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"Entrenchment" Under Section 7 of the Clayton Act: An Approach for Analyzing Conglomerate Mergers

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INTRODUCTION

While economists continue to debate whether the American economy is becoming significantly more concentrated,[1] there can be little doubt that the pace of corporate mergers and acquisitions is quickening. The number of corporate mergers and large acquisitions has increased each year since 1975, and the number of signifi-

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1. *See generally* OFFICE OF THE ASSISTANT SEC'Y FOR POLICY, U.S. DEP'T OF COMMERCE, 1 MERGERS AND ECONOMIC EFFICIENCY: PROCEEDINGS OF A WORKSHOP AND SUPPLEMENTARY PAPERS (1980) [hereinafter cited as MERGERS AND ECONOMIC EFFICIENCY]. Although opinion is divided, one highly regarded authority concludes that "[T]he long-run trend has clearly been one of increasing aggregate [asset and value added] concentration." F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 49 (2d ed. 1980) [hereinafter cited as SCHERER]. Relying on Federal Trade Commission data, Professor Scherer found that the 100 largest U.S. manufacturing corporations held 47% of domestic manufacturing assets in 1973, compared with 37% in 1947. Concentration in terms of value added by the 100 largest manufacturing concerns, though at a lower absolute level, rose even more dramatically during the same period, from 23% in 1947 to 33% in 1973. *Id.* at 48-49. "In 1976, according to FTC statistics, the 451 largest U.S. companies controlled 70% of the nation's manufacturing assets and earned 72% of the profits. In 1960, comparable concerns controlled only about half the manufacturing assets and earned only 59% of the profits. . . ." Taylor & Schorr, *Government May Abandon Fight to Stem Conglomerate Takeovers*, Wall St. J., Nov. 24, 1980, at 33, col. 4 [hereinafter cited as Taylor & Schorr]. The significance of these statistics may be mitigated by the substantial turnover over time in the identity of the 100 largest manufacturing concerns and the relatively small percentage of national income (26%) attributable to the manufacturing sector of the economy. *See* Weston, *Industrial Concentration, Mergers, and Growth: A Summary*, in MERGERS AND ECONOMIC EFFICIENCY, *supra* this note, at 38, 42-43 (1980). *See also* White, *The Merger Wave: Is it a Problem?*, Wall St. J., Dec. 11, 1981, at 28, col. 3 (Southwest ed.) [hereinafter cited as White].

cantly large acquisitions has been increasing as well.[2] Between 1978 and 1980, there were at least 34 corporate acquisitions involving more than one-half billion dollars,[3] and it is now almost commonplace to read about multi-billion dollar transactions.[4] The current merger wave predominantly involves conglomerate transactions.[5] Between seventy and eighty percent of recent acqui-

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2. BUREAU OF COMPETITION, FTC, STATISTICAL REPORT ON MERGERS AND ACQUISITIONS 1978 25, 119 (1980) [hereinafter cited as FTC 1978 REPORT]. There were 2,395 merger announcements in 1981. The total value of these transactions was a record $82.6 billion, almost double the previous record (set only in 1980) of $44.3 billion. *Mergers Climbed 27%, Prices Rose Nearly 20% in 1981, Surveys Find,* Wall St. J., Jan. 14, 1982, at 16, col. 3 (southwest ed.).

3. Taylor & Schorr, *supra* note 1.

4. Recent proposed transactions (some of which have not been consummated) include the following:

Acquiring Firm	Acquired Firm	Purchase Price
DuPont Co.	Conoco, Inc.	$ 7.5 billion[a]
Societe National Elf Aquitaine	Texas Gulf Inc.	$ 2.7 billion[b]
Standard Oil Co. of Ohio	Kennecott Corp.	$1.77. billion[c]
Fluor Corp.	St. Joe Minerals Corp.	$ 2.5 billion[d]
Nabisco Inc.	Standard Brands Inc.	$ 1.9 billion[e]
Exxon Corp.	Reliance Electric Co.	$ 1.2 billion[f]
Standard Oil Co. of California	Amax, Inc.	$ 3.9 billion[g]
Santa Fe Industries	Southern Pacific	$ 1.2 billion[h]
Shell Oil Co.	Belridge Oil Co.	$ 3.7 billion[i]
U.S. Steel Corp.	Marathon Oil Co.	$ 6.4 billion[j]
Connecticut General Corp.	INA Corp.	$ 4.3 billion[k]

[a] Wall St. J., July 15, 1981, at 3, col. 1. (A competing bid of $8.19 billion was made for Conoco by Mobil Corp., Wall St. J., July 27, 1981, at 3, col. 1.)
[b] Wall St. J., July 7, 1981, at 2, col. 2.
[c] Wall St. J., June 3, 1981, at 2, col. 2.
[d] Wall St. J., May 13, 1981, at 2, col. 1.
[e] Wall St. J., April 23, 1981, at 3, col. 1. (The dollar figure represents the combined market value of the common stock of the two merging concerns.)
[f] Wall St. J., March 23, 1981, at 14, col. 2. (The transaction was consummated in 1979.)
[g] Wall St. J., March 6, 1981, at 3, col. 1.
[h] Wall St. J., May 16, 1980, at 3, col. 1.
[i] NEWSWEEK, June 27, 1981, at 54.
[j] Wall St. J., Nov. 20, 1981, at 3, col. 1. (southwest ed.).
[k] Wall St. J., Nov. 10, 1981, at 3, col. 1. (southwest ed.). (The dollar figure represents the combined market value of the common stock of the two merging companies.)

5. Conglomerate mergers are those which are neither horizontal (between presently com-

sitions are classifiable as conglomerate, and the majority of these mergers are classifiable as "pure" conglomerate.[6]

The recent acceleration of conglomerate merger activity has generated serious questions regarding the adequacy of existing law to protect the public interests affected by such a trend.[7] The thesis of this article is that these interests may be reconciled fruitfully if the enforcement agencies and federal courts give renewed attention to the "entrenchment" theory, a theory tentatively explored in the mid-1960's as a means of appraising the anticompetitive effects of certain conglomerate mergers. The article traces the development of the entrenchment doctrine, explores its present boundaries, and examines the appropriateness of its broader application in the current economic climate.

The Need to Examine the Entrenchment Doctrine

Federal merger control policy is embodied in section 7 of the Clayton Act.[8] It is generally accepted that the passage of the origi-

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peting firms), nor vertical (between firms that maintain or might establish a supplier-customer relationship).

6. FTC 1978 Report, *supra* note 2, at 115. The Federal Trade Commission classifies conglomerate mergers into three subcategories. A "product extension" merger is one between two companies which "are functionally related in production and/or distribution but [which] sell products that do not compete directly with one another." A "market extension" merger is one between two companies which "manufacture the same products, but [which] sell them in different geographic markets." The third category, denominated by the FTC as "other," and frequently referred to as "pure" conglomerate merger, involves combinations of "essentially unrelated firms." *Id.* at 108-09.

7. *See generally* House Comm. on Small Business, Conglomerate Mergers—Their Effects on Small Business and Local Communities, H.R. Rep. No. 96-1447, H. Doc. No. 96-343, 96th Cong., 2d Sess. (1980) [hereinafter cited as H.R. Rep. No. 96-1447]; *Proposed Small and Independent Business Protection Act of 1979: Hearings on S. 600 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, pts. 1 & 2, 96th Cong., 1st Sess. (Comm. Print 1979); *Rodino, Fearing Effects of Large Mergers, Plans House Hearings on Antitrust Policy*, Wall St. J., July 23, 1981, at 13, col. 1.

8. 15 U.S.C. § 18 (1976), as amended by the Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 6(a), 94 Stat. 1157 (1980) [hereinafter cited as 15 U.S.C. § 18 (1976) (amended 1980)] provides in pertinent part:

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

nal Clayton Act[9] in 1914 was in large part a reaction to the Supreme Court's opinion in *Standard Oil Co. v. United States*[10] and its enunciation of the "rule of reason"[11] as the guiding principle for construing the vaguely worded Sherman Act.[12] The Sixty-third Congress feared that the rule of reason would be employed to exonerate types of business practices which it had presumed the Sherman Act to condemn.[13] To prevent this development, Congress identified in the Clayton Act several specific acts or practices[14] which could be enjoined whenever their effect might[15] be "to substantially lessen competition or tend to create a monopoly."[16] One of the specific categories of conduct to be subjected to this "effects" clause was set out in section 7:[17] the acquisition of one

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9. Clayton Act, ch. 323, 38 Stat. 730 (1914). See note 17 *infra* for the text of the original version of § 7.

10. 221 U.S. 1 (1911).

11. The term "rule of reason" was coined by Chief Justice White in his opinion for the Court in Standard Oil Co. v. United States, *id.* The term refers to the judicial gloss placed on the categorical language of the Sherman Act, which condemns "*every* contract, combination . . . or conspiracy, in restraint of trade," 15 U.S.C. § 1 (1976) (emphasis added), and "*every* person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade on commerce," 15 U.S.C. § 2 (1976) (emphasis added). The Court interpreted the term "every" in sections 1 and 2 of the Sherman Act to reach only "unreasonable" practices. 221 U.S. at 65-69.

12. Sherman Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1 (1976)).

13. *See* 2 P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶ 303a & 303b, at 4-5 (1978) [hereinafter cited as AREEDA & TURNER]. Although most of the legislative support for passage of the Clayton Act reflected a desire "to strengthen and clarify the law which many believed [Chief Justice] White had emasculated and obscured," Chadwell, *Competition Under Section 1 of the Sherman Act—Instant Antitrust or Long-Run Policy,* 27 A.B.A. ANTITRUST SECTION 60, 61 (1965), some may have supported the legislation in the hopes of preventing too aggressive an application of the rule of reason to business conduct. *See* P. AREEDA, ANTITRUST ANALYSIS ¶ 148, at 52 (3d ed. 1981) [hereinafter cited as AREEDA]. However, the formal title of the bill that became the Clayton Act, "An Act to supplement existing laws against unlawful restraints and monopolices . . . ," suggests that Congress' objective indeed was to strengthen federal antitrust policy to reach transactions which the courts might have found "reasonable" under *Standard Oil's* rule of reason.

14. The Clayton Act deals with price discrimination (§ 2), tying and exclusive dealing (§ 3), merger (§ 7), and interlocking directorates (§ 8). 15 U.S.C. §§ 13, 14, 18 & 19 (1976) (amended 1980).

15. Each substantive provision of the Clayton Act would be violated when challenged conduct *"may"* have one of the proscribed effects of substantially lessening competition or tending to create a monopoly. *Id.* § 18 (emphasis added). The administration of the statute thus requires predictions of consequences likely to flow from challenged conduct, rather than findings that adverse consequences have already occurred.

16. *Id.*

17. The original § 7 provided:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substan-

company by a competitor of that company.[18] The inclusion of such acquisitions on the list of suspect business conduct indicates that Congress was not content to allow merger law to develop within the unknown and presumptively tolerant contours of the rule of reason. Although pre-*Standard Oil* merger cases decided under the Sherman Act had revealed no inclination toward leniency on the part of the Supreme Court,[19] the rule of reason seemed to portend a construction of the Sherman Act's broad language which might countenance a combination of two previously competing firms so long as their merger did not create power to control prices, i.e., monopoly power.[20] Section 7 assured that at least horizontal mergers[21] would be held to a stricter standard than that, with any likely substantial lessening of competition between the merging firms being sufficient to warrant enjoining the transaction.[22]

Section 7 of the Clayton Act was significantly amended in 1950 by passage of the Celler-Kefauver Act.[23] Like the original Clayton Act itself, the 1950 legislation was stimulated by a Supreme Court decision. In *United States v. Columbia Steel Co.*,[24] the Court had approved United States Steel Company's acquisition of a western steel fabricating concern in a transaction which had serious horizontal, vertical, and market extension competitive implications.[25]

> tially 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.

Clayton Act, ch. 323, § 7, 38 Stat. 731-32 (1914).

18. The original § 7 solely addressed the lessening of competition between the acquiring and acquired firms. Its scope was thus primarily limited to horizontal mergers, although a non-horizontal merger could be reached under the "tend to create a monopoly of any line of commerce" proscription. *See, e.g.,* United States v. E.I. duPont de Nemours & Co., 353 U.S. 586 (1957).

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

20. Chief Justice White's explication of the rule of reason in *Standard Oil* tended to view "the wrong against which the statute provided," to be "the consequence of monopoly." Standard Oil Co. v. United States, 221 U.S. 1, 55, 60 (1911).

21. *See* note 18 *supra.*

22. *See* note 15 *supra.*

23. Celler-Kefauver Act, ch. 1184, 64 Stat. 1125 (1950). The 1980 amendments, *supra* note 8, extended the reach of the Act to entities other than corporations and to those engaged "in any activity affecting commerce." *See* note 8 *supra* for the text of the current version of § 7.

24. 334 U.S. 495 (1948).

25. The Court thus approved entry through merger of the nation's largest steel company into a developing geographic market by absorption of a major firm. It approved an increase in the level of concentration in an already highly concentrated industry, as well as the end of significant actual and potential competition.

