
<td>1957</td>
<td>585</td>
<td>1.472</td>
</tr>
<tr>
<td>1944</td>
<td>324</td>
<td></td>
<td>1958</td>
<td>589</td>
<td>1.107</td>
</tr>
<tr>
<td>1945</td>
<td>333</td>
<td></td>
<td>1959</td>
<td>835</td>
<td>1.960</td>
</tr>
<tr>
<td>1946</td>
<td>419</td>
<td></td>
<td>1960</td>
<td>844</td>
<td>1.710</td>
</tr>
<tr>
<td>1947</td>
<td>404</td>
<td></td>
<td>1961</td>
<td>954</td>
<td>2.129</td>
</tr>
<tr>
<td>1948</td>
<td>223</td>
<td>$.130</td>
<td>1962</td>
<td>853</td>
<td>2.194</td>
</tr>
<tr>
<td>1949</td>
<td>126</td>
<td>.067</td>
<td>1963</td>
<td>861</td>
<td>2.917</td>
</tr>
<tr>
<td>1950</td>
<td>219</td>
<td>.173</td>
<td>1964</td>
<td>854</td>
<td>2.798</td>
</tr>
<tr>
<td>1951</td>
<td>235</td>
<td>.201</td>
<td>1965</td>
<td>1,008</td>
<td>3.900</td>
</tr>
<tr>
<td>1952</td>
<td>288</td>
<td>.327</td>
<td>1966</td>
<td>995</td>
<td>4.100</td>
</tr>
<tr>
<td>1953</td>
<td>295</td>
<td>.679</td>
<td>1967</td>
<td>1,496</td>
<td>8.222</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>19682</td>
<td>2,442</td>
<td>12.616</td>
</tr>
</tbody>
</table>

1. Acquisitions of manufacturing and mining firms with assets of $10 million or
   more.
2. Figures for 1968 are preliminary.
3. Sources: Data limited to mergers and acquisitions reported by Moody's Investors
   Service, Inc., and Standard & Poor’s Corporation. Comparable totals for the years 1919
   to 1939 were published in the Commission’s Report on Corporate Mergers and Acquisitions,
   May 1955, p. 33.
4. Sources: Economic Report of the President, 1969, p. 271, and Bureau of Economics,
   Federal Trade Commission.
   SOURCE: Bureau of Economics, Federal Trade Commission, Tables 2 and 9, FTC

larger than all previous merger movements. In the first merger wave, 1898 to 1902, 2,653 mergers were reported. In the second wave, 1925 to 1931, 5,846 mergers were reported. The current wave, with nearly 23,000 mergers catalogued, has outshadowed previous waves in absolute terms. (Table 1)

Another measure is the amount of assets involved in the acquisitions. The ownership of manufacturing assets has become increasingly concentrated. According to the Department of Justice in its recent complaint against Ling-Tempco-Vought, “The proportion of total assets of the nation’s manufacturing corporations held by the 200 largest firms has increased from 48.1% in 1948, to 54.2% in 1960, to 58.7% in 1967.” The complaint further asserts that “a great bulk of this in-

7. S. Reid, supra note 6, at 74.
8. Id.
9. United States v. Ling Tempco Vought, Inc., Jones & Laughlin Steel Corp. and Jones
   and Laughlin Industries, Civil Action, 69-438, D.C., W.D. Pa., complaint filed April 14,
   1969.
10. Id. at 4.

248
Conglomerate Mergers

Table 2
Overall Number of Mergers and Acquisitions Recorded, by Industry of Acquiring Company, 1960-1968

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total recorded</td>
<td>1,345</td>
<td>1,724</td>
<td>1,667</td>
<td>1,479</td>
<td>1,797</td>
<td>1,893</td>
<td>1,746</td>
<td>2,384</td>
<td>4,003</td>
</tr>
<tr>
<td>Full acquisitions2</td>
<td>1,216</td>
<td>1,592</td>
<td>1,504</td>
<td>1,329</td>
<td>1,519</td>
<td>1,628</td>
<td>1,517</td>
<td>2,181</td>
<td>3,803</td>
</tr>
<tr>
<td>Mining*</td>
<td>48</td>
<td>74</td>
<td>48</td>
<td>79</td>
<td>59</td>
<td>62</td>
<td>55</td>
<td>82</td>
<td>130</td>
</tr>
<tr>
<td>Manufacturing*</td>
<td>918</td>
<td>1,043</td>
<td>985</td>
<td>906</td>
<td>1,006</td>
<td>1,063</td>
<td>1,051</td>
<td>1,557</td>
<td>2,525</td>
</tr>
<tr>
<td>Trade3</td>
<td>127</td>
<td>255</td>
<td>235</td>
<td>186</td>
<td>207</td>
<td>191</td>
<td>188</td>
<td>232</td>
<td>452</td>
</tr>
<tr>
<td>Services and others4</td>
<td>123</td>
<td>220</td>
<td>236</td>
<td>158</td>
<td>247</td>
<td>312</td>
<td>223</td>
<td>310</td>
<td>696</td>
</tr>
<tr>
<td>Partial acquisitions5</td>
<td>129</td>
<td>132</td>
<td>163</td>
<td>150</td>
<td>278</td>
<td>265</td>
<td>229</td>
<td>203</td>
<td>200</td>
</tr>
</tbody>
</table>

1. Broad industrial classification of acquiring company in full acquisitions only.
2. Acquisitions of other independent companies, subsidiaries of other independent companies, and whole divisions of other independent companies.
3. Wholesale and retail trade combined.
4. "Others" consists mainly of companies engaged in insurance, warehousing and storage, commercial farming, contract construction, and extending credit to businesses and individuals (other than banks).
5. Acquisitions involving less than half of the assets or stock of a company.

* Totals are larger than those shown on subsequent tables because of the use of additional sources.


An increase in concentration has resulted from mergers and acquisitions."

A number of independent companies have disappeared from the list of most active companies in the country. From 1948 to 1966, 912 large (over $10 million in assets) manufacturing and mining concerns, with combined assets of $31 billion, were absorbed by other firms through merger and acquisition. Nearly half of these assets were acquired during the last 5 years. Federal Trade Commission data further illustrates this fact: acquisitions by the 200 largest mining and manufacturing firms or units with assets of $10 million or more have risen sharply during this period; i.e., 91 occurring in 1964, 93 in 1965, 101 in 1966, 169 in 1967, 192 in 1968.

An evaluation of the total assets acquired in mergers of this type shows an even more striking acceleration. The amount of assets acquired within this classification in 1964 was $2.7 billion, it rose steadily through the period: in 1964 $2.7 billion, in 1965 $3.7 billion, in 1966 $4.1 billion, in 1967 $8.2 billion, in 1968 $12.6 billion (Table 1). There was a one hundred percent (100%) increase in merger activity based on asset acquisition from 1966 to 1967 and a fifty percent (50%)

11. Id.
13. FTC 1968 Statistical Report, Table 5, p. vii

249
from 1967 to 1968. Over the current period $40.5 billion worth of assets have been acquired (Table 2). Acquisition by approximately 200 companies (assets of $250 million or more) account for over 70% of Manufacturing and Mining assets acquired in 1968.14

In 1965 only one firm with assets of more than $250 million was absorbed by merger or acquisition. But the total quickly rose. There were 3 in 1966, 6 in 1967 and 12 in 1968 (Table 3).

### Table 3

**Number and Assets of Large Manufacturing and Mining Companies: Acquired, by Industry of Acquired Company, 1968**

<table>
<thead>
<tr>
<th>Industry of acquired company</th>
<th>Number of acquisitions</th>
<th>Per- cent</th>
<th>Assets ($Millions)</th>
<th>Per- cent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Food and kindred products</td>
<td>17</td>
<td>8.9</td>
<td>$1,475.0</td>
<td>11.7</td>
</tr>
<tr>
<td>Tobacco manufacturers</td>
<td>3</td>
<td>1.6</td>
<td>514.2</td>
<td>4.1</td>
</tr>
<tr>
<td>Textile mill products</td>
<td>9</td>
<td>4.7</td>
<td>324.9</td>
<td>2.6</td>
</tr>
<tr>
<td>Apparel</td>
<td>4</td>
<td>2.1</td>
<td>383.3</td>
<td>3.0</td>
</tr>
<tr>
<td>Lumber and wood products</td>
<td>3</td>
<td>1.6</td>
<td>355</td>
<td>0.3</td>
</tr>
<tr>
<td>Furniture and fixtures</td>
<td>4</td>
<td>2.1</td>
<td>160.5</td>
<td>1.3</td>
</tr>
<tr>
<td>Paper and allied products</td>
<td>8</td>
<td>4.2</td>
<td>1,061.2</td>
<td>8.4</td>
</tr>
<tr>
<td>Printing and publishing</td>
<td>10</td>
<td>5.2</td>
<td>249.2</td>
<td>2.0</td>
</tr>
<tr>
<td>Chemicals and allied products</td>
<td>8</td>
<td>4.2</td>
<td>620.9</td>
<td>4.9</td>
</tr>
<tr>
<td>Petroleum and oil products</td>
<td>2</td>
<td>1.0</td>
<td>761.4</td>
<td>6.0</td>
</tr>
<tr>
<td>Rubber and plastics products, n.e.c.</td>
<td>2</td>
<td>1.0</td>
<td>27.9</td>
<td>0.2</td>
</tr>
<tr>
<td>Leather and leather products</td>
<td>2</td>
<td>1.0</td>
<td>34.2</td>
<td>0.3</td>
</tr>
<tr>
<td>Stone, clay, and glass products</td>
<td>4</td>
<td>2.1</td>
<td>66.8</td>
<td>0.5</td>
</tr>
<tr>
<td>Primary metal industries</td>
<td>15</td>
<td>7.8</td>
<td>2,227.6</td>
<td>17.7</td>
</tr>
<tr>
<td>Fabricated metal products</td>
<td>19</td>
<td>9.9</td>
<td>488.7</td>
<td>3.9</td>
</tr>
<tr>
<td>Machinery, except electrical</td>
<td>37</td>
<td>19.3</td>
<td>1,546.4</td>
<td>12.3</td>
</tr>
<tr>
<td>Electrical machinery</td>
<td>14</td>
<td>7.3</td>
<td>944.5</td>
<td>7.5</td>
</tr>
<tr>
<td>Transportation equipment</td>
<td>9</td>
<td>4.7</td>
<td>696.2</td>
<td>5.5</td>
</tr>
<tr>
<td>Instruments and related products</td>
<td>4</td>
<td>2.1</td>
<td>130.4</td>
<td>1.0</td>
</tr>
<tr>
<td>Miscellaneous manufacturing</td>
<td>8</td>
<td>4.2</td>
<td>211.6</td>
<td>1.7</td>
</tr>
<tr>
<td>Mining</td>
<td>10</td>
<td>5.2</td>
<td>655.8</td>
<td>5.2</td>
</tr>
<tr>
<td>Total</td>
<td>192</td>
<td>100.02</td>
<td>$12,616.2</td>
<td>100.02</td>
</tr>
</tbody>
</table>

1. Figures for 1968 are preliminary.
2. Percentages do not add to 100.0 due to rounding.


These figures indicate the size of the movement. This examination leads us to the inescapable conclusion that concentration has increased during the current period.

A recent study by the Federal Trade Commission covering the period 1950-1962, was referred to by the FTC's Chief Economist, Willard F. Mueller, in his 1965 statement before the Senate Subcommittee on Antitrust and Monopoly.15 He testified:

14. Id. at 2.
15. S. Reid, supra note 6 at 81.
Conglomerate Mergers

The Commission's earlier studies in the area of aggregate concentration indicate that there has been a sizable increase in concentration for manufacturing as a whole. Between 1950 and 1962 the share of manufacturing assets held by the 200 largest corporations increased from 46.7 to 54.6 percent and the share held by the 100 largest corporations grew from 38.6 to 45 percent. Hence by 1962 the share held by the 100 largest firms was almost as great as the share held by the 200 largest in 1950 . . . [and] the 200 largest manufacturing firms alone acquired over 2,000 concerns with combined assets of about 17.5 billion. . . . In other words, the acquisitions activity of the top 200 was sufficient to more than wipe out the equivalent of the second tier of 1,000 corporations in manufacturing.16

II. The Merger Problem: 1968

The characteristics of 1968 may mark a turning point or may act as a base from which the merger movement will skyrocket. All previous levels of merger activity were eclipsed by development in 1968.

According to the FTC 1968 Statistical Report, total mergers climbed to a record 4,003 for 1968, an increase of 68 percent over the previous year (Table 1). In 1968, a firm with assets of more than $1 billion ($1.15) was acquired, marking a new first (Table 3): Ling-Tempco-Vought bought Jones and Laughlin Steel Company, the nation's sixth largest steel producer with 1968 sales of over $1 billion and assets of over $1.15 billion. In 1967, J & L accounted for between five to ten percent of national steel output.17

Manufacturing and mining acquisitions totaled 2,442 for 1968 a 63% increase over the 1967 figure of 1,496 which in turn was a 50% increase over the 1966 figure (Table 2). This trend left no segment of manufacturing and mining untouched. Growth sectors (electrical, non-electrical machinery, chemicals and fabricated metals) experienced the most rapid merger growth; they accounted for nearly 900 acquisitions in 1968.18 Merger activity in trade and service sectors also rose sharply in 1968, accounting for 29% of overall activity. In 1966 trade and service sectors recorded 188 and 223 mergers, respectively; in 1968 these numbers had climbed to 452 and 696. This is an increase

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18. These sectors known as "growth sectors" seem to be the likeliest for merger activity.
of 140% in the trade sector and more than 200% in the service sector (Table 2).

Measured by assets, mergers also showed a sharp increase during 1968. Acquisition of firms with assets over $10 million totaled $12.6 billion for 1968, a 50% increase over the 1967 figure. This figure in turn was 3 times greater than the 1966 figure (Table 2). The average size of these acquisitions has also grown sharply, from $27.6 million in 1966 to $65.7 million in 1968, an increase of 138%. In 1968, acquiring firms with assets of $250 million or more accounted for 51% of the number and 73% of the assets of all large acquisitions. Conglomerate mergers increased sharply during the year 1968, accounting for 84% of the number and 89% of the assets of all recorded large acquisitions (Table 4).

In 1968, when the total assets acquired in mining and manufacturing, $17.6 billion, are compared with investment for that period we find that the acquisition of used assets accounts for 45% of the total value of new investment in plants and equipment. This ratio represents a substantial growth over all earlier years.

Conglomerate mergers of 1968 revealed a dramatic change in character and average size. The classification used by the FTC includes product extension, (geographic) market extension, and a category representing combinations where no relationship is discernible. The latter we will hereinafter call the "pure" conglomerate and/or "free form". In 1968 the pure conglomerate category accounted for 43% of all large acquisitions. The most striking feature of the current wave is that mergers and acquisitions have become more circular and conglomerate oriented than any of the two previous waves. All forms of conglomerate mergers accounted for 87% of all large acquisitions.

Apart form the impressiveness of the raw figures, we may validly ask, "Is this merger wave serious?" The FTC Bureau of Economics, in its recently published *Economic Report on Corporate Mergers*, thinks that it is serious. The Stigler Task Force hinted that it was not convinced. A justification for writing further must be based on

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20. *Id.*
23. *Task Force on Productivity and Competition* B.N.A. Antitrust and Trade Regulation Report No. 413 (June 10, 1969), (hereinafter referred to as the Stigler Report) Recommendations 7 and 8, in particular, were as follows:
### Table 4

<table>
<thead>
<tr>
<th>Type of acquisition</th>
<th>1964</th>
<th>1965</th>
<th>1966</th>
<th>1967</th>
<th>1968</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>No. sets</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>14</td>
<td>13</td>
<td>12</td>
<td>13</td>
<td>13</td>
<td>11</td>
<td>13</td>
</tr>
<tr>
<td>18</td>
<td>22</td>
<td>22</td>
<td>23</td>
<td>22</td>
<td>22</td>
<td>22</td>
</tr>
<tr>
<td>68</td>
<td>64</td>
<td>59</td>
<td>39</td>
<td>38</td>
<td>37</td>
<td>38</td>
</tr>
<tr>
<td>3</td>
<td>3</td>
<td>3</td>
<td>3</td>
<td>2</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Total</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
</tr>
</tbody>
</table>

**Note:**
- Figures for 1968 are preliminary.
- Detail does not add to total due to rounding.

**Source:** Bureau of Economics, Federal Trade Commission, Table 10, FTC 1968 Statistical Report.
either: (a) a belief that increasing "overall concentration" in the economy\(^\text{24}\) is a real problem (perhaps a social and political, instead of, or in addition to, an economic problem), or (b) a belief that, apart from any increases in overall concentration, particular mergers may have harmful effects—and the harmful effects may be compounded if such mergers take place in large numbers over a short period of time. Both these contentions have some validity, although strong arguments can be made against each of them.\(^\text{25}\)

"Overall concentration" figures may cause concern about the pol-

7. The Department of Justice Merger Guidelines are extraordinarily stringent, and in some respects indefensible. We suggest a number of revisions in the accompanying Report.

8. We strongly recommend that the Department decline to undertake a program of action against conglomerate mergers and conglomerate enterprises, pending a conference to gather information and opinion on the economic effects of the conglomerate phenomenon. More broadly, we urge the Department to resist that natural temptation to utilize the antitrust laws to combat social problems not related to the competitive functioning of markets.

24. "Overall concentration" is placed in quotation marks because: (1) There is disagreement as to just what the term means, and how to measure it. See Rose, Bigness, Is a Numbers Game, FORTUNE, Vol. 80, No. 6, p. 112 (November, 1969); Adelman, Monopoly and Concentration, in Low, THE ECONOMICS OF ANTITRUST (1968) 43, 52-59. (2) There is disagreement over whether "overall concentration" means anything in terms of economic power in particular markets (which most economists would view as the only relevant terms), or in terms of anything else. Adelman, Monopoly and Concentration, supra, this footnote. But see FTC CONGLOMERATE MERGER REPORT, Chapter 5 and Appendices A through G, pp. 161-212, 655-745.

It is true, as Adelman points out, that "overall concentration" need not necessarily have anything to do with concentration in particular markets. "Overall" concentration could, as a matter of mathematics, increase without concentration in any particular market increasing, if (a) one particular product market expanded relative to other product markets, but (b) the concentration in no product market changed. To take a drastically oversimplified example: Suppose there were 5 widget producers, sharing equally the widget market, which amounted to 1% of the total U.S. gross national product. Suppose also there is no significant overall concentration elsewhere in the economy. Then suppose that the market for widgets expands to 50% of total U.S. gross national product, that the original 5 firms continue to share the market equally, and that the market shares of other companies in other markets also do not change. Overall concentration has increased to the point where 5 firms now account for 50% of all productive activity in the economy; concentration in any particular market has not changed at all.

