Some Misadventures in Antitrust Policymaking—
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I. Introduction

In discussing proper methods of statutory construction, Mr. Justice Frankfurter once wrote that, “it makes a great deal of difference whether you start with an answer or with a problem.”1 This perceptive observation is equally applicable to the entire judicial process. It was Holmes who taught us to focus upon the inarticulate major premise,2 for no doctrine is any more valid than the postulates from which it is derived, no matter how impeccable may be its logic. Unless I misread the current antitrust rulings of the Supreme Court, their premises appear to run counter to the history, philosophy, purposes and language of our antitrust statutes and jurisprudence. The Court has gradually been moving toward condemnation of all contractual restrictions on trade and restatement of antitrust principles in absolute terms.3 Its new major premises are unrelated to the preservation of competition and the prevention of monopoly; it seems to be enough if the contract restrains and thus limits the economic freedom of the parties. According to Mr. Justice Black, speaking for a unanimous Court in FTC v. Brown Shoe,4 the central policy of the antitrust laws is to prohibit “contracts which take away freedom of purchasers to buy in an open market.”5 Similarly, last year in Pennington,6 Mr. Justice White stated that “restraints upon the freedom of economic units to act according to their own choice and discretion . . . run counter to antitrust policy.”7

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[5.] Id. at 321.
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Obviously there is nothing unusual in stressing such important elements as open markets and economic freedom in expressing antitrust goals. However, any contract involves the mutual relinquishment of the parties’ freedom of action. It is subversive of the very nature of a contract to say, without more, that neither party may circumscribe his future course of action without violating the antitrust laws. The common law defined a contract in restraint of trade as a bargain “which purports to limit in any way the right of either party to work or to do business, whether as to the character of the work or business, its place, the manner in which it shall be done, or the price which shall be demanded for it . . . .” But since 1711, the law has not prohibited all restraints of trade. Only the unreasonable restraint was condemned; and this has been antitrust’s central policy at least since 1911. To equate any contractual restriction on the economic freedom of the parties with antitrust illegality is thus to abandon the rule of reason.

The antitrust laws, either expressly or through judicial construction, are couched in qualifying terms. But if the Federal Trade Commission, when acting under the spacious provisions of Section 5 of its organic statute, can dispense with the necessity of proving anticompetitive effects, the conduct only qualifiedly forbidden by the Clayton Act can be totally interdicted. We move towards absolutism if the legality of horizontal mergers depends solely upon an increase in concentration rather than on the likely impairment of the vigor of competition. Similarly, monopoly no longer signifies, in any realistic sense, the power to set prices or to exclude others if markets are artificially constructed to suit the exigencies of the particular litigation.

All this has not yet come to pass. But the signposts seem to point that way. Moreover, last year’s antitrust decisions compel us to ask whether the policy predicates of these new premises are sound, viable or wise.

II. Exclusive Dealing and the Federal Trade Commission

Brown Shoe, the nation’s second largest shoe manufacturer, sells both through company-owned and independent retail stores. It makes cer-

tain benefits available, free of charge, to those independents who agree to "concentrate" their purchases on Brown's make of shoes and not to buy, stock or resell competing lines. Over 760 retailers entered into this program, either by formal written agreement or orally. Pursuant to the arrangement, the franchisees purchased an average of 75% of their shoe requirements from Brown, amounting to more than $24.5 million annually, and representing approximately 1% of total shoe sales nationally.

The Commission held that Brown's purchase system constituted an unfair trade practice under Section 5 of the Federal Trade Commission Act because it "effectively foreclosed [Brown's] competitors from selling to a significant number of retail shoe stores . . . ." Alternatively, the Commission went on to find that the record also established a "prospective competitive impact" sufficient to meet the standard of illegality of Section 3 of the Clayton Act.

[16.] FTC v. Brown Shoe Co., 384 U.S. 316, 318 (1966). The clause in question states: "In return [for receiving benefits] I will . . . concentrate my business within the grades and price lines of shoes representing Brown Shoe Company Franchises of the Brown Division and will have no lines conflicting with Brown Division Brands of the Brown Shoe Company." Ibid. The franchise benefits included "architectural plans, costly merchandising records, services of a Brown field representative, and a right to participate in group insurance at lower rates than the dealer could obtain individually." Ibid.

[17.] Brown Shoe Co., Trade Reg. Rep. ¶ 16316 at 21141-42 (F.T.C. 1963) (760 stores by October 1961); Brown Shoe Co. v. FTC, 339 F.2d 45, 49 (8th Cir. 1964) (767 stores by October, 1961). The Supreme Court apparently adopted the figures in the Commission complaint which alleged "approximately 650 Brown Franchise Stores" as of October, 1959 (Complaint, p. 3), since Mr. Justice Black speaks of "some 650 retail stores," 384 U.S. at 317.

[18.] Id. at 21142. "This percentage . . . in the case of individual stores may vary from 60 to a high of 95%." [19.] Id. at 21145.

[20.] Id. at 21144. The number of stores under the franchise plan was also approximately 1% of the national number of retail shoe outlets, not including cobbler shops, drug stores and other outlets with a limited selection or a small proportion of shoes to total inventory. Ibid. Under any reasonable standard, the amount of business closed was accordingly minimal. The 760 franchised stores being 1% of some 70,000 outlets, and Brown's $25 million in franchise sales constituting 1% of approximately $2.5 billion in annual shoe sales, Brown's competitors still had open to them some 69,300 stores and 2 billion 200 million dollars worth of business.

[21.] The Commission's opinion was written by Chairman Dixon. Commissioners Anderson and Higginbotham did not participate, and Commissioner Elman concurred in the decision and order but not in the Commission's opinion. Chairman Dixon's opinion thus represented the views of himself and Commissioner MacIntyre.


[23.] Id. at 21145.

[24.] 38 Stat. 731 (1914), 15 U.S.C. § 14 (1964): It shall be unlawful for any person engaged in commerce . . . to . . . make a . . . contract for sale of goods . . . for use, consumption or resale . . . or fix a price charged therefor, or discount from . . . such price, on the condition, agreement, or understanding that the . . . purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the . . . seller, where the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce.
On appeal, the Eighth Circuit reversed, holding that there had been a failure to prove an exclusive dealing arrangement violative of either statute.

The Supreme Court, in setting aside the decision of the Court of Appeals and reinstating the Commission’s order, confined itself to the Section 5 holding. Relying on the Commission’s “broad power” to declare unfair “trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though . . . not actually [violative of] these laws,” the Court held that it was unnecessary for the Commission to find a reasonable likelihood of a substantial lessening of competition, the *sine qua non* of a Section 3 violation. This was because “the Commission has power . . . to arrest trade restraints in their incipiency,” and Brown’s program “conflicts with the central policy of both § 1 of the Sherman Act and § 3 of the Clayton Act against contracts which take away freedom of purchasers to buy in an open market.” Significantly, the Court did not characterize this central policy as curbing unreasonable restrictions on purchasers’ freedom or preventing restraints which may substantially lessen competition. Rather, the freedom to which it refers is absolute and unqualified.

I have discussed exclusive dealing arrangements at various times in this series of annual reviews. Repeated comment was necessary because the views of both the Supreme Court and the Commission have oscillated on the applicable standard of illegality, and sometimes divergently.

Without repeating my prior analysis of the legislative history, suffice it to say that Congress, after mature and careful deliberation in 1914, was unwilling to leave the legality of exclusives to the uncontrolled discretion of the Federal Trade Commission, but specifically legislated on the problem in Section 3.

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[25.] Brown Shoe Co. v. FTC, 339 F.2d 45 (8th Cir. 1964).
[26.] 384 U.S. at 321.
[27.] Id. at 322.
[28.] Id. at 321.
[32.] The original House bill would have outlawed all exclusives. H.R. 15557, 63d Cong., 2d Sess. (1914); H.R. REP. No. 627, 63d Cong., 2d Sess. (1914). The Senate Judiciary Committee, however, recommended deletion from the bill of any reference to exclusives on the theory that they could best be handled by the Federal Trade Commission. 51 CONG. REC. 13849 (1914). The Senate voted to drop the reference to exclusives. Id. at 14273. The
The Supreme Court's initial interpretation of the statute was in Standard-Magrane, where it emphasized the seller's market dominance. This was abandoned as the test of illegality in Standard Stations, where Mr. Justice Frankfurter fashioned a rule of comparative quantitative substantiality— if the market share foreclosed by the exclusive is substantial, the statute has been violated. Several years later, in Maico, the Commission held that, even though the courts might be ill-equipped to make a discriminating economic analysis to determine the impact of an exclusive on competition, it, as an expert body, could and would make such an investigation in assessing its legality.