L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 591 (1977) [hereinafter cited as

This acquisition could not be reached under the Clayton Act because of the "asset loophole" incorporated in the original section 7. Before the adoption of the 1950 amendments, section 7 condemned only stock acquisitions,[26] and United States Steel had acquired the assets of Consolidated Steel, not its stock.[27] The Federal Trade Commission had long sought to have Congress plug this "asset loophole,"[28] and the *Columbia Steel* decision provided the impetus to accomplish that end.[29] But there was more to the 1950 amendments than this. Subtle changes in the language of section 7 and a fairly compelling legislative history reveal that years of persistent lobbying by the Federal Trade Commission had coalesced with increasing concern over a perceived post-war rush to economic concentration to produce not only a major broadening of the jurisdictional reach of section 7, but a broadening of federal merger policy objectives as well. In an exhaustive and authoritative[30] review of the legislative history of the 1950 amendments, the Supreme Court in *Brown Shoe Co. v. United States*[31] described the overriding policy concerns which the new legislation reflected as follows:

> 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 expansion through mergers. Other considerations cited in support of the bill were the desirability of retaining "local 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

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SULLIVAN].

26. *See* note 17 *supra*.

27. United States v. Columbia Steel Co., 334 U.S. 495, 498 (1948).

28. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 314 & n.25 (1962).

29. *See id.* at 318 n.33. "[T]here is no doubt that Congress did wish to 'plug the loophole' and to include within the coverage of the [Clayton] Act the acquisition of assets no less than the acquisition of stock." *Id.* at 316. *See also* SULLIVAN, *supra* note 25, at 592.

30. Leading scholars generally stipulate the accuracy of *Brown Shoe's* construction of the legislative history of the Celler-Kefauver Act. *See* 4 AREEDA & TURNER, *supra* note 13, ¶ 903, at 8-11; R. POSNER & F. EASTERBROOK, ANTITRUST 153 (2d ed. 1981) [hereinafter cited as POSNER & EASTERBROOK]; SULLIVAN, *supra* note 25, at 592 n.2. *But see* 4 AREEDA & TURNER, *supra* note 13, ¶ 904, at 11-14.

31. 370 U.S. 294 (1962).

a trend toward concentration was thought to pose.[32]

While the amendments retained an "effects" clause which requires a showing of a probable substantial lessening of competition or a tendency to create a monopoly before an acquisition might be enjoined,[33] the Supreme Court was impressed with Congress' overriding emphasis on economic concentration and its concomitant social, political, and economic consequences. The legislative history led the Court to perceive a mandate for a more sophisticated and sensitive analysis of the likely effects of a given merger.[34] In particular, the Court discerned a directive to consider the relationship between concentration and competition when evaluating the probable effects of a merger.[35] Both the *existence* and the *substantiality* of any probable lessening of competition were to be analyzed in the context of this concentration/competition relationship. The Court construed this Congressional mandate to authorize the establishment of a presumption that a merger which portends to initiate or exacerbate a trend toward concentration in an industry also portends a lessening of competition in that industry.[36] A probable lessening of competition was capable of being characterized as "substantial" if the threatened increase in concentration—in the context of any clearly identified market—was considered "substantial."[37]

Another significant effect of the 1950 amendments was the removal of the provision in original section 7 which had restricted the scope of inquiry to the elimination of any competition which may have existed between the acquiring and acquired firms.[38] Although the effects of a given merger were to be examined in the context of a specific market[39] and its "structure, history and proba-

32. *Id.* at 315-16.

33. *See* note 8 *supra.*

34. Brown Shoe Co. v. United States, 370 U.S. 294, 321-22 & 322 n.38 (1962).

35. *Id.* at 317-18 & 318 n.32.

36. *Id.* at 333-34, 344-46.

37. As the Supreme Court stated in its first post-*Brown Shoe* merger decision:

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

United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963).

38. *See* notes 17 & 18 *supra.*

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

ble future,"[40] the courts were now free to search far and wide to find any line of commerce and any section of the country in which substantial adverse concentration/competition effects would be likely. The more sophisticated analysis mandated by amended section 7 was, therefore, capable of being applied to vertical and conglomerate mergers, as well as horizontal ones.[41]

During the 10 years following the *Brown Shoe* decision, the Supreme Court, adhering to the mandate it had perceived in the 1950 amendments, proceeded to fashion a set of legal rules which have been described as being "so strict that relatively few horizontal or vertical mergers are now attempted."[42] The emergence of these rules tended to direct corporate acquisition propensities toward conglomerate merger.[43] Although there are three distinct types of conglomerate mergers[44]—product extension, market extension, and pure conglomerate—a series of Supreme Court opinions in the immediate post-*Brown Shoe* period indicated that amended section 7 would be flexible enough to deal with all three. Speaking in terms of such relatively esoteric concepts as potential competition,[45] entrenchment,[46] and reciprocity,[47] the Court explained how each type of conglomerate acquisition might aggravate the concentration/competition relationship in a given market to such an extent that section 7's "effects" clause would be violated. Despite this string of government enforcement victories, the late 1960's witnessed an unprecedented merger boom in which conglomerate mergers

40. *Id.* at 322 n.38.

41. *Id.* at 317 & n.31.

42. Baker & Grimm, *S.600—An Unnecessary and Dangerous Foray into Classic Populism,* 40 OHIO ST. L.J. 847, 854 (1979) [hereinafter cited as Baker & Grimm]. *See also* STAFF OF ANTITRUST SUBCOMM. OF HOUSE COMM. ON JUDICIARY, 92D CONG., 1ST SESS., INVESTIGATION OF CONGLOMERATE CORPORATIONS 2 (1971) [hereinafter cited as *House Staff Report*]. Although the observation by Baker and Grimm is undoubtedly accurate, *see* FTC 1978 REPORT, *supra* note 2, at 115, the current merger wave, *see* notes 2-4 *supra* and accompanying text, encompasses a number of striking horizontal and vertical proposals. *See, e.g., Conoco Merger With Mobil or Texaco May Pass U.S. Antitrust Scrutiny but Spark Private Suits,* Wall St. J., July 15, 1981, at 4, col. 1; *Gulf Oil Raising $5 Billion Credit to Buy Oil Firm,* Wall St. J., July 21, 1981, at 3, col. 1; *Heileman Makes $494 Million Bid for Jos. Schlitz,* Wall St. J., July 27, 1981, at 2, col. 2; *Mobil Begins Two-Step Offer for Marathon Oil Stock, But Target Concern Appears Ready to Fight Bid,* Wall St. J., Nov. 2, 1981, at 3, col. 1 (southwest ed.).

43. *See* HOUSE STAFF REPORT, *supra* note 42, at 2. *See also* SULLIVAN, *supra* note 25, at 598.

44. *See* note 6 *supra.*

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

46. *See* FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).

47. *See* FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965).

predominated.[48]

In the late 1960's and the early 1970's, the conglomerate merger movement became a political issue. The Democratic Congress, alarmed at the accelerating trend toward concentration in the economy, explored the need for new legislation to strengthen section 7 still further.[49] Meanwhile, the Republican administration promised to vigorously contest the conglomerate merger trend under existing law.[50] In 1970, Richard McLaren, the Assistant Attorney General in charge of the Justice Department's Antitrust Division, advised a Senate subcommittee that additional merger legislation seemed unnecessary in light of the Supreme Court's receptivity to the economic theories of potential competition, entrenchment, and reciprocity.[51] He pointed out that the Justice Department had recently commenced additional litigation which was expected to test, and perhaps expand, the reach of these theories.[52] He added, however, this note of caution: "If we are incorrect [in our assessment of the pending cases], then the need for new legislation, of some sort, is clear."[53] Unfortunately, the validity of Mr. McLaren's assessment of the ability of section 7 to stem the conglomerate merger tide eluded an authoritative test. The cases which the Justice Department had selected to be the vehicles by which the law could be clarified were settled.[54]

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48. SULLIVAN, *supra* note 25, at 653.

49. *See generally* HOUSE STAFF REPORT, *supra* note 42. Congressional alarm was stimulated when Donald Turner, then Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, took the position in 1967 that § 7 was inadequate to deal with conglomerate mergers. SULLIVAN, *supra* note 25, at 654. Professor Turner's position on this issue had been foreshadowed in his article, Turner, *Conglomerate Mergers and Section 7 of the Clayton Act,* 78 HARV. L. REV. 1313 (1965) [hereinafter cited as Turner].

50. Address by John Mitchell, Attorney General, Georgia Bar Association, Savannah, Georgia (June 6, 1969), *reprinted in* 5 TRADE REG. REP. (CCH) ¶ 50,107, at 55,124 (1981).

51. Statement by Assistant Attorney General Richard McLaren, Subcommittee on Antitrust and Monopoly, Senate Committee on the Judiciary (February 18, 1970), *reprinted in* 5 TRADE REG. REP. (CCH) ¶ 50,114, at 55,172 (1981) [hereinafter cited as *McLaren Statement*].

52. *Id.* at 55,175. The cases were United States v. Ling-Temco-Vought, Inc., et al., Civ. Action No. 69-438, W.D. Pa.; United States v. International Tel. & Tel. Corp., Civ. Action No. 69-C-924, N.D. Ill.; United States v. Northwest Ind., Inc., et al., Civ. Action No. 69-C-1102, N.D. Ill.; United States v. International Tel. & Tel. Corp., et al., Civ. Action No. 13320, D. Conn.; United States v. International Tel. & Tel. Corp., et al., Civ. Action No. 13319, D. Conn.

53. *McLaren Statement, supra* note 51, at 55,177.

54. United States v. International Tel. & Tel. Corp., 1971 Trade Cas. ¶¶ 73,665-66 (D. Conn. 1971) (consent judgments entered); United States v. International Tel. & Tel. Corp., 1971 Trade Cas. ¶ 73,619 (N.D. Ill. 1971) (consent judgment entered). For a review of the circumstances surrounding the settlement of these suits, see Blake, *Beyond the ITT Case,*

The Supreme Court continued to acknowledge the applicability of section 7 to conglomerate mergers in the early 1970's,[55] but the Court's decisions in this period began to reveal significant disagreements among the Justices.[56] Out of these disagreements emerged a "new antitrust majority"[57] which succeeded in reducing the potential competition theory, "once the most promising of the conglomerate merger theories, . . . into a doctrine of almost metaphysical complexity."[58] The result has been that in the seven years since the emergence of this "new antitrust majority," government and private plaintiffs have lost twenty consecutive conglomerate merger cases which were based on the potential competition theory.[59] Moreover, the applicability of section 7 to pure conglomerate mergers remains uncertain.[60]

The Supreme Court's change of attitude with regard to the potential competition theory was not prompted by legislative direction. In fact, Congress had acquiesced in the Court's rather bold

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HARPER'S, June, 1972, at 74.

55. *See* United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973); Ford Motor Co. v. United States, 405 U.S. 562 (1972). The government prevailed in each case.

56. Four separate opinions were filed in each of the cases cited in note 55 *supra*, although only seven Justices participated in each decision.

57. This emergence occurred in United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974). *Marine Bancorporation* was the first conglomerate merger opinion rendered by the Court in which all four of President Nixon's appointees participated. Justices Powell and Rehnquist had not participated in *Ford*, and Justice Powell had not participated in *Falstaff*. In *Marine Bancorporation*, Justices Powell and Rehnquist joined the other two Nixon appointees, Chief Justice Burger and Justice Blackmun, and, together with holdover Justice Stewart, formed the five-member majority. Justice White's dissenting opinion in *Marine Bancorporation* referred to this group as "the Court's new antitrust majority." 418 U.S. at 642.

58. Brodley, *Limiting Conglomerate Mergers: The Need for Legislation*, 40 OHIO ST. L.J. 867, 869 n.8 (1979) [hereinafter cited as BRODLEY, *Limiting Conglomerate Mergers*].

59. Taylor & Schorr, *supra* note 1. *See also* Brodley, *Limiting Conglomerate Mergers*, *supra* note 58, at 868-69 & nn.5 & 8. *But see* Grand Union Co., 3 TRADE REG. REP. (CCH) ¶ 21,888, at 22,235 (FTC 1981) (decision of FTC Administrative Law Judge holding supermarket chain merger illegal on potential competition grounds); Yamaha Motor Co., Ltd. v. FTC, 1981-2 Trade Cas. (CCH) ¶ 64,202 (8th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3802 (U.S. Apr. 5, 1982) (affirming FTC order enjoining an international joint venture on potential competition grounds).

The significance of the "new antitrust majority's" retreat from earlier Supreme Court pronouncements on the potential competition doctrine is reviewed in Brodley, *Potential Competition Mergers: A Structural Synthesis*, 87 YALE L.J. 1, 16-19 (1977) [hereinafter cited as Brodley, *Potential Competition Mergers*]. *See also* Sloviter, *The October 1973 Term Merger Cases: Whither Clayton § 7?*, 48 TEMPLE L.Q. 861, 903-10 (1975).