This example may be regarded as a rather trivial mathematical exercise. It is relevant only to the point that "overall" concentration does not necessarily indicate anything about economic power within particular markets. In the real world, things are not at all like our simple example. Many industries, perhaps most, are somewhat oligopolized. FTC CONGLOMERATE MERGER REPORT 248-249. (This statement is obviously open to question with respect to what is meant by "somewhat." We here mean that some of the theoretically predicted behavior of oligopoly markets can be observed in many of the markets occupied by large conglomerates. FTC CONGLOMERATE MERGER REPORT at 245-50 and Chapter 6) Since, as we will see (Part V, infra) mergers among the leaders of oligopolized industries tend to tighten or entrench the oligopolistic structure of the markets of merging firms, even though each merger is across industry lines and therefore in a technical sense does not immediately result in increased market concentration. In this context, there seems to be ample reason for concern about the sharp increases in oversuch concentration.

Conglomerate Mergers

itical consequences of such a centralization of economic power. Two hundred corporations account for over 60% of all manufacturing assets.\textsuperscript{26} One hundred seven corporation account for 50% of all manufacturing assets.\textsuperscript{27} And these figures probably understate the true concentration for several reasons:

1. Many of the 200 largest corporations do not fully consolidate the assets of all their subsidiary companies.
2. Some large corporations themselves have common owners and;
3. Some large corporations jointly own with other companies subsidiary concerns that are only partially included in the assets of their corporate parents.\textsuperscript{28}

Based on other parts of the report, we add:

4. At least 48% of the companies included in the top 1000 in 1968 were corporations in which other corporations in the same group held equity interests amounting to more than 10%.\textsuperscript{29}

5. Banks and other financial institutions own significant interests in the large manufacturing corporations—and often have representatives on the boards of directors of the companies in which they hold interests.\textsuperscript{30} The pervasiveness of interlocking among the management and boards of directors of many corporations significantly reduces the number of independent business decision-making units in our economy; exactly what the reduction is, quantitatively, is hard to define, but that it is significant seems clear. To take just one example:

General Motors Corporation, the country’s largest industrial corporation when measured by sales, was interlocked with 7 of the 100 largest industrial corporations, with the Nation’s largest railroad, and with the largest telephone company. All told, the 63 corporations with which General Motors was interlocked in 1962 had combined assets exceeding $65 billion.\textsuperscript{31}

Analysis of aggregate figures, however, may not correctly indicate the impact of the current merger wave. To isolate the economic effects

\textsuperscript{26} 60.9% of total corporate manufacturing assets, and 60.4% of all manufacturing assets. \textit{FTC Conglomerate Merger Report} 172.
\textsuperscript{27} Id. at 168.
\textsuperscript{28} Id. at 174.
\textsuperscript{29} Id. at 169.
\textsuperscript{30} The inter-corporate ties include at least joint ventures and interlocking directorates, as well as less formal relationships. For a discussion of the formal relationships, see \textit{FTC Conglomerate Merger Report} at 198-212. For a discussion of some less formal ties, see \textit{FTC Conglomerate Merger Report} at 459-471.
\textsuperscript{31} Id. at 199.
of particular mergers and of series of mergers, we have examined var-
ious studies, especially the *FCC Conglomerate Mergers Report* and
the cases described in Part V, *infra*. Some startling conclusions de-
volved.

The data seem to indicate that the law has been able to check only
simple horizontal and vertical mergers; all other types of mergers have
accelerated. (See Table 4). While the Celler-Kefauver Act* was enacted
to preserve market competition in a narrow economic sense, it was also
cconcerned with the preservation of overall economic concentration.
Admittedly, we may not want an industrial structure so highly frag-
mented that we cannot have the benefits of the economies of scale
so popularly known as "mass production"; but we by no means need
the concentration that is generally taking place, that which exceeds the
optimum technical organization mix.* Reasons for mergers seem un-
related to requirements of efficiency. The evidence seems to indicate
that institutional arrangements involving taxation,* accounting meth-
ods,* and the stock market* have played the major role in encourag-
ing the current movement. There is little evidence that the current
movement has generally exploited opportunities to improve efficiency
in resource allocation.* What we do see is a centralizing and consolidat-
ing of corporate control and decision making among a relatively few
vast companies.

Functional integration in production and distribution are becoming
less apparent. We all know that within the American economic system
there is a separation of ownership from management.* But the case

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32. The conclusions we here draw are based upon the various cases reviewed in Parts
4 and 5, *infra*, and upon *FTC Conglomerate Merger Report*, especially by Chapter 5,
etitled "Most Active Acquiring Firms, 1961-68," and Chapter 8, entitled "Case Studies
of Most Active Acquiring Firms." The FTC there studied the 25 most active (during the
1960's) acquiring firms. Other studies have been conducted, see e.g. *Hearings Before the
Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United
States Senate, Part 1, Overall and Conglomerate Aspects, 88th Congress, 2d Session, pur-
suant to S. Res. 262, July 1, 2 and Sept. 9, 10, and 11, 1964, and Part 2, Mergers and
Other Factors Affecting Industry Concentration, 89th Congress, 1st Session, pursuant to
S. Res. 46, Mar. 16, 17, 18, Apr. 13, 14, 15, and 21, 1965; but the FTC *CONGLOMERATE
MERGER REPORT* contains the most up to date collected data as of this writing.
34. *See, e.g., FTC CONGLOMERATE MERGER REPORT* 87-89.
35. *Id.* at 142-159.
36. *Id.* at 120-141.
37. *Id.* at 80-85.
38. *Id.* 72-76, 85-99. Conglomerates did not even seem to improve profits. *Id.* at 100-119;
*REID, supra.* note 6, at 181-194.
39. *See, e.g., S. REID, supra.* note 6, Chapters 7 and 8 for a good discussion of this fact
and of some of its implications with respect to this merger wave.
Conglomerate Mergers

studies of firms of the current wave indicate that one further separation is underway: a separation of management from production. The current wave may be creating a system of nationally centralized private decision-making units that is incompatible with efficient patterns of economic organization, and may be politically undesirable. The new giants may hope that sheer size will isolate them from the market forces that traditionally discipline private economic power. They are “growth companies” but have relied on external rather than internal growth. Any growth, of course, even external growth, might be expected to temporarily isolate them from market forces because of their size and financial resources.

But suppose, for example, that there is a major cyclical downswing. It is one thing to have smaller marginal firms leave the productive process as their profit levels fall below what is acceptable. This phenomenon causes periodic ripples in the economy as these units leave. But what would happen if large conglomerates, holding these smaller marginal units, were to support the smaller units until their resources were finally exhausted. Instead of smaller marginal units falling by the wayside on a downswing, we could have units accounting for as much as several billion dollars of output falling out of the industrial structure at one time. When General Motors, General Electric, or United States Steel have a strike, a temporary shutdown, the impact is felt in almost every sector of the economy. What would happen if LTV, IT & T, and Gulf & Western ceased operations altogether? What kind of a snowball effect could be created?

Economic analysis indicates that a part of the motivation for the

40. This statement can be supported by a consideration of the management problem in a conglomerate. If one is the president of, say ITT, with 10 divisions in telecommunications equipment, 17 divisions in electronic components and consumer products, 14 divisions in technical industrial products, 16 divisions in consumer and business services, 3 divisions in defense industries, and 3 "miscellaneous" divisions (FTC CONGLOMERATE MERGER REPORT at 525) and one is also engaged in a fight with the Antitrust Division of the Department of Justice over from 1 to 5 other acquisitions, then one is not going to pay too much attention to production in any one division.

Overall management in a conglomerate—especially an active conglomerate (ITT made over six mergers per year; Teledyne during the 1960's made over fifteen mergers per year)—is likely to be more concerned with the financial and stock market position of the company than with production.

41. In SURVEY OF CURRENT BUSINESS, Volume 49, No. 12 (United States Department of Commerce, Office of Business Economics, December, 1969) at 1, the fact that the economy was softening, and that Gross National Product was falling off, was attributed to the impact of the General Electric strike—both directly and through the multiplier effect of the decrease in GE purchases of goods and services and in GE employee purchases of goods and services.
current wave must be a desire to overcome the microeconomic forces\textsuperscript{42} that discipline private economic power. Generally speaking we have seen more rigid pricing behaviour and a higher degree of product differentiation\textsuperscript{43} develop in many markets during the last 25 years. One aim of many current mergers seems to have been to give the acquiring firm a dominant position in some broad sector. Size, diversification, access to capital, captive customers, captive suppliers, have been types of power available to conglomerate firms. Product extension mergers into industries closely affiliated in a technological sense have also been prime targets.\textsuperscript{44} Attributable to the current wave are also increased barriers to entry and acts which discourage potential competition by independents.\textsuperscript{46} Price competition is affected by two key variables: independent units and potential entry. Acquiring firms in the current wave have hindered the free interplay of these two important economic variables. They have raised the costs of entry, and increased the degree of product differentiation and the degree of seller concentration. All of these effects convince us that the current rate of merger activity poses a serious problem.

A further reason for considering the current merger wave serious is that the effects of two other merger waves, each of far smaller dimensions, are still with us. A merger wave from about 1898 to 1904\textsuperscript{46} resulted in the formation of many giant manufacturing corporations, whose existence still inhibits competition in their respective industries because of e.g., price leadership practices, and the tendency for other companies to try to join forces in order to feel, psychologically, "on a par" with the giants.\textsuperscript{47} United States Steel Corporation, United States Rubber Corporation (now merged with the Royal Tire Company to

\textsuperscript{42} "Microeconomics" deals with the economic decisions and behavior of individual consumers, individual firms, and industries, interacting in markets. For its range see, e.g. C. Ferguson, MICROECONOMIC THEORY (2d Ed., 1968).

\textsuperscript{43} "Product differentiation" refers to artificial or unreal product differentiation based on building the belief in consumers' minds that products, which actually do not differ in any significant respect, are different. The tools of product differentiation are principally advertising and packaging. Frequently the packaging and the advertising may be related —this may be easiest where the packaging is incorporated in the product, as in automobiles.

\textsuperscript{44} See, e.g., the oil company-chemical company mergers, and the multi-mineral mining company mergers, in Table 3, supra, p. 253. The former are discussed in FTC CONGLOMERATE MERGER REPORT 283-314, especially 302-312.

\textsuperscript{45} These specific effects in and on markets will be discussed, infra., Part 5, in detail.

\textsuperscript{46} S. Reid, supra note 6. Ch. 3.

\textsuperscript{47} This is the "triggering other mergers" problem discussed in connection with the current merger wave, infra., Part 4, Section F(2), and Part 5, Section A.
Conglomerate Mergers

form "Uniroyal"), American Tabacco Company, and the American Can Company are examples. 48

A second merger wave in the late 1920's 49 produced large holding corporations such as the Allegheny Corporation and the United Corporation. 50 It also, in manufacturing, resulted in securing the positions of a number of firms which were (and are) not the largest, but are among the largest, firms in their industries; several of the largest firms also consolidated themselves, assuring that their tenure as the dominant firm in their respective industries would be lengthened. 51

If the effects of these two earlier merger waves are still with us, if mergers consummated at the turn of the century, and in the 1920's, are still exerting an inhibitory effect on competition, it certainly seems reasonable to be concerned about the building of such conglomerate giants as Ling-Tempco-Vought, International Telephone & Telegraph Corp., Textron, Inc., Gulf & Western Industries, Inc., FMC Corp., McDonnell Douglas Corp., Teledyne, Inc., and McDonnell-Douglas Corp., 52 during the current merger wave. Will they increase the instability of the economy? To what extent will they dominate either the economy or their respective industries, or both, thirty years from now?

The conclusion of the Stigler Task Force that the current merger wave is not especially serious, and that the Department of Justice has "over-reacted," both in its published Merger Guidelines and in its current enforcement policies, 53 seems to us to be short-sighted. The conclusion expressed must revolve around a preliminary question: How much evidence does one demand before acting? If the effect of continuing our present course may be drastic, even catastrophic, perhaps, we should stop while we study the problem. For example, we may not be absolutely certain, even now, that cigarette smoking has effects on human health; but if it does have an effect, it is life itself

48. S. Reid, supra note 6, Ch. 3; FTC CONGLOMERATE MERGER REPORT 30-33.
49. S. Reid, supra note 6, Ch. 4; FTC CONGLOMERATE MERGER REPORT 33-38.
50. Bonbright and Means, Holding Companies, United States 7 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 403, 408, 409 (1962). Both of the named holding companies were formed in 1929. The latter is asserted (Id. at 408-409) to have "working control of or substantial influence over" public utility companies "whose combined assets approach those of the American Telephone and Telegraph Company."
51. S. Reid, supra note 6, Ch. 3; FTC CONGLOMERATE MERGER REPORT 33-38.
52. FTC CONGLOMERATE MERGER REPORT 260-261. It will be noted that, for all of these firms except ITT, acquired assets accounted for more than 70% of the growth, from 1961 through 1968 inclusive of total assets.
53. STIGLER REPORT, Recommendations 7 and 8, quoted in note 23, supra.
that is at stake: Not being sure, it seems wiser to stop smoking than to continue. We may call a halt to enforcement activity until we are sure that the merger movement will harm us. Or we may call a halt to the merger movement until such time as we are reasonably sure that it will not harm us.

The potential harm seems great. The current merger wave may result in a rather thorough restructuring of American industry if it continues at its present rate. Past merger waves have had such an effect. It would seem to us the better part of valor to call a halt to mergers, and not to Clayton § 7 enforcement activity, until we have some idea of the probable effects of the current movement. The Stigler Task Force's contrary conclusion would appear to us to be based almost solely on short-run economic theoretical analysis, and not on either long-run economic analysis, or on long-run observed effects of other merger waves.

III. THE MERGER PROBLEM: THE LAW

Using the law as an analytic framework, we shall analyze the effects of particular mergers, on a case by case basis. Nevertheless, the effects of a series of mergers, a "trend toward concentration" may become relevant in assessing the substantiality of harm in particular horizontal, vertical, and possibly even product extension or geographic market extension merger cases. The effects of the entire wave become relevant in assessing the substantiality of the harm in "pure" conglomerate or "free form" merger cases. Section 7 of the Clayton Act is designed to deal with particular mergers, on a case by case basis, rather than with a merger movement.

54. B. BOCK, IN ANTITRUST ISSUES AND CONGLOMERATE ACQUISITIONS (National Industrial Conference Board, New York, 1969) 36-39, argues that market boundaries have blurred, and industrial structure has already changed, both in a way and to an extent such that conventional antitrust theory makes little sense, now. Surely such a conclusion might justify our stopping and taking a look before the wave engulfs us, rather than afterward. If we then decided we granted to proceed, all well and good: at least we would have an idea we were going where we wanted to go. Furthermore, if the possibility of getting a signal to restart the merger wave were conditioned on actually getting the information from corporations and others that were interested, such information would be more likely to be forthcoming than if we told the business community to "continue merging until we can manage to prove it is fairly certain to harm the economy."

55. The question of substantiality in conglomerate merger cases is probably more in need of clarification than any other single legal question. We do not claim to have accomplished this, but the question is discussed infra., Part 5, Section B.

Conglomerate Mergers

The fact that a merger movement or wave, started three or four years after Clayton § 7 was amended to be more restrictive of mergers raises the question of whether the language of the amendment is relevant to the current merger wave, and whether, if the language seems to be relevant, it has been interpreted out of existence by the courts.

The possibility that the language of the amended Clayton § 7 does not adequately "cover" the problem must be taken seriously, in light of the history of the two earlier merger waves referred to. History could be repeating itself: The Sherman Act was interpreted out of effective existence (for many years) by the E. C. Knight case; and Section 7 of the Clayton Act as originally enacted passed out of effective existence because it covered only stock acquisitions. It is conceivable that because of some oversight in drafting, or because the dimensions of the current merger could not then be foreseen, the amendment to Section 7, enacted in 1950 ostensibly to prohibit mergers, has been interpreted out of effective existence.

In each of the earlier waves, the form of the mergers was significantly affected by the antitrust statutes in force at the time. Since "manufacturing [was] not commerce," companies merging during the first merger wave, 1898-1904, avoided the Sherman Act by concentrating on manufacturing corporations. Since the original Section 7 of the Clayton Act prohibited stock acquisitions but did not prohibit asset acquisitions, companies merging during the second merger wave, 1898-1904, avoided the Sherman Act by concentrating on manufacturing corporations. Since..., 1898-1904, avoided the Sherman Act by concentrating on manufacturing corporations. Since the original Section 7 of the Clayton Act prohibited stock acquisitions but did not prohibit asset acquisitions, companies merging during the second merger wave, 1898-1904, avoided the Sherman Act by concentrating on manufacturing corporations.

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57. In 1954 or 1955. See Table 1, supra; the date depends on whether number of mergers or value of acquired assets is used as a criteria. The latter can be distorted by one or two large mergers. See, e.g. FTC CONGLOMERATE MERGER REPORT, footnote 1, p. 35. Figure 1-2, p. 36. The sharp upturn, in both number of mergers and value of acquired assets, started in 1966. Id., Figure 1-2, p. 36, and Figure 1-3, p. 40.
60. Act of October 15, 1914, c. 323, § 7, 38 Stat. 731. The original wording provided: That no corporation engaged in commerce shall acquire . . . the whole or any part of the stock . . . of another corporation . . . where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.
63. United States v. E.C. Knight Company, 156 v.5.1, at 12, 14, 17. S. Reid, supra note 6, has speculated, that the decision in Northern Securities Co. v. United States 193 U.S. 197 (1904), signaled the end of this first merger wave.
64. S. Reid, supra note 6, Chapter 3.
1925-1931, seldom took the stock acquisition route, substituting the asset acquisition route to merger.

During the current wave, the Supreme Court, in a series of opinions starting with Brown Shoe-Kinney Shoe, in 1962, has developed an interpretation of Section 7 of the Clayton Act which has grown increasingly restrictive. It is not that the later opinions are inconsistent with the earlier opinions, but rather that each major opinion has made it clear that the statute applies to a new class of cases.