The Supreme Court's ruling in Motion Picture Advertising, decided the same year as Maico, added to the confusion. In that case Mr. Justice Douglas, in a broad dictum, suggested that in challenging exclusives under Section 5, the Commission might apply an even more stringent standard of illegality than Standard Stations provided for Section 3 cases.

But the pendulum continued to swing back and forth. Within a span of five months the Commission and the Court had switched positions. In Mytinger & Casselberry, the Commission jettisoned Maico and adopted the quantitative substantiality rule of Standard Stations, while in Tampa Electric the Supreme Court, while not repudiating Standard Stations in so many words, refused to limit its inquiry to the substantiality of the amount of commerce foreclosed, indicating that other factors were also pertinent, such as the relative strength of the parties and the probable immediate and future effects of the arrangement on effective competition in the relevant market. It is in the context of this flip-flopping that Brown Shoe must be appraised.


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Mr. Justice Black's opinion, though brief, is not free of ambiguity. The case may stand for a very narrow proposition. Mr. Justice Black states that the question before the Court is whether the Commission can declare it unfair for "the second largest manufacturer of shoes in the Nation . . . to secure a contractual promise from [hundreds of customers] that they . . . will not purchase conflicting lines of shoes from Brown's competitors." And he concludes that the Commission has such power "on the record here." Does this mean that the decision is limited to the facts of the particular case before the Commission, which involved a leading nationwide seller having a network of more than 600 customers subject to the restriction, with the inevitable concomitant foreclosure of competing sellers?

Another construction is possible. The Commission's opinion stated that Section 5 was violated because Brown's competitors were foreclosed "from selling to a significant number of retail shoe stores." And Mr. Justice Black also stressed the number of foreclosed outlets. Does the case therefore stand for the proposition that the Commission may apply a standard of absolute quantitative substantiality—the number of outlets or dollar volume foreclosed—in assessing the validity of exclusives? This, of course, is the rule applicable to tie-ins (but not exclusives) under Section 3. In this connection it is noteworthy that the Commission likened the challenged program to a de-in because the receipt of benefits was conditioned on accepting the exclusive.

[41.] 384 U.S. at 320.
[42.] Ibid.
[43.] The Commission relied on the record in Brown Shoe Co. v. United States, 370 U.S. 294 (1962), in which the Brown-Kinney merger was invalidated in light of all the economic facts concerning potential foreclosure of Brown's competitors from Kinney's outlets which represented less than 1% of national shoe sales after the acquisition. See Brown Shoe Co., Trade Reg. Rep. ¶ 16316, at 21144-45 (F.T.C. 1963). Commissioner Elman concurred relying solely on the record of the merger case. Id. at 21150.
[44.] Id. at 21144.
[45.] When the seller enjoys a monopolistic position in the market for the "tying" product, or if a substantial volume of commerce in the "tied" product is restrained, a tying arrangement violates the narrower standards expressed in § 3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred. Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 603-09 (1953).
[46.] "Respondent's practice of conditioning the benefits of membership in the plan to adherence to the restrictive terms of the franchise agreement for the purpose of foreclosing other manufacturers from selling to its franchisees is akin to the operation of tying clauses generally held as inherently anticompetitive." Brown Shoe Co., Trade Reg. Rep. ¶ 16316, at 21144 (F.T.C. 1963). It may be that the Commission treated the case in this fashion, bringing the proceeding under Section 5 rather than Section 3, because it was not certain that Brown's franchise plan fell within the language of Section 3. Since the independent shoe stores were free to continue to buy shoes from Brown without accepting the exclusive (they would, of course, lose the franchise benefits), Commission counsel may have felt that the "sale" was not made "on the condition" that the purchaser "not use or deal in the goods . . . of a competitor or competitors of the . . . seller," as Section 3 requires. On the other hand, the statute prohibits discounts to induce an exclusive, and the franchise.
But if the Supreme Court intended to sanction the Commission’s application of the tie-in test to exclusives, contrary to the distinction drawn between these two restraints in *Standard Stations*, one would expect an explicit declaration to that effect.

The opinion can be read yet another way. Does Mr. Justice Black mean that the Commission, under Section 5, may rely upon its “expertise” to strike down any exclusive dealing arrangement which, in its unlimited discretion, it deems improper? There is language in the opinion capable of such a construction. It is said that the Commission has “broad power . . . [to declare unfair], trade practices which conflict with the basic policies” of the antitrust laws, and that the “central policy of both § 1 . . . and § 3 . . . [is] against contracts which take away freedom of purchasers to buy in an open market.” Taking the Court literally, every exclusive conflicts with that policy because the buyer, when he agrees to purchase only from the seller, by definition loses his freedom to buy from others.

*Brown Shoe* may also have implications going beyond the law of exclusives and affecting antitrust in general. Has the Court, in the name of arresting trade restraints in their incipiency, issued the Commission a blank check to prohibit any restrictive arrangement regardless of whether it runs afoul of the antitrust laws? Does the case mean, for example, that the Commission, in enforcing Section 2(a) of the Robinson-Patman Act, need find only a price difference and may dispense with the statutory element of probable injury to competition? Will the Commission be free to prohibit a merger without finding a likelihood of a substantial lessening of competition? Can it dispense with the rule of reason inquiry in Sherman Act cases?

If this is the real meaning of *Brown Shoe*, the decision raises grave issues far beyond the law of exclusive dealing. Is it consonant with our democratic traditions to permit an administrative agency to refashion statutory standards of legality with no limit other than the vague concept of incipiency? This problem is particularly acute in antitrust,
where the statutory standards themselves are very broad with a wide zone for judicial and administrative interpretation.

This notion that the Commission has authority to condemn activity which, if full blown, would violate the Clayton Act is, to say the least, anomalous. The Clayton Act itself is designed to arrest acts and practices in their incipiency which, when mature, could rise to the level of unreasonable restraints of trade or monopolization forbidden by the Sherman Act. That is why the statute talks of probabilities. To assert that the Commission may arrest incipient Clayton Act violations is to prohibit incipient incipiencies— which could have the effect of converting qualified into absolute prohibitions or of substituting the mere possibility of competitive harm for the reasonable probability which hitherto has been the test. And the suggestion that the Commission, as an expert body, is better equipped than Congress or the courts to fashion appropriate rules is belied by the fact that the Commission's approach to exclusives has been anything but a model of consistency over the years.

Nobody today would argue for a stingy construction of the Commission's power akin to that in Gratz. That decision, widely criticized ever since it was handed down, unduly limited the Commission's ability to apply Section 5 dynamically. The concept of unfair competi-


[53.] See Gordon, Walking Backward into the Future, How To Comply with the Antitrust Laws 45, 48 (Van Cise & Dunn ed. 1954). Both the Federal Trade Commission and the Clayton Acts were intended to arrest in their incipiency anticompetitive practices which, if uncurbed, might develop into full-grown violations of the Sherman Law. Thus, Senator Newlands, the Senate floor manager of the Federal Trade bill, stated as its purpose: "We want to check monopoly in the embryo." 51 Cong. Rec. 12030 (1914). See also 51 Cong. Rec. 11455, 14938 (1914). The Clayton Act is to the like effect. Thus, the Senate Report on the Clayton Bill states:

Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the Act of July 2, 1890 [the Sherman Act], or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation.

S. Rep. No. 698, 63d Cong., 2d Sess. 1 (1914) (Emphasis added.)

The legislative record is clear that the Commission was authorized to enforce the specific prohibitions of the Clayton Act by proceeding under that enactment or under its own organic law. See Section 11 of the Clayton Act, 15 U.S.C. § 21 (1958); 51 Cong. Rec. 11108-12, 11230-31 (1914). There is no evidence whatever that the Commission was empowered under the Trade Commission Act to prohibit incipient violations of the Clayton Act. The incipiency concept, wherever used, related to Sherman Act violations exclusively.

See 51 Cong. Rec. 11455, 12030, 14938 (1914).


tion should be flexible; but it should develop like any common law principle—interstitially, by addition or subtraction, and by reasoned analysis. That is a far cry from permitting the Commission, in areas explicitly governed by statute, to formulate standards different from those established by Congress or operate with no standards at all.