60. *Ford*, *Falstaff*, and *Marine Bancorporation* all involved product or market extension mergers. Their impact on the entrenchment theory and the problem of pure conglomerate transactions is discussed in notes 141-156 *infra* and accompanying text.

development of the potential competition theory in the 1960's.[61] Therefore, it is not suprising that, as had been the case following *Standard Oil*[62] and *Columbia Steel*,[63] the more timid decisions of the early 1970's provoked Congress to consider legislation re-emphasizing the anti-concentration policy that had prompted passage of the Celler-Kefauver Act of 1950.[64] At this time, however, no new legislation has been forthcoming, nor are prospects for it favorable.[65]

Much recent discussion has focused on the likelihood that the potential competition theory, once so promising, might be revived in an appropriate case,[66] making section 7 once again a potent

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61. The Supreme Court had expressed its enthusiasm for the potential competition doctrine in FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); United States v. Continental Can Co., 378 U.S. 441 (1964); United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964). Despite this string of government victories based at least in part on potential competition grounds, there was no Congressional action regarding § 7 prior to the *Marine Bancorporation* decision in 1974.

62. *See* text accompanying notes 9-22 *supra.*

63. *See* text accompanying notes 23-29 *supra.*

64. *See* S. 600, 96th Cong., 1st Sess. (1979). This bill would create a rebuttable presumption against mergers between two very large firms or between one very large firm and a leading firm in a concentrated industry. It resembles the 1968 proposal of the Presidential task force. *See* REPORT OF WHITE HOUSE TASK FORCE ON ANTITRUST POLICY ("NEAL REPORT") 3 (1968), *reprinted in* 2 ANTITRUST L. & ECON. REV. [hereinafter cited as NEAL REPORT].

65. *See* Taylor & Schorr, *supra* note 1. Efforts to pass S. 600, 96th Cong., 1st Sess. (1979), made little progress prior to the election of President Reagan and the 97th Congress. Both Mr. Reagan and the Republican majority now in control of the Senate Judiciary Committee are on record as opposing anticonglomerate bills. *Id. See also Reagan Team Believes Antitrust Legislation Hurts Big Business,* Wall St. J., July 8, 1981, at 1, col. 1. *But see Mobil's Conoco Bid Sparks Moves by Justice Agency and Legislators,* Wall St. J., July 20, 1981, at 3, col. 1 (efforts at reviving S. 600-type bills being contemplated in the House and Senate).

The fact that the recent change in the philosophy of § 7's interpretation has been mandated judicially rather than legislatively confounds the debate over the need for new legislation. *Compare, e.g.,* Baker & Grimm, *supra* note 42, *with* Brodley, *Limiting Conglomerate Mergers, supra* note 58. Although it is true that Congress has been unwilling to pass post-*Marine Bancorporation* proposed legislation, it is surely as significant to note that Congress consciously acquiesced in the anti-conglomerate opinions of the 1960's. *See* note 61 *supra* and accompanying text. Indeed, whatever action Congress *has* taken with respect to § 7 since the 1950 amendments has been to *ease* its enforcement or *expand* its coverage. *See* Clayton Act, § 7A, 15 U.S.C. § 18a (added by Pub. L. 94-435, Title II, § 201, 90 Stat. 1390 (1976)) (premerger notification required and "hold separate" orders available for large acquisitions); Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 6(a), 94 Stat. 1157 (1980) (amending 15 U.S.C. § 18 (1976)) (enlarging the jurisdiction of § 7 to reach business entities affecting interstate commerce as well as those engaged in interstate commerce).

66. *See* Baker & Grimm, *supra* note 42, at 854-55; Brodley, *Potential Competition Mergers, supra* note 59, at 63-89.

force for combating large conglomerate mergers. Yet, the Government continues to search for the "perfect" potential competition case to take to the Supreme Court to revive that theory.[67] This has led some commentators to conclude that section 7's demise in the conglomerate field is complete.[68] They advocate the need for enforcement and legislative initiatives which would allow the courts to bypass section 7's "effects" clause and its requirement that there be a showing of a probable lessening of competition or a tendency to create a monopoly before a merger can be enjoined.[69] Before the "effects" clause is abandoned or modified, however, it is appropriate to re-examine some of the other theories which were endorsed by the Supreme Court in the 1960's, in order to determine whether a less drastic means exists to re-establish the vitality of section 7 in the conglomerate area.

One of the promising section 7 theories of the mid-1960's was "entrenchment."[70] Like potential competition, the entrenchment theory has been viewed skeptically of late. Some authorities have dismissed it as unimportant, suggesting that it is too narrow to reach most of the recent large transactions.[71] Others fear an overbroad application of the entrenchment doctrine which would establish a rule of virtual per se illegality for any large conglomerate merger which promises to make the acquired firm more efficient.[72] It is true that a theory incapable of distinguishing between those transactions that threaten to lessen competition in a relevant market and those that do not would be of little utility given the cur-

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67. " 'As the losses pile up,' said Barry Grossman, Chief of the Antitrust Division's Appellate Section, 'it becomes more important to choose your (case) carefully.' " *Justice Department Won't Appeal Loss on Merger Theory,* Wall St. J., December 3, 1980, at 18, col. 4.

68. *See, e.g.,* Brodley, *Limiting Conglomerate Mergers, supra* note 58, at 869: "[T]here is virtually no prospect that the present Court will adopt effective rules to regulate conglomerate mergers."

69. *Id.* at 890-92; Carstensen & Questal, *The Use of Section 5 of the Federal Trade Commission Act to Attack Large Conglomerate Mergers,* 63 CORNELL L. REV. 841 (1978). *See also* H.R. REP. No. 96-1447, *supra* note 7; Statement of the Federal Trade Commission Regarding Staff Recommendations of Advance Notice of Proposed Rulemaking on Potential Competition Mergers, 5 TRADE REG. REP. (CCH) ¶ 50,419, at 55,942 (1980).

70. The entrenchment theory focuses on the propensity for a given merger to insulate an existing market leader, or an existing noncompetitive market structure, from competitive forces. The details of entrenchment analysis are developed in the text accompanying notes 157-95 *infra.*

71. *See* Brodley, *Limiting Conglomerate Mergers, supra* note 58, at 869 & n.8. *See also* Davidow, *Conglomerate Concentration and Section Seven: The Limitations of the Anti-Merger Act,* 68 COLUM. L. REV. 1231, 1255-64 (1968).

72. 5 AREEDA & TURNER, *supra* note 13, ¶ 1103, at 5-11; POSNER & EASTERBROOK, *supra* note 30, at 511-12.

rent language of section 7.[73] The Supreme Court has yet to determine, however, whether the entrenchment theory incorporates such a fatal flaw.[74] This article examines the entrenchment doctrine to see if it might be revived as a coherent, economically defensible theory under which a significant number or class of conglomerate mergers might be shown to violate the "effects" clause of the Clayton Act's existing section 7.

THE EMERGENCE AND DEVELOPMENT OF THE ENTRENCHMENT DOCTRINE IN CONGLOMERATE MERGER CASES

Origins

The entrenchment doctrine is generally considered to have been first announced in *FTC v. Procter & Gamble Co.*,[75] decided by the Supreme Court in 1967. In 1957, Procter had acquired Clorox Chemical Co., which was by far the leading manufacturer and marketer of household liquid bleach in the United States, with a market share approaching 50% nationally.[76] Largely as a consequence of Clorox's dominance, the industry was highly concentrated, with the six leading firms accounting for almost 80% of the market.[77] At the time of the acquisition, Procter neither manufactured nor sold liquid bleach; it was, however, the country's leading marketer of household detergent and the nation's largest advertiser. Since the marketing of liquid bleach depended heavily on mass advertising, the Clorox product fit neatly into Procter's product line.[78] In short, this was the paradigm product extension merger.[79] The FTC promptly[80] attacked the acquisition on the basis of two apparently distinct[81] theories. One ground of the attack was based on the po-

73. *See* note 28 *supra*.
74. *See* notes 141-56 *infra* and accompanying text.
75. 386 U.S. 568 (1967).
76. *Id.* at 570-71.
77. *Id.* at 571.
78. *Id.* at 572-74.
79. *Id.* at 577-78. For the FTC's definition of product extension mergers, see note 6 *supra*.
80. The acquisition was closed on August 1, 1957, and the FTC's complaint was issued on September 30, 1957. Procter & Gamble Co., 63 F.T.C. 1465, 1469 (1963).
81. Although the Supreme Court treated the FTC's opinion as if it had found two independent grounds for holding the merger to be in violation of § 7, 386 U.S. at 574-75, 578, one of those grounds, the elimination of potential competition, was not articulated carefully in the FTC's formal complaint. The factual allegations of the complaint did not contend that but for the acquisition Procter would have entered the bleach industry independently ("future potential competition" theory). Nor did the complaint allege that Procter had been exerting a pro-competitive influence on the bleach industry prior to its acquisition of Clorox

tential competition theory.[82] The FTC noted that because Procter was the most likely entrant into the liquid bleach industry, the acquisition deprived bleach consumers of the competitive influence which Procter had been exerting from the wings of the bleach industry.[83] In advancing the theory that has come to be known as the entrenchment theory, the FTC contended that, as a result of the acquisition, "[r]espondent's competitive position in the production and sale of household liquid bleaches may be *enhanced* to the detriment of actual and potential competition."[84]

In support of the "enhancement" allegation, the FTC found Procter to be in a position to bestow upon Clorox significant competitive advantages which would alter the structural characteristics of the liquid bleach industry.[85] These advantages included access to volume discounts on advertising (which was all-important in this industry),[86] an existing direct sales force,[87] promotional and display preferences at the retail level (attributable to Procter's position as an important supplier "of a broad range of common grocery items"),[88] and the "financial strength" of a larger, diversified parent company, which would be available to discipline, by price-cutting or excessive promotion, any existing or potential rival con-

("actual potential competition" theory, or "wings effect"). *See generally* AREEDA, *supra* note 13, ¶ 603, at 845-47. The complaint did include a broad allegation that "[a]ctual and potential competition generally in the production and sale of household liquid bleaches may be substantially lessened." Procter & Gamble Co., 63 F.T.C. 1465, 1472 (1963). But actually, the loss of the pro-competitive influence being exerted by Procter prior to the acquisition was viewed by the FTC primarily as a factor which aggravated, i.e., made more substantial, the entrenchment effects of the merger. The Commission appears not to have treated the loss of potential competition as an independent ground for decision. *See id.* at 1560, 1569-82. Thus, the Supreme Court seems to have treated the two theories as more obviously distinct than did the FTC. *But see* note 116 *infra* and accompanying text.

82. FTC v. Procter & Gamble Co., 386 U.S. 568, 574-75, 578 (1967). *See* note 81 *supra*.

83. *Id.* at 575; Procter & Gamble Co., 63 F.T.C. 1465, 1577-78 (1963). The Supreme Court obliquely suggested that the FTC had also rested its decision on the "future potential competition" (*see* note 81 *supra*) theory. 386 U.S. at 575. In fact, the Commission's reliance on potential competition concerns was restricted to the "actual potential competition" or "wings effect" (*see* note 81 *supra*) theory. Procter & Gamble Co., 63 F.T.C. 1465, 1578 (1963). The Supreme Court's fuller treatment of the potential competition aspects of the case is confined to this "actual potential competition" theory. 386 U.S. at 580-81.

84. Procter & Gamble Co., 63 F.T.C. 1465, 1473 (1963) (emphasis added).

85. *Id.* at 1568.

86. *Id.* at 1562-65. On the merits of this point see Purex Corp. v. Procter & Gamble Co., 419 F. Supp. 931, 936 (C.D. Cal. 1976), *rev'd on other grounds*, 596 F.2d 881 (9th Cir. 1979); Peterman, *The Clorox Case and the Television Rate Structures*, 12 J. LAW & ECON. 321 (1968).

87. Procter & Gamble Co., 63 F.T.C. 1465, 1565 (1963).

88. *Id.* at 1566.

templating aggressive price competition or promotion.[89] These advantages previously had been unavailable to the Clorox Company.[90] Now that the market leader had access to these advantages, the FTC predicted that existing competitors and potential entrants would become incrementally intimidated, thus substantially lessening the level of competition in the industry.[91]

The Supreme Court accepted both of the FTC's theories, potential competition and entrenchment.[92] Specifically, the Court thought it was probable that (1) the oligopolistic structure of the liquid bleach industry would become even more rigid than it had been, as existing competitors, intimidated by the incremental power wielded by Procter, as compared with Clorox, would likely fall in line under the price leadership of Procter,[93] and (2) the possibilities for eventual deconcentration of the industry through the attraction of new entrants would be significantly reduced because of the heightened barriers to entry attributable to the advertising, marketing, and promotional prowess of Procter.[94] The Court, like

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89. *Id.* at 1566-67.

90. *Id.* at 1563-67.

91. The Commission summarized the argument as follows:

> Procter . . . is in a position to entrench still further the already settled consumer preference for the Clorox brand, and thereby make new entry even more forbidding than it was prior to the merger.
>
> . . . [A] heightening of entry barriers concomitantly enhances the power of market leaders to dominate their small rivals, and so smother effective competition. Given Procter's materially greater strength, compared to Clorox, as a liquid bleach competitor, vigorous competition by the small firms in the industry would appear still more effectively and substantially inhibited than prior to the merger.