It is clear, in June, 1969, that Section 7, as amended in 1950, prohibits most major horizontal mergers, and most major vertical mergers. It is fairly clear that product extension and geographic market extension mergers involving an acquisition by a major corporation of one of the leading companies in a "neighboring" product or geographic market will be proscribed. It is probable that a product extension or geographic market extension merger which gives the merged company the power to foreclose a substantial share of some market will be proscribed. It seems likely that these rules have been influential in diverting the current merger wave from simple horizontal and vertical mergers to conglomerate, product extension or market extension mergers. As to "pure" conglomerate, or "free-form," mergers, where there is no immediately discernible relationship between the activities of

67. S. REID, supra note 6, Chapter 4. Stigler, supra note 62.
69. See, e.g., editorial comment in Fortune Magazine following each Supreme Court Decision to date.
73. It is clear, from the data reviewed in Parts I and II and in, that the current merger wave has been so diverted. Our conclusion that the antitrust laws have been a causal factor in this diversion, is based on: (1) our observation, based on economic theory, that in the absence of any antitrust laws, businessmen ought to prefer horizontal mergers (to the point of monopoly) to any other type, and ought to prefer vertical mergers (which allow the rationalization of all facets of a manufacturing and selling process) over conglomerate mergers; (2) the testimony of various persons in business and industry involved with various aspects of merger problems; (3) on Stigler, supra note 62, and (4) on S. REID, supra note 6. See supra note 21, supra.
the merging corporations (other than the fact that they, e.g., borrow money from the same bank, ship their products via the same common carrier), the law has said little.

In a real sense, then, history is indeed repeating itself. The "anti-merger" amendment to Clayton § 7 has had an effect; but that effect has been to deflect the merger movement from simpler horizontal and vertical merger forms to various conglomerate merger forms.

The question is: Can Section 7 be used to effectively block the increasing tide of conglomerate merger activity in the economy?

IV. SECTION 7 OF THE CLAYTON ACT: CURRENT INTERPRETATIONS

To answer this question, we will determine what is the approach of the courts and of the enforcing agencies to merger problems, generally, and then make some predictions as to whether and how the same approach might affect mergers classified as "conglomerate."

We state our conclusion in advance, and without noting all the qualifications and explanations which will be discussed below:

The government must prove that it is reasonably probable that competition, in the future, will be substantially less if the merger in question takes place than if the merger in question does not take place.

To justify this conclusion we must develop some operative definition of the language in Section 7 of the Clayton Act. Not, simply, what do the words mean, but what must be proved when the government brings an action for divestiture or to enjoin a merger.

Section 7 of the Clayton Act provides:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital, and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation also engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. 74


The Sherman Act, Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U.S.C. §§1-7, is largely ignored herein, not because it is irrelevant—it may ultimately prove very relevant—but because it has been largely ignored by the enforcement agencies. Short of some fairly special cases, a merger "may tend to lessen competition," within the meaning that phrase has been given, long before any Sherman Act problem is visible.
A. "may"

The statutory condition for illegality—"where the effect . . . may be substantially to lessen competition"—duplicates language in Section 2 and in Section 376 of the Clayton Act. There was ample precedent on the meaning of "may" in these Sections prior to the amendment of Section 7 in 1950: "may be" means "will reasonably probably be."76 Confronted with the duplication of language, it did not seem unduly difficult for the courts to hold that the same language, used in Section 7 had the same meaning as that in the other two sections.77

More bothersome to the average businessman or economist78 is the question of what "reasonably probable" means. A reference to statistical analysis presents the clearest analogy: the judgmental process is exactly equivalent to the process by which a level of significance is picked. To say that substantial anticompetitive effects are "reasonably probable" is simply to say that the probability of anticompetitive effects is great enough that a reasonable man79 would believe that such effects, when they did occur, were not due to random variation.80

B. "substantially"

The question, "How much harm to competition does it take to be substantial?" is also a judgmental issue. The analogy with the statistical judgment of significance levels is even closer, here. Any harm to

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75. Act of October 15, 1914, c. 1184, §§ 2, 3, 15 U.S.C. §§ 13, 14, Section 3, unamended since its original enactment in 1914, differs only in that, in Section 3, the infinitive is split: " . . . to substantially lessen . . . ." This may indicate something about how grammatical customs change over time, but does not indicate any change in the antitrust laws.
76. This history is discussed in Brown Shoe Company v. U.S., 370 U.S. 294, n.39 at 323.
77. Id.
79. The reasonable man is a fictitious personage of great antiquity and great authority, in the law. To say that what is reasonable is what a reasonable man would do or think is reasonable may reasonably be regarded, in the context of antitrust law, as a clever way to avoid being too closely tied down by a quantitatively indefinable standard.
80. Strictly, perhaps, statistical analysis will say only that the chance of some event occurring because of random variation will be less than some specified percentage. (The extreme purists might even restrict statistical analysis from any statement of cause whatever, saying only that the probability of one event occurring in the absence of another, will be less than some specified percentage.) In using the results of statistical analysis as a basis for making decisions, however, the decision maker must be subjectively satisfied that the probability of one event (say some anticompetitive effect) occurring, given another event (say, a merger) is great enough (or conversely that the probability that the anticompetitive effect would occur solely because of random variation is small enough) that he decides to behave as though the merger will cause the anticompetitive effect. For one discussion of a basis for this analogy, see S. H. OZGA, EXPECTATIONS IN ECONOMIC THEORY (1965), 49-77.
Conglomerate Mergers

competition which is "not insubstantial," not *de minimis*, which is more than negligible, is "substantial," within the meaning of the cases interpreting Clayton § 7. If the harm is "significant," it is "substantial."

C. "competition"

The meaning of "competition" must be central to any discussion of Section 7. No precise and explicit definition has ever been given by the Supreme Court. The Court is not entirely at fault. It has received little help from others—in particular, businessmen and economists. There has been a surplus of theories of how "pure" (or "monopolistic" or "imperfect") competition works, but there has been little analysis in which economic theory has been held within the constraints of law.

Left to its own devices, the Supreme Court has indicated what competition means in Supreme Court opinions. In *Continental Can-Hazel Atlas* the Court said, "... we must recognize meaningful competition where it is found to exist." The Court has been unconcerned with the niceties of economic theory. It searches for "competition in fact." Competition, as developed by the Court, means *rivalry*. If A and

![Diagram of competition](image-url)

**Figure I**

82. United States v. Continental Can Company, 378 U.S. 441, 449 (1964) (emphasis added). The court held that this merger, of a leading metal can manufacturer with a leading glass jar manufacturer, would reasonably probably eliminate meaningful interproduct competition between the two companies. (The problematic aspect of this case involves, not whether there was a harm to competition, but whether that harm was substantial. See infra, note 88, note 226 and accompanying text for discussion of this.)
B are competing to sell something to P (purchaser), or if X and Y are competing to buy something from S (seller), then A and B are rivals, and X and Y are rivals. It follows that there is competition in fact.

D. "in any line of commerce, in any section of the country"

Given the concept of competition as rivalry, consideration of the relevant line of commerce and the relevant section of the country may be ignored (at least as a preliminary matter). Any kind of economic rivalry—competition in fact—must take place with respect to some product or products, and must take place in time and space. The location in space will determine the section of the country.\textsuperscript{84} The product or products will determine the line of commerce.\textsuperscript{85} If rivalry is found, a market will be defined. If rivalry is not found, then no market will be found.

Some difficult factual questions may arise, but one conclusion seems reasonable: However many relevant product and geographic markets can be plausibly defined it seems a reasonable generalization from the approach taken by the Supreme Court in \textit{Du Pont-General Motors},\textsuperscript{86} in \textit{Alcoa-Rome},\textsuperscript{87} in \textit{Continental Can-Hazel Atlas},\textsuperscript{88} and in \textit{Pabst-}

\textsuperscript{84} For two cases in which this was the major analytic problem, see United States v. Pabst Brewing Company, 384 U.S. 546 (1966); United States v. El Paso Natural Gas Company, 376 U.S. 651 (1964).

\textsuperscript{85} For two cases in which this was the major analytic problem, see United States v. Continental Can Company, 378 U.S. 441 (1964), and United States v. Aluminum Company of America, 377 U.S. 271 (1964).

\textsuperscript{86} United States v. DuPont, 366 U.S. 316 (1961). 23% of the stock of General Motors Corporation was purchased by E. I. DuPont de Nemours & Company, a manufacturer of, \textit{Inter alia}, paints and finishes. The court held that paints and finishes for automobiles constituted a specialized product market. Given this conclusion, then General Motors Corporation, by itself constituted a substantial portion of that market, and the potential market foreclosed as a result of the vertical integrative influence of DuPont's stock ownership was also substantial. (See Part 4, Section F, infra, for a discussion of the harm that may result from vertical mergers.)

\textsuperscript{87} United States v. Aluminum Company of America, 377 U.S. 271 (1964). Alcoa bought Rome Cable Company. Alcoa manufactured aluminum cable, both bare and insulated. Rome manufactured bare and insulated copper cable, and also manufactured a small amount of aluminum cable. Out of all possible combinations of products—bare aluminum wire, insulated aluminum wire, all aluminum wire, and all aluminum plus all copper wire, the court selected all (both bare and insulated, that is) aluminum wire as the relevant market. Thus, what the merging parties probably considered a product extension merger was held illegal on the basis of a very small overlap in corporate products.

\textsuperscript{88} United States v. Continental Can Company, 378 U.S. 441 (1964). The "market" used to test this as a horizontal merger was combined metal and glass containers. The propriety of adding totals of two somewhat different products, even if the products themselves are in competition, has been questioned by a number of writers, starting with Justice Harlan's dissent, 378 U.S. at 467. The criticism goes most strongly not to the harm to competition, or even to the identification of the market or markets in which that harm would take place. It goes to whether that harm is substantial. \textit{Continental Can—Hazel Atlas analyzes the potentially harmful consequences to competition with reasonable economic sophistica-
Conglomerate Mergers

Blatz\textsuperscript{89} that that market definition which is least favorable to upholding the merger in question will be adopted by the courts. The statute provides that a merger is illegal if it may lessen competition in any line of commerce in any section of the country.\textsuperscript{90} A merger therefore violates the statute if there is even one product and geographic market (defined by the existence of rivalry) in which competition will reasonably probably be substantially lessened. It is irrelevant that in other markets the merger might have no adverse effect. It is even irrelevant that in another market, or in various other markets, the merger might have beneficial—procompetitive—effects.\textsuperscript{91} The statute would still be violated if there were one market in which competition might be substantially lessened.

The more serious problem of defining the exact boundaries of the "market" returns after a harm to competition has been found. The size of the market itself, has a great deal to do with the question of substantially. A harm to competition in a market which is itself de minimis, or a harm to a de minimis proportion of a market which is even very large, will not substantially lessen competition. The question of market definition, therefore, while it has been conveniently disposed of as a preliminary determination to finding a reasonably probable harm to competition, will probably remain with us as a preliminary requirement to a finding that the harm is substantial. We will return to this
later, when we consider the special problems of judging the substan-
tially of harm with respect to conglomerate mergers.

E. Why Competition?

Why is competition desirable? We explore this because the reason
behind a rule helps define and limit the situations to which the rule
will be applied.\textsuperscript{92} Congress decided to prohibit mergers which would
tend substantially to lessen \textit{competition}: We have already hypothesized
that the Supreme Court means \textquotedblleft rivalry\textquotedblright \ when its says \textquotedblleft competition.\textquotedblright The
merely substitutes words. Is competition desired because of short
run effects or long run effects, or is it desired for its own sake or because
of social, psychological, and/or political side effects? The kinds of harm
which will be recognized by the courts, and perhaps their judgment
of the substantiality of that harm may well depend on why the courts
conceive competition to be important—or on why the courts think
Congress conceived it to be important.

We offer our own observations, based largely on U.S. Supreme Court
opinions, but influenced to some extent by commentators.

Americans want competition, and a compatible economy, first be-
because of the economic consequences of competition—prices at or close
to average cost, and costs as low as possible because, under competition,
suppliers are motivated to introduce cost cutting or product improving
technological and managerial changes in order to outsell competitors
(through cheaper prices) and/or make greater profits. As Richard Low
has stated:

\begin{quote}
Pure competition attains its beau ideal status because the pres-
ure of competition on each producer is such that he must con-
stantly seek new ways to cut his costs and must usually make do
with the minimum profit necessary for him to remain in business.
Thus, it scores high in regard to short term efficiency based on
cost-reduction . . .\textsuperscript{98}
\end{quote}

Competition is also desired because, under a competitive system, we
—most of us, at least—believe we have (or will have) greater economic
freedom: greater opportunities for individual entrepreneurship on our
own initiative and greater choice of things to buy and freedom from

\textsuperscript{92} We maintain this despite the fact that pointing out to a first year law class that \textit{cessat rationale legis, cessat ipsa lex} results in a predictably resounding guffaw. Perhaps
the principle suffers in translation.
\textsuperscript{93} R. Low, \textit{ANTitrust ECONOMICS} (1968), Introduction, at 3.
coercion as to the terms of sales: greater freedom of economic opportunity—for ourselves, both as sellers or buyers, actual and potential.94

These may be referred to, respectively, as competition desired for its consequences, and competition desired for its own sake. The distinction here is relevant; if we are concerned solely with the economic consequences of competition, then we shall take cognizance only of those harms to competition which we can predict will have "not insubstantial" economic consequences: increased pricing power, a significant market foreclosure, or the like. We shall also permit a showing that a merger will result in "efficiencies"—cost savings in management, distribution, production, or whatever—to be used as a defense in a divestiture action; at least we will if there is any probability that such cost savings will be passed on to consumers and become a social, as well as a private, benefit.95

If we are concerned also with competition for its own sake, we shall take cognizance of any merger which will "reasonably probably" inhibit various kinds of independent action by competitors. And we may be very concerned with the number of competitors, and with a fragmented structure in the economy, as such, without regard to whether specific economic consequences can be predicted.

There is abundant evidence that Congress, when it amended Section 7 in 1950, was vitally concerned not only with the economic consequences of competition, but with competition for its own sake, and with the social detriment from the absence of competition. The Supreme Court outlined some of this history in Brown Shoe-Kinney Shoe.

The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy. Apprehension in this regard was bolstered by the publication in 1948 of the Federal Trade Commission's study on corporate mergers. Statistics from this and other current studies were cited as evidence of the danger to the American economy in unchecked corporate expansions through mergers. Other considerations cited in support of the bill were the desirability of retaining 'local con-

95. Low, Ease of Entry: A Fundamental Economic Defense in Merger Cases 36 Geo. WASH L. REV. 515 (1968), discusses one such defense. The possibility (and in the absence of regulation the probability) that cost savings if an oligopoly or monopoly market will not actually be passed on to consumers (especially where the cost savings are due to size alone and cannot be duplicated by smaller competitors) will lead us to forego the term "efficiencies" in favor of "cost savings." See FTC v. Procter & Gamble, 386 U.S. 568 (1967).
control' over industry and the protection of small businesses. Throughout the recorded discussion may be found examples of Congress' fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose . . . .

Moreover, as we have remarked above, not only must we consider the probable effects of the merger upon the economics of the particular markets affected but also we must consider its probable effects upon the economic way of life sought to be preserved by Congress. Congress was desirous of preventing the formation of further oligopolies with their attendant adverse effects upon local control of industry and upon small business. Where an industry was composed of numerous independent units, Congress appeared anxious to preserve this structure.96

The concern for competition for its own sake, goes back almost to the beginning of American antitrust law. As early as 1897, in Trans-Missouri Freight Association,97 the Supreme Court rejected an efficiencies defense by pointing to the long run detriment of monopoly even where short run operating cost savings might result from a combination:

[Trusts and combinations] may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class, and the absorption of control over one commodity by an all-powerful combination of capital.98

And in a famous passage in his 1945 Alcoa decision, Judge Learned Hand stated:

Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.99

98. Id. at 323.
More recently, in interpreting Section 7 in merger cases, the Supreme Court has made it clear that it believes Congress intended to protect and preserve not only the economic consequences of competition, but competition for its own sake.

First, the court has said so, in almost identical language in *Brown Shoe-Kinney Shoe,*\(^\text{100}\) and, more recently, in *Procter & Gamble-Clorox:*

Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition. See *Brown Shoe Company v. United States,* 370 U.S. at 344.\(^\text{101}\)

Second, the ultimate test of harm to competitors has tended more and more to be stated in terms of barriers to entry,\(^\text{102}\) and decreased ease of competitive action by independent (which seems to carry the added connotation of "small") firms.\(^\text{103}\)

"Barriers to entry" may be connected to purely economic consequences of competition, as Justice Harlan has recently done, laboriously, in *Procter & Gamble-Clorox:*

Two justifications for the use of entry barriers as a determinant under Section 7 can be given. The first is that an increased range over which pricing power may be exercised is contrary to the mandate of Section 7 because Congress’ use of the word ‘competition’ was a shorthand for the invocation of the benefits of a competitive market, one of which is a price close to average cost. Such an approach leads also to the conclusion that economic efficiencies produced by the merger must be weighed against anticompetitive consequences in the final determination whether the net effect on competition is substantially adverse . . . . The second justification is found in the tendency to monopoly clause of Section 7. Certainly the clearest evil of monopoly is the excessive power the monopolist has over price. Since ‘antitrust operates to forestall concentrations of economic power which, if allowed to develop unhindered, would call for much more intrusive government supervision of the economy, Blake & Jones, *In Defense of Antitrust,* 65 Col. L. Rev. 377, 383, increased power over price should be attackable under Section 7. Cf. S. Rep. No. 1775, 81st Cong., 2d Sess., 4-5.\(^\text{104}\)

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102. *Id.* at 579.
103. *Id.* see also *Brown Shoe Company v. United States,* 370 U.S. 294, 343-346.
104. 386 U.S. 568, 596-597.
The interpretation of barriers to entry by the majority in *Procter & Gamble-Clorox* was quite different, however, and shows the Court's concern with competition not merely as a means to an end but as an end to be valued in itself:

The acquisition may also have the tendency of raising the barriers to new entry. The major competitive weapon in the successful marketing of bleach is advertising. Clorox was limited in this area by its relatively small budget and its inability to obtain substantial discounts. By contrast, Procter's budget was much larger; and although it would not devote its entire budget to advertising Clorox, it could divert a large portion to meet the short-term threat of a new entrant. Procter would be able to use its volume discounts to advantage in advertising Clorox, it could divert a large portion to meet the short-term threat of a new entrant. Procter would be able to use its volume discounts to advantage in advertising Clorox. Thus, a new entrant would be much more reluctant to face the giant Procter than it would have been to face the smaller Clorox.105 (Emphasis supplied.)