It is this apparent absence of any guiding standard which makes the Brown Shoe opinion potentially dangerous—more dangerous than Grand Union, where the Commission applied Congressional proscriptions analogously to an area arguably left uncovered by inadvertent omission. Now the Commission has been given authority to deal with cases squarely within the ambit of a specific provision of the Clayton Act without having to apply the statutory test. If exclusive dealing arrangements are inherently anticompetitive with no possible justification, why should they not be prohibited per se by the courts under Section 3? If the answer is that the judiciary does not have the authority to read Section 3 to permit of such a rule, is it a fair reading of the legislative history or indeed of the Federal Trade Commission Act itself that Congress gave such broad power to the Commission? If, on the other hand, an absolute quantitative substantiality rule is appropriate, or any other standard for that matter, why should it be a proper guide in one forum and not in the other?

But the underlying policy question is even more fundamental. What are the anti-social consequences, if any, of exclusive dealing arrangements? Are they all perniciously anticompetitive with no redeeming virtues? Are they all innocuous with no reprehensible anticompetitive effect? Are some bad and others good? If so, what is the criterion for determining which arrangements fall into which category? Should not that criterion be based on the ultimate purpose of antitrust to preserve competition, rather than to unrelated social goals? In any event, is there any justification for our being left in the dark about the policy postulate of the new rule?

For me the policy issue is quite simple. The legality of an exclusive depends upon the particular facts of each agreement. It may in some circumstances impair and in others strengthen the competitive forces in the relevant market. That is why neither the common law, the Sherman Act nor the Clayton Act has condemned all exclusives out

[57.] Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962).
[58.] The case involved the Commission’s authority, under Section 5, to find that the inducement of unlawful promotional allowances was unlawful as violative of the spirit of the Robinson-Patman Act even though the statutory language did not reach such behavior. See Handler, Recent Antitrust Developments, 71 YAL. L.J. 75, 90-98 (1961).
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of hand. Where no substantial anticompetitive effect is likely, the freedom which should be protected is the freedom to contract, not the freedom to buy in a market untrammelled by any restriction, however reasonable.

III. Mergers and Markets

Each of the past several years has witnessed a new act in the unfolding drama of Section 7 as applied to horizontal mergers. Each year the noose became tighter and tighter. This year the judicial playwrights sprung the trap door. If Joe's Delicatessen has not yet become the law of the land, at the very least, its methodology has been accorded the flattery of judicial imitation.

The evolution of the judicial construction of amended Section 7 as applied to horizontal mergers has been remarkably swift. The curtain-raiser of this four-act play was Brown Shoe, decided in 1962. There Chief Justice Warren provided a comprehensive and what appeared to be authoritative exegesis of the statute, ruling that each merger is unique and must be functionally viewed in the context of its particular industry; that per se rules are inappropriate; and that statistics alone are insufficient to determine whether a given acquisition is likely to substantially lessen competition.

The doctrine of Brown Shoe withered in Act Two. Philadelphia National Bank, decided in 1963, announced a rule of presumptive illegality when a merger "produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market . . . ." What is more, in a pregnant footnote, Mr. Justice Brennan added that, "... if concentration is already great, the importance of preventing even slight increases in concentration . . . is correspondingly great." The merger, producing a firm with a 30% share of a market in which the top four banks controlled 78%, was held unlawful.

[65.] Id. at 363.
[66.] Id. at 365 n.42.
Act Three was in two scenes, *Alcoa-Rome* and *Continental Can*, but the plot was the same in both. A slight (as distinguished from significant) increase in concentration in already highly concentrated industries was declared, without more, to be unlawful. Mergers resulting in combined market shares of 29% and 25% were prohibited even though the increase in the market share of the acquiring company as a result of the merger was only in the 1 to 3% range.

The stage having thus been set, last Term’s decisions in *Von’s Grocery* and *Pabst* brought down the curtain on the Final Act. Von’s, the third ranking food chain in the Los Angeles area, acquired Shopping Bag, the number six company. Together they became the second largest chain with sales of about $172 million annually and a market share of 7-1/2%. Both companies had impressive records of growth by internal expansion prior to the merger. In a ten-year period Von’s had practically doubled the number of its stores, from 14 to 27, while Shopping Bag went from 15 to 34. At about the same time the number of single store operators in Los Angeles decreased from 5,365 to 3,818. By 1963, three years after the merger, there had been a further drop to 3,590. During roughly the same period, the number of chains with two or more grocery stores increased from 96 to 150. “While the grocery business was being concentrated into the hands of fewer and fewer owners, the small companies were continually being absorbed by the larger firms through mergers.” Thus, from 1949 to 1958 nine of the top 20 firms acquired 126 stores from their smaller competitors.

Mr. Justice Black, writing for a six-man majority, invalidated the merger solely on the basis of the facts that I have just outlined: “These facts alone are enough to cause us to conclude contrary to the District Court that the Von’s-Shopping Bag merger did violate § 7.”

The Court’s opinion derives logically from Mr. Justice Black’s fundamental premise: that the basic purpose of Section 7 “was to prevent

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[71.] 384 U.S. at 272.
[72.] Ibid.
[73.] Ibid.
[74.] Id. at 273.
[75.] Ibid.
[76.] Ibid.
[77.] Ibid.
[78.] Ibid.
[79.] Justices Stewart and Harlan dissented; Mr. Justice White wrote a concurring opinion and Mr. Justice Fortas did not participate.
[80.] 384 U.S. at 274. (Emphasis added.)
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economic concentration in the American economy by keeping a large number of small competitors in business.”

If Section 7 is indeed an anti-concentration statute, and if concentration means, as Mr. Justice Black states, “a total decrease in the number of separate competitors,” then it follows inexorably that a horizontal merger in a market in which the number of firms has decreased is violative of the statute. The difficulty with this syllogism is that the major premise is faulty. Section 7 is not an anti-concentration statute pure and simple; a statutory violation presupposes proof that competition is likely to be diminished, and such impairment is not the inevitable result of an increase in concentration. Moreover, Mr. Justice Black’s notion of concentration is, to say the least, novel; it goes far beyond what was heretofore accepted to be the understanding of that term and what the Solicitor General argued to the Court in his Von’s brief.

Concentration, both in economics and in law, has traditionally meant the collective economic power, measured by market shares, of the leading firms in a line of commerce. Thus, the Solicitor General, in arguing for the illegality of the merger, set forth the Government’s proposed rule in terms of market power and tendency towards oligopoly. According to the Government’s brief, “a merger between direct competitors which occurs in a market still relatively unconcentrated but beginning to display the attributes and symptoms of oligopoly, and which contributes appreciably toward further concentration of that market, violates Section 7 . . . .” In explaining this proposed criterion, the brief went on to talk about the “transformation of small-firm, relatively unconcentrated markets into markets dominated by a few large and powerful sellers,” and the Government stressed the importance of the market shares of the 10 largest sellers in assessing the relative state of concentration of the market.

[81.] Id. at 275.
[82.] Id. at 273 n.3.
[83.] “Through years of usage the term ‘concentration ratio’ has come to mean the share of the total activity or resources of a given segment of the economy accounted for by its largest companies.” BUREAU OF THE CENSUS, 89th Cong., 2d Sess., REPORT ON CONCENTRATION RATIOS IN MANUFACTURING INDUSTRY—1963 FOR SUB. COMM. ON ANTITRUST AND MONOPOLY OF SENATE COMM. ON THE JUDICIARY xi (Comm. Print 1966); see, e.g., Hearings on Economic Concentration Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 88th Cong., 2d Sess., pt. 1, at 78 (testimony of Dr. John M. Blair), at 111 (testimony of Willard F. Mueller) (1964). No one will deny that the Sherman and Clayton Acts are biased against concentration. But the concentration which these enactments are designed to prevent is that which results in monopolization, undue restraint of trade or substantial lessening of competition. In other words, they are not anti-concentration statutes simpliciter.
[85.] Ibid.
[86.] Id. at 25-26, 32-33.
Mr. Justice Black ignored the Solicitor General's argument. His opinion does not discuss whether the Los Angeles grocery market was beginning to show evidence of oligopoly, nor does he even refer to the collective strength of the leading companies. To Mr. Justice Black, a decrease in the number of separate competitors constitutes an increase in concentration which, in his words, "is the crucial point here."87 If the facts are examined in the context of the usual meaning of concentration, far from showing a tendency in that direction, economic concentration in the market had in fact decreased. The market position of Safeway, the leading chain, declined in the decade preceding the merger from 14 to 8%.88 and the combined market shares of the leading chains likewise declined over the same period.89

Nor is there any mention by Mr. Justice Black of the health and intensity of competition in the retail grocery business in Los Angeles—between chains and single stores, established firms and newcomers alike;90 of the ease of entry into the field;91 of the opportunities afforded for stores of all sizes by the population explosion in Los Angeles;92 of the substantial turnover in the membership of the top 20 firms;93 of the fact that many of the acquisitions in the relevant market were not horizontal, but rather market extensions;94 or that fewer than half of the stores of Von's and Shopping Bag were so situated as to be able to compete with each other.95 Only by reading the perceptive dissenting opinion of Mr. Justice Stewart,96 joined by Mr. Justice Harlan, can one appreciate the wealth of evidence that the majority disregarded.