Id. at 1568. These conclusions were based essentially on *predictions* of how competitive relationships in the industry would develop after the merger. Although the Hearing Examiner had supported some of his findings with post-acquisition evidence, which seemed to corroborate these predictions, the Commission eschewed any reliance on this evidence. *Id.* at 1582-84.

92. FTC v. Procter & Gamble Co., 386 U.S. 568, 574-75, 578 (1967). *See* note 81 *supra*. Although the word "entrenched" does not appear until the last page of the Supreme Court's opinion, the Court firmly embraced the Commission's predictions which had supported its entrenchment theory. In listing the "anticompetitive effects with which this product-extension merger is fraught," the Court stated that "the substitution of the powerful acquiring firm for the smaller, but already dominant, firm may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing." *Id.* at 578.

93. *Id.*

94. *Id.* at 579. The Court, like the FTC, was willing to condemn the acquisition on the basis of assumptions and predictions. Although the Court was less reluctant than the FTC to bolster the validity of these predictions by references to post-acquisition evidence, *see id.* at 579 n.3, its affirmance of the FTC's assessment of the probable competitive effects cannot be said to have relied on such evidence. "[T]here is certainly no requirement that the an-

the Commission, considered it significant that there was a "very great discrepancy in size between Procter and, not only Clorox, but any firm in the liquid bleach industry."[95] The Court seems almost implicitly to have concluded that these effects were likely enough and substantial enough to bring the acquisition within the prohibitions of section 7's "effects" clause.[96]

It must be emphasized that the predicted structural effects which the Supreme Court identified in *Procter & Gamble* were relevant only to that part of section 7's "effects" clause which focuses on the tendency "to substantially lessen competition." The court did not deem it necessary to conclude that the acquisition would "tend to create a monopoly" in order to find a section 7 violation. It was sufficient for the Court that the level of competition generally within the industry was likely to be adversely affected due to the fortification of the already leading firm. The FTC also had been concerned primarily with the first of the two types of effects prohibited by section 7.[97] For both the FTC and the Supreme Court, then, Procter's ability to "entrench" the Clorox brand was condemned not because this would tend to create a monopoly, but rather, because it would tend substantially to lessen competition generally throughout the liquid bleach industry. It was the noncompetitive market structure which was being entrenched as much as the position of the acquired firm. Therefore, although the entrenchment doctrine implicates, at least potentially,[98] both aspects of section 7's "effects" clause—the tendency to create a monopoly

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ticompetitive power manifest itself in anticompetitive action before section 7 can be called into play." *Id.* at 577. *See generally* Note, *The Effective Use of Postacquisition Evidence Under Section 7 of the Clayton Act*, 12 Loy. Chi. L.J. 459 (1981).

95. The quoted language is from the FTC's opinion, Procter & Gamble Co., 63 F.T.C. 1465, 1571 (1963). *See* FTC v. Procter & Gamble Co., 386 U.S. 568, 578-79 (1967) (referring to size disparity in adopting both potential competition and entrenchment theories).

96. FTC v. Procter & Gamble Co., 386 U.S. 568, 578 (1967). Whether the Court intended to hold that these structural entrenchment effects would have been sufficient to make out a § 7 violation in the absence of the perceived potential competition effects is uncertain. *See* text accompanying notes 107-33 *infra*.

97. Whenever the FTC emphasized the likely increased dominance of Clorox following the merger, it was to demonstrate how competition generally would be lessened, not how Procter would tend to become a bleach monopolist. *See, e.g.*, Procter & Gamble Co., 63 F.T.C. 1465, 1568 (1963), quoted at note 91 *supra*.

98. The FTC observed that "a merger involving a leading firm in a market that is already well on the way to a non-competitive structure" could aggravate non-competitive conditions to such an extent that "resort may be had . . . to the statute's tendency-to-monopoly clause." *Id.* at 1577. Since competition in the pre-merger bleach market had not deteriorated to such an extent, the Commission found it unncessary to invoke the "tendency-to-monopoly" clause in this case. *Id.*

and the tendency to substantially lessen competition in the industry generally—*Procter & Gamble* established that a showing on either one of these effects is sufficient to invoke the doctrine.

Although *Procter & Gamble* is generally considered to be the first case to discuss the concept of entrenchment, an opinion of the Supreme Court two years earlier had foreshadowed the theory. In *FTC v. Consolidated Foods,*[99] the FTC succeeded in blocking the acquisition of a leading, but not dominant, manufacturer of dehydrated onions and garlic by a much larger food processor and distributor.[100] Characterizing the acquisition as a product extension merger, the FTC predicted that the acquired firm, Gentry, would be the beneficiary of an "unfair" advantage as a result of the acquisition. Since many of Gentry's customers and potential customers were dependent upon the goodwill of Consolidated for the successful marketing of their products, it was thought that they would tend to patronize Gentry in order to induce Consolidated to continue to make purchases from them. The FTC described this "advantage" as "a mixed threat and lure of reciprocal buying."[101] Thus, although the *Consolidated Foods* case is most frequently cited for its stern language about reciprocity, coerced or voluntary,[102] it can also be viewed as an application of what has become known as the entrenchment doctrine. The buying power of the acquiring company would give the acquired company an "unfair advantage" not previously enjoyed, and that advantage would tend to insulate the acquired firm from competition which otherwise would have occurred.[103] If the acquired firm could not be predicted to dominate its industry as a result of this advantage, it could be predicted to garner more business than it otherwise would have, thus deterring new entrants.[104] The new advantage would aggravate an already oligopolistic situation, and the significant position of the acquired firm would become artifically fortified, or entrenched, against competitive inroads.[105] The FTC had found the threatened lessening of competition to be substantial, and Justice Douglas, speaking for the Court, thought that conclusion was supported by substantial evidence, particularly in view of Gentry's already sub-

99. 380 U.S. 592 (1965).
100. *Id.* at 595 & n.3.
101. *Id.* at 593.
102. *See, e.g.*, SULLIVAN, *supra* note 25, at 656-57.
103. 380 U.S. at 597.
104. *Id.* at 598-99.
105. *Id.* at 599.

stantial position in the market.[106]

Sufficiency of Entrenchment Effects Alone

Although it was not the case in *Consolidated Foods,* most Government attacks on conglomerate mergers have included an argument under the potential competition theory.[107] In such cases, where more than one theory is advanced, the courts have not always carefully separated their analyses of the separate and distinct theories. This is not entirely the fault of the courts. Often it appears that the enforcement agencies view their theories as related, or even cumulative.[108] This raises the question whether entrenchment effects, standing alone, may make out a violation of section 7. If the entrenchment doctrine is nothing more than an aggravating factor which can tip an ambiguous potential competition case over the edge of illegality, then the theory would be of little relevance to pure conglomerate transactions, where, even before its demise, the potential competition doctrine had little force.[109] On the other hand, if entrenchment effects are sufficient in themselves to make out a section 7 violation, then the entrenchment doctrine could apply across the board to all three types of conglomerate transactions.[110]

Procter & Gamble itself implies that the entrenchment theory can stand on its own two feet. The Court's opinion avoided the cumulative effects approach found in Commissioner Elman's opinion for the FTC.[111] The potential competition and entrenchment theories were enumerated separately.[112] Also, Justice Harlan's

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106. *Id.* at 600.

107. The various aspects of the potential competition doctrine are summarized at note 81 *supra.* For a detailed analysis of the potential competition doctrine, see Brodley, *Potential Competition Mergers, supra* note 59.

108. This was true of the FTC's approach in the Clorox case. The Commission's opinion, authored by Commissioner Elman, suggested that it was the combination of the loss of Procter as a potential entrant *plus* the entrenchment of Clorox which supported the conclusion that there would be a substantial lessening of competition. Procter & Gamble Co., 63 F.T.C. 1465 (1963). *See* note 81 *supra* and note 116 *infra.*

109. *See* text accompanying notes 57-60 *supra.* In a pure conglomerate transaction, where there is no obvious relationship between the activities of the acquired and acquiring firms, it is virtually impossible to establish one of the prerequisites for invoking the potential competition doctrine: that the acquiring firm is one of only a very few firms which have both the incentive and capability to enter the acquired firm's market. *See* SULLIVAN, *supra* note 25, at 634-35.

110. *See* note 6 *supra.*

111. *See* note 108 *supra.*

112. FTC v. Procter & Gamble Co., 386 U.S. 568, 578 (1967).

careful concurring opinion considered entrenchment to be an independently viable theory,[113] and he thought the majority had so found.[114] But the sufficiency of the theory was not addressed squarely in Justice Douglas' opinion for the Court.

Few courts since *Procter & Gamble* have addressed the theory's sufficiency directly, but the first lower court cases to apply the *Procter & Gamble* holding tended to treat reasonable predictions of entrenchment effects as a sufficient ground to support a finding of a section 7 violation. *General Foods Corp. v. FTC*[115] was the first post-*Procter & Gamble* case to reach the courts. At issue was General Foods' acquisition of S.O.S. Company, a leading manufacturer of soaped steel wool scouring pads. The FTC's opinion mentioned potential competition only to describe how that competition would be adversely affected by the predicted entrenchment effects.[116] The Third Circuit similarly treated the loss of potential competition merely as a consequence of the merger's entrenchment effects, not as an independent ground for decision.[117] The court

113. *See id.* at 598-99 (Harlan, J., concurring).

114. *Id.* at 585-86 (Harlan, J., concurring).

115. 386 F.2d 936 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968).

116. The Commission viewed the case as on all fours with *Procter & Gamble.* General Foods Corp., 69 F.T.C. 380, 418, 421-22 (1966). It found that "General Foods' entry into the household steel wool market conferred on S.O.S. a series of advantages which its competitors could not match." *Id.* at 424. Although the Commission went on to conclude that this transfer of advantages from General Foods to S.O.S. would "have the effect of substantially lessening potential competition," it was not thereby advancing the potential competition doctrine as a ground for condemning the merger. *Id.* at 426. The FTC did not contend that the merger foreclosed "future potential competition" between General Foods and S.O.S. Neither did the agency contend, as it had in *Procter & Gamble,* that the acquisition deprived the market of the "actual potential competition" effects being exerted by the acquiring firm from the "wings" of the industry prior to the merger. *See* note 81 *supra.* Rather, the FTC argued that the transfer to S.O.S. of General Foods' advertising, marketing, and financial advantages would have the effect of raising "to virtually insurmountable heights" the barriers to entry into this industry, thus further insulating this concentrated industry from the threat of new entry. 69 F.T.C. at 426. In short, the projected lessening of potential competition was considered to be a result of the entrenchment effects (i.e., heightened entry barriers) of the merger; it was not presented as a separate theory of illegality.

The Commission's sole reliance on the entrenchment theory led Commissioner Elman, who drafted the FTC's opinion in *Procter & Gamble,* to dissent in *General Foods.* Writing before the Supreme Court's decision in *Procter & Gamble,* Commissioner Elman contended that, in the then novel area of product extension mergers, a combination of entrenchment *and* potential competition effects should be shown in order to make out a section 7 violation. *Id.* at 450-51, 456-57 (Elman, C., dissenting).

117. For example, the court noted, "[w]e do not read *Clorox* as holding that 'product extension' mergers must involve the elimination of . . . potential competition [from the acquiring firm] to run afoul of the Clayton Act." General Foods Corp. v. FTC, 386 F.2d 936, 946 (3d Cir. 1967), *cert. denied,* 391 U.S. 919 (1968). It then observed, approvingly: "[T]he

adopted the general findings of the FTC, which emphasized the structural effects of the acquisition.[118] In particular, the court accepted the FTC's prediction that the industry structure after the merger would be significantly less conducive to competition and deconcentration than it had been before the merger because of the alteration of competitive relationships within the industry.[119] Potential competitors would be deterred from entering the industry, and existing competitors would be intimidated from competing aggressively because of their fear of retaliation from the disproportionately large acquiring firm.[120] In short, the acquisition promised to transform an already concentrated industry into "an even more rigid oligopoly."[121]

The first Justice Department-initiated suit to advance the entrenchment theory was *United States v. Wilson Sporting Goods Co.*,[122] in which the Justice Department sought to enjoin Wilson's acquisition of Nissen, the nation's leading manufacturer of gymnastics equipment.[123] This was another product extension acquisition; Wilson was the leading manufacturer and distributor of a wide line of sporting goods and equipment, but it had not previously engaged in the gymnastics end of that market.[124] Because of Wilson's position as "one of a recognized small group of large potential entrants, waiting on the edge of the [gymnastics equipment] market,"[125] the case obviously lent itself to analysis along potential competition lines. Although the Justice Department sought to make a case under both branches of the potential competition doctrine,[126] Judge Marovitz concluded that the potential competition factor "would not be sufficient to block the merger."[127]

Commission's finding that potential competition was reduced by the instant merger is based on its finding that the substitution of G.F. for the smaller S.O.S. Company increased the difficulty of entering the market, and the reduction of potential competition was a predictable consequence." *Id.*

118. *See* note 116 *supra*.