"Barriers to entry," which we have identified with a value given to competition as an end in itself, can of course be linked to economic consequences of competition in ways other than the way Justice Harlan has suggested. In fact it is rather surprising that so few have made this link.106 When we speak of entry by new firms, new entrepreneurs, we are speaking of new investment. In traditional microeconomic theory the distinction between the short run and the long run has been that in the short run real capital investment is fixed; whereas in the long run new real capital, new plant and equipment, can be brought into a production process.107

More specifically, the economic long run is a time sufficiently long that fixed costs can be regarded as variable. The tendency of particular markets to approach equilibrium positions where price will equal average costs (including normal profits),108 and where average costs will approach the minimum average costs of the most efficient sized

105. *Id.* at 579, Emphasis supplied.
106. With the rather notable exception of *J. S. Bain, Barriers to New Competition* (1956).
108. "Normal" profits are profits sufficiently high to keep a producer in the business, but not high enough to attract additional producers into the business, in the absence of an increase in demand. See *W. Baumel, Economic Theory and Operations Analysis* (2d Ed., 1965) 315-316.
Conglomerate Mergers

firm or plant, is a tendency that will be observed only where entry is reasonably easy.\textsuperscript{109} The existence of "reasonable ease of entry" will depend on whether the criteria for making (or not making) an investment are unduly influenced by factors irrelevant to efficiency. Investment decisions will normally depend on whether expected revenues will justify known present, and expected future, costs, with both future revenues and future costs discounted to present values.\textsuperscript{110} If there are alternatives, then that alternative which maximizes net returns will (or should) be selected.\textsuperscript{111}

Particular market structures may "distort" the expectations of potential entrants, or even of firms considering expansion, by making their expectations depend on factors irrelevant to production costs, real product quality, and consumer tastes based on knowledge of true

\textsuperscript{109} COHEN AND CYERT, supra note 107, Ch. 8; FERGUSON, supra note 107, Ch. 9 at 210-14. Most economic literature will specify that entry must be "free." There will usually be some costs—e.g., investment costs—attached to entry. To obtain the kinds of long run economic benefits we associate with competition, it is probably sufficient that entry is reasonably easy, and that barriers unrelated to efficiency and other economically desirable factors not dominate such decisions. Low, supra note 95, conditions such that existing firms in the industry, smaller than optimum size, can expand could, conceivably, take the place of entry—though one would expect the two sets of conditions to be nearly identical.

\textsuperscript{110} For a brief description of the mathematics of computing present values see HENDERSON & QUANDT, MICROECONOMIC THEORY (1958), Ch. 8, especially pp. 223-229, or BIERMAN AND SMIDT, THE CAPITAL BUDGETING DECISION (2d Ed., 1966). For a fuller description of the investment decision, see note 111, infra.

\textsuperscript{111} In deciding whether to make a given investment, one may, as suggested in the text, make that investment which maximizes the present value of all returns from the investment, net of the present value of all costs of the investment. See J. W. CONARD, AN INTRODUCTION TO THE THEORY OF INTEREST (University of California Press, Berkeley, 1959); BIERMAN AND SMIDT, supra note 110. In long run terms, this is the equivalent of profit maximization in the short run—the maximization of net gain—and is considered, in conventional economic theory, to be the only rational method of making an investment decision. COHEN & CYERT, supra note 107; BIERMAN AND SMIDT, supra note 110. In practice, it is seldom used. The government uses a benefit to cost ratio, and thus ranks alternative projects in such a way as to maximize the rate of return. O. ECKSTEIN, WATER RESOURCES DEVELOPMENT (Harvard University Press, Cambridge, 1958); R. MCKEAN, EFFICIENCY IN GOVERNMENT THROUGH SYSTEMS ANALYSIS (1958). When the rate of return is discounted, as it is in government benefit-cost studies, it will inform one accurately and rationally whether there is a net gain or a net loss from the investment. Inconsistencies between present value and discounted rate of return analysis arise only when ranks alternative investments that have different lifetimes and/or different patterns of return over time (as will usually be the case for government investments).

Businessmen commonly use as criteria the rate of return on their own invested funds, and/or the "payback period"—the time it takes to return their own invested capital. M. SOLOMON, INVESTMENT DECISIONS IN SMALL BUSINESS (University of Kentucky Press, Lexington, 1963) 57-58. Solomon argues that in the context of the uncertainties involved in making actual decisions, these criteria are not irrational: In most cases, collecting the additional information necessary to apply the present value analysis meaningfully would cost more than would be gained from using present value instead of payback period analysis. Most important among these uncertainties are the expected revenue—which usually depends on the expected size of the market—and the length of life of the investment. Of these two, by far the greatest uncertainty attaches to the expected revenues. \textit{Id.}, 57-58, 85-92.
product quality. Such irrelevant factors might include the power of other firms (e.g. big conglomerates) to close off markets, by any means considered reasonably probable, whether legal (vertical integration by merger or expansion, or product differentiation) or illegal (tie-ins, or exclusive dealing contracts); or they might include cost advantages of other firms (such as capital access, volume discounts, or advertising discounts). If, for any reason, a small independent or potential entering firm fears that access to a market (any market) for his output can be arbitrarily cut off, he may well decide to invest available funds in something else.\textsuperscript{112} We will discuss some of these reasons in connection with specific sorts of harm to, or lessening of, competition, infra.\textsuperscript{113} To the extent that the expectations of potential entrants are distorted, their investment decisions will not be conducive to the long run purely economic consequences of competition.

In fact, when we talk about some of the benefits of “competition for its own sake” we may well be talking about long run economic consequences. Freedom of economic opportunity, for example, refers to conditions such that if someone has an idea (even, e.g., for a better mousetrap) it is possible for him to try out that new idea. It increases our sense of freedom to know that if we do have an idea we can try it out—and this increased sense of freedom may legitimately be regarded as a value in and of itself, regardless of whether any other, more purely “economic” good ever comes of it.

The long run economic consequences, however, are that people are more likely to put forth the effort to invent or develop new products or production processes if they are likely to be able to try them out. The easier the entry, the more likely it is that an inventor will be able to try out his invention. The greater is freedom of economic opportunity, other things being equal, the greater the likelihood that people will take advantage of that economic opportunity. Pluralism in economic affairs, just as in political affairs, is widely believed to produce good results. If there are too few decision makers, good ideas may never be tried (or perhaps never even thought of) simply for lack of a chance

\textsuperscript{112} A non-rational factor which affects many business decisions, of course, is the experience and background of the decision maker. One whose experience is in retail and wholesale clothing will perhaps be a little hesitant to invest in tool & die making equipment, and vice versa. Id. 57-68. This factor affects only certain individual investors who might otherwise consider entry, however, it would not be a general factor affecting all potential entrants, and would not be expected to have general market influence. 

\textsuperscript{113} Part 4, Section F, and Part 5, Section A(1).
Conglomerate Mergers

to try them out. The greater the number of people searching for improvements in products and production processes, the more likely such improvements are to come about.

It has been claimed, of course, that innovation, under conditions where the technology of research and development has become so complex, and expensive, requires large, even very large, industrial firms for support.\footnote{114} Large firms, on the other hand, may have large investments in existing technology, which they will not want to make obsolete by introducing radically new inventions. This suggests that large firms will be more likely to support and develop minor improvements and modifications of existing products and production processes, rather than inventions which call for replacements. Some empirical research supports the hypothesis suggested above—the more inventors, the more inventions. As the \textit{F.T.C. Conglomerate Merger Report} notes:

\textbf{[A]} large proportion of radical new concepts such as xerography, polaroid cameras, and catalytic cracking of petroleum is the product of the creative individual—the individual who typically pursues relentlessly the unconventional idea even though it involves a high risk that the effort will be unsuccessful.\footnote{115} As a result of such risk, it is contended, the manager and technical staff of very large corporations will typically be conservative in their approach to solving particular problems, thereby making a less than proportional contribution in terms of major inventions. Thus, institutionalized invention at a large corporate research laboratory is unlikely to generate significant deviations from conventional practice.\footnote{116}

We shall lump the various long run economic consequences with the independent value which the Supreme Court has accorded to competition as a value in itself. In this, we follow the Court’s practice. On occasion we shall analyze the long run economic effects separately.

\footnote{114. J. SCHUMPETER, \textit{Capitalism, Socialism and Democracy} (Harper \& Row, New York, 1942), especially Ch. 7.}
\footnote{115. [Renumbered FTC \textit{Conglomerate Merger Report} footnote]. The studies of inventive activity by JEWKES, SAWERS, AND STILLERMAN, \textit{The Sources of Invention}, (St. Martin's Press, 1958) and by Mueller, \textit{The Origins of the Basic Inventions Underlying DuPont's Major Product and Process Innovations, 1920 to 1950, The Rate and Direction of Inventive Activity}. (Princeton Univ. Press, 1962). Both studies found that over half the important products of processes had been developed by single inventors or others working outside leading corporations.}
\footnote{116. FTC \textit{Conglomerate Merger Report} at 90. For example, DuPont, "often considered a highly inventive and innovative firm, has obtained most of its basic inventions and processes from outside sources." Instead of making basic inventions, DuPont has made improvements on other people's basic inventions. Id. at 92, citing Mueller, \textit{supra} note 115.}
In giving an independent status to competition for its own sake, we admit that Congress' action in 1950 was not completely clear and that historically, Congress has not been entirely consistent in its concern for competition for its own sake.\textsuperscript{117} We admit, as we have already noted, that at least one member of the Supreme Court, Justice Harlan, does not agree that competition should be protected for its own sake.\textsuperscript{118} It may nevertheless be predicted that the Supreme Court will continue to give weight to "reasonably probable" effects of any mergers which come before it on competition as such, as well as to the "reasonably probable" effects on the economic consequences of competition.

And we think such action by the Courts is not bad law, or even necessarily bad economics.\textsuperscript{119} The evidence may not be overwhelming that Congress cared about competition for its own sake as well as for both its short and long run consequences; but evidence does exist, and to ignore that evidence entirely, or to regard it as being irrelevant, seems unjustified.

In a nation which has shown itself willing to pay heavily for political freedom,\textsuperscript{120} it seems reasonable to believe, as does the Supreme Court, that Congress believed that economic freedom was worth paying for—with the price being measured in "occasional higher costs of production" and, implicitly, possible higher prices.\textsuperscript{121} Indeed, in a world where social choices cannot produce complete Pareto optimality\textsuperscript{122} (and

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{117} See, e.g., the retail price maintainance provisions of Section 1 of the Sherman Act, 15 U.S.C. § 1.
\item \textsuperscript{118} See, e.g., Justice Harlan's concurring opinion in FTC v. Procter & Gamble Company, 386 U.S. 568, 581 et seq., quoted in part, supra, at note 192.
\item \textsuperscript{119} With all due respect to Professor Turner, \textit{Conglomerate Mergers and Section 7 of The Clayton Act '78 HAR. L. REV. 1313, 1325 (1965), who disagrees.}
\item \textsuperscript{120} In two World Wars in this century alone, as well as two undeclared wars over the political independence of people of difference cultures 8,000 miles away, one of which is still being fought.
\item \textsuperscript{121} Brown Shoe Company v. United States, 370 U.S. at 315-16.
\item \textsuperscript{122} Ferguson, Microeconomic Theory (2d Ed. 1968) Chapter 14; Henderson and Quandt, Microeconomic Theory (1958), Chapter K; Arrow, Social Choice and Individual Values (Revised Ed., 1963). Pareto optimality (named after an Italian economist who developed some of the basic concepts of general equilibrium) is defined as a state of resource allocation and use, such that no individual can improve his position (with respect to consumption and/or production) without some other individual's position being worsened. An improvement in social welfare (because, e.g., of increased production due to private or governmental investment, or because of technological changes in production or distribution) is considered to be unambiguous if and only if at least one person is made better off and no person is made worse off. It has been proven (see Ferguson, and Henderson and Quandt, above) that under conditions of perfect competition (many sellers, many buyers—an "atomistic" market, that is—homogeneous products, free entry and exit of resources, perfect knowledge, plus consumers motivated solely by personal utility maximization and producers motivated solely by profit maximization), Pareto optimality will prevail. Unfortunately, few of the assumptions of perfect competition are
\end{enumerate}
\end{footnotesize}
realizing that Pareto optimality is at best a low level criterion of how well an economic system functions), it may even have been wise as a matter of economics for Congress to have attached a positive value to competition as such, making its (not necessarily everyone's) choice of the best among all possible Second-Best alternatives.  

F. "To lessen competition": Types of Harm

For convenience we will examine the types of harm recognized by the courts, independently of any questions with regard to the substantiality of that harm. These may be classified broadly into two categories: First, is the sort of harm which results from a horizontal merger—the elimination of one or more competitors in a field, and a change in the relative sizes of firms in a field. Second, is the sort of harm that results from a vertical merger—the closing off of markets (product market or factor market or both) because of considerations of corporate ever fully satisfied in real life. Even if some were approximately satisfied, problems would arise due to imperfect knowledge, and to the impossibility of explaining human behavior by any single motivating factor.

The assertion that social choice cannot be made in such a way as to produce Pareto optimality rests in part on imperfections in the processes of social decision making, explored by Arrow. It rests, also, in part on the existence of known perversities in man's nature, and of perceived inequities in the distribution of resources. As long as one consumer's satisfaction depends in part on what his neighbor consumes (e.g., liquor, or "too much," or "too little") or upon what other producers produce, then any alteration in the distribution or type of consumption or production is likely to interfere with achievement of Pareto optimality. An extreme on the production side might be monopoly; if monopoly exists, the distribution of productive facilities (in the absence of a growth in demand) cannot be altered without lowering the monopolist's profits, and thereby his (consumer) satisfaction. Even at a less extreme point, a consumer's satisfaction may depend in part on what he, in his capacity as a producer, produces, and indirectly on what others produce. It is very satisfying to "produce," for example, a 4 minute mile; but is is not nearly so satisfying if someone else can "produce" a 3 minute 55 second mile. Competitive satisfaction or dissatisfaction of this sort is not quite so clearly visible in more obviously economic sorts of production activities, but is probably never completely absent. See, e.g., W. Baumol, Business Behavior, Value and Growth (The Macmillan Company, New York, 1959), and Konrad Lorenz, On Aggression (Harcourt, Brace & World, New York, 1967).

123. It has been proven, mathematically that if any one condition for Pareto optimality is not met, the allocation of resources resulting from satisfying the remaining conditions will not, in general, be the most optimal "second best" alternative to Pareto optimality. Lancaster, and Lipsey, The General Theory of Second Best, 24 Review of Economics and Statistics 11 (1942). In fact, where the departures from the ideal of perfect competition vary from industry to industry and from place to place, there may well be no demonstrable second best alternative. See E. Mishan, Welfare Economics (1964) at 79-80, and works there cited. In this case (and perhaps in any case) it can hardly be considered irrational to attach some value, some positive (consumer-type) utility, to the existence of a fragmented industrial structure. Such a structure may give satisfaction in and of itself, to many people, completely apart from any goods which may be produced.

277
relationship, reciprocal buying or tie-in pressure, or any other similar relationships.

Every merger case before the Supreme Court since Brown Shoe-Kinney Shoe\textsuperscript{124} has involved relationships between merging parties which the parties themselves did not regard as typically horizontal or vertical. Philadelphia Bank-Girard Trust\textsuperscript{125} could be viewed as a geographic market extension merger, in that it permitted penetration of nationwide banking markets; and was tested (and rejected) as a horizontal merger by the Supreme Court. The Continental Can-Hazel Atlas\textsuperscript{126} and Alcoa-Rome\textsuperscript{127} mergers broadened product lines into closely related fields—so closely related that they were held to be the same line of commerce, allowing the court to treat them as horizontal mergers. Even Pabst-Blatz\textsuperscript{128} and Vons Stores-Shopping Bag\textsuperscript{129} involved significant geographic market extension aspects; El Paso-Pacific Northwest\textsuperscript{130} and Penn-Olin\textsuperscript{131} involved even more significant geographic market extension aspects. Nevertheless all four of these were treated essentially as horizontal mergers.

Consolidated Foods-Gentry\textsuperscript{132} and Procter & Gamble-Clorox\textsuperscript{133} were even further removed from the range of ordinary horizontal and vertical mergers Nevertheless, the types of harm to competition in these cases can be referred to as vertical or horizontal, respectively.

1. \textit{Horizontal Merger, Two Firm Industry}

Analyzing the problem of anticompetitive effects schematically, sup-

\begin{enumerate}
\item \textsuperscript{124} 370 U.S. 294 (1962).
\item \textsuperscript{125} 374 U.S. 321 (1963). See note 91, \textit{supra}.
\item \textsuperscript{126} 378 U.S. 441 (1964). See note 88, \textit{supra}.
\item \textsuperscript{127} 377 U.S. 271 (1964). See note 87, \textit{supra}.
\item \textsuperscript{128} 384 U.S. 546 (1966). See note 89, \textit{supra}.
\item \textsuperscript{129} United States v. Vons Grocery Company, 384 U.S. 270 (1966). The lower court, and Justice Stewart in his dissent, 384 U.S. at 295-296, emphasized that Vons stores and Shopping Bag stores operated supermarkets scattered through the Los Angeles area in such a way that Vons stores did not actually compete with Shopping Bag stores in any particular neighborhood. The merger could, therefore, be viewed by Vons as a way of "filling in holes," extending Vons' geographic market area into a number of neighborhoods where Vons did not do business.
\item \textsuperscript{132} FTC v. Consolidated Foods, 380 U.S. 592 (1965). Consolidated Foods Corporation, a manufacturer and seller of a broad line of food products here acquired Gentry, Inc., a manufacturer of dehydrated onion and garlic. The merger involved the possibility (and apparently also the actuality) of reciprocal dealing. See note 126, \textit{infra}, and accompanying text, for further discussion of reciprocity in general, and this case in particular.
\item \textsuperscript{133} FTC v. Procter & Gamble Company, 386 U.S. 568 (1967).
\end{enumerate}
Conglomerate Mergers

pose A and B compete to sell to P (purchaser), or X and Y compete to buy from S (seller).

![Figure II](image1)

Apart from questions of substantiability, a horizontal merger between A and B, or between X and Y will eliminate (and thereby lessen) competition.

![Figure III](image2)

2. Vertical Merger

Similarly, a vertical merger between, say, A and P may, foreclose the entire market. In the extreme case, where P is the only purchaser and A

134. Which will be dealt with specifically, in relation to conglomerate mergers, in Part V (B), infra.
can expand to satisfy all of P's wants, such a vertical merger will "reasonably probably" eliminate B's entire market, thereby eliminating B, and eliminating (and thus lessening) competition. A vertical merger between, X and S will, by paralleled arguments, reasonably probably eliminate (and thereby lessen) competition by eliminating Y as a competitor.

A vertical merger between, X and S will, by paralleled arguments, reasonably probably eliminate (and thereby lessen) competition by eliminating Y as a competitor.

Figure IV

To some extent the adverse economic consequences of vertical mergers, it must be recognized, are associated only with long run phenomena: Markets will be foreclosed only if the output of the selling

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135. Professor Bork has argued that vertical mergers cannot cause any economic damage, and that the contrary assertion involves double counting. Bork, Antitrust in Dubious Battle, FORTUNE Vol. LXXX, No. 4 (1969), p. 103. Double counting arises, he claims, because when a firm has market power in one stage of production, merges with a firm without market power in another stage of production, it cannot simultaneously use its market power in both stages of production—in both markets.