Mr. Justice Black evinces a similar preoccupation with concentration in his other merger opinion of the past Term, Pabst.97 Pabst, the nation's tenth largest brewer, acquired Blatz, which ranked eighteenth,98 the new entity thereby becoming fifth with a market share of 4.5%.99 Three years later the merged company ranked third and its

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[87] 364 U.S. at 273 n.3
[88] Id. at 290 (dissenting opinion of Mr. Justice Stewart).
[89] Ibid.
[90] Id. at 291-92.
[91] Id. at 300.
[92] Id. at 288.
[93] Id. at 290.
[94] Id. at 295.
[95] Id. at 296.
[96] Id. at 281.
[98] Id. at 547.
[99] Id. at 550.
market share had risen to 5.8%.100 Between 1934 and 1961 the number of breweries in the nation declined from 714 to 229.101 The Court holds that the Government had "no duty" to prove that the decline in the number of competitors was due to mergers;102 it makes no difference what the reason was. In the period 1957-1961, the market share of the top ten firms increased from 45% to almost 53%.103 This evidence, to Mr. Justice Black, was "amply sufficient to show a violation of § 7" in the national market.104

Putting Von's Grocery and Pabst together, the essence of the Court's view on horizontal acquisitions appears to be this: the merger of two successful competitors in a market in which the number of independent competitive factors has been decreasing for a substantial period of time is unlawful if the aggregate market share is 7.5%; and if, in addition, the combined market share of the leaders in the market has increased, a merger producing a 4.5% share of the market contravenes the statute.

The question remains whether such small percentages would have sufficed to make out a violation if the number of competitors in the market had not significantly declined or if the combined market shares of the leading companies had not increased. The head of the Antitrust Division apparently is not prepared to go that far. Shortly after Von's was handed down, Professor Turner, in an interview with the press, stated that the Government would proceed against a horizontal acquisition involving healthy competitors where each had a market share of approximately 4% if the industry involved was tending towards concentration.105 He did not elaborate on what he meant by concentration, but if he adheres to his prior writings,106 he certainly would not be content with a mere counting of noses.

The statistically oriented rules of Von's and Pabst do not, alone, tell the whole story of the Supreme Court's merger decisions of 1966. After all, market share percentages can be derived only after the geographic and product markets have been delineated. In Pabst and Grinnell,107 the Court addressed itself to these concepts as well, and the full import
of last Term's developments under Section 7 can be appreciated only in light of the opinions on the question of market definition.

The most hotly contested issue in *Pabst* was whether the State of Wisconsin, as well as the nation as a whole, constituted a relevant geographic market, for in that State the combined share of the two brewers was 24\%—a figure in the area of presumptive illegality under *Philadelphia National Bank*. Mr. Justice Black adopted this market, but in the process appears to have stripped the geographic market inquiry of much of its significance. The Court's opinion does not refer to a single fact in support of its conclusion in this regard. This was no oversight. The majority goes out of its way to deprecate the importance of geographic market definition in Section 7 cases.

Again, Mr. Justice Black's opinion stems from an unsupported major premise: "Congress did not seem to be troubled about the exact spot competition might be lessened; it simply intended to outlaw mergers which threatened competition in any or all parts of the country." Thus, the Court held that, in a Section 7 case, it is enough for the Government to "prove the merger may have a substantial anticompetitive effect somewhere in the United States—'in any section' of the United States."'

In other words, the Court ruled that in establishing the geographic area within which the effect of a merger is to be measured, it is no longer necessary to look to the facts in order to define an economically meaningful market entity. In Mr. Justice Black's words, the market need not be delineated "by metes and bounds as a surveyor would lay off a plot of ground." The Justice goes on to tell us that any "section of the country" means any spot in the United States where competition might be lessened—the legislative history to the contrary notwithstanding.

Ironically enough, the Government in *Pabst* did not seek the sweeping victory it obtained. The Solicitor General's brief made a convincing

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[109] Id. at 549.
[110] Ibid. (Emphasis by the Court.)
[111] Ibid.
[112] "Certainly the failure of the Government to prove by an army of expert witnesses what constitutes a relevant 'economic' or 'geographic' market is not an adequate ground on which to dismiss a § 7 case." Ibid.
[113] "The deletion of the word 'community' in the original Act's description of the relevant geographic market is another illustration of Congress' desire to indicate that its concern was with the adverse effects of a given merger on competition only in an economically significant 'section' of the country." Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962). (Emphasis added.) See the Court's summary of the relevant legislative history, id. at 320 n.35.
case for the proposition that, as a matter of economic reality, Wisconsin was an appropriate geographic market. This persuasive evidence is summarized in Mr. Justice Harlan's concurrence. The disturbing and significant feature of *Pabst* is that Mr. Justice Black does not even consider such evidence.

The *Pabst* approach to the geographic market issue is in sharp contrast to *Philadelphia National Bank*, where, whatever one may think of the result, the Court took great pains to grapple with the issue. In *Pabst*, the question is treated cavalierly with the back of the hand. As Justice Harlan states, the statutory phrase, “in any section of the country,” has been emasculated.

The same disinterest in economic realities appears with regard to the definition of the relevant product market. As I have previously noted, *Alcoa-Rome* and *Continental Can* made clear that the Court was willing to manipulate product markets to facilitate anti-merger enforcement. This process reached its zenith in Mr. Justice Douglas' opinion in *Grinnell*, which, although a monopoly decision, is equally pertinent to the product market issue in merger cases.

Each of the defendants in *Grinnell* was engaged in supplying fire, burglary or other kinds of property protection, all with a hook-up to a central station. The defendants' protection was “accredited” by insurance carriers, with the result that insurance rates were lower for their customers. In ascribing a monopoly to the defendants, the Supreme Court measured their market share, not in terms of the business of fire protection only, or burglary protection only, or protection against other calamities, or all of these together. The measure was not even the business of furnishing these services with a hook-up to a central location. Instead, the market was held to be the business of supplying fire and other protection (all lumped together) from a central station and then, only when accredited by insurance companies—a market which, in the dissenters' words the defendants'
business “fits neatly”\textsuperscript{124} and “comes close to filling.”\textsuperscript{122} As Mr. Justice Fortas’ dissent notes, it is simple to find unlawful market power if the Court has “tailored the market to the dimensions of the defendants”\textsuperscript{120} and utilizes a “strange, red-haired, bearded, one-eyed man-with-a-limp classification” of the relevant market.\textsuperscript{127}

When the Von’s-Pabst numbers game is added to the endless market possibilities sanctioned by Pabst and Grinnell, the Court’s rules on horizontal mergers appear to provide the enforcement agencies with a vast armory of weapons to attack horizontal mergers. Now that the Court has spoken, the remaining question relates to the manner in which the enforcement officials wield this enormous power. Having regard for the number of mergers occurring each year,\textsuperscript{128} selective enforcement becomes inevitable; there is plainly not enough government manpower to proceed against every merger falling within the ambit of Von’s and Pabst with their new anti-concentration premise. We can only hope that the Antitrust Division and the Federal Trade Commission will exercise their awesome administrative discretion with prudence and objectivity. Blank checks have a habit of bouncing back.

On the policy level, the opinions unfortunately are singularly unilluminating. We are not told how the economy will be strengthened, the public interest promoted or the cause of antitrust advanced by the artificial definition of markets and the conversion of Section 7 from a prohibition of anticompetitive mergers into a ban on concentration. Yet, after all, this is the basic issue. If mergers truly have anticompetitive implications, they can be readily forbidden under the carefully framed rules of Brown Shoe. When those rules are by-passed, one can only assume, as the dissents fully document, that the challenged mergers were not likely to impair competition in any properly defined market. What then is the policy basis for preventing such mergers? To me it is not enough to mouth such high-sounding generalities as concentration and the protection of small business. I believe we are

\[\text{\textsuperscript{124.} Id. at 587.}\]
\[\text{\textsuperscript{125.} Ibid.}\]
\[\text{\textsuperscript{126.} Id. at 590.}\]
\[\text{\textsuperscript{127.} Id. at 591.}\]
entitled to a bill of policy particulars so that the Court's inarticulate premises can be openly debated.