119. General Foods Corp. v. FTC, 386 F.2d 936, 945-46 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968).

120. *Id.*

121. *Id.* at 946.

122. 288 F. Supp. 543 (N.D. Ill. 1968).

123. *Id.* at 545.

124. *Id.* at 546. Wilson itself was a subsidiary of a large conglomerate, Ling-Temco-Vought, Inc. *Id.* at 544.

125. *Id.* at 563.

126. *Id.* at 551, 559. For an explanation of the two branches of the potential competition doctrine, see note 81 *supra*.

127. *Id.* at 563.

But the government had also advanced the entrenchment doctrine as an "independent basis"[128] for enjoining the acquisition.[129] Emphasizing the structural changes that were likely to occur due to the "casting of a relative colossus (Wilson-LTV) into the midst of a group of small competitors,"[130] the District Court found the predicted entrenchment effects to be "more probable than not"[131] and enjoined the merger. Although it is possible to construe *Wilson* as relying on an aggregation of effects,[132] it seems clear that the now familiar entrenchment concerns were considered by Judge Marovitz to be controlling and sufficient to enjoin the merger.[133]

Tendency to Narrow the Application of the Theory

In light of the uncertainty concerning the independent status of the entrenchment doctrine, it is not surprising that many lower courts have tended to construe the doctrine narrowly. This tendency is illustrated by two cases in which the courts accepted the entrenchment doctrine in principle, but found the records before them inadequate to support predictions of entrenchment. In *United States v. Crowell, Collier and Macmillan, Inc.*,[134] the Justice Department challenged the acquisition of the nation's leading band uniform manufacturer and distributor by a large, diversified firm which already had subsidiaries holding substantial positions in the publishing industry, particularly the educational and musi-

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128. *Id.* at 551.

129. The entrenchment argument was that the merger "would entrench and possibly increase Nissen's already leading market position in gymnastics apparatus, while at the same time discouraging smaller competitors from aggressive competition with Nissen and deterring other companies from entering the market." *Id.*

130. *Id.* at 554.

131. *Id.* at 556.

132. The court considered at length each of the Justice Department's three profferred theories: entrenchment, potential competition, and the entrenchment of the *acquiring* firm in *its* position as the leader in the entire sporting goods market. *Id.* at 551, 563-66.

133. The district court summarized the probable effects of the acquisitions as follows:

> (1) . . . Nissen's competitive position will likely improve from the merger but certainly will not decline with Wilson's backing, and this is due in part, at least, to the marketing advantage Nissen's products will likely receive when marketed by Wilson dealers; (2) . . . the smaller rivals of Nissen . . . psychologically will fear the Wilson-Nissen combine, with the probable result in the long run that the industry would be transformed into a tighter oligopoly featuring large diversified companies with no serious threat from potential competitors; and (3) . . . small potential entrants will be deterred from entering as a result of the merger.

Id. at 559.

134. 361 F. Supp. 983 (S.D.N.Y. 1973).

cal branches of that industry.[135] Among the theories advanced by the Government was the entrenchment theory.[136] The theory predicted that promotional activities financed by the deep pocket of the acquiring firm and the superior access to educational customers enjoyed by its existing education-related subsidiaries would give the acquired firm advantages which would have the entrenching effects described in the earlier cases. The court found that these alleged "advantages" would be of no consequence, however, in view of the way purchasing decisions were customarily made with respect to band uniforms. Unusual levels of advertising or an extra large sales force with ready access to school purchasing officials (who were found to be more sophisticated in their major purchasing decisions than consumers of liquid bleach) would not in fact be of any advantage to the acquired firm.[137] Hence, existing rivals could not be expected to be intimidated, nor would potential entrants.

Similarly, in *United States v. Black and Decker Mfg. Co.*,[138] a district court found that the advantages which the acquiring parent might bestow upon its newly acquired subsidiary to be of little moment, given the charcter of the market in which the acquired firm competed. Black and Decker, the leading manufacturer of portable electric tools, was acquiring McCulloch, a leading manufacturer of gasoline powered chain saws.[139] Although the court conceded that national advertising was becoming increasingly important in the chain saw market, it concluded that any additional advertising by McCulloch made possible by the acquisition would not entrench its position. In support of this conclusion, the court determined that advertising is less influential for products that are not physically identical than it is for fungible products, such as the liquid bleach involved in *Procter & Gamble*. In addition, several existing chain saw manufacturers were found to be at least as financially strong as Black and Decker; thus, they could match any advertising budget Black and Decker might offer.[140]

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135. *Id.* at 985-87. The suit also attacked another recent acquisition by Crowell, Collier, but the mergers were analyzed independently, and the band uniform merger amply illustrates the point.

136. *Id.* at 991.

137. *Id.* at 992.

138. 430 F. Supp. 729 (D. Md. 1976).

139. *Id.* at 734-35.

140. *Id.* at 774-76. This limitation on the entrenchment theory tends to overlook the impact of the acquisition on the overall structure of the acquired firm's industry. There was

Absence of Recent Supreme Court Clarification

In each of the seminal Supreme Court cases advancing the entrenchment concept in the mid-1960's, the Court was able to point to post-acquisition evidence of apparent efforts by the acquiring firm to exercise the leverage which the entrenchment theory predicted it would have—the deep pocket for excessive promotion and price-cutting in the case of *Procter & Gamble*,[141] and the reciprocal buying power in the case of *Consolidated Foods*.[142] Thus, in neither of those cases did the Court have to rely entirely on mere predictions of adverse market structure changes which might flow from the acquisitions. Although these early cases can be read as authorizing the FTC and lower courts to base their decisions on such predictions, the Supreme Court's attention to post-acquisition evidence in each of them could severely limit their precedential value. The Court's recent unenthusiastic attitude toward the potential competition doctrine[143] warrants inquiry into whether the Court has indeed restricted the scope of the entrenchment doctrine. Unfortunately, recent Supreme Court opinions do little to clarify the contours of the entrenchment doctrine.

In the Supreme Court's 1972 decision in *Ford Motor Co. v. United States*,[144] Justice Douglas drafted a plurality opinion approving a district court's partial reliance on the entrenchment doctrine. The district court had condemned Ford's acquisition of Electric Autolite Company, a spark plug manufacturer.[145] This was a vertical as well as a product extension merger,[146] and there were

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evidence in *Black & Decker*, for example, that the acquisition may have triggered some defensive mergers involving smaller firms which had not feared an independent McCulloch. Although the court found this evidence to be unconvincing, *id.* at 775 n.81, it *could* have found that one effect of Black and Decker's acquisition was to induce a more concentrated and less competitive market structure in the chain saw market. But the court chose to focus on McCulloch's prospects rather than those for the industry as a whole.

141. FTC v. Procter & Gamble Co., 386 U.S. 568, 579 n.3 (1967).

142. FTC v. Consolidated Foods Corp., 380 U.S. 592, 596 (1965).

143. *See* text accompanying notes 57-60 *supra*.

144. 405 U.S. 562 (1972).

145. The district court had found that the acquisition "had the effect of raising the barriers to entry in to [sic] [the sparkplug] market [and] . . . transmitting the rigidity of the oligopolistic structure of the automobile industry to the spark plug industry, thus reducing the chances for future deconcentration of the spark plug market. . . ." *Id.* at 568, *quoting* 315 F. Supp. at 375.

146. Spark plugs are included as original equipment on new cars. In that sense, Ford was integrating backward by acquiring a supplier. But since Ford was also "anxious" to participate in the spark plug replacement market, the merger also had product extension characteristics. 405 U.S. at 565.

several grounds on which to affirm the divestiture order.[147] Although Justice Douglas did highlight entrenchment language from the district court's findings, his opinion spoke only for himself and Justices Brennan, Marshall, and White. The remaining opinions in the *Ford* case left the status of the entrenchment doctrine somewhat cloudy.[148]

A year after *Ford*, in *United States v. Falstaff Brewing Corp.*,[149] Chief Justice Burger and Justice Blackmun joined in a plurality opinion drafted by Justice White which acknowledged that section 7 "bars certain acquisitions of a market competitor by a noncompetitor, such as a merger by an entrant who threatens to dominate the market *or otherwise upset market conditions to the detriment of competition. . . .*"[150] This passage, which cites approvingly the entrenchment passage in the *Procter & Gamble* opinion, would indicate that Chief Justice Burger and Justice Blackmun do accept the full scope of the entrenchment doctrine. The *Falstaff* votes of Chief Justice Burger and Justice Blackmun, when added to those of the three surviving Justices who joined Justice Douglas's plurality opinion in *Ford*,[151] would suggest that there is presently a five-justice majority on the Supreme Court which has expressed support for the entrenchment doctrine. But the extent of Justice Blackmun's and Chief Justice Burger's support is put in question by their concurrence in the majority opinion in the next merger case decided by the Supreme Court, *United States v. Marine Bancorporation, Inc.*[152]

Previous references to *Marine Bancorporation* have emphasized the hostility with which the Supreme Court's "new antitrust ma-

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147. These grounds included vertical foreclosure, *see* United States v. E.I. duPont De Nemours & Co., 353 U.S. 586 (1956), and even the "wings effect" branch of the potential competition doctrine. *See* note 81 *supra*.

148. Separate opinions were filed by Justices Stewart, Blackmun, and Chief Justice Burger, all of whom concurred at least partially in the result. Ford Motor Co. v. United States, 405 U.S. 562, 578-79, 582, 595 (1972). Justice Stewart's opinion contains language consistent with the entrenchment doctrine's focus on "probable future trends in the . . . market" and preserving opportunities for "measurable deconcentration in the market." *Id.* at 580-81 (Stewart, J., concurring). Although Chief Justice Burger and Justice Blackmun seemed to acquiesce in the plurality's endorsement of all of the grounds on which the district court had relied, their separate opinions focused almost entirely on the remedial aspects of the case. *See id.* at 582-95 (Burger, C.J., and Blackmun, J., concurring). Justices Powell and Rehnquist did not participate in this case.

149. 410 U.S. 526 (1973).

150. *Id.* at 531 (emphasis added).

151. Justices Brennan, White, and Marshall joined Justice Douglas's opinion in *Ford*.

152. 418 U.S. 602 (1974).

jority" treated the potential competition doctrine.[153] The entrenchment doctrine may have been spared a similar fate only because the Justice Department was not asserting an entrenchment theory. A footnote in the majority opinion took note of the doctrine, citing passages from both *Procter & Gamble* and *Falstaff*, only to observe that the Court had not been asked to apply the doctrine in this case.[154] This technically neutral statement, as the Supreme Court's most recent expression relating to the entrenchment doctrine, only underlines the uncertainty regarding the extent of the doctrine's present support. However, the *Marine Bancorporation* opinion provides little reason to doubt the existence of the gerrymandered majority of supporters from the *Ford* and *Falstaff* opinions.[155] Thus, until there is further guidance from the Supreme Court, it is fair to conclude that a current majority of the Court continues to recognize the entrenchment doctrine as a viable, independent basis upon which to predicate a section 7 challenge to a conglomerate merger.[156]

Current Dimensions of the Doctrine

A synthesis of opinions rendered by the Supreme Court, lower courts, and the FTC reveals four essential factors which must be

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153. *See* notes 57-58 *supra* and accompanying text.

154. We put aside cases where an acquiring firm's market power, existing capabilities, and proposed merger partner are such that the merger would produce an enterprise likely to dominate the target market (a concept known as entrenchment). *See* FTC v. Procter & Gamble Co., 386 U.S. 568 (1967). *Cf. Falstaff Brewing Corp.*, ... There is no allegation that the instant merger would produce entrenchment in the [acquired firm's] market.

United States v. Marine Bancorporation, Inc., 418 U.S. 602, 623 n.23 (1974).

155. *See* text accompanying note 151 *supra*. This majority is comprised of Justices Blackmun, Brennan, Marshall, White, and Chief Justice Burger. In addition, Justice Stevens, a careful interpreter of antitrust precedents, see e.g., National Soc'y of Prof. Engineers v. United States, 435 U.S. 679 (1978), is a possible supporter of the entrenchment doctrine. However, since Justice Stevens joined the Court after the decisions analyzed here, his views on the issue remain a matter for conjecture.

156. The wording of footnote 23 in *Marine Bancorporation*, 418 U.S. at 623 n.23, quoted at note 154 *supra*, suggests that the Justices who joined in that opinion may have taken a restricted view of the entrenchment doctrine. The language of the footnote seems to conceptualize entrenchment as being concerned solely with the possibility that the acquired firm will dominate its market, thus implicating only the "tendency-to-monopolize" part of § 7's "effects" clause. Yet, neither of the entrenchment passages cited in the footnote restricted the entrenchment doctrine in this way. Thus, it would be reading too much into this casual footnote to conclude that the Court meant to suggest that it no longer considers the entrenchment theory relevant to the other portion of § 7's "effects" clause, which focuses simply on a merger's propensity to substantially lessen competition. *See* text accompanying notes 97-98 *supra*.

established to make out a section 7 violation under the entrenchment doctrine.