Of course, his argument depends on the hypothesis that the acquired firm operates in a completely competitive market. This is unlikely. (FTC CONGLOMERATE MERGER REPORT 248-249); for one example of concentration in geographic markets where the industry, nationwide does not show such high concentration, See BUREAU OF ECONOMICS, STAFF REPORT TO THE FTC, ECONOMIC REPORT ON MERGERS & VERTICAL INTEGRATION IN THE CEMENT INDUSTRY. (U.S. Gov't. Printing Office, Washington, April, 1969).

Aside from its lack of realism, however (and even if Professor Bork's factual assumption is correct in a particular case), his argument seems to place too much emphasis on conventional economic theory. If a 2-stage vertically integrated firm simultaneously tries to maximize short run profits in both stages, then what he says is true. If the firm follows a long run strategy, however, it may try to shave profits, and prices, in the competitive stage of production, in order to possibly gain market power there.

His argument also depends on a complete and total adherence by the firm to profit maximization as a goal. If there is any departure from that, then his conclusion fails. For example, if the firm maximizes revenue, then it would logically seek to reduce prices in the competitive market—even at the cost of reducing overall profits, within the constraint that profits should not fall below some acceptable minimum—in order to maximize

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280
firm in a vertical merger can be expanded to satisfy all of the demands of the buying firm in such a merger; and this may well occur only if (1) there is slack capacity in the industry (or more specifically, in the selling firm), or (2) if new capital investment in machinery and equipment is to be made after the merger. In case of any change in production, either because of a shift in demand, or because of replacement or new investment in production equipment, the merged firm will try to expand its own internal self-sufficiency, decreasing its dependence upon rival firms. It can do this by increasing the production of the division which is at the earlier, “selling” stage of production, to the point where the integrated firm “buys” only from itself. The result of this will be that competitors of the (former) selling firm of a vertically merged corporation will find that when they calculate potential demand, they must subtract the demand of the integrated firm from the total demand for their product. In the long run, this will mean capital investment is made only (or at a minimum, at a greater rate) in the vertically merged firm.

We note three potential side effects of vertical mergers: (1) Independent firms may feel forced to enter into other vertical mergers in order to preserve their existence—a vertical merger may “trigger other mergers.” The fact that the merger “artificially” reduces the total competitive demand for the product of the selling firm in the vertically merged corporation (by the amount of the purchases of the buying firm, in the long run) creates a barrier to entry by new firms, and may force smaller existing firms out of business. (3) The process of triggering

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136. This has been raised more frequently in conglomerate merger cases than in vertical merger cases. See, e.g., FTC v. Procter & Gamble Company, 386 U.S. 568 (1967).

137. For a good discussion of the results of foreclosure, see Justice Harlan’s opinion, dissenting in part, in Brown Shoe Company v. United States, 370 U.S. 294, 369-373 (1962).
other mergers, added to the absence of entry, and/or the process of independent firms going out of existence (in the long run) may mean that a vertical merger may result (again in the long run) in the transfer of an oligopoly market structure from one level of production to another.

3. Horizontal Merger, Multi-Firm Industry

Suppose there are three sellers of equal size, A, B, and C; and A and B merge. Competition has not been eliminated, but there are now two competitors instead of three and any competitive balance between A, B, and C has been destroyed.

As to the number of competitors, economic theory does not really tell us much about the difference in functioning between a market with \( n \) competitors and a market with \( n-1 \) competitors (unless \( n = 1 \) or 2, or unless \( n \) is so large that the difference is predictably zero). At the most simplistic level, competition between the merging companies will be eliminated, and therefore competition will be lessened.\(^{138}\) Further, it seems reasonable, in terms of the behavioral analysis of oligopoly, to expect that the probability of collusion, or conscious parallelism, becomes greater as the number of competitors become smaller.\(^{139}\) Also, as the size differential between various firms in the same market be-

\(^{138}\) See, e.g., Brown Shoe Company v. United States, 370 U.S. 294, 335.

Conglomerate Mergers

comes greater, it is also reasonable to expect the probability of such noncompetitive market performance characteristics as price leadership to become greater.\footnote{140} Therefore, in terms of the consequences of competition, harm to competition seems reasonably probable in a case where two of three equally balanced competitors merge.

In terms of competition for its own sake, such a merger will decrease apparent economic freedom by changing a field of three reasonably balanced competitors to a field of two firms, one twice as big as the other. Because of the increased financial staying power and the increased market power\footnote{141} of the big firm, some, perhaps most, forms of independent competitive action by C will be much more difficult after he is confronted with a combined A plus B. Price competition, at least, will be more difficult for C, simply because of the financial staying power of A plus B—the larger firm could sell even at a loss, and hold out longer than C.\footnote{142} Other competitive behavior may also be harder. Mounting an intensive sales campaign may be undertaken only with trepidation, if the response on the part of one’s competitor may be overwhelming because of (1) general financial strength and consequent ability to concentrate resources on some one aspect of competitive activity,\footnote{143} or (2) the larger firm’s ability to get advertising discounts or favorable “shelf space allocation,” or both.\footnote{144} The only competitive behavior which will probably not be affected is real product improvement and technological advances in production; even here, the smaller company may realistically fear the potential retaliative force of the larger

\footnotetext{140}{COHEN AND CVERT, supra note 139 at 241-49.}  
\footnotetext{141}{Cf. Foremost Dairies, Inc., 60 FTC 944 (1962).}  
\footnotetext{143}{See, e.g., the description of Purex’ experience when it tried to increase its share of the Buffalo market in competition with the merged Procter & Gamble, 386 U.S. 568, 595 (1967). This “massing of resources” is the “deep pocket” effect which has been made the basis of the decision only in one court case, FTC v. Reynolds Metals Company, 309 F.2d 223 (D. C. Cir. 1962), and in no Supreme Court case. The opinion in the Reynolds case, however, was written by Warren E. Berger, Jr., now Chief Justice of the United States Supreme Court. It should be noted that the Procter & Gamble case dealt with a conglomerate merger, and that the Reynolds case dealt with a vertical merger. Safeway (see note 142, supra.) was also a conglomerate, in the sense that it operated in more than one market. Any company operating in more than one market probably has fuller opportunities for massing of resources than a large firm operating in only one market. Because of this, the effect of size disparity is more than proportional when the giant is a conglomerate. See Part 5, Section A(1), infra. for discussion.)}  
firm's decisive advantages with respect to other forms of competition. 145

In terms of long run economic effects, a decision by C to expand production, or even to renew or replace worn out equipment, will be inhibited because of all the difficulties that put C at a disadvantage in the short run.

The mere fact of the introduction of a giant into a field otherwise occupied by pygmies does have harmful competitive effects. The story of David and Goliath is memorable and stirring at least in part because the spirit of David is so rare. It may be remembered that among all the people of Israel, there was only one David. 146 Should we expect that there will be more among modern businessmen?

These imbalance factors will affect C's competitive behavior by making C apprehensive of the consequences of vigorous competitive assertiveness. A fortiori, the same imbalance factors will make new entry by independent entrepreneurs unlikely. Such entry, almost inevitably involving "starting out small," is perhaps the ultimate expression of independent competitive assertiveness. The effect on the long run economic consequences of competition are even more obvious when we consider the outsider making a decision as to whether to try to break in. While it may be true that entry by a large firm through internal expansion will not be inhibited, the fact that entry by small independent entrepreneurs will be severely inhibited should be a sufficient harm under the statute. 147

4. Summary

The possibility of harm resulting from a merger between two of a relatively small number of competitors can be summarized as follows:

(1) Competition between the two will be eliminated.
(2) Whatever concentration existed in the industry before will be intensified.
(3) An imbalance or disparity in size may be created or intensified.

Because of these,

(a) Oligopoly patterns of pricing and other competitive behavior may be produced or intensified.
(b) Entry barriers will be increased and the forces making for

146. 1 Samuel, Chapter 17.
147. See, notes 121 and 122, supra, and quotations from FTC v. Procter & Gamble Company, accompanying them.

284
independent competitive behavior by smaller firms will weaken.

The effects of a vertical merger in a market with several buyers and/or sellers are not materially different from the effects in a market with three parties, already analyzed. The anti-competitive effects are the possible or probable foreclosure of all or some share of a market or a source of supply, with consequent inhibitory effects on the range of free competitive action by independent firms, on freedom of entry, and in the long run with damaging economic effects as a result of shifting possible industrial concentration from one level of production to another. These effects will be further explored in connection with the problem of reciprocity power.

V. SECTION 7 AS APPLIED TO CONGLOMERATE Mergers

We have examined the current merger movement, and the special significance of 1968 in that movement. We have explored the meaning of Section 7 of the Clayton Act, generally, as it might apply to horizontal or vertical mergers. The current merger wave, however, has become a wave of conglomerate mergers.\textsuperscript{148}

We therefore examine the application of Clayton § 7 to conglomerate mergers. There are only two problems of application which are peculiar to conglomerate, as distinguished from horizontal and vertical mergers: the definition of the type of harm to competition which may result from a conglomerate merger, and the determination of the substantiality of that harm. What we mean by “may”, what we mean by “competition”—and the values we hope to promote by preventing a substantial lessening of competition—and what we mean by “market”, do not change. The delineation of a product and geographic market, within which to measure substantiality, may be more difficult when we deal with conglomerate mergers, but the nature of the market definition is not different from that used in analyzing horizontal and vertical mergers.

By definition, direct competition, and direct buyer-seller relationships between the merging firms are lacking in conglomerate mergers.

A. The Basic Types of Harm, Applied to Conglomerate Mergers

What if D, a corporation not previously in the same product or geographic market as A or B, merges with A?

\textsuperscript{148} Especially in 1968. See Part II, supra.
Whether this makes any difference to competition depends on who D is, and involves questions of substantiality as we consider the possibility of an effect on competition. Keeping in mind that we are making no judgment of how large the effect is, let us consider some possibilities for harm.

1. **Relative Bigness**

   If D is a large corporation relative to the size of the market in which A and B are selling, then the evenness of the competition between A and B (now D and B) will be affected by the mere fact that D is a giant relative to B. As Corwin D. Edwards said, in a frequently quoted passage:

   > In encounters with small enterprises it can buy scarce materials and attractive sites, inventions, and facilities; preempt the services of the most expensive technicians and executives; and acquire reserves of materials for the future. It can absorb losses that would consume the entire capital of a smaller rival . . . moment by moment the big company can outbid, outspend, or outlose the small one; and from a series of such momentary advantages it derives an advantage in attaining its large aggregate results.\(^{149}\)

   A conglomerate, operating in different product and/or geographic markets, can, if the markets are reasonably well insulated from each other, finance losses in one market from profits in another market or

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Conglomerate Mergers

other markets. (We shall adopt the term used in the FTC Conglomerate Merger, Report, “cross subsidization,” for this process.) If all of the markets in which the conglomerate operates are competitive markets, then the opportunities for such cross subsidization may be limited.\textsuperscript{150} Most of the large conglomerates of the 1960’s (and early 1970’s) do not operate entirely in competitive markets—one, or usually several, of their markets are oligopolistic in some degree.\textsuperscript{151} Oligopoly profits will therefore be available in most cases to support branches of the corporate operation which need subsidizing for some reason. The reason may be legitimate, as might be the case with a regional recession or a drop in demand for one product, or it might be legally questionable.\textsuperscript{152}

Of the three cases that the FTC Conglomerate Merger Report analyzes in detail, the National Dairy-Kraft case, dealing with a 50\% promotional price cut to dealers, is perhaps the most striking.\textsuperscript{153} Kraft, as a seller of jams and jellies, entered the Baltimore-Washington-Richmond-Norfolk market in 1956. As pointed out in the FTC Report:

By 1960, Kraft was a major supplier in this four-city area. Its sales volume there was $475,129. The sales of its three leading independent regional competitors were as follows: Old Virginia, $1,462,195; Theresa Friedman (95 percent private label), $644,569; and Polaner, $339,868.\textsuperscript{154} The sales of Old Virginia in the four-city area represented about 39 percent of its total sales for 1960, whereas

\textsuperscript{150} See FTC CONGLOMERATE MERGER REPORT at 398, 403, where conflicting views on the theoretical question are discussed.

\textsuperscript{151} Id. The Report’s conclusion is that while there may be an argument over the question of whether large size alone can confer the power to cross subsidize, in practice most multimarket firms do operate in oligopoly markets, where they can reap oligopoly profits, in some markets. See also Tables 4-1 and 4-2, Id. at 218 and 220.

\textsuperscript{152} The effectiveness of cross subsidization will not depend on whether the purpose is legal or illegal. The only difference may be that illegal cross subsidization can be arranged to suit the convenience of the conglomerate practicing it, and possibly to suit the inconvenience of the victims. Illegal cross subsidization may be, therefore, faster and more certain in its accomplishments; this advantage may even be great enough to overcome the risk of getting caught. It is true that two earlier studies of predatory pricing, Adelman, The A & P Case: A Study in Applied Economic Theory, 63 QUARTERLY JOURNAL OF ECONOMICS 238 (1949), and McGee, Predatory Price Cutting: The Standard Oil (N.J.) Case, 1 JOURNAL OF LAW AND ECONOMICS 137 (1958), question whether predatory price cutting has ever or ever can actually occur. The FTC does not regard these studies as conclusive, and cites extensive literature to the contrary, in a nearly 3 page footnote, FTC CONGLOMERATE MERGER REPORT at 403-405. We do not here take a position on the A & P or Standard Oil cases. The number of other cases of cross subsidization cited in the FTC CONGLOMERATE MERGER REPORT convinces us that cross subsidization, even if not predatory pricing in the narrow sense, has occurred. See, e.g., the National Dairy Case, discussed next, infra.

\textsuperscript{153} FTC CONGLOMERATE MERGER REPORT 432-443. The other two were (1) the Safeway Supermarket chain price war, in El Paso and Dallas in 1954-1955 (see note 142, supra), and (2) the Anheuser-Busch disciplinary price cut in St. Louis in 1954-1955. Id., at 406-431.

\textsuperscript{154} FTC footnotes omitted.
Kraft’s sales there were approximately 3.5 percent of its national sales of jams and jellies and .03 percent of National Dairy’s total sales. Kraft’s sales into the four-city area were concentrated in Baltimore, where it made 67 percent of its four-city sales; it made only 8 percent in Washington, D.C.

Dissatisfied with its share of the Washington market, Kraft decided upon an “all out” program to improve sales. During the 26-day period from January 16 through February 10, 1961, Kraft offered the trade one case free with every case of jams and jellies purchased at list price, the free cases to be delivered after the close of the promotion on February 10. The only limits to the quantity that could be purchased were the financial capabilities and storage facilities of the buyer.155

The fact that National Dairy might be taking a loss on .03% of its total sales, whereas a competitor (the position of the firm chosen for comparison purposes is probably at the high end of the spectrum, but its proportion of sales in a relatively localized market is certainly vastly more typical of the single market firm than is National Dairy’s proportion) would be be taking a loss on nearly 40% of its total sales is illustrative of the kind of leverage a large conglomerate may have when it masses resources in one market. Proportionately, its losses might be so small that its stockholders could hardly notice them. Its competitors will notice very much, however: National Dairy sold 27,994 cases of jelly in the Baltimore-Washington-Richmond-Norfolk area in January and February, 1960, and 168,977 cases in the 12 months of 1960. It sold 400,803 cases in 26 days during the promotion of January and February, 1961. The promotion went so well, in fact, that National Dairy had to cut back on the original offer:

Instead of delivering the free cases according to the terms of the one-for-one promotion, National Dairy delivered only 153,909 cases and paid $829,005 in cash in lieu of delivering the remaining 246,894 cases.156 The total cost of the promotion to National Dairy was $1,345,502; $516,577 represented the value of the 153,908 cases

155. FTC CONGLOMERATE MERGER REPORT at 434.
156. (Renumbered FTC footnote)

The Court held that the evidence supported the Commission’s findings as to the reasons National cut back on the promotion. The Commission found that National knew the market was glutted during the 26-day period; knew the Commission had commenced an investigation of . . . [National’s] practices; and it was not until five weeks thereafter (April) the cash in lieu of free goods diversion of the program was seized upon. The Commission further found . . . [National’s] supply of fruit spreads for the areas in issue was adequate to meet the demand from the program (Opinion, p. 7).

288
of free goods delivered, and $829,005 the sum of the cash payments. After the deal, National Dairy sold an additional 145,695 cases during 1961.157

The F.T.C. staff's conclusion, complete with the comments of some of National's competitors bears quoting:

From an economic standpoint, the issue is not simply the diversion of trade from the regional producers as such, it is how conglomerate power may be used in a particular market to restructure that market or change the conduct of the firms. National Dairy exercised conglomerate power when it introduced its extraordinary promotional deal. The company's size and diversification, compared to those of its regional competitors, enabled it to wield this conglomerate power. Thus, structural imbalance and the consequent availability of differing strategies—based on differences in firm structures among the competitors—were the sources of National Dairy's power. The one-for-one deal was available only to National Dairy as a market strategy or conduct option in the four-city area. Its three regional competitors could not meet it, let alone originate it. The president of Theresa Friedman testified that when the buyer for the Giant chain of supermarkets asked him what he intended "to do about" the Kraft deal, he answered:

I told him there was nothing I could do about it because anything that I would do would be so small compared to the Kraft deal, it just wouldn't pay to do anything.

At that time he advised me that he thought I was correct....

Polaner's president testified that he would have been 'out of business in short order' if he had offered the same deal as Kraft. He said:

... we felt if we did offer such a promotion to meet what was being done, and if our customers would take us up on the promotion, that we could not stand the quantity of free goods that may have to be given out. We felt the danger was too great to attempt to meet it.

The president of Old Virginia testified that to have followed Kraft 'would have broken us up.'158

This kind of financial power—a power which is greater in the hands of a conglomerate firm than in the hands of an equal-sized single firm.

157. FTC CONGLOMERATE MERGER REPORT at 436.
158. Id., at 439-440.
market firm—is made even stronger because it is actually subsidized by our tax laws.

Since taxes are paid by a conglomerated corporation as a whole, losses in one division can be subtracted from the profits in another division. This means that any possible losses in, for example, our hypothetical (see diagram p. 286) A Division of D are shared by the Internal Revenue Service (with the Federal Government absorbing 50% of the loss, if D is indeed large). For the B Corporation, making only one product, any actual losses are borne entirely by the B Corporation, though the absence of profits may be "shared" by the Internal Revenue Service. This is one of the cost savings of being not only big but diversified, and is one way in which a size disparity of the firms in the market may be magnified where the giant is a conglomerate.