IV. Monopolization

Most Sherman Act litigation arises under Section 1, with a Section 2 charge thrown in as a mere make-weight. The precise relationship between the two sections has always been one of antitrust's major perplexities. In Standard Oil of New Jersey, Chief Justice White treated them as essentially synonymous, both being aimed at unreasonable restraints of trade, but with Section 2 having a somewhat broader reach, since a restraint not yet undue might be challenged as an attempt to monopolize. The more conventional approach, both in the decided cases and in the literature, has been to regard Section 1 as requiring a lesser degree of proof than Section 2, since a restraint can be unlawful in the absence of monopoly power, whereas the existence of undue market domination is integral to the offense of monopolization.

Unlike its wealth of learning on restraint of trade, the common law provided little illumination as to the meaning and scope of monopoly. Pure monopoly cases are extremely rare, and it took many years of
administration before the rules governing the various Section 2 offenses crystallized.\textsuperscript{149} The past Term is quite unique in that the ambit of our monopoly principles was explored in two of the Court's rulings.

The first of these was \textit{Walker Process};\textsuperscript{141} in which the narrow issue was whether Section 2 may be violated by the maintenance and enforcement of a fraudulently procured patent. The facts were these: Food Machinery had obtained a patent for knee-action swing diffusers used in aeration equipment for sewage treatment systems, and brought an action against Walker, charging infringement.\textsuperscript{142} Walker denied the infringement, sought a declaratory judgment that the patent was invalid, and counterclaimed for treble damages under Section 4 of the Clayton Act,\textsuperscript{143} contending that Food Machinery had fraudulently obtained and maintained its patent and, by so doing, had been guilty of monopolization.\textsuperscript{144} The alleged fraud was in the patentee's having misrepresented to the Patent Office that its invention had not been in public use for more than one year prior to the patent application when, in fact, Food Machinery itself had been party to such prior use.\textsuperscript{145}

The District Court\textsuperscript{146} dismissed the counterclaim and the Seventh Circuit\textsuperscript{147} affirmed, both courts ruling that the remedy for fraud on the Patent Office is a Government suit to cancel the patent, or a defense to an infringement action, but that such fraud could not be used affirmatively as the basis of an antitrust claim. On certiorari, the Supreme Court unanimously reversed.\textsuperscript{148}

Mr. Justice Clark, for the Court, first rejects the contention that an antitrust claim cannot be predicated upon a fraud on the Patent

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{142.}] \textit{Id.} at 173.
\item[\textsuperscript{144.}] 382 U.S. at 174.
\item[\textsuperscript{145.}] \textit{Id.} at 173. Under the statutory scheme, the applicant may not be granted a patent if, among other things, "the invention was patented or described in a printed publication in this or a foreign country or in public use or in sale in this country, more than one year prior to the date of the application for patent in the United States." 35 U.S.C. \textsection{} 102(b) (1964).
\item[\textsuperscript{146.}] The opinion of the District Court is unreported.
\item[\textsuperscript{147.}] Food Mach. & Chem. Corp. v. Walker Process Equip., Inc., 335 F.2d 315 (7th Cir. 1964).
\item[\textsuperscript{148.}] In a separate concurring opinion, Mr. Justice Harlan emphasized that the Court's decision applied only to cases of deliberate fraud and should not be read to authorize the use of private antitrust suits to "reach monopolies practiced under patents that for one reason or another may turn out to be voidable under one or more of the numerous technicalities attending the issuance of a patent." 382 U.S. at 180.
\end{enumerate}
\end{footnotesize}
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Office. But he makes clear that a violation of Section 2 requires more than proof of fraud. "To establish monopolization . . . it [is] necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved." In other words, the scope of the patent is not necessarily co-extensive with the relevant product market; and the offense is not made out unless the threshold element of monopoly power, in a meaningful economic sense, is proved. Accordingly, the case was remanded for a hearing on the merits.

The Court's reasoning in Walker Process is eminently sound. The monopoly resulting from a valid patent is, of course, immune from antitrust liability emanating, as it does, from the Government pursuant to explicit constitutional authority. Improper use of the patent may create liability, but the grant itself is unassailable. If, however, the patent is obtained through willful fraud, the grant is tainted and the patentee has placed himself through misrepresentation in a position to exclude others from a market which by right should be open to all. Such an unwarranted market position having been secured, the question becomes: What is the appropriate remedy? When the patent is either co-extensive with an economically realistic product market or commands a position of dominance within such a market, Section 2's prohibition of monopolization is applicable, as the Court holds. Per contra, when the patent does not confer upon its owner a dominant position in a meaningful market, Section 2 does not come into play, the proper remedy being cancellation of the patent or a defense against infringement; but antitrust may not be invoked because there is no contract, combination or conspiracy in restraint of trade and there is no monopolization, there being no monopoly power.

The Court's other Section 2 decision of the past term was Grinnell. There the Government brought a civil action under Section 2 charging monopolization of the accredited central station service protection industry by four affiliated firms enjoying 87% of the market as so defined. Over a substantial period of time, the defendants had acquired 30 competing companies and, at the time the complaint

[149.] Id. at 175.
[150.] Id. at 177.
[151.] U.S. Const. art. I, § 8, cl. 3.
[153.] Grinnell (which manufactures plumbing supplies and fire sprinkler systems) owned 76% of the stock of American District Telegraph Co. (which provides burglary and fire protection), 89% of the stock of Automatic Fire Alarm Co. of Delaware (which supplies fire protection), and 100% of the stock of Holmes Electric Protective Co. (providing burglary services). 384 U.S. at 566.
[154.] Ibid.
was filed, had a purchase offer outstanding for another. The defendant companies also entered into restrictive agreements with each other limiting the aspects of the business in which each would engage. Moreover, they reduced rates in competitive areas while renewing contracts at increased rates in areas in which they had a substantial monopoly position.

In holding that Section 2 was violated on these facts, Mr. Justice Douglas provided the following restatement of the law of monopolization:

The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

It will be noted that, under this formulation, the primary requisite to a finding of monopolization is the existence of monopoly power. Mr. Justice Douglas does not pause to define this crucial term, but there is no suggestion in the opinion of any departure from the traditional definition of monopoly power as the “power to control prices or exclude competition.” Since the existence or absence of such power cannot be determined in the abstract, it is essential to measure the defendant's position within a defined market.

But a finding of monopoly power does not mark the end of the inquiry. There must also be a willful acquisition or maintenance of that power. This language marks the Court's current interpretation of the teaching of Alcoa and United Shoe Machinery that not all monopolies are unlawful. Justice Douglas' succinct synthesis does not catalogue the myriad of facts which may constitute willful acquisition or maintenance. He does, of course, distinguish the unlawful conduct from "growth or development as a consequence of a superior product, business acumen, or historic accident." It is noteworthy that the metaphor of power thrust upon the monopolist is not indulged. That

[155.] Id. at 568.  
[156.] Id. at 568-70.  
[157.] Id. at 570.  
[158.] Id. at 570-71.  
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correct had produced great conceptual difficulty and did not begin to indicate the full scope of the exemption of lawful monopolies from Section 2's strictures. The difficulty with Grinnell arises not from its legal principles but from its market determination. Once the Court defined the market as accredited central station service protection, the case was over. The defendants controlled 87% of that market, and had willfully acquired and maintained that position.

In the four years that have elapsed since Brown Shoe was decided, we have become accustomed to the Court's constructing markets broadly to endow a conglomerate merger with horizontality. Likewise, we are no longer surprised to find the Court fragmenting a market both as to product or geographical scope when this magnifies market shares and enlarges the dimension of the acquisition.