1. Market Position of the Acquired and Acquiring Firms

Some lower courts have held that the entrenchment doctrine applies only where the acquired firm is *the dominant* firm in its market.[157] Although the acquired firm fit this description in two of the Supreme Court cases which focused squarely on entrenchment,[158] the Court has never stated that such a dominant status is indispensable for invoking entrenchment analysis. Indeed, the Supreme Court has applied entrenchment analysis where the acquired firm was neither dominant nor the leading firm in its industry.[159] Entrenchment analysis focuses on the likelihood that smaller firms in the acquired firm's market and potential entrants to that market will be intimidated by competitive advantages which will become available to the acquired firm as a result of the acquisition. The acquired firm's status as one of the leading firms in its market should suffice to establish the possibility of these intimidating effects and thus commence entrenchment analysis.[160] Whether the acquired firm is characterized as dominant or leading, the theory requires that the firm compete in a concentrated market before entrenchment effects will be found.[161] Since most major markets in

157. *See, e.g.,* United States v. Crowell, Collier & Macmillan, Inc., 361 F. Supp. 983, 991 (S.D.N.Y. 1973); United States v. International Tel. & Tel. Corp., 324 F. Supp. 19, 24 (D. Conn. 1970), *appeal dismissed,* 404 U.S. 801 (1971).

158. United States v. Falstaff Brewing Corp., 410 U.S. 526, 528 (1973) (acquired firm largest in relevant market); FTC v. Procter & Gamble Co., 386 U.S. 568, 570-71 (1967) (acquired firm dominant nationally).

159. In *Ford,* the acquired firm was a poor third in a concentrated market, accounting for only 15% of the national market. Ford Motor Co. v. United States, 405 U.S. 562, 566 (1972). In *Consolidated Foods,* the acquired firm was a distant second in a concentrated market. FTC v. Consolidated Foods Corp., 380 U.S. 592, 595 (1965).

160. SULLIVAN, *supra* note 25, at 655-56.

161. If the relevant market were not concentrated, any effects caused by the proposed merger would be difficult to distinguish from the effects which would accompany independent entry by the acquiring firm. Every Supreme Court opinion discussing the entrenchment concept has emphasized the necessity of a concentrated market. United States v. Falstaff Brewing Corp., 410 U.S. 526, 550-51, 558-59 (1973) (Marshall, J., concurring); Ford Motor Co. v. United States, 405 U.S. 562, 566, 568 (1972); FTC v. Procter & Gamble Co., 386 U.S. 568, 571 (1967); FTC v. Consolidated Foods Corp., 380 U.S. 592, 595 (1965). On the other hand, the general statement of the doctrine in Justice White's plurality opinion in *Falstaff* does not include this limitation: "[Section 7] . . . bars certain acquisitions of a market competitor by a non-competitor, such as a merger by an entrant who threatens to dominate the market or otherwise upset market conditions to the detriment of competition. . . ." 410 U.S. at 531. Nor does the FTC's most recent discussion of the entrenchment doctrine emphasize the concentration issue. Heublein, Inc., 3 TRADE REG. REP. (CCH) ¶

our economy are classified as concentrated,[162] and since rarely will a firm be capable of being characterized as leading or dominant in an unconcentrated market, this "concentrated market" condition is not inappropriately limiting.

Several courts have suggested that the *acquiring* firm must have certain characteristics in order to invoke entrenchment analysis. It has been suggested that the acquiring firm must be significantly larger than the acquired firm and its competitors,[163] or the acquiring firm must itself be a leading firm in a product line that is closely related to that of the acquired firm.[164] These conditions may have been present in the Supreme Court cases exploring the entrenchment doctrine, but each of those cases involved product extension or market extension mergers, where such factors would be expected. The Court has never suggested that the doctrine is limited to the facts of those cases. Rather, the cases suggest that the acquiring firm need only be capable of bestowing some significant competitive advantage upon the acquired firm. Although this capability often will be derived from the acquiring firm's size in comparison with the leading firms in the acquired firm's industry, disproportionate size is not considered to be a requirement of the doctrine.[165] Nor is it necessary that the acquiring firm must be participating in a market closely related to that of the acquired firm. A pure conglomerate acquisition[166] is capable of producing the kind of significant advantages postulated by the theory, even though the acquiring firm would not have been participating in a related market.[167]

21,763, at 21,936, 21,948 (1980). The Justice Department's merger guidelines, however, suggest entrenchment problems are limited to concentrated markets. 1 TRADE REG. REP. (CCH) ¶ 4510, at 6881, 6888-89 (1981).

162. "[S]omething in excess of half of all American manufacturing industry can be categorized as oligopolistic." SCHERER, *supra* note 1, at 67.

163. *See, e.g.*, United States v. International Tel. & Tel. Corp., 324 F. Supp. 19, 24 (D. Conn. 1970); Carrier Corp. v. United Technologies Corp., 1978-2 Trade Cas. ¶ 62,393, at 76,360, 76,365 (N.D.N.Y.).

164. *See, e.g.*, Missouri-Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 859 (2d Cir. 1974), *cert. denied*, 419 U.S. 883 (1974).

165. *See id.* at 865-66.

166. *See* notes 5-6 *supra*.

167. *Cf.* Kennecott Copper Corp. v. FTC, 467 F.2d 67 (10th Cir. 1972). The aborted ITT cases were designed to test the entrenchment doctrine in a pure conglomerate context. United States v. International Tel. & Tel. Corp., 324 F. Supp. 19 (D. Conn. 1970); United States v. International Tel. & Tel. Corp., 306 F. Supp. 766 (D. Conn. 1969), *appeal dismissed*, 404 U.S. 801 (1971). Although the Government lost in the lower court in each case, neither district court opinion suggested that the entrenchment theory was inapplicable in assessing the effects of pure conglomerate acquisitions. The district courts merely found

In summary, entrenchment analysis may be invoked (a) whenever the acquired firm is a significant competitor in a concentrated market and (b) the acquiring firm is in a position to bestow upon the acquired firm a significant competitive advantage which can be expected to aggravate the competitive situation in the acquired firm's market.

2. Types of Advantages

A number of advantages bestowed upon an acquired firm may be considered potentially entrenching, including: advertising advantages which flow from the deep pocket of the new parent and the parent's ability to purchase advertising at a cheaper rate than can the competitors of the acquired firm;[168] other marketing advantages, such as superior access to potential retailers due to contacts, sales force, brand names, or a broad line of related products marketed by the acquiring firm;[169] and the cheaper capital costs that larger firms tend to enjoy.[170] Also, "cost savings," presumably attributable to greater efficiency, have been categorized on occasion as an "unfair advantage."[171]

It is neither possible nor desirable to set forth an exhaustive list of advantages. As Commissioner Pitofsky recently wrote for the FTC, "[a]rguably any substantial competitive advantage resulting from the acquiring firm's size disparity or resources" may be sufficient.[172]

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that the alleged anticompetitive effects had not been proven on the records presented. United States v. International Tel. & Tel. Corp., 324 F. Supp. 19, 33 (D. Conn. 1970); United States v. International Tel. & Tel. Corp., 306 F. Supp. 766, 778 (D. Conn. 1969), *appeal dismissed,* 404 U.S. 801 (1971).

168. FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); General Foods Corp. v. FTC, 386 F.2d 936 (3d Cir. 1967), *cert. denied,* 391 U.S. 919 (1968).

169. FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); United States v. Wilson Sporting Goods Co., 288 F. Supp. 543 (N.D. Ill. 1968). The last two listed factors are presumed to be indicative of a type of subtle tying or leverage that may influence retailers in the same manner that subtle, uncoerced reciprocity was thought to have affected industrial buyers of dehydrated onions and garlic in FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965). *See* text accompanying notes 99-106 *supra.*

170. United States v. Ingersoll-Rand Co., 320 F.2d 509 (3d Cir. 1963); United States v. International Tel. & Tel. Corp., 306 F. Supp. 766 (D. Conn. 1970), *appeal dismissed,* 404 U.S. 801 (1971).

171. The initial FTC inquiries into the entrenchment doctrine stressed this factor. General Foods Corp., 69 F.T.C. 380, 424 (1966); Procter & Gamble Co., 63 F.T.C. 1465, 1563 (1963). The appropriateness of treating cost savings as a negative factor is considered in notes 228-35 *infra* and accompanying text.

172. Heublein, Inc., 3 Trade Reg. Rep. (CCH) ¶ 21,763, at 21,936, 21,948 (1980).

3. Uniqueness of Advantages

For the entrenchment doctrine to apply to a conglomerate acquisition, the advantages offered by the acquiring firm must be in some sense unique.[173] If the advantages are possessed or independently obtainable by competitors of the acquired firm, other than by defensive mergers of their own, then the transfer of the advantages from the acquiring firm to the acquired firm could not be expected to unsettle existing competitive relationships in the acquired firm's market. Thus, when the alleged advantages relate to financial power, e.g., lower capital costs, the advantages will only be unique if the acquiring firm's financial power is disproportionately large vis-a-vis the leading firms in the acquired company's industry.

Disproportionate size often explains the uniqueness of other types of advantages, such as superior access to outlets through an established sales force,[174] or market acceptance associated with a heavily advertised and differentiated brand name or product line.[175] But the disproportionate size of an acquiring firm is not the only basis for a finding that the acquisition confers a unique benefit on the acquired firm.[176] An advantage of good will or superior access to outlets resulting from a small but well ensconced sales force or established consumer acceptance could be transferred by a firm that did not enjoy disproportionate size.[177]

173. Missouri-Portland Cement Co. v. Cargill, Inc., 498 F.2d 851 (2d Cir. 1974); United States v. Black & Decker Mfg. Co., 430 F. Supp. 729 (D. Md. 1976); Heublein, Inc., 3 Trade Reg. Rep. (CCH) ¶ 21,763, at 21,936 (1980). *Cf.* United States Steel Corp. v. Fortner Enterprises, 429 U.S. 610 (1977) (competitive advantages are of no antitrust significance unless they are unique).

174. United States v. Wilson Sporting Goods Co., 288 F. Supp. 543 (N.D. Ill. 1968).

175. General Foods Corp. v. FTC, 386 F.2d 936, 939 (3d Cir. 1967), *cert. denied,* 391 U.S. 919 (1968); General Foods Corp., 69 F.T.C. 380, 425 (1966). *See also* Abrams, *Exploiting Proven Brand Names Can Cut Risk of New Products,* Wall St. J., Jan. 22, 1981, at 25, col. 1.

176. United States v. Wilson Sporting Goods Co., 288 F. Supp. 543, 563-64 (N.D. Ill. 1968). The court was partially influenced by the argument that tiny Nissen might actually entrench giant Wilson by bringing into the Wilson line the universally accepted premier line of gymnastics equipment. The court stated that it "would hesitate to block [the] merger on this ground alone," *id.* at 563, but it concluded that the point "constitutes a meaningful argument." *Id.*

177. No matter how large the acquiring firm, some advantages may not in fact be transferable. *Cf.* United States v. Crowell, Collier & Macmillan, Inc., 361 F. Supp. 983 (S.D.N.Y. 1973), in which the court found advertising advantages to be inconsequential where purchasers of the acquired firm's product line were considered so sophisticated in their purchasing decisions that they would not be influenced by excessive advertising. Other advantages, particularly of a psychological nature, may prove to be inconsequential in view of

4. Realistically Predictable Substantial Lessening of Competition

A final condition upon the applicability of the entrenchment doctrine is a showing that the extension of unique advantages from the acquiring firm to the acquired firm is expected with reasonable probability[178] to result in a substantial lessening of competition in a relevant market, or a serious tendency for either the acquired or acquiring firm to achieve a monopoly in its market. This, after all, is the requirement of section 7's "effects" clause.

The most commonly-mentioned adverse effect of a conglomerate merger is the aggravation of oligopolistic behavior in the acquired firm's market.[179] There may be an increased susceptibility to price leadership, with established firms following the lead of the newly entrenched firm.[180] Even if overt price leadership does not develop, there may be a diminution of competitive aggressiveness on the part of the incrementally intimidated rivals of the acquired firm.[181] Because the doctrine's applicability is dependent upon the acquired firm's market being fairly concentrated,[182] any diminution in competitive behavior is considered to be a serious effect.[183] This effect is appraised by looking at the likely conduct and development of the industry as a whole, not just the acquired firm, even though the focus must be on specific industry-wide structural or behavioral changes likely to be induced by the acquisition of that firm.[184]

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customer buying behavior and sophistication. *See* text accompanying notes 134-37 *supra*.

178. It is well settled that the Clayton Act does not require certainty of anticompetitive effects to make out a § 7 violation. Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962). Discussion of the proper standard to evaluate the probability of adverse entrenchment effects is postponed to notes 256-78 *infra* and accompanying text.

179. Ford Motor Co. v. United States, 405 U.S. 562, 568-69 (1972); FTC v. Procter & Gamble Co., 386 U.S. 568, 578 (1967); General Foods Corp. v. FTC, 386 F.2d 936, 945-46 (3d Cir. 1967), *cert. denied,* 391 U.S. 919 (1968).