Cross subsidization of legal losses may be just as harmful as cross subsidization of illegal losses, in the long run. For example, over time, one would expect that economic downswings and mild recessions, which would adversely affect only one or a few industries, would occur more often than recessions which affected all industries. One would also expect regional recessions to occur more often than general, nationwide recessions. If a conglomerate operates in several markets and it goes through a mild or regional recession which adversely affects only one of its markets, then the conglomerate may end up surviving easily. If all the other firms in the affected industry or geographic area, however, are one-industry, non-conglomerate firms, then they may not all survive. If a few go out of business, then that industry will be more concentrated after the recession than before. The very fact that one firm in the industry is a conglomerate—even without what will usu-

159. INT. REV. CODE of 1954, § 1501.
160. Id., Section 11. The exact figure is 48% for taxable years beginning after December 31, 1964.
161. One qualification must be made to this statement: Losses in one year can be "carried forward" and cancelled out against profits in any of the succeeding five years. To what extent this possibility mitigates the relative position of the single product, as against the diversified firm, we do not know. Since the single product firm must be strong enough, even with this "loss carry forward" provision, to finance the entire loss until such time as it can manage to make a profit, we suspect that the loss carry forward provision helps the corporation which made a loss to stand better, once it is on its feet, but does not especially help it to get on its feet.

In one respect the loss carry forward provisions encourage mergers. A loss carry over may be lost, "wasted," if the firm does not make profits last enough to exhaust it within the time limit specified in the Internal Revenue Code. A firm that has a large loss carry over (provided its annual losses do not appear to be a permanent feature) may therefore be an exceptionally attractive merger partner for another corporation making profits. See FTC CONGLOMERATE MERGER REPORT 151-155.
Conglomerate Mergers

ally be present, namely oligopoly profits in some of that firm's markets—may tend to result in greater concentration in particular markets, over a period long enough that shifts in demand, or regional recessions, can occur.

Also, on the basis of size alone, D may be able to obtain capital more easily, and may be able to bargain for favorable price discrimination in obtaining advertising or other services. Such advantages may be associated with volume purchases, as in Proctor & Gamble's advertising advantages,\(^{162}\) or, as Professor Turner has suggested, with respect to the costs of borrowing.\(^{163}\) Or they may be associated with institutional factors. For an example of the latter, take the case of the small grocer, dealt with in an earlier FTC report:

Small retailers appear to face obstacles in obtaining desired store locations. There are several reasons for this. First, many of the most desirable sites for new markets are located in shopping centers. The developers of shopping centers generally prefer large, well-established retailers because they have demonstrated their ability to get and maintain high store traffic. The small retailer, and certainly an entirely new entrant into food retailing, lacks such consumer acceptance.

Second, those financing shopping centers often require that the developers provide space only to those food retailers that have AAA credit ratings. To obtain such a rating requires a minimum net worth of $1 million.\(^{164}\)

Another institutional bias in favor of bigness arises from Federal Government contract procedures. If there is any possibility of making sales to the Federal Government, especially the Department of Defense, it is common experience that large corporations find it easier to get defense contracts than do small corporations.\(^{165}\)

If the competitive disadvantages of smallness and specialization are

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162. Cf. FTC v. Procter & Gamble Company, 386 U.S. 568 (1967), where this was made a basis for the decision.

163. Turner, supra note 119, 1938-1939 Professor Turner suggests that the lower prices of large volume borrowing may in fact be associated with lower real costs.

164. FTC Economic Report on the Structure and Competitive Behavior of Food Retailing at 295-296. [footnotes omitted].

165. LINOWES; MANAGING GROWTH THROUGH MERGERS (American Management Association, Inc., New York, 1968). This result is undoubtedly abetted, and perhaps rationalized entirely, on the basis of requirements than government contractors be "financially sound." See PAUL, UNITED STATES GOVERNMENT CONTRACTS AND SUBCONTRACTS (Joint Committee on Continuing Legal Education Philadelphia, 1964), pp. 100, 168-170, 553-554. Given the natural conservatism of a bureaucracy, it is clearly possible that a rule of thumb could come into being such that "financial soundness" meant a net worth of, e.g., $1,000,000, or ten times the projected cost on the contract.
serious enough, B may be led to attempt to merge with some other conglomerate (or, at a minimum, big) firm. This the Supreme Court refers to as the danger that the merger under scrutiny may "trigger other mergers." If other mergers are triggered, a market of several small firms will be replaced by a market of several large firms. The degree of oligopoly may or may not be changed, in a numerical sense, but economic freedom and individual initiative and opportunity in that particular market will almost surely be reduced. In the long run, the oligopolistic character of the market will be more firmly entrenched; and in a behavioral sense, it will be tighter. Entry will be more difficult, both subjectively and objectively.

It is also clear, for the same reasons, that barriers to entry will be raised, simply because, in the terms of rivalry, a new firm, starting out small, will "have to take on a giant." Other long-run economic effects will occur for basically the same reason: The ability of the larger firm, especially the conglomerated firm, to be able to predict its financial position, its market position, indeed all of the factors influencing investment decisions, with greater certainty—perhaps more relevantly, with greater security—will always tend to make the larger, conglomerated firm more likely to invest at any given time. When scores of smaller decisions are added together, over time, increased concentration seems a reasonably probable long-run economic consequence.

As the FTC said of the National Dairy case:

[T]he facts indicate that the unregulated exercise of cross subsidization—as well as the unregulated creation of such conglomerate power through merger activity—can change the conditions of both business survival and entry. These changes, plus defensive conduct and merger activity by competitors, can be expected to restructure an industry with probable adverse consequences.

On the basis of size alone, then, the introduction of a giant into a market otherwise characterized by smaller independent firms will create the same sort of harm to competition as are produced by a horizontal merger, with the exception of elimination of competition between the merging firms. We are, however, slightly less certain (but not uncen-
Conglomerate Mergers

tain than in the case of a horizontal merger that such a merger will produce harm to the economic consequences of competition.

Despite the certainty of many of the adverse effects of such a merger, no case involving solely the problem of the introduction of a giant into a market has yet been brought before the courts. Reynolds, Foremost Dairies, and Beatrice Foods, the latter two predominantly geographic market extension cases, all prosecuted by the Federal Trade Commission are perhaps the closest. Even these, however, involved a trend toward concentration in the relevant markets, which the mergers in question augmented and intensified. The substitution of nationwide or regional tight oligopolies for local loose (or even tight) oligopolies is clearly a harm to competition of which the courts will take cognizance.

2. Analyze Conglomerate as Horizontal or Vertical Merger

Philadelphia National Bank-Girard Trust, Vons Grocery-Shopping Bag, and Pabst-Blatz had some geographic market extension aspects, but were also substantial horizontal mergers, provided unfavorable geographic market definitions were applied. They were treated as horizontal mergers.

Alcoa-Rome and Continental Can-Hazel Atlas had some product extension aspects. The Court was undoubtedly right, however, in seeing competition in fact between the companies involved in the respective mergers, and in viewing the harm to competition as the same sort that would result from a horizontal merger.

171. We are still satisfied that a harm is reasonably probable. See Part 4, Section A, supra.

172. FTC v. Reynolds Metals Company, 309 F.2d 223 (D.C. Cir., 1962). This case concerned a vertical merger, between an aluminum corporation and a processor of aluminum foil into flower wrap. The court's rationale was that of a conglomerate merger, however.

173. 60 F.T.C. 944 (1962).


175. Beatrice Foods, TRADE REG. REP. ¶ 17,244 [1965-1967 Transfer Binder at 22,317] (FTC 1965), and Foremost Dairies, 60 F.T.C. 944 (1962), present litigated cases where this sort of geographic spreading of oligopoly was dealt with and prohibited. A more blatant example is the group of mergers of major eastern and western oil companies, visible in Table 3, supra p. 250; these appear to be an example of an already firmly entrenched regional oligopoly becoming even more firmly entrenched by becoming national.


3. Elimination of Potential Competition

Most conglomerate merger cases which have been dealt with as conglomerate cases has depended on a finding of some ancillary harm. One of these ancillary harms is the elimination of potential competition.

In *El Paso Gas*-Pacific Northwest Gas,\(^{181}\) the harm to competition was in the geographic market where El Paso already sold. Pacific Northwest was so close to being in actual competition in that market that it had already negotiated with one of El Paso's customers—forcing El Paso to make price concessions in order to ward off actual entry. In terms of actual sales, Pacific Northwest was more than a potential competitor—it was an actual competitor—and the merger had a more than passing resemblance to a simple horizontal merger.

In *Penn-Olin*,\(^{182}\) and in *Procter & Gamble-Clorox*,\(^{183}\) as in *El Paso*-Pacific Northwest,\(^{184}\) there were problems of elimination of a potential competitor. In *Penn-Olin* both joint venturers, Pennsalt and Olin Mathieson, might logically have entered the southeastern market for sodium chlorate independently. Since entry by one of the firms would have left the other as a potential entrant exerting a competitive influence from the sidelines,\(^{185}\) the merged venture would eliminate this potential competition, and substitute a substantially larger firm where there might have been two. On remand it was found by the District Court that independent entry by either or both, separately, was not "reasonably probable."\(^{186}\)

In *Procter & Gamble-Clorox* the FTC specifically found that Procter & Gamble was the most likely entrant into the chlorine bleach market, but did not find that entry by Procter & Gamble was probable.\(^{187}\) The

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185. United States v. Penn-Olin Chemical Company, 378 U.S. 158 (1964). Pennsalt was already shipping sodium chlorate into the Southeast from a western plant; Olin Mathieson had licensed, royalty free, a paper bleaching process which required sodium chlorate, and owned production facilities and know-how capable of being applied to the manufacturer of sodium chlorate. Thus it seemed reasonable to suppose that either or both companies might have considered entry independently. Turner, supra note 119, at 1371-73, discusses this background.
187. TRADE REG. REP. §16,673 [1963-1965 Transfer Binder] (FTC 1963). This fact, and its not very explicit recognition by the majority opinion in the Supreme Court, taken together with the history of the same issue in Penn-Olin (supra, notes 7, 185, and 186, and accompanying text) leave one somewhat in doubt as to just what must be proved by

294
Conglomerate Mergers

impact on the Supreme Court's decision of the elimination of Procter & Gamble as a potential competitor is difficult to gauge, since this was only one of four anti-competitive effects found by the Court.\textsuperscript{188} It seems likely that the Court would have found the merger illegal even if the issue of potential competition were not present.\textsuperscript{189}

The influence of the issue of potential competition on legal thinking about a particular merger may perhaps be best explained by quoting from Commissioner Ellman's opinion for the FTC in \textit{Procter & Gamble-Clorox}:

\begin{quote}
[T]he merger eliminates the salutary effect of Procter as a potential competitor of Clorox in liquid bleach. At the time of the merger, Procter was a progressive and experienced manufacturer of many products in the same product line as liquid bleach; it has in the past frequently extended its product line by introducing a new brand in an industry in which it had not theretofore been active; it was one of the very few manufacturers of household products in the same general line as liquid bleach that was powerful enough to challenge, with some hope of success, Clorox's entrenched position in the bleach market; and it had actually pondered the possibility of entry into the liquid bleach market on its own. By virtue of all these facts, Procter must have figured as a tangible influence on Clorox's policies until the merger eliminated it as a potential competitor. Procter, though \textit{in absentia}, was nonetheless, by reason of its proximity, size, and probable line of growth, a substantial competitive factor in the liquid bleach market. We
\end{quote}

the government to make potential competition the determinative factor in a Section 7 case. The analysis of the problem of "potential competition" and what it may mean in terms of disciplining otherwise non-competitive behavior by leading firms in an industry, is analysed in United States v. Wilson Sporting Goods, 288 F. Supp. 543 (N.D. Ill., 1968), a case where a preliminary injunction was issued prohibiting the acquisition of George Nissen, Inc., the largest manufacturer of gymnastic equipment, by Wilson. The opinion suggests that it should not matter whether a likelihood of actual entry can be shown; all that matters is that, before the entry by merger, the outside firm exerted a competitive influence just because it was logically (and psychologically) the most probable entrant.

\textsuperscript{188}. 386 U.S. 568 (1967). The other three were (1) intensification and hardening of oligopoly conditions in the chlorine bleach market, by substituting a giant for the already dominant firm in the industry, and probably triggering other mergers, (2) increasing barriers to entry, and (3) making competition by independent producers more difficult because of Procter & Gamble's advantageous position in getting favorable shelf space treatment by grocers and Procter & Gamble's ability to get favorable advertising discounts—Procter & Gamble's advertising expenditures, about $80,000,000, were approximately twice as large as Clorox's total sales, about $40,000,000.

\textsuperscript{189}. This statement is based in part upon the fact that Justice Harlan, who is somewhat less convinced of the far-reaching effects of Section 7 than the rest of the Court (He has either dissented or written a special concurring opinion in every major merger case to come before the Court since and including \textit{Brown Shoe}) disagreed that the issue of potential competition was convincing upon the record, but nevertheless agreed that the merger was illegal under Section 7.
have said that the possibility of new entry may exercise a restraining influence upon oligopolistic firms, inclining them to maintain prices at a level low enough to discourage entry. Prior to the merger, Procter was not only a likely prospect for new entry into the bleach market, it was virtually the only such prospect. Once the threat of Procter's entry vanished, one of the last factors tending to preserve a modicum of competitive pricing and business policies in the liquid bleach industry was removed. As the Commission, in a related context, has had occasion to observe, 'When market concentration is high, the main, and sometimes the only, restraint on the use of market power by oligopolistic sellers is potential competition.' *Foremost Dairies, Inc.* [1962 TRADE REG. REP. Transfer Binder, ¶ 15, 877].

We have no occasion to speculate on such questions as whether or not Procter, had its acquisition of Clorox been blocked, would in fact have entered the bleach industry on its own, or whether or not, had it done so, the result would have been to increase competition in the industry—although, with reference to the second question, we note the Supreme Court's recent observation that "one premise of an antimerger statute such as Section 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition." *Philadelphia National Bank*, [374, U.S. 321, at 370] . . . . It is sufficient that the tangible possibility of Procter's entry on its own into the liquid bleach industry was a continuing and important procompetitive influence in that industry, and that the acquisition of Clorox, by eliminating that possibility, thereby removed a critical check on the power of Clorox to stifle effective competition in the sale of household liquid bleach.190

The economic, and psychological, results of eliminating a potential competitor are clear enough from these cases—especially when the harm to competition, both for its long run economic consequences and for its own sake, is put in terms of "barriers to entry," or barriers to independent action by smaller firms. The principal difficulty in assessing the legal importance of the elimination of a potential competitor through merger is the question of how probable actual entry must be, in order for the elimination of a possible entrant to be legally recognized as a harm.

*Penn-Olin,*191 as we have seen, was ultimately resolved in favor of permitting the merger, largely on the grounds that actual entry by

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Conglomerate Mergers

either joint venturer alone was not sufficiently likely to justify a holding that competition might be lessened by the merger. In the context of the sodium chlorate market in the Southeast that might have been a reasonable conclusion: The court was dealing with an effective maximum of two firms, with competitive restraints applied only by other potential entrants. If neither firm was likely to enter independently, a finding of no reasonably probable harm to competition from their combined entry is at least plausible.

In Procter & Gamble-Clorox, where a giant conglomerate entered a new product market already occupied by an assortment of firms, Procter & Gamble entered by buying the largest firm in the market they were entering. The Supreme Court seemed, in its opinion, to take the psychological and behavioral effect of Procter & Gamble on the market, as a potential competitor, somewhat more seriously (though its opinion by no means cleared up this problem). The F.T.C. considered the psychological and behavioral effects on the market quite important, as the quote from their opinion, supra shows. In Wilson-Nisson, Wilson Sporting Goods Co., a "full line" manufacturer of sporting goods (and a subsidiary of Ling-Tempco-Vought), entered a new product market, gymnastic equipment, by buying the largest manufacturer of gymnastic equipment—the George Nissen Co. There, rather than analyze the question of causation in detail, the court viewed the "frame of reference" in judging whether a merger might be proscribed by Section 7 to be, not competition in the present, but competition in the future. With that as the frame of reference, it is not necessary to show that a merger will reduce competition below its present level. What is necessary is to show that future competition will be less if the merger occurs than if it does not occur.

Having taken this frame of reference, the court said:

194. See Justice Harlan's opinion 386 U.S. at 581 where he regards it as "just as probable" that a small firm would put forth extra effort in the presence of a giant, as that it would be circumspect and trepid. For reasons dealt with, supra, in Part 4, Section A (1), and at footnote 146 and accompanying text, we feel otherwise. Nevertheless, the matter still seems to rest on psychological speculation.
195. Supra note 190.
197. 288 F. Supp. at 544.
198. Professor Turner's phrase. Supra note 119 at 13.
[V]irtually anything [Wilson] could do would be more pro-competitive than the path it has chosen. It is aware of the attractive opportunities in the gymnastic apparatus field, and like Proctor & Gamble in Clorox, has decided upon a quick and easy way to buy a leading position in the industry. If Wilson were to enter through internal expansion, that obviously would increase competition by adding another competitor to the market. If instead it entered by buying one of the small companies in the field, 'it would have the effect of increasing the strength of a small company at the expense of the leading companies, and that would be more pro-competitive.'\textsuperscript{9} If it simply continued waiting on the sidelines as an interested bystander, that might have some effect in restraining price exploitation in the market, and that would be more pro-competitive.

Hence, by disallowing the merger we would insure a benefit to competition in the market. It is apparent, therefore, that the proposed merger would probably have the effect of lessening competition in the industry, in violation of Section 7.\textsuperscript{200}

The Stigler Committee suggested a completely objective test for "potential entry": Don't identify potential entrants by introspection, do it by past performance:

The identity of potential entrants should not be established by introspection. If the producer of X is truly a likely entrant into the manufacture of Y, the likelihood will have been revealed and confirmed by entrance into Y of other producers of X (here or abroad), or by the entrance of the firm into markets very similar to Y in enumerable respects.\textsuperscript{201}

4. Reciprocity Power

The other collateral circumstance that the Courts have used to justify holding that a particular conglomerate merger violates Section 7 is the possibility for coercing reciprocal dealing.\textsuperscript{202} Reciprocal dealing, or reciprocity, is simply the practice whereby A says to B, "I will buy your product if you buy mine." Reciprocity power can be created by a merger between two firms one (or more) steps removed in a chain of production: Suppose A buys from B, and B buys from C; if A merges with C, B may feel compelled to buy from C, in order to retain A as a customer.