I have frequently stated that the delineation of the relevant market is an economic matter and must correspond to business reality. This is especially imperative under Section 2, which is a criminal statute. To stigmatize an enterprise as monopolistic is fraught with serious consequences, of which the drastic remedy of divestiture is but one. Virtually all of the restraints which have been upheld under the rule of reason, both at common law and under the antitrust statutes, are uniformly condemned when the defendant possesses monopoly power. Thus, a seller with monopoly power may not enter into exclusive representation arrangements whereby he contracts not to sell to more than one buyer in a particular locality—a restraint which, absent monopoly, has been traditionally upheld as reasonable. Similarly, exclusive dealing arrangements at common law, under the Sherman Act and under Section 3 of the Clayton Act, have been con-

[163.] Ibid. See also Handler, Annual Antitrust Review, 11 THE RECORD 367, 394-95 (1956).
[165.] E.g., Handler & Robinson, The Supreme Court vs. Corporate Mergers, Fortune, January, 1965, p. 164. The nature and extent of a market cannot vary depending on whether the case arises under the Clayton or Sherman Act. One would, therefore, expect that the Court, as it did in Grinnell, would treat as applicable in a Section 2 Sherman Act litigation its market precedents in Section 7 Clayton Act cases. But the application of these precedents to the facts of Grinnell lays bare their essential unsoundness.
[168.] See Handler, ANTITRUST IN PERSPECTIVE ch. 2 (1957).
[169.] See cases cited in Robinson, supra note 166, at 275 n.103.
demned when entered into by a firm dominating the relevant market. The same rule of illegality applies to territorial and customer restrictions imposed on buyers to foster the orderly marketing of the seller's goods, when the seller is a monopolist.\footnote{174}

In view of these severe side effects of a finding of monopoly, the adoption of a tailor-made definition of the market may well produce grave injustice. If the courts hold as a matter of law that there are no competitors when in fact there are, a defendant may be placed at a serious competitive disadvantage and competition throttled rather than preserved. Our modern economy has developed along lines which reward the firm able to differentiate its product successfully from that of its competitors. If product markets may be fashioned to fit the defendant's peculiar marketing patterns, almost any producer or vendor of a non-fungible product may become vulnerable to the charge of monopoly. This would inevitably depreciate the entire monopoly concept and introduce further confusion into our antitrust jurisprudence.

I would like to believe that, as precedent, \textit{Grinnell} is nothing more than a misapplication of perfectly valid principles to the \textit{sui generis} facts of that case and that it does not portend a segmentation of markets to the point where undue market power disappears as an ingredient of a Section 2 offense.

V. Preliminary Injunctions and the FTC

The Supreme Court's propensity to decide antitrust cases on broad policy grounds reached its high-water mark in \textit{Dean Foods.}\footnote{172} Mr. Justice Clark's opinion for a five-justice majority\footnote{173} confers upon the Federal Trade Commission the right to seek a preliminary injunction from a court of appeals in merger cases. Mr. Justice Fortas' masterly dissent\footnote{174} demonstrates that the ruling is not only bad law, but bad administration and bad policy as well.

Dean, the third or fourth largest distributor of packaged milk in the Chicago area, agreed to acquire the assets of Bowman, which ranked second, the merged company constituting a 23\% market factor.\footnote{175} The plan was for Dean to acquire fixed assets, receivables and good will,
with Bowman retaining cash, securities and real estate investments for
distribution to its stockholders.\textsuperscript{7}\textsuperscript{7} Dean then planned to dispose of
most of Bowman’s retail milk routes, certain of its plants and equip-
ment, and to consolodate the remaining assets.\textsuperscript{7}\textsuperscript{7}

The Federal Trade Commission issued a complaint alleging a viola-
tion of Section 7 of the Clayton Act. Because the Commission has no
statutory authority to issue preliminary injunctions, and the district
courts’ jurisdiction is limited to cases brought by either the United
States or private parties,\textsuperscript{178} the Commission petitioned the Court of
Appeals for the Seventh Circuit under the All Writs Act\textsuperscript{179} for a
preliminary injunction to maintain the status quo pending the outcome
of the Commission proceeding. The Court of Appeals dismissed the
petition, ruling that the Commission “did not have authority to in-
stitute this proceeding.”\textsuperscript{180} The Supreme Court reversed and remanded
for the Court of Appeals to decide on the merits whether an injunction
should issue.

The All Writs Act provides that federal courts may “issue all writs
necessary or appropriate in aid of their respective jurisdictions and
agreeable to the usages and principles of law.”\textsuperscript{181} As applicable to the
courts of appeals, the statute has generally been construed to permit the
issuance of a writ, usually mandamus, to protect the court’s appellate
jurisdiction.\textsuperscript{182} Mr. Justice Clark held that this statute authorized the
granting of preliminary relief to the Commission in merger cases when
an impending sale or commingling of assets threatens its ability to
devise an effective divestiture remedy after decision on the merits. This
result was reached in spite of the fact that the Commission had, for
many years, sought authority in Congress either to issue preliminary
injunctions itself or to petition for such relief in the district courts,
and that Congress had repeatedly refused to confer such authoriza-
tion.\textsuperscript{183} To Mr. Justice Clark, this history had “no relevance what-

\textsuperscript{176.} Id. at 599.
\textsuperscript{177.} Ibid.
\textsuperscript{179.} 28 U.S.C. § 1651(a) (1964): “The Supreme Court and all courts established by Act
of Congress may issue all writs necessary or appropriate in aid of their respective jurisdic-
tions and agreeable to the usages and principles of law.” See generally 6 Moore, FEDERAL
PRACTICE ¶ 54.10 (2d ed. 1965).
\textsuperscript{180.} FTC v. Dean Foods Co., 356 F.2d 481, 482 (7th Cir. 1966).
\textsuperscript{181.} See note 179 supra.
\textsuperscript{182.} See La Buy v. Howes Leather Co., 352 U.S. 249 (1957); Roche v. Evaporated Milk
Ass’n, 319 U.S. 21 (1943); McClellan v. Garland, 217 U.S. 268 (1910). See generally 6 Moore,
FEDERAL PRACTICE ¶ 54.10(4) (2d ed. 1965).
\textsuperscript{183.} The Commission’s persistent efforts to obtain legislation vesting it with standing
to seek preliminary injunctive relief began in early 1956, following two unreported opinions
ever."184 To deny the courts of appeals power to grant preliminary relief under the All Writs Act would "stultify congressional purpose."185

The majority opinion, to the dissenters, flies in the face of the careful enforcement scheme set forth in the Clayton Act;186 it disregards the limited construction given the All Writs Act in prior decisions;187 it perverts the proper functioning of appellate courts;188 and it disregards ten years of legislative history.189 Nevertheless, the precise holding of the case is narrower than might be supposed.

Since the Commission's only route to a preliminary injunction is via the All Writs Act, it faces an initial jurisdictional hurdle not confronted by the Department of Justice when it seeks preliminary relief in a district court. Acts which do not threaten to destroy present or prospective jurisdiction are beyond the scope of the statute. Accordingly, unless the Commission can show, as it did in Dean Foods, that an ultimate order of divestiture or other relief would be ineffectual, the courts of appeals would have no jurisdiction to issue a preliminary injunction, no matter how clear it may be that a merger violated Section 7. For example, in a case involving a pure conglomerate acquisition where the acquired company is to be maintained as a separate entity with no commingling of assets, a threat to the court of appeals' appellate jurisdiction could not be shown, and an injunction therefore would not issue.

Furthermore, even if the court of appeals is satisfied on the jurisdictional necessity for an injunction, the inquiry is not over. The court must still apply the traditional standards of equity and antitrust to decide whether the injunction should issue. The Commission must prove a "reasonable probability" that the merger is unlawful.190 The reaching conclusions contrary to Dean Foods, FTC v. Farm Journal, Inc. (3d Cir. 1955); In re A. G. Spalding & Bros., Inc. (1st Cir. 1955). Subsequently, the Second Circuit, in FTC v. International Paper Co., 241 F.2d 372, 373 (1956), also held that the All Writs Act provided the Commission with "no authority to seek an injunction." During the ensuing decade, 37 bills of the Commission were introduced in Congress. None of these bills was enacted. See generally Appendix to Opinion of Mr. Justice Fortas, 384 U.S. at 636-40.

[184.] Id. at 611.
[185.] Id. at 606.
[186.] Id. at 615-22.
[187.] Id. at 622-30.
[188.] Id. at 630-36.
[189.] Id. at 613, 619. See also Appendix to Opinion of Mr. Justice Fortas, id. at 636-40.
court must balance the equities.\footnote{It must weigh the possible injury to the public against the harm to the merging parties and consider the availability of less drastic relief, such as an order requiring separate functioning of the acquired company, pendente lite. Only when the balance tips decidedly towards the Commission may an injunction be forthcoming.} It must weigh the possible injury to the public against the merging parties and consider the availability of less drastic relief, such as an order requiring separate functioning of the acquired company, pendente lite. Only when the balance tips decidedly towards the Commission may an injunction be forthcoming.