180. FTC v. Procter & Gamble Co., 386 U.S. 568, 578 (1967).

181. *Id.;* General Foods v. FTC, 386 F.2d 936, 946 (3d Cir. 1967), *cert. denied,* 391 U.S. 919 (1968); United States v. Wilson Sporting Goods Co., 288 F. Supp. 543, 556 (N.D. Ill. 1968).

182. *See* note 161 *supra* and accompanying text.

183. Ford Motor Co. v. United States, 405 U.S. 562, 568 (1972); Procter & Gamble Co., 63 F.T.C. 1465, 1577 (1963); *cf.* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 365 n.42 (1963) (horizontal merger case holding that "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great.").

184. *Cf.* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 621 (1974) ("[I]n no previous § 7 case has the court determined the legality of a merger by measuring its effects on areas where the acquired firm is not a direct competitor."); United States v. Interna-

Another anticompetitive structural effect frequently emphasized by the courts is the aggravation of barriers to entry resulting from the transfer of the acquiring firm's advantages to the already significant acquired firm.[185] Whatever the advantages may be, potential entrants must now contemplate matching or overcoming those new advantages if entry is to be profitable. Even if the acquired firm's market is already protected by barriers to entry, the marginal effect of the acquisition still may be to make the eventual deconcentration of that market less likely, a significant effect in concentrated markets.[186]

For an acquired firm already dominant in its industry, as was the case in *Procter & Gamble,*[187] the new advantages could be so decisive that monopoly power would likely result.[188] This would establish a violation of the "tendency to monopolize" branch of section 7's "effects" clause, and would serve as a clear indication of a probable substantial lessening of competition.

There are other effects which are less amenable to documentation, but which continue to attract inquiry. One of these is the "triggering effect" which may result from the new relationship established by a significant merger.[189] Merger waves sometimes wash through industries leading to increased concentration.[190] A merger

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tional Tel. & Tel. Corp., 324 F. Supp. 19, 52 (D. Conn. 1970), *appeal dismissed,* 404 U.S. 801 (1971) (that "anticompetitive consequences will appear in numerous though undesignated individual 'lines of commerce' " is insufficient to establish a § 7 violation).

185. Ford Motor Co. v. United States, 405 U.S. 562, 568 (1972); FTC v. Procter & Gamble Co., 386 U.S. 568, 579 (1967); General Foods Corp. v. FTC, 386 F.2d 936, 946 (3d Cir. 1967), *cert. denied,* 391 U.S. 919 (1968); United States v. Wilson Sporting Goods Co., 288 F. Supp. 543, 557 (N.D. Ill. 1968).

186. *See* note 183 *supra. See also* United States v. Falstaff Brewing Corp., 410 U.S. 526, 558-59 (1973) (Marshall, J., concurring).

187. FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).

188. United States v. Falstaff Brewing Corp., 410 U.S. 526, 531 (1973); Procter & Gamble Co., 63 F.T.C. 1465 (1963); *cf.* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 623 n.23 (1974) (acknowledging that conglomerate mergers producing "an enterprise likely to dominate the target market" have been held to violate § 7).

189. *See* General Foods Corp. v. FTC, 386 F.2d 936, 946 (3d Cir. 1967), *cert. denied,* 391 U.S. 919 (1968); United States v. Wilson Sporting Goods Corp., 288 F. Supp. 543, 558 (N.D. Ill. 1968); General Foods Corp., 69 F.T.C. 380, 424 (1966); *cf.* United States v. Aluminum Co. of America, 377 U.S. 271, 279 n.6 (1964); Brown Shoe v. United States, 370 U.S. 294, 343-44 (1962); Pillsbury Mills, 50 F.T.C. 555, 572-73 (1953) (existence of a merger trend in an industry is relevant to an appraisal of competitive effects).

190. *See, e.g.,* United States v. Von's Grocery Co., 384 U.S. 270 (1966) (retail grocery chains); United States v. Aluminum Co. of America, 377 U.S. 271 (1964) (aluminum conducter manufacturers); Heublein, Inc., 3 TRADE REG. REP. (CCH) ¶ 21,763, at 21,936 (1980) (wineries). Consider the current trend of large financial conglomerates acquiring major Wall Street securities firms, as summarized in *Hutton Stake of 2.5% Bought by Transamerica,*

wave may be triggered by the need to become large enough to exploit available economies of scale,[191] or it may be triggered by a defensive instinct that drives firms to be as large as their rivals even where additional economies of scale are not obtainable.[192] A given merger trend may be predominantly horizontal, vertical, or conglomerate. In the case of a conglomerate trend, when several independent factors in a market each become subsidiaries of large, diversified concerns, a sense of heightened interdependence, sometimes referred to as "cross-market linkage," between the conglomerate parents may develop.[193] The conglomerates, sensitive to their interdependence, may be inclined to have their subsidiaries pursue a policy of mutual forbearance.[194] One outsider's entry into a mar-

Wall St. J., Aug. 20, 1981, at 5, col. 1.

191. Even then, however, the merger wave does not necessarily have a positive or even a neutral effect on competitive conditions in an industry. The merger also may be contrary to non-efficiency related policies reflected in § 7. *See, e.g.*, United States v. Falstaff Brewing Corp., 410 U.S. 526, 540-43 (1973) (Douglas, J., concurring); Brown Shoe Co. v. United States, 370 U.S. 294, 332-33, 344-45 (1962). *See also* FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967).

192. Many large firms are larger than is necessary to achieve manufacturing economies of scale, although there may be multiplant economies (or diseconomies) of scale. AREEDA, *supra* note 13, at 29-34; SCHERER, *supra* note 1, at 133-41. *Compare* Liebler, *Industrial Concentration, Efficiency, and Antitrust Reform: Another View*, 12 Sw. U. L. REV. 379 (1981), *with* Asch, *Industrial Concentration, Efficiency, and Antitrust Reform Once Again: A Reply to Professor Liebler*, 12 Sw. U. L. REV. 405 (1981). *See also* Klein, *Some Firms Fight Ills of Bigness by Keeping Employee Units Small*, Wall St. J., Feb. 5, 1982, at 1, col. 6 (southwest ed.): "A growing body of opinion has it that the 'economies of scale' made possible by bigness often are more than nullified by organizational rigidities and bottlenecks."

193. *See* Baker, *Potential Competition in Banking: After Greely, What?*, 90 BANKING L.J. 362 (1973); Solomon, *Bank Merger Policy and Problems: A Linkage Theory of Oligopoly*, 89 BANKING L.J. 116 (1972); 1 *Proposed Small and Independent Business Protection Act of 1979: Hearings (Merger & Economic Concentration) on S.600 before the Subcommittee on Antitrust, Monopoly & Business Rights of the Senate Committee on the Judiciary*, 96th Cong., 1st Sess. 96 (1979) (Statement of John H. Shenefield, Assistant Attorney General, Antitrust Division). *But see* Areeda & Turner, *Conglomerate Mergers: Extended Interdependence and Effects on Interindustry Competition on Grounds for Condemnation*, 127 U. PA. L. REV. 1082 (1979).

194. This conclusion is an extension of traditional oligopoly theory. *See generally* SCHERER, *supra* note 1, at 152. The prospect of quick retaliation operates as a disincentive toward aggressive pricing or promotion strategies. Within an oligopoly of conglomerates, moreover, the opportunities for retaliation are broader than in the single product oligopoly. Thus, Conglomerate A will be reluctant to have its wine subsidiary become aggressive, for it fears retaliation not only from the wine subsidiaries of Conglomerates B, C, and D, but also from their other subsidiaries, which may be holding unexploited advantages that could injure another subsidiary of Conglomerate A quite clearly. As more and more product markets become controlled by conglomerate firms, the number of markets in which a given conglomerate faces another conglomerate multiplies, and the tendency for intermarket forbearance becomes even stronger.

ket by the acquisition of a leader in that market may trigger a rush of defensive mergers which would bring about the absorption of that market into the hands of a group of conglomerates who are perhaps already exercising this mutual forbearance policy in other markets where their subsidiaries meet each other. In this manner, one acquisition which fits the entrenchment doctrine's definitional prerequisites may produce a substantial probability of general market entrenchment in the acquired firms industry.[195]

THE CONSISTENCY OF ENTRENCHMENT ANALYSIS WITH THE POLICIES OF SECTION 7 OF THE CLAYTON ACT

Although the Supreme Court's "new antitrust majority"[196] has not eliminated the theory of entrenchment as an approach for analyzing conglomerate mergers,[197] it must be noted that the entrenchment doctrine recently has been subjected to serious criticism.[198] This raises the question of whether the doctrine should be revived and aggressively applied. The inherent consistency of the doctrine with the policies underlying section 7 of the Clayton Act[199] and federal antitrust laws in general[200] suggests that concerns voiced by critics of the doctrine are unwarranted.

Consistency with Legislative History of Section 7

The legislative history of amended section 7 of the Clayton Act indicates that the basic policy objective of the statute is to forestall any trend or tendency toward economic concentration resulting from mergers and acquisitions.[201] The drafters of section 7 were concerned with economic concentration not only because of the belief that it is inimical to competition, but also because of the belief that economic power carries with it disturbing degrees of political power and even a certain unaccountable power over social institutions.[202] Yet, the language of section 7's "effects" clause clearly in-

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195. Although the Supreme Court's *Marine Bancorporation* opinion exhibited considerable skepticism toward the linkage theory of oligopoly, the theory was not rejected in principle, at least with respect to entrenchment type cases. *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 620-23, 623 n. 23 (1974).

196. *See* note 57 *supra* and accompanying text.

197. *See* notes 144-56 *supra* and accompanying text.

198. *See* notes 71-72 *supra* and notes 217-37 *infra* and accompanying text.

199. *See* notes 201-05 *infra* and accompanying text.

200. *See* notes 206-16 *infra* and accompanying text.

201. *See* notes 8-32 *supra* and accompanying text.

202. *See* text accompanying note 32 *supra*. *See also* 4 AREEDA & TURNER, *supra* note 13, ¶ 904, at 11; Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555,

dicates that Congress intended "to restrain mergers only to the extent that such combinations may tend to lessen *competition*."[203] The use of the term "competition" rather than "concentration" in the statutory language apparently reflects Congress' recognition that acquisitions increasing concentration within a given market are likely to tend to lessen competition. In fact, the legislative history of amended section 7 reveals that Congress explicitly contemplated that, in applying the effect on competition test, courts would consider structural factors such as those focused on by the entrenchment doctrine. The House report accompanying the 1950 amendments stated that a probable substantial lessening of competition might be established by a showing of an "increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive."[204] Because the entrenchment doctrine focuses on structural changes that can be predicted to lessen competition in a particular industry, the doctrine is consistent with the objectives of section 7, as expressed in its legislative history.[205]

Consistency with General Antitrust Policy

The basic thrust of federal antitrust policy is to prevent undue

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584-85 (1973) [hereinafter cited as Blake]; Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 236-37 (1960) [hereinafter cited as Bok]; Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1060-65 (1979). *See generally* United States v. Falstaff Brewing Corp., 410 U.S. 526, 540-43 (1973) (Douglas, J., concurring). For recent corroboration of the reasons for these fears, see notes 229-32 *infra* and accompanying text.

203. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (emphasis added). *See also* United States v. International Tel. & Tel. Corp., 324 F. Supp. 19, 51-54 (D. Conn. 1970), *appeal dismissed*, 404 U.S. 801 (1971). Professors Areeda and Turner emphasize this point in support of the suggestion that the "undeniable" congressional concern with non-economic values should be given only a "limited role" in the application of § 7 of the Clayton Act. 4 AREEDA & TURNER, *supra* note 13, ¶ 904, at 11-14.

204. H.R. REP. No. 1191, 81st Cong., 1st Sess. 8 (1949). It is precisely this relationship between industry structure and competition, recognized by the Supreme Court in *Procter & Gamble* and *Consolidated Foods*, which forms the foundation for the entrenchment doctrine. *See* notes 75-106 *supra* and accompanying text.

205. Application of § 7 can serve both economic and non-economic policy concurrently. If a merger can be predicted to lead to increases in or insulation of undesirable levels of concentration in a given market, and if there is an inverse relationship between concentration and competition in that market, then condemning such a merger would further both the economic *and* the non-economic policies reflected in the statute. *See* note 202 *supra* and accompanying text. Cf. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?* 125 U. PA. L. REV. 1191, 1202-03 (1977) (efficiency and nonefficiency goals of antitrust are frequently not in conflict).

concentrations of economic power.[206] A faithful recognition of this policy has led the courts to articulate entrenchment-like concerns in cases dealing with problems other than conglomerate mergers.[207] Non-conglomerate merger opinions frequently have pointed to entrenchment-like effects as grounds for condemning acquisitions which threatened to accelerate the rate of concentration in particular industries.[208] These cases have emphasized the need to preserve industry structures in deconcentrated states, and, where an industry's structure is already concentrated, to preserve opportunities for deconcentration.[209] These non-conglomerate merger cases reveal a sensitivity for the tendency of a given merger to initiate or perpetuate a trend toward a level of concentration in an industry which could be presumed to lead to a substantial lessening of competition in that industry.[210] This concept, sometimes described as "triggering effect," established that in appraising the probable ultimate effect a merger will have on competition, it is permissible to consider, as does the entrenchment theory,[211] other possible future mergers which might be spawned by that merger. Horizontal and vertical merger opinions also evince a concern with the possible entrenchment of a single firm with undue market power, as it threatens to grow through mergers and acquisitions to a size which inherently would intimidate smaller existing and potential

206. This point has been ably developed by Blake, *supra* note 202, at 575-78, 584-85 and Brodley, *Potential Competition Mergers, supra* note 59, at 33-35.