\textsuperscript{199} Court's footnote omitted.
\textsuperscript{200} 288 F. Supp. 543 at 563.
\textsuperscript{201} The Stigler Report supra note 23.
\textsuperscript{202} FTC v. Consolidated Foods, 380 U.S. 592 (1965), is perhaps the leading Supreme Court case on this issue.
To the extent that B can be compelled to buy from C, C's competitors will be foreclosed from selling to B. This is the same sort of harm that might result from a vertical merger.\(^{203}\) The principal legal uncertainty in this area (aside from the substantiality question) is whether the creation through merger of the *power* to engage in reciprocity practices is sufficient to prove illegality, or whether a reasonable probability that this reciprocity power will actually be *used* must be proved.\(^{204}\) In the one reciprocity case thus far decided by the Supreme Court, *Consolidated Foods-Gentry*\(^{205}\) the majority decided on the grounds that reciprocity power was enough. There was abundant evidence, however, that reciprocity power would be *used*,\(^{206}\) and had been used, even with some success.\(^{207}\)

Indeed, the only case thus far decided in which reciprocity power, unaided by any showing that there was a reasonable probability that the power would be used, was cited as a determining factor was *Ingersoll-Rand Goodman-Lee-Norse.*\(^{208}\) And in that case, the horizontal aspects of the merger would probably have rendered it illegal without reciprocity power.

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\(^{203}\) See Part 4, Section F(2), *supra*.

\(^{204}\) Note the similarity to the question whether, in a potential competition case, proof must be submitted that the corporation outside the market in question was actually about to enter, or whether the subjective (on the part of competitors in the market it entered by merger) impression that it might have been about to enter is sufficient.

\(^{205}\) FTC v. Consolidated Foods, 380 U.S. 592.

\(^{206}\) *Id.*, at 596-97.

\(^{207}\) *Id.*, Justice Stewart's concurring opinion, at 607-08.

Ingersoll-Rand is balanced by Reynolds Tobacco-Penneck & Ford, where, in the face of a large amount of evidence of corporate purpose not to engage in reciprocity practices the court held there was no reasonable probability of harm to competition, at least in the context of a request for a preliminary injunction. (The strength of this conclusion, as to the necessity for showing more than the mere power to engage in reciprocity practices, is weakened by the fact that the Court also found that even if the harm could be found to be probable, it would not probably be substantial, since the maximum market foreclosure was about 10% to 12%.)

In view of the difficulty of proving actual use of reciprocity power, a difficulty which has been examined by several commentators, there would seem to be a strong argument for holding that the mere existence of reciprocity power, created by a merger should be a sufficient cause for enjoining or ordering divestiture of a merger. The only difficulty is whether one can say that the use of the power is "reasonably probable," given that that use is illegal. That question is avoided if one examines, not the actions or probable actions of the firm with reciprocity power, but the probable reactions of small independent firms and potential small entrants. If there is a giant in one's midst, with power to effectively close off one's market, one may not wish to test whether the giant is law abiding. Shooting people is illegal, but in the presence of a man with a loaded gun, most of us will avoid action that would make him want to shoot us. The existence of reciprocity power, thus, can act as a clog on competition, regardless of the intent to use it, or whether it is ever actually used. This conclusion is especially evident if one analyzes the effect of reciprocity power on competition as an end in itself.

In the long run, the effects of reciprocity will be felt through the effects of reciprocity power on the investment decisions of competitors of the reciprocal partners. If they believe their market will be cut off (because they think it can be cut off), then potential entrants and smaller competitors will tend to either merge defensively, or drop out. These long run effects on smaller present and potential competitors is intensi-

209. United States v. Penick & Ford, Ltd., 242 F. Supp. 518 (D. N. J. 1965). The opinion in this case, on the question of whether or not a preliminary injunction should be issued, notwithstanding, a consent judgment was entered September 22, 1969, in which divestiture was ordered. This fact would seem to blunt the effect of the original decision not to grant a preliminary injunction.
210. See note 227, infra.
211. See, e.g., Davidow, Conglomerate Concentration and Section 7: The Limitations of the Anti merger Act, 68 Col. Law Rev. 1231 (1968) at 1267.
Conglomerate Mergers

fied where the entire industrial structure of the nation tends to revolve around a relatively few conglomerate firms with strong reciprocity ties. For example:

An incident arising between Du Pont and U.S. Steel illustrates . . . how 'great corporations stand together' in solving their competitive problems. In the early 1960's Du Pont experienced a persistent decline in sulfuric acid sales to U.S. Steel. In 1962, Du Pont made a survey to determine what might be done to reverse its declining sales. The following are excerpts from the Conclusions and Recommendations of its U.S. Steel Survey.

It is obvious that while our [Du Pont] goal is to reverse current sulfuric acid purchase trends, exactly the opposite will result unless we take positive action. The purpose of this meeting is to formulate a plan of action. Let us consider the following:

2. In a recent press conference, Roger Blough stressed the seriousness of plastic competition. Let's urge Plastics Department Sales Management to explore at high levels the advantages and problems of cooperative sales efforts with U.S. Steel—e.g.—the sale of Delrin pipe (Du Pont plastic pipe).

3. If the sulfuric acid market in St. Louis has acute over capacity and the prospects for improvement are slight would Monsanto consider discontinuing production at East St. Louis in favor of purchase? Can we encourage this by purchasing HCL at Cleveland from Mobay [a joint venture between Monsanto and Farbenfabriken Bayer AG at the time].

4. Encourage U.S. Steel Steel to discontinue sulfuric acid manufacture at Donora in favor of purchase.
   a. Direct from St. Joseph Lead Company
   b. Direct from Du Pont...

5. Entrenching Oligopoly

Perhaps the most general rationale for holdings of illegality, discernible in the opinions relating to conglomerate mergers, to date, is the entrenching of oligopoly. If a giant firm such as Procter & Gamble, which already operates in several oligopolistic markets, enters the chlorine bleach market, another oligopolistic market, by purchasing the dominant firm in the chlorine bleach market, then the oligopolistic

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212. FTC CONGLOMERATE TO MERGER REPORT 465.
213. This is suggested as one type of harm, in Davidow, footnote 211, supra., at 1253-1255, and as the major basis, albeit an implicit one in several cases, for most of the merger holdings in the 1960's, in Brodley, note 139, supra., passim.
structure of the chlorine bleach market will become much more difficult to break up. Furthermore, the oligopolistic structure of the "general household cleaning materials" market may also become more difficult to break up. Oligopoly may be more firmly entrenched in both the market of the acquired corporation and the market of the acquiring corporation.

If, in the long run, we want the kind of economic benefits that come from reasonably free entry into markets, then a merger which entrenches oligopolistic market structures in two markets, or even one market, will tend to lessen the benefits we expect from competition. If we want the kind of flexibility and freedom of opportunity in our economy that we associate with competition—both in the long run and the short run—then a merger that assures that an oligopolistic market structure will be with us for a long time in a major consumer goods industry will not may—lessen competition.

Any ancillary factors—the elimination of potential competition, or the creation of reciprocity power, for example—would under this view simply be mechanisms, additional structural characteristics, that one would look to analyze the extent to which any particular merger entrenched oligopoly. Barriers to entry, as hinted in Procter & Gamble-Clorox, could well be a relevant proxy, since any entrenching of oligopoly in an industry would tend to increase barriers to entry. And conversely, in an oligopolistic industry, any increase in barriers to entry would tend to indicate, (and possibly cause) further entrenchment of oligopoly.

Oligopoly, however, is a hard thing to measure; and the degree to which oligopoly is entrenched by a particular merger may come to be a matter of just deciding that if the merger is "too big," it is illegal.

We certainly cannot say that the Supreme Court has come this far. We can say that it has moved in this direction—further where oligopoly is the issue than where pure bigness is concerned.

But bigness, almost as much as oligopoly, is recognized as creating a threat to competition; it is recognized in the language of court and FTC opinions, and it is recognized by the way in which the majority

214. FTC v. Procter & Gamble Company 386 U.S. at 578.
Conglomerate Mergers

of the Supreme Court deals with issues such as barriers to entry. On the other hand, no case to date, has been decided on the basis of bigness alone: There have always been collateral problems, such as a visible loss of potential competition, a special threat by way of lower advertising costs or other cost savings due to favorable price discrimination on account of bigness, or reciprocity power, or some way to stretch a market definition to cover the merger in question.

Such specific problems, added to bigness, and combined with oligopolistic market structures, may be enough to slow down acquisitions by such giants as LTV, ITT, Northwest Industries, General Dynamics, and (possibly shortly) Litton, simply because: (1) these corporations are potential entrants by internal expansion into almost any field, and (2) they may find it difficult to acquire any other corporation without creating possibilities for reciprocity. Stopping only these mergers, however, will not stem the tide of concentration referred to in Parts I and II of this paper: It may help in avoiding too much "super-bigness," but it will do nothing about the slightly less than giant corporate acquisitions.

By way of prediction, we can expect that the perceptible movement of the courts and the FTC toward recognizing the creation of pure bigness through merger, even in the absence of an oligopolistic structure in the market of the acquired firm(s), as a threat to competition will continue. At some time within the next five or ten years, a merger will be found illegal under Section 7 simply because it introduces a giant into a field otherwise occupied by "human sized" firms. Just how significant this prediction would be, even if largely undisputed, remains to be seen.

221. This word was contributed by Johanna Broughton, the four (then three) year old daughter of one of the writers. It was initially used to describe one aspect of the problem of a three year old dealing with (or from her point of view competing with) parents.
222. BRANDEIS, THE CURSE OF BIGNESS (1964) (reprints of various papers written by Justice Brandeis). "Human sized" does not, here, mean that we are advocating an industrial structure consisting of sole proprietorships. What is referred to is a size of firm that a human being can comprehend. No specific upper limit can be named, of course—Brandeis, who originated the term, also specified none—if for no other reason than because different people have different levels of comprehension where complex organizational structures are concerned. While the term clearly refers to something larger than the "mom and pop" grocery, it also fairly clearly refers to something smaller than the giant conglomerates or giant holding companies of today. Even someone with a considerable background in corporation finance and corporation law, will not comprehend or have a "feel" for the structure of, say, LTV, General Dynamics, Ford Motor Company, or AT&T, without considerable study.
223. Below Part V (C) and Part VIII.
B. "Substantiality" in Conglomerate Mergers

It is easier to define substantiality than to apply that definition to particular cases. A few principles governing applicability may be tentatively put forward, however—tentatively because in our opinion the principles in this area are somewhat in a state of flux, and they may, particularly with some new members on the Supreme Court, be subject to change over the next several years.

The doctrine of "quantitative substantiality," first set forth clearly in 1949,224 and adopted rather forcefully for Section 7 cases in Philadelphia National Bank-Girard Trust,225 has not to date been found especially helpful in analyzing conglomerate merger cases. In the form of concentration ratios, it may be used in gauging the impact of a simple horizontal merger: The percentage of the market dominated by the merged firm or by the top four or so firms, and/or the change in concentration wrought by the merger—quantitative measures of market dominance—are probably good guides to the competitive effects of such a merger. Similarly, the percentage of the market foreclosed, or potentially foreclosed, by a vertical merger is probably a fairly good guide to the competitive impact of a simple vertical merger.

Where the merging companies do not make the same product, however, even if they are, in fact, competing, then it seems questionable simply to add up in some geographic area, the total sales for the product lines of both companies, or some part of those product lines, and take a simple percentage of their aggregate.226 (Where present or potential interproduct competition is eliminated by such a merger, however, it should be possible to construct some function, of the position of each of the merging partners in their respective product markets, that will indicate in a quantitative way what the impact of the merger is.) Similar arguments apply to mergers dealing with potential competitors, reciprocity power,227 or any other "conglomerate-type" problem. A

227. Professor Turner, note 119, supra, at 1390-1391, suggests that reciprocity possibilities be related to the test of substantiality in requirements contracts. If a foreclosure of, say, 7 per cent by a requirements contract (or a vertical merger) is viewed as substantial, he suggests, then a possible foreclosure by reciprocity power, assuming it were to be completely effective, of 15% to 20% should be considered substantial.
fortiori, a concentration-ratio test of substantiality cannot usefully be applied to a "pure" conglomerate merger.

What tests of substantiality can be applied in conglomerate merger cases? We suggest two criteria: First, the size of the reasonably probable economic impact of the merger, measured (a) in absolute dollar terms, (b) possibly in terms of the number of people affected, and/or (c) in terms of the proportion of some identifiable field of economic activity. Second, the context in which the merger takes place—e.g., whether it takes place in a market that has been undergoing a trend toward concentration, whether it is a loose or tight oligopoly, and/or whether oligopolistic conditions are spreading vertically or geographically in the industry.

The size of the problem, and whether that size is compounded by the existence of a trend which is regarded as inimical to competition: these are the criteria that have been applied in one way or another in almost every merger case before the Supreme Court, since Section 7 was amended.

*Brown Shoe-Kinney*, although not really a conglomerate, introduced this non-quantitative substantiality test. That case involved a potential vertical foreclosure of as little as 5% and as much as 57%. The Court regarded the lower figure as "substantial," because of (1) a trend toward vertical integration in the shoe industry, and (2) the fact that many independent shoe manufacturers would be closed off from the market if the trend toward linking retail outlets with manufacturers continued. The horizontal combination was also regarded as threatening a "substantial" harm, with market dominance being 5%. The Court felt that the loose structure of the market was threatened by even so small a combined market share, given, again, the existence of an incipient trend toward concentration.

In *Vons Grocery-Shopping Bag*, the Court similarly found a trend toward concentration in the retail grocery business in Los Angeles, and relying in large part on the existence of this trend found a merger which resulted in a 7.5% market share illegal.

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229. Id., at 332-34. In addition, Justice Harlan emphasized the size of the possible foreclosure in terms of the probability that independent shoe manufacturers would "fall by the wayside" as a result of the merger. Id., at 373.
230. Id., at 349-44.
In more typically conglomerate cases, where the type harm discussed has gravitated more and more toward barriers to entry and inhibition of independent competitive action by smaller firms, the question of substantiality has tended to rest almost solely on a preliminary recitation of numbers indicating the total size of the market which could be affected.\textsuperscript{232} Since the size of the market represents the possible impact of the merger, a showing that a merger could affect a substantial market raises an implication that the merger would "reasonably probably" have some substantial anticompetitive effect.\textsuperscript{233} Predictions of the exact proportion of this market which might be affected may be well nigh impossible, in many cases.

The above suggestions are meant to indicate the current state of the law, not to defend that state. It is in this area, a description of the tests of substantiality where conglomerate mergers are concerned, where the law is most in need of clarification. A more exact analysis of the long run economic consequences of competition, and a more definitive statement of just what it is that the antitrust laws are supposed to protect might well help in this clarification. So, of course, would a more exact empirical analysis of the actual economic consequences of conglomerate mergers.

One suggestion, perhaps a third criterion, in addition to those suggested above, which we were led to in a tentative way by the analysis of the manner in which conglomerate mergers can entrench the market power of the leaders of oligopolized industries, has since been suggested by the Neal Committee,\textsuperscript{234} and by the \textit{FTC Conglomerate Merger Report}. Where a large firm outside an industry acquires one of the leaders in an industry, then there will be some entrenching of the oligopoly structure of all the markets in which the conglomerated firm now operates. Depending on certain relative size variables—the concentration in the markets of both the acquired and acquiring firms, the closeness of the products (the "circularity" of the merger, the extent to which common distribution channels, manufacturing processes, etc. can be utilized), the relative size of the acquiring and acquired firms, and perhaps the absolute size of the firms—this harm may well be substantial.

\textsuperscript{233} \textit{Id.}
\textsuperscript{234} \textit{White House Task Force Report on Antitrust Policy, BNA Antitrust and Trade Regulation Report} No. 411 (May 27, 1969). This Task Force, appointed by President Johnson, was Chaired by Dean Phil C. Neal, of The University of Chicago Law School.
The FTC Conglomerate Merger Report suggests the following:

Although it is impossible to draw simple rules to encompass all possible industrial settings within which anticompetitive leading firm conglomerate mergers might occur, we believe that the following criteria describe those most likely to violate the law:

(1) When the acquiring corporation is a large enterprise having a substantial volume of sales in one or more concentrated industries. (For this purpose a large firm is defined as having annual sales or assets in excess of $250 million.)

(2) When the acquired company is one of the leading firms in at least one concentrated industry. (A concentrated industry is defined as one in which the 4 leading firms account for 40 percent or more of sales. A leading firm is one included among the 4 to 6 largest sellers in an industry.)

The Neal Committee suggested an alternative, but closely related measure; recommending that merger between "large" firms, and leading firms in any particular product and geographic market not be permitted.

235. FTC CONGLOMERATE MERGER REPORT at 17.
236. "White House Task Force on Antitrust Policy," footnote 234, supra. Specifically, the report suggested, at 15, the following:

Appendix B. Merger Act
Section 1. Prohibited Acquisitions
(a) No large firm shall directly or indirectly merge with, combine with, or acquire any equity security in any leading firm or directly or indirectly acquire all or substantially all the assets used by a leading firm in any market in which it is a leading firm.
(b) No leading firm shall directly or indirectly merge with, combine with, or acquire any equity security in any large firm or directly or indirectly acquire all the assets of a large firm or a part thereof sufficient to constitute a large firm.
Section 2. Definitions.
As used in this Act
(a) The term "large firm" shall mean a firm engaged in commerce which, giving effect to any acquisition or other transaction referred to in section 1 of this Act and all acquisitions or other such transactions completed at or prior to the effective date of such acquisitions or other transaction,
(i) had or would have had sales which exceeded $500 million during the most recent base year, or
(ii) had or would have had assets which exceeded $250 million at the end of the most recent base year.
(b) The term "leading firm" shall mean a firm engaged in any market in which its market share was more than 10%, during at least two base years, and in which the aggregate market share of any four or fewer firms during the same two base years was more than 50%, provided that the term "leading firm" shall not include a firm whose market share during the same two base years was not among the four largest in such market.
C. Limitations of Antitrust Law

If antitrust law has reached a stage where it can be predicted that the problem of pure bigness will be recognized by the courts, and that "giantism" will be defined as a sufficient basis to hold a merger illegal under Section 7, why does that current merger wave continue so vigorously?

A major reason is that the Supreme Court has not yet said that a giant entering a field of human sized firms by merger is illegal. Furthermore, it may be some time before it so holds. It is the fact that merger cases take so long to wend their way through trial and appeal to the Supreme Court,\textsuperscript{237} that makes us willing to predict such a holding only within the next five to ten years.\textsuperscript{238}

If it takes as long as ten years for the message to get through to the business community, that will be too late: whatever overall undesirable effect may result from the current merger movement will have already occurred.

What can be done? One thing is to concentrate on deterrence—unfavorable publicity alone might have some effect; Another might be to make changes in other laws—e.g., tax laws—designed to discourage (or at any rate to stop encouraging) mergers; Another might be to pass a new law, amending Section 7, which would provide for simplified procedures and substantive tests of legality.