If my analysis is correct, the practical effect of the decision may be quite limited. This was the conclusion reached by the Solicitor General in his brief on behalf of the Commission:

[T]he courts of appeals will not be inundated by applications of the Commission. Such applications will be made sparingly, be-
cause many merger cases can proceed without preliminary relief and because the Commission is mindful that "all writs" jurisdiction is an extraordinary power to be invoked only in emergency situations.195

On the other hand, experience has taught that when the Government rests its arguments on a narrow ground of decision, once a favorable result is obtained, it is used in later cases to support broader contentions.196 If that history is repeated, applications to the courts of appeals for preliminary relief may become routine.

The important feature of Dean Foods to me is that the Court, having essayed the role of policy making instead of confining itself to matters of statutory construction, legislative history and precedent, has come forth with bad policy. Reasonable men may differ as to whether the Commission itself should be empowered to apply to the district courts for preliminary relief instead of having to enlist the aid of the Department of Justice.197 But what justification is there for saddling already overburdened appellate courts with responsibilities that they are ill-equipped to discharge and which can be better performed by trial judges? The issues on petitions for injunctions in merger cases are quite complex; to do justice to the parties a full dress evidentiary hearing may be necessary;198 the hearing is in reality a trial and may require several days as a minimum. Does it make sense to convert appellate into trial courts and to have three judges do the work that may more efficiently be done by one?

If the courts of appeals afford the parties a real hearing, their appellate dockets must inevitably suffer; if injunctions automatically issue as a matter of course, the bitter lessons of the evils of trial by affidavit and rule by injunction will have been ignored.

The Supreme Court had no avenue open to it other than the All Writs Act by which to give the Commission the power it sought. Unlike a legislative body, it could not vest the district courts with power to grant injunctions under the usages and principles of equity. This only serves to illustrate the limited capacity of courts to fashion policy and the unsatisfactory results which obtain when those limits are

[196.] See the progression of the position of the Government in merger cases since Brown Shoe.
[197.] Compare the majority opinion in Dean Foods, 384 U.S. at 605-07, with the dissenting opinion, id. at 615-22.
[198.] See id. at 630-35 (dissenting opinion).
breached. It is well to remember that the judiciary is not the only branch of government capable of governing.\textsuperscript{109}

VI. Intra-corporate Conspiracy

In a little noted decision last year,\textsuperscript{200} the Federal Trade Commission resurrected one of the weirdest concepts ever to rear its head in antitrust jurisprudence—the doctrine of intra-corporate conspiracy.

Under a consent order entered in 1954, Schenley Industries had been prohibited from conspiring, combining or even consulting with any of its subsidiaries or affiliated companies with respect to prices and related matters.\textsuperscript{201} The order had been agreed to in the wake of the Yellow Cab,\textsuperscript{202} Timken\textsuperscript{203} and Kiefer-Stewart\textsuperscript{204} cases at a time when our antitrust enforcement agencies were singing Mr. Justice Black’s spine-chilling refrain: “The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws.”\textsuperscript{205} Having champed under this strait jacket for more than a decade, Schenley decided to do something about it. What it did was to petition the Commission for a modification of the order, claiming that since its entry the law had changed and hence its restrictions on intra-corporate activity were no longer warranted.

The Commission rejected Schenley’s application out of hand. In a terse statement, it asserted that it did “not agree with [Schenley] that there has been a change in law in this area of intracorporate conspiracy nor that the doctrine has been discredited over the years since 1951.”\textsuperscript{206}

In one sense, the Commission was right. The cases it cited are still on the books, and the Supreme Court has not had occasion to reconsider their sweeping language. But, as a practical matter, in the past decade the intra-corporate conspiracy doctrine had fallen into disuse. The Department of Justice for some years has entered into numerous consent decrees which exclude intra-corporate activities from their injunctive prohibitions;\textsuperscript{207} the Commission itself, apart from the consent

\begin{itemize}
  \item \textsuperscript{[200.]} Schenley Industries Inc., TRADE REG. REP. ¶ 17353, at 22251 (Oct. 25, 1965).
  \item \textsuperscript{[201.]} Schenley Industries, Inc., 50 F.T.C. 747 (1954).
  \item \textsuperscript{[202.]} United States v. Yellow Cab Co., 332 U.S. 218 (1947).
  \item \textsuperscript{[203.]} Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).
  \item \textsuperscript{[204.]} Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951).
  \item \textsuperscript{[205.]} Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951).
  \item \textsuperscript{[206.]} TRADE REG. REP. ¶ 17353, at 22223 (Oct. 25, 1965).
  \item \textsuperscript{[207.]} Two major forms of exclusionary clauses have been employed. The first reads: “For the purpose of this Final Judgment, defendant and its subsidiaries, officers, directors, agents, servants and employees or any of them, shall be deemed to be one person.” This
orders against the major distillers, has not attacked intra-enterprise arrangements; and the present head of the Antitrust Division, in August of 1965, stated that:

We should not press to the limits afforded by past decisions wherever on present evaluation those decisions appear to have gone too far. We should not, for example, attempt to push the intra-corporate conspiracy doctrine as far as a free-wheeling interpretation of the Timken case might suggest.208

Against this background, the Commission’s ruling in Schenley came as an unpleasant surprise.

What do we mean when we speak of intra-corporate conspiracy? Simply stated, this doctrine puts agreements eliminating competition among the member companies of a corporate family on the same plane and subject to the same antitrust rules as agreements among legally independent and separately owned and controlled businesses. In other words, under this doctrine it is just as unlawful for two subsidiaries of Schenley to fix the prices of I. W. Harper and Dewar’s White Label as it is for Schenley and Seagram to enter into price agreements with each other.

There is a structural difference of great significance between the first and second sections of the Sherman Law. Section 1 forbids contracts, combinations and conspiracies in restraint of trade; it does not prohibit restraints of trade as such. Section 2, on the other hand, outlaws monopolization as well as combinations and conspiracies to monopolize.

Thus Section 1, unlike Section 2, requires a plurality of actors for its violation; it takes at least two people to contract, to combine or to
conspire. Under Section 2, however, a single person, by himself, can monopolize or attempt to monopolize. It is only when the Section 2 charge is conspiracy to monopolize that there must be more than one person involved in the wrongdoing.

It has long been the law that when a company monopolizes an industry, the directors who authorize or participate in the challenged corporate action may be guilty of conspiracy with the corporation and each other to monopolize in violation of Section 2.203 There is no conceptual difficulty in such an idea, and nothing strange about holding directors liable for conspiring to commit the crime which the corporation can itself perpetrate alone. And if the monopoly scheme is carried out by a group of affiliated companies, there manifestly is no difficulty in charging the group with the collective crime of monopolization or with conspiracy to monopolize.210

Under Section 1, however, where the corporation by itself is incapable of violating the statute, serious theoretical and practical problems arise when the members of the same corporate family are proceeded against.

Let us consider a few examples.

Is it price-fixing for the officers and directors of a company to consult with one another on the prices to be charged for the products the company makes? Are they guilty of a conspiracy to curtail production when they order a shutdown of their facilities when demand slackens? Are they illegally dividing markets when they establish branch sales offices in various parts of the country?

If the plurality of actors demanded by Section 1 were satisfied by the officers and directors of a single company, then no corporate action would be immune from antitrust attack. Even an individual proprietorship could not transact any business without violating the antitrust laws.

Needless to say, not even the most extreme partisan of antitrust has ever suggested so bizarre a rule.

We can thus start with the postulate that the internal decisions and actions of a single corporation, though formulated or executed by more than one person, are not subject to the prohibitions of Section 1. There must be a concert of action with some other legal entity.

Is that concert to be found in the relations between a parent and its subsidiaries or among affiliated companies?

Let us suppose that a corporation markets several brands through several subsidiaries. Or that its various functions such as production, selling and financing are carried on by separate subsidiaries. Or, finally, that it operates regionally through separate selling subsidiaries.

If the parent company sets the subsidiaries' prices, or if it instructs them not to deal with a particular customer or limits them to defined territories, are the constituent companies engaged in price-fixing, boycotting or dividing markets?

Suppose the officers of the parent confer from time to time with the executives of the subsidiaries on prices and terms and conditions of sale. Are such normal consultations evidence of an unlawful combination?

It is fatuous to require a corporation to compete with itself. There is nothing inherently anti-competitive in the use of subsidiaries. It is, of course, true that there are technical grounds for applying the conspiracy concept literally to the acts of related companies. Each corporation is a separate legal entity, so that joint action of two or more partakes of the essential legal characteristics of conspiracy. But antitrust is concerned with substance and not mere form.