We will take up, here, some deterrent actions, and some possibilities for changes in the antitrust laws.

VI. Guidelines

The new Guidelines of both the FTC and the Department of Justice, setting forth their enforcement policies with respect to mergers,

\textsuperscript{237} Appeals procedure depends on whether the case is initially brought by the FTC or by the Justice Department. If by the FTC, then the appeal line is to one of the Courts of Appeals—in any Circuit where the defendant does business. (If the Commission decides that a merger does not violate Section 7, no appeal lies by the FTC Staff). From the action of the Court of Appeals, either party may apply to the Supreme Court by writ of certiorari, and the Supreme Court may, if it chooses, hear the case. If the case is brought by the Department of Justice, it will be brought in a District Court in some district where the defendant does business. In most cases the judgment of the District Court could be appealed to a Court of Appeals. In antitrust cases, however, application by either party to the Supreme Court by writ of certiorari represents the only chance of having the case heard on appeal.

\textsuperscript{238} In United States v. Continental Can Company, 378 U.S. 441 (1964), it was seven years between the merger and the Supreme Court opinion. In FTC v. Procter & Gamble Company, 386 U.S. 568 (1967), it was ten years between the merger and the Supreme Court decision. And in FTC v. Consolidated Foods Corporation, 380 U.S. 592 (1965), it was fourteen years.
Conglomerate Mergers

represents an experiment in trade regulation and antitrust enforcement.\textsuperscript{239} Instead of relying on case by case processes to disseminate policy, they now are offering blanket advice in advance concerning their probable enforcement activity on mergers. This is a break with past procedures, and is an effort to inform the business community of current merger policy and to deter merger activity.

The guidelines issued by both agencies are experimental in philosophy, and seem to be addressed to a wider range of merger and market criteria than have been encompassed by formal litigation. Their similarity is in their purpose, and ends there.

The FTC's policy statements pinpoint specific segments of the economy where it is believed that further merger activity would tend to substantially lessen competition. The guidelines represent the expertise developed through economic investigation by the FTC.\textsuperscript{240}

Between January 1967 and May 1968, the FTC issued five sets of policy statements based on its formal studies in five sectors of the economy. The policy statements encompassed (1) vertical mergers in the cement industry, (2) product extension mergers in grocery product manufacturing, (3) mergers in the food distribution industries, (4) tire manufacturing activity and (5) retail gasoline sellers.\textsuperscript{241} It should be noted that since 1950, the FTC has been active in merger cases only in these areas or very closely related areas. In each set of guidelines a history of the industry, as well as the specific criteria that will be used in evaluating merger activity in the industry, is developed.

The Department of Justice's Guidelines by contrast seem to be a wide veil, covering all merger possibilities that they believe come under the scope of Clayton Section 7.\textsuperscript{242} Their Guidelines are set up to evaluate mergers according to market structure criteria. The merger activity is judged by whether it lessens or tends to lessen competition—competition for its own sake as well as for its economic consequences.

The Department of Justice's Guidelines fall into three separate sections: horizontal, vertical, and conglomerate activity. The Department has devised broad criteria for each category. The criteria include: relative market share, degree of concentration (speed of change, number

\textsuperscript{239} Division of Antitrust, Department of Justice Guidelines, May 30, 1968.
\textsuperscript{240} B. Bock, Mergers and Markets: (7th Ed., National Industrial Conference Board \#105, New York, 1969) at 93.
\textsuperscript{241} Id., at 94; FTC Guidelines, see also Kerr, A Quest for Some Certainty: Guideline (1968) and Task (1969) Approaches to Merger Law. 8 Duq. L. Rev. 95 (1969).
\textsuperscript{242} Department of Justice, supra note 239.
and sales), barriers to entry, reciprocal buying, power potential entry, possible triggering of other mergers, etc.

In their present forms both sets of guidelines seem to be an image of existing court decisions. This is especially true with respect to vertical and horizontal activity. Both agencies seem to handle these types of merger activity admirably well. This is not so with conglomerates.

Guideline policy concerning conglomerates has, since 1967-1968, come to contain a new spirit and a new shift of emphasis. Both agencies are taking a more active role to try to stem merger activity in its incipiency. The change in emphasis is shown by the active role of the FTC concerning Kennecott-Peabody Coal, White Consolidated Industries-Allis Chalmers and the Department of Justice's concern involving Ling-Temco-Vought-Jones and Laughlin Steel, IT & T-Canteen, IT & T-Hartford Insurance, and Northwest Industries-B. F. Goodrich. The more active role of the agencies is also shown by the FTC's investigation of conglomerate activity. FTC questionnaires were sent to some 450 companies in the $250 million or more category. If a firm is going to acquire a company with $10 million or more in assets, it must now fill in this questionnaire. No reporting requirement existed at all till March, 1969. At that time the FTC issued an order requiring companies making acquisitions to name the acquired firm and the way in which it planned to acquire it.

Now, under an amended order issued in May, 1969, the procedure is much more complex and informative. The acquiring firm must name every industry in which it does business, and the amount of business

243. B. Bock, supra note 156 at 109-10.
250. FTC CONGLOMERATE MERGER REPORT. This investigation is scheduled to continue at least through 1970, with the publication of future reports, as well as a number of research papers used in preparing the FTC CONGLOMERATE REPORT.
Conglomerate Mergers

it does in each. The classification of products it buys must be down to the fourth digit of the Census Bureau's Standard Industrial Classification lists. The acquiring company must further list every product it sells down to the seventh digit of the Census Bureau’s Standard Industrial Classification lists. The types of economic activity engaged in by firms will now be readily available to the FTC.

Through this new procedure the FTC hopes, in part, to dampen the amount of merger activity occurring in the economy. It also hopes to get a sharper profile of the structure of the conglomerates in the economy. By use of the product and factor classification information, the FTC hopes to be able to identify actual and/or potential violations of the antitrust laws. With computer analysis, the smallest overlap will be evident. With instant recall and comparisons possible, policy statements and enforcement action will be greatly facilitated. Closer control, more informative data and speed will enable the FTC to do a more effective job. This will especially be true when the larger conglomerates come under scrutiny. These new disclosure rules should deter and hinder further acceleration in the current movement, because anticompetitive effects can be revealed to enforcing agencies quickly.

VII. Possible Solutions

There are a number of ways in which the antitrust laws could be amended to deal with the “conglomerate merger problem.” Each proposal, however, raises additional problems, some of which could be as serious as the conglomerate problem itself. Let us briefly indentify some avenues for change, and examine some of the problems with each.

A. Since size is a primary concern, perhaps all mergers above a certain size should be prohibited, or perhaps all acquisitions by corporations above a certain size should be prohibited. The main problems here are: (1) There is no universal agreement that size alone is a primary concern;\(^{252}\) (2) such a prohibition would not solve the problem even if universal agreement did exist; and (3) prohibition might have disastrous effects on capital markets.

The reason it would not solve the problem is that large companies would still expand into new areas by internal expansion if the merger route were closed off.\(^ {253}\) At present, a company can expand by merger

\(^{252}\) Cf. Turner, supra note 119 at 1326-27.
\(^{253}\) Id.
without actually spending any money, by making a tender offer to "buy" stock with stock instead of cash. A prohibition of the merger route may therefore slow down the rate of expansion of large companies, because internal expansion would require the exchange of cash (or other financial instruments) for real capital assets, subject to market constraints and also to capital budget constraints. Internal expansion would thus be slower and more difficult than external growth, which is not subject to such constraints.

But if we really care about bigness, slowing down the rate of expansion of the largest corporations will not be sufficient, unless that rate of expansion is smaller than the rate of expansion of the economy as a whole. If the largest (say the largest 200) corporations were to grow internally faster than the Gross National Product was growing, then their proportion of GNP would increase. Let us assume that it will not be shown that stopping mergers alone would slow large corporations' growth sufficiently to move the economy toward decentralization at a politically acceptable speed. Then we might be led to the conclusion that the only means of dealing effectively with the problem of pure size would be for Congress to require the dissolution of every corporation that was larger than some legislatively fixed maximum size.

The writers of this paper are not prepared to advocate such a solution, at least not without seeing considerably more research than has been done to date on the impact of such a law on many facets of society.

B. Since the time it takes to get definitive resolutions of antitrust cases is a major weakness of the present enforcement of Section 7, one reform that has been suggested by a number of students of antitrust is an easier procedure for getting preliminary relief. Post-merger divestiture is not always an adequate remedy. Assets have been mingled, and personnel have moved from one company to another and may have shifted to different functions. Customer lists, trade secrets,
expertise, all have been permanently transferred to the acquiring corporation. It would be our prediction, for example, that when Clorox is finally separated from Procter & Gamble (by spin-off or outright sale), Procter & Gamble will enter the chlorine bleach market by internal expansion or purchase of a smaller concern, and quickly and severely erode Clorox's present position as the leader in that industry.

Unless provisions for court approval of preliminary injunctions were conditioned on such stringent requirements for a showing of anticompetitive effect that the convenience of the changed procedure was wiped out, such a procedural change, however, would have the effect of making the FTC and the Justice Department the principal adjudicators of the legality of mergers. If a merger must await a five or ten year period of trial and appellate proceedings before being consumated, it will probably not be attempted, since the two corporations would have no certainty that economic conditions, and the conditions of the companies, five or ten years hence would make merger, then, desirable. While it might conceivably be reasonable for Congress to prohibit all large mergers, it does not seem reasonable to leave to the FTC staff and the Justice Department the question of which large mergers to prohibit, and which to permit.

C. The Neal Committee had a suggestion on what to do about the "ultimate" problem—economic and market power—as well as a possible solution to the merger problem. That suggestion was a proposed "Concentrated Industries Act." If enacted by Congress, this would provide for civil suits by the Attorney General, in equity, to break up oligopoly markets to the point where no single oligopoly firm accounted for more than 12% of any market and to enjoin various

259. Id., at 15-17, a "Merger Act."
260. An oligopoly industry is defined, Id., at 13, as follows:
Section 4. Definitions.
As used in this Act.
(a) The term "oligopoly industry" shall mean a market in which
(i) any four or fewer firms had an aggregate market share of 70% or more during at least seven of the ten and four of the most recent five base years; and
(ii) the average aggregate market share during the five most recent base years of the four firms with the largest average market shares during those base years amounted to at least 80% of the average aggregate market share of those same four firms during the five preceding base years,
but shall not include any market in which the average aggregate sales of all firms during the five most recent base years declined by 20% or more from such average sales during the preceding five base years.
This definition is intended to require both a large degree of concentration, and stability, in the sense that the firms occupying the top slots remain there.
261. Only "oligopoly firms" would be required by the act, § 1(e), to split up or
forms of contractual and cooperative arrangements that produced economic (and perhaps social) results similar to oligopoly.

This combination proposal—the proposed concentrated industries act taken together with the proposed anti-merger act—would seem to have a great deal to recommend them. They are neither extreme in their economics, as is the suggestion to totally prohibit certain classes of mergers, nor procedurally extreme, as is the suggestion to make the FTC or the Department of Justice in effect the final decision maker on the legality of a merger. Both acts provide reasonably certain numerical tests for a violation.

The difficulty will be, not in administering these proposed acts, but in being convinced, and in convincing Congress that the remedy which these acts provide goes far enough to solve the problem, yet does not go too far. An additional difficulty may arise in convincing the relevant decision makers that a problem exists. Agreement even on that is not yet universal. The Stigler Task Force, for example, does not believe a problem exists. At least that Task Force would not act on the problem until clear and convincing proof that it did exist, and what its dimensions were, was presented. As we have noted above, we feel that to advocate this is to advocate inaction until such time as the disease has perhaps become incurable. We take a contrary position: the possibilities for harmful consequences of the current merger wave through a major restructuring of the American economy are so great, compared with the apparent possibilities for good, that the movement itself should be slowed down or stopped until we have some certainty that the possible harm will not take place.

otherwise shrink to a maximum of 12% of the market. An oligopoly firm is defined in § 4(b) as a firm whose market share (during at least 2 of the last 3 years) exceeded 15%. Conceivably a firm whose market share remained stable over time at 14% in a market which satisfied the definition of an oligopoly market, might be allowed to remain permanently with that share. The difference of 2% (it could be 3% at most) may not be significant, but it leaves one wondering why it is there.

262. See note 23, supra. Interestingly, Professor Stigler, Chairman of the Stigler Task Force, once criticized economists for not recognizing the danger that inhered in the 1898-1940 merger wave. See Stigler, Monopoly and Oligopoly by Merger, 40 AMERICAN ECONOMIC REVIEW, Supp. 23, 30-31 (1950):

It is sobering to reflect on the attitudes of professional economists of the period toward the merger movement. Economists as wise as Taussig, as incisive as Fisher, as fond of competition as Clark and Fetter, insisted upon discussing the movement largely or exclusively in terms of industrial evolution and the economies of scale. They found no difficulty in treating the unregulated corporation as a natural phenomenon, nor were they bothered that the economies of scale should spring forth suddenly and simultaneously in an enormous variety of industries—and yet pass over the minor firms that characteristically persisted and indeed flourished in these industries. One must regretfully record that in this period Ida Tarbell and Henry Demarest Lloyd did more than the American Economic Association to foster the policy of competition.

263. See notes 53 and 54, supra, and accompanying text.
Conglomerate Mergers

A danger in taking this position is that it may be interpreted as a belief that further study—of the kind that the Stigler Committee, among others, suggests—is not necessary. *Such study is very necessary.* Rigorous empirical studies of the problems posed by the current merger wave are sadly rare. Some of the problems, of course, are conceptual—for example, we have not decided, firmly, whether Congress meant to protect competition for its own sake. And not a few of these conceptual problems relate to economic theory, especially as applied in a legal framework.

Among the economic problems which must be dealt with is the development of a definition of competition that can be applied within the framework of antitrust law—now, but especially in the future. Traditional economic theory on market structure has not help much in analyzing conglomerate mergers.\(^{264}\) The study of barriers to entry undertaken by Bain\(^ {265}\) is a step in the right direction; but even that step tends to be cast in terms of static market structure analysis.

The tasks for lawyers and economists, then, are clear: Work out the political, social and economic changes which are likely to result if the merger movement continues.\(^ {266}\) Also work out the political, social and economic changes that are likely to follow if any of several proposed solutions are adopted.

In the interim, we might go a long way toward a solution by concentrating on some things we do know. We might change the tax laws, the antitrust laws, and/or the accounting requirements of the SEC to encourage internal rather than external growth. By this means we would encourage growth which would be governed by market forces instead of financial staying power. As long as the less difficult method of entry, external growth, is easily available, it will be used. We could

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264. For reasons explored in Part 5, Section A; *supra.*
265. J. BAIN, BARRIERS TO NEW COMPETITION (1956).
266. A question that may have to be asked and answered ultimately by society, is whether corporations, as entities, are worth preserving in the same way that communities are worth preserving. That question is now being asked only by corporate management. "Management" consists of individuals who have invested much time and effort in constructing the institution they manage. The institution, the corporation, is a social structure, as well as a set of economic functions. The individuals who comprise "management" could hardly be expected to regard this social structure as valueless: Predictably, their answer will be that the corporate structure is worth preserving for its own sake, they will go to considerable effort to preserve it; the specific economic functions for which the corporation was originally organized will be also predictably regarded as secondary in importance to the preservation of the structure of the corporation itself. The merger movement is one piece of evidence of this. The liberalization of state corporation laws, especially with reference to how specifically the corporate purposes must be set forth, (PA. Bus. Corp. Law [1968] § 204(3)) is one other piece of evidence.
also channel mergers so that they would increase rather than reduce competition.\textsuperscript{267}

Fuller disclosures would also be helpful. Like modern mashed potatoes, it is sometimes hard to tell whether conglomerate financial statements are artificial or real; their financial records are often merged, and mixed, so as to make them almost meaningless as a tool for antitrust analysis, or any analysis.\textsuperscript{268} Product line, and geographic financial analysis as a basis for financial reporting might produce a more valuable tool for understanding conglomerates than we have yet had.

A change in emphasis in economic analysis might also be desirable: A shift from product market orientation, with its various concentration ratios to factor market\textsuperscript{269} analysis. Many recent mergers seem to be closely affiliated in a technological sense.\textsuperscript{270} By looking at control of factors and/or sources of supply, new ratios, or some other quantitative tests, may be able to be developed—ones that will be applicable to multi-market, multi-product firms.

We know that the size of the firm acquired, or even the relative sizes of both merging partners, does not necessarily indicate the competitive consequences of a particular merger. We also know that many of the current indicators used to test the competitive state of an industry by structure, conduct, and performance do not tell us what we need to know to analyze the competitive relationships of these new, multi-product, multi-market firms. However, there often seems in many of these firms to be some internal structure with the components related in terms of control of similar factor markets. The extent to which mergers may have lessened actual or potential competition, extended market positions, raised barriers to entry, and created possible structural conditions which will restrict competition, may be revealed in

\textsuperscript{267}. Competition could be increased, rather than lessened, if a large firm entering a new industry entered by acquiring a small firm in the new industry, instead of one of the leaders, or if the large firm expanded by building new facilities. This sort of result is part of what is behind both the FTC and the Neal Committee suggestions described, \textit{supra.}, footnotes 235 and 236 and accompanying text.

\textsuperscript{268}. \textit{FTC Conglomerate Merger Report} at 119-141 describes the current problems of conglomerate financial reporting extremely well.

\textsuperscript{269}. A "factor" is an input to a production process. Iron ore, coal, limestone, and labor, for example are all "factors" in the manufacture of steel. Usually markets are analyzed from the point of view of sellers—producers—and their costs. Any market can of course be analyzed from the point of view of either buyers or sellers. Factor markets, because the demand for factors is derivative—that is, the demand depends on the demand for something else, namely the product manufactured by means of the various factors of production—must often be analyzed from the point of view both of the buyers and the sellers.

\textsuperscript{270}. \textit{See, e.g.}, the oil company—chemical company mergers and the oil company, coal company mergers, described in \textit{FTC Conglomerate Merger} 302-312.
Conglomerate Mergers

intensive factor market analysis. These merging units are growing and extending their control in many factor markets. The emphasis that reciprocity power has been given in recent Justice Department complaints is evidence that factor market relationships are being taken seriously; to date the analysis has been largely qualitative—or at least, it quantitative, only approximately so. Intensive quantitative factor market analysis may prove to be a fruitful framework with which to evaluate multi-product, multi-market firms.

Until these tasks have been researched, and some idea (not certainty, but even an inkling—based on facts, not theory) as to possible answers is before us, the “conglomerate merger problem” will continue to be a problem.