What social objective is attained by compelling subsidiaries to compete with one another? I can see none. The Sherman Act properly requires that the external relations of any business be competitive and not collusive. But to demand internal competition within a business unit as well is to invite chaos without promoting the public welfare. Moreover, there can be no rational validity to a doctrine which can be easily circumvented by consolidating all affiliated and subsidiary companies into one corporation.

Is there any reason to assume that, if a family of companies is treated as a single unit, the door will be opened wide for antitrust violation? I see none. If the corporate group possesses or exercises monopoly power, Section 2 will close the door tightly whether the group be treated as one or several entities. Similarly, if the objective of the intra-corporate conspiracy doctrine is to prevent unified stock ownership in companies which historically were competitive and independent, an effective tool is available in the antimerger provisions of Section 7 of the Clayton Act and there is no need to stretch the conspiracy concept to the breaking point.

In sum, there was no rational basis or any pressing enforcement need for the intra-corporate conspiracy doctrine when first announced and there is no such basis or need today. The plain fact is that intra-corporate conspiracy makes absolutely no sense, legal or economic, and should be flatly repudiated.
VII. Less Restrictive Alternatives

In a recent address, the Assistant Attorney General in charge of the Antitrust Division proposed a new yardstick for measuring antitrust legality. Referring specifically to vertical territorial restrictions, Professor Turner suggested that illegality should hinge on whether “the agreements [are] more restrictive than is necessary to achieve the legitimate purposes which they are claimed to serve.”

A restraint should be upheld only if no less restrictive alternative is available. This test may appear, at first blush, to be plausible and unobjectionable; on analysis, it strips the rule of reason of any genuine content.

A vertical territorial restriction is an agreement whereby the seller restricts his dealers with regard to the geographical areas in which they may resell his product. It serves several vital functions in the distribution of goods. To obtain optimum sales coverage, a manufacturer must secure a network of dealers who are willing and able to provide effective promotion, advertising and service. It is not easy to find dealers who will assume the risks inherent in distribution without some guarantee that their efforts will bear fruit, particularly where substantial pre-sale effort is necessary or after-sale service is important in maintaining the product’s good will. Territorial restrictions provide such assurances by protecting the dealer from intrabrand competition, thus leaving him free to channel his energies towards the more vital interbrand competitive struggle.

Moreover, if the seller desires to achieve maximum market penetration, he must encourage his dealers to exploit the potential of their territories to the fullest possible extent. By overextending himself into neighboring territories, a dealer may spread himself too thin and neglect his duties in the home area. Furthermore, the temptation to steal the easy sale from his neighboring dealer—“skimming the cream”—may sacrifice the more difficult sale at home to the competing brand and, even more important, the neighboring dealer who needs some “cream” to sustain his business may be forced to drop the product as unprofitable. This is particularly so when the product requires preselling since the local dealer may not only lose his expected profit, but incur a loss. And when after-sale service is important, the local dealer

[212.] The following material is derived from a statement by the author delivered before the Small Business Administration on March 11, 1966 and reprinted at 11 ANTITRUST BULL. 417 (1966).
may not do as good a job of servicing a product sold by someone else, the net result being customer dissatisfaction.

Despite all of these factors, Professor Turner concludes that, except where a new firm or a new product is involved, "there are ample alternative devices, all less restrictive than territorial restraints, whereby a manufacturer can attempt to achieve an efficient, aggressive marketing system," and accordingly "that territorial restrictions are [not] reasonably necessary to any legitimate purpose. . ." Although the Assistant Attorney General does not go into specifics, the less restrictive alternatives he has in mind are probably primary responsibility clauses and profit pass-overs.

There can, of course, be no doubt that such provisions are less restrictive than territorial restraints; but Professor Turner provides no evidence that they can successfully achieve the purposes sought by territorial restrictions. It apparently is enough for him that alternatives exist.

But what about the business man? Why should he be required to experiment with less restrictive (and possibly less effective and less practical) alternatives on pain of incurring severe antitrust liability? Why should he be second-guessed by economic theoreticians because he has elected to cope with his distribution problems in a business-like manner, selecting the arrangements which promise to be most effective from a business point of view?

The fundamental fallacy in this approach is that, no matter what the restraint, there will almost always be a less restrictive alternative, and indeed, further alternatives to each alternative ad infinitum. Since Professor Turner has suggested that his rule should apply to antitrust in general as well as in the area of vertical restraints, a few examples of its unworkability in other areas will serve to illustrate my point.

How would the Turner thesis operate in the field of industrial mergers? There is obviously a less restrictive alternative to every merger; the acquiring company can expand internally. Does this mean

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[213.] Turner, supra note 211, at 6.
[214.] Id. at 4-5.
[215.] Primary responsibility clauses authorize the assignment to dealers of territories in which they will be primarily responsible for sales and generally permit termination of the dealerships for failure to adequately represent the sellers in those territories. See Paragraph IV(D) of the decree in United States v. Philco Corp., 1956 TRADE C. 68409, at 71753 (E.D. Pa. 1956).
[216.] Profit pass-overs provide for a sharing of profits on sales made by dealers outside their own territories in order to compensate the dealers in whose territory the sales have been made for the loss of those sales. See White Motor Co. v. United States, 372 U.S. 253, 270-71 (1963) (concurring opinion of Brennan, J.).
that whenever the acquiring company possesses sufficient capital to expand, the merger path is closed to it? Suppose a manufacturer seeks to acquire distribution outlets by acquisition. Is such vertical forward integration to be forbidden because a less restrictive alternative is available—a requirements contract with the company to be acquired? But what about the requirements contract itself? Isn't there a less restrictive alternative—namely, a partial requirements contract? Suppose the contract requires the buyer to buy 80% of his needs. Will the seller be told that he has violated the law because a 40% agreement was possible? How about 25%? Or take a covenant not to compete. It is always possible to cut down the spatial and temporal scope of the restriction until it becomes meaningless. If we must search endlessly for less restrictive alternatives, inevitably we must end up with no restraint at all—which is another way of saying that there is to be no rule of reason in antitrust any more.

I am not suggesting for a moment that Professor Turner's question about the reasonable necessity of a restraint is not a proper question or that the existence of available alternatives is not a relevant factor. My objections are two-fold: a restraint should not be condemned, in the abstract, merely because it is theoretically possible to conjure up less restrictive alternatives; the legality of a restraint must be related to the basic antitrust goal of preserving competition and preventing monopoly. If the restraint promotes and does not suppress competition, it should be upheld under the rule of reason despite the availability of less restrictive alternatives. This was the wise counsel of Justice Brandeis217 to which we should adhere.

VIII. Conclusion

The central theme of Cardozo's writings was that the judge in his creative role of lawmaker must strike a delicate balance between stability and change, order and progress. Under this view, judicial policy-making was to be limited to interstitial changes. In antitrust, a less modest conception of the scope of judicial law making has been in vogue in recent years, particularly in the cases I have reviewed in this paper. It must, of course, be recognized that the judicial process inescapably involves a choice of policy. What differentiates the present situation is the magnitude of the policy decisions. Perhaps later Courts may revert to a more circumscribed view of the proper role of judges.

in the policy area, but no such retreat is likely on the part of the present Court. The vital question, therefore, is how can the bar and the academic community best assist the courts in making good policy? As Justice Harlan has put it: "Constructive criticism of judicial decisions, as with other aspects of the work of the courts, is a good thing for the judiciary and for healthy development of the law. Only a warped judicial outlook could think otherwise." Continuing, he writes: "Much of the useful criticism of judicial decisions, whether from the standpoint of substance or professional quality, now comes from the law schools. I believe it would be of great value were their output to be supplemented on an organized basis by bar critiques bringing to bear the points of view of active practitioners on important cases."

But enlightened criticism is not enough. If the bar is to render maximum assistance to the courts, consonant with the noble traditions of our profession, the practitioner must be trained in preparing records and in making arguments which will enable the courts to decide policy questions wisely. Training future practitioners and judges in the delicate art of policy making will require revolutionary changes in both the curriculum and the teaching techniques of our various law schools. Along with these changes, I would hope that the courts would stop disguising their innovations by fictitiously ascribing them to the legislators, that they would with the fullest candor make their policy postulates explicit, and that they would welcome from counsel arguments touching upon the jugular policy issues.

[219.] Harlan, supra note 199, at 945.
[220.] Ibid.
[222.] See Address by the author before a Seminar on The Training of the Practitioner, Rutgers University School of Law, September 10, 1966.