207. *See, e.g.,* Standard Oil Co. v. United States, 221 U.S. 1, 56-62 (1911); United States v. Aluminum Co. of America, 148 F.2d 416, 428-29 (2d Cir. 1945).

208. *See, e.g.,* United States v. Von's Grocery Co., 384 U.S. 270, 274-78 (1966); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362-63 (1963); Brown Shoe Co. v. United States, 370 U.S. 294, 343-46 (1962).

209. *See* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 365 n.42 (1963).

210. In Brown Shoe Co. v. United States, 370 U.S. 294 (1962), the Court considered the possibility that the challenged merger would encourage subsequent acquisitions, stating: "If a merger achieving 5% control were now approved, we might be required to approve future merger efforts by Brown's competitors seeking similar market shares. The oligopoly Congress sought to avoid would then be furthered. . . ." *Id.* at 343-44. *See also* United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963), expressing the fear that approval of the merger in question would allow any firm "to embark on a series of mergers that would make it in the end as large as the industry leader." *Id.* at 370. In United States v. Von's Grocery, 384 U.S. 270 (1966), the Court stated that:

> It is enough for us that Congress feared that a market marked at the same time by both a continuous decline in the number of small businesses and a large number of mergers would slowly but inevitably gravitate from a market of many small competitors to one dominated by one or a few giants, and competition would thereby be destroyed.

211. *See* text accompanying notes 189-95 *supra.*

competitors.[212]

It is fair to say, then, that entrenchment considerations are well established within the body of case law decided under section 7, and the development of the entrenchment doctrine in the conglomerate sphere is thus quite consistent with the development of federal antimerger policy in general. The merger opinions of the Supreme Court's "new antitrust majority,"[213] although calling for a more realistic appraisal of the actual effects on competition that are likely to follow from a merger under challenge,[214] have not rejected the basic proposition, established in the earlier line of cases just reviewed, that section 7 analysis is required to be predictive.[215] Nor has the new majority stepped back from the proposition that,

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212. *See, e.g.,* United States v. Von's Grocery Co., 384 U.S. 270, 278 (1966); Brown Shoe Co. v. United States, 370 U.S. 294, 343-44 (1962). In United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S.D.N.Y. 1958), Judge Weinfeld indicated that an increase in the absolute size of a firm accomplished through acquisition may give rise to a § 7 violation, stating: "Even in a case where two companies operate primarily in separate areas, a merger can have an adverse effect on competition in that the enhanced strength of the merged company may give it such an undue advantage in each area that competition may be substantially lessened." *Id.* at 600.

One particularly intriguing employment of entrenchment language is found in then-Circuit Judge Burger's opinion affirming the FTC's condemnation of Reynolds Metals Company's vertical acquisition of the leading converter of aluminum foil for the florist trade:

> Arrow's assimilation into Reynolds' enormous capital structure and resources gave Arrow an immediate advantage over its competitors who were contending for a share of the market for florist foil. The power of the 'deep pocket' or 'rich parent' of one of the florist foil suppliers in a competitive group where previously no company was very large and all were relatively small opened the possibility and power to sell at prices approximating cost or below and thus to undercut and ravage the less affluent competition . . . .

Reynolds Metals Co. v. FTC, 309 F.2d 223, 229-30 (D.C. Cir. 1962).

In another aluminum industry vertical acquisition, the Supreme Court affirmed, *per curiam,* a district court's divestiture order which had been premised on such typical entrenchment concerns as the "unlimited funds" of the parent and its superior reputation and prestige which might benefit the new subsidiary by giving its products the advantage of preferential consideration by the architects and builders who made the purchasing decisions in the acquired firm's market. United States v. Aluminum Co. of America, 233 F. Supp. 718 (E.D. Mo. 1964), *aff'd per curiam,* 382 U.S. 12 (1965).

213. *See* note 57 *supra.*

214. United States v. Marine Bancorporation, 418 U.S. 602, 627-28, 641-42 (1974); United States v. General Dynamics Corp., 415 U.S. 486, 497-501 (1974).

215. *See, e.g.,* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 622-23 (1974): "[I]t is to be remembered that § 7 deals in *'probabilities'* . . . ." (emphasis added); United States v. General Dynamics Corp., 415 U.S. 486, 498 (1974): " '[O]nly a further examination of the particular market—its structure, history and *probable future*—can provide the appropriate setting for judging the probable anticompetitive effect of the merger.' [Brown Shoe v. United States, 370 U.S.] at 322." (Emphasis added). *See* notes 256-78 *infra* and accompanying text.

where reasoned predictions suggest a given merger will lead to a more concentrated structure in a given industry, there is a presumption, subject to rebuttal, that that industry will become less competitive because of the merger.[216]

Appropriateness of Characterizing Entrenchment Effects as Adverse to Competition

Despite the apparent congruence between entrenchment theory and basic antitrust policy, some eminent commentators have questioned whether it is appropriate to presume that entrenchment effects will have an adverse impact on the level of competition in the acquired firm's industry. These authors doubt that the factors referred to in the entrenchment cases as "unfair advantages"[217] are really *unfair*. These advantages, if they exist at all,[218] are said to result from resource savings attributable to economies of scale or other efficiencies which are (a) equally available to any firm, and (b) socially desirable.[219] It is awkward, they suggest, to have an antitrust doctrine which posits that the enjoyment of real cost savings can have anticompetitive consequences. These commentators question whether the possession of the alleged advantages actually leads to increased market power for the newly acquired firm or increased concentration in the acquired firm's industry.[220] They point out, for example, that overt exploitation of the alleged advantages in the predicted fashion would run afoul of other provisions in the federal antitrust laws.[221] These commentators also sug-

216. *See* United States v. General Dynamics Corp., 415 U.S. 486, 498 (1974). *See also* United States v. Citizen's & Southern Nat'l Bank, 422 U.S. 86, 120 (1975). *See generally,* Schneider, *Evolving Proof Standards Under Section 7 and Mergers in Transitional Markets: The Securities Industry Example,* 1981 Wis. L. Rev. 1, 17-36 [hereinafter cited as Schneider]. Mr. Schneider observes: "[I]n some circumstances—notably in industries undergoing significant regulatory or structural adjustments—evidence other than concentration data may support a finding of likely adverse effect more emphatically than concentration data." *Id.* at 36. Thus, even under the view of the "new antitrust majority," it is not necessary to predict a substantial increase in market concentration, but rather, the required prediction is of a substantially less competitive market structure.

217. *See* notes 168-72 *supra* and accompanying text.

218. Doubts as to the existence of the kinds of advantages postulated by the entrenchment theory are expressed in 5 Areeda & Turner, *supra* note 13, ¶¶ 1134-35, at 202-19; Posner & Easterbrook, *supra* note 30, at 938.

219. 5 Areeda & Turner, *supra* note 13, ¶ 1103b, at 6-7; Posner & Easterbrook, *supra* note 31, at 511-12.

220. Posner & Easterbrook, *supra* note 30, at 511.

221. Overt reciprocity or tying, for example, are probably *per se* illegal. *See* 5 Areeda & Turner, *supra* note 13, ¶ 1134c, at 206 (tying); *id.*, ¶ 1130a, at 177-78 (reciprocity). *But see Antitrust Chief Baxter Denies Clouding Law or Helping Fuel Recent Rise in Mergers,* Wall

gest the futility of the entrenchment doctrine in preventing the exploitation of unfair advantages, if they do exist, since they could be bestowed on a smaller firm in the target market through a presumably unobjectionable "toehold" acquisition, or exercised internally by the conglomerate parent who decides to enter an industry *de novo* by internal diversification.[222]

Aside from the internal difficulties and speculative aspects they find in the entrenchment theory, the opponents of the entrenchment doctrine see the application of the doctrine as potentially imposing serious harm on the nation's economy. First, they contend that the application of the entrenchment doctrine would prevent mergers which could benefit the economy by generating resource savings and improved efficiency at the acquired firm.[223] Second, they fear that the doctrine would have the effect of insulating inefficient managers from viable takeover threats, thus depriving the economy of a valuable incentive for efficient management.[224] On this view, conglomerate acquisitions offer the beneficial effect of shifting "resources to higher valued uses or more skilled users, and . . . society gains as a result."[225] Vigorous enforcement of the entrenchment doctrine is thus viewed as an artificial impediment to the efficient functioning of the market for capital assets.

As for the Clayton Act's concern with the political power of large firms, which provides part of the foundation for section 7 and the entrenchment doctrine, some of these commentators view the existence of such power as a myth, noting that organized small business consistently has demonstrated more political influence than has big business.[226] Other commentators are less willing to challenge the legitimacy of the oft stated concern with political power, but they *are* willing to relegate this concern to the field of political science rather than economic science. In this manner, they excuse themselves from the necessity of analyzing the political power

St. J., Aug. 27, 1981, at 12, col. 3 ("[Mr. Baxter] conceded that he wouldn't sue to block reciprocal dealing between companies, which courts have ruled illegal."). Predatory or discriminatory pricing is also illegal. *See* 3 AREEDA & TURNER, *supra* note 13, ¶ 711a, at 150.

222. 5 AREEDA & TURNER, *supra* note 13, ¶¶ 1103b, at 6-7; POSNER & EASTERBROOK, *supra* note 30, at 511. A "toehold" acquisition involves the purchase of an insignificant factor in a market. From the standpoint of market impact, toehold acquisitions and internal diversification may be treated as equivalent.

223. 5 AREEDA & TURNER, *supra* note 13, ¶ 1103c, at 9-10.

224. POSNER & EASTERBROOK, *supra* note 30, at 940-42.

225. *Id.* at 942.

226. *Id.* at 938-40. Professor Posner adds that the success of the small business lobby has been to the detriment of the economy.

problem in the context of conglomerate merger analysis, and they infer that the courts should similarly refrain from embarking upon such an analysis.[227]

That the critics tend to dismiss the political power underpinnings of the entrenchment doctrine leads to the first point in a response to their critique. In short, their analysis is only one-dimensional; it focuses entirely on the issue of economic efficiency. But there is just too much in the legislative history of section 7 and its amplification in unshakeable Supreme Court precedent to dismiss the political and social concerns reflected in the statute.[228] Recent experience with corporate political action committees,[229] increasing use of the newly discovered first amendment protection for corporate "advocacy" advertising,[230] and a new propensity to rely on corporate largess to support important public institutions[231] all tend to re-emphasize the relationship between economic power and political and social power which has accounted for much of the congressional purpose in enacting antitrust legislation.[232] An approach to merger analysis which restricts attention to a transaction's effect on efficiency[233] does not comport with the consistent judicial observation, uncontradicted in subsequent legislation,[234] that Congress expects the courts to view economic "de-

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227. 5 Areeda & Turner, *supra* note 13, ¶ 1142c, at 244-46; *see* note 203 *supra* and accompanying text. *See also* White, *supra* note 1. ("The [economic] data [available] . . . do not, and cannot address the question of whether there is a social-political problem from the relative size of the largest companies in our economy.").

228. *See* notes 30-32 and 202-16 *supra* and accompanying text.

229. "In 1980, business PACs gave $35 million to Congressional candidates, nearly tripling what labor gave." Miller, *The Political Danger of New Mega-Corporations*, Wall St. J., Aug. 20, 1981, at 24, col. 3 (southwest ed.). *See also* Grigot, *Some Corporations Trying to Turn Stockholders Into a Political Force*, Wall St. J., Jan. 19, 1982, at 27, col. 4 (southwest ed.).

230. *See* Brodley, *Limiting Conglomerate Mergers*, *supra* note 58, at 873-74. *See also* Citizens Against Rent Control v. City of Berkeley, 102 S. Ct. 434 (1981) (First Amendment prohibits enforcement of ordinance placing financial limits on contributions to committees formed to support or oppose ballot measures submitted to popular vote).

231. *See* Business Week, July 6, 1981, at 26-27; Newsweek, March 9, 1981, at 86; Newsweek, October 5, 1981, at 26. *See also* Carey, *Facing Cuts in Federal Grants, Big Schools Try to Get Research Work from Business*, Wall St. J., Feb. 9, 1982, at 27, col. 4 (southwest ed.).

232. *See* notes 32 & 202-05 *supra* and accompanying text.

233. *See, e.g.*, 4 Areeda & Turner, *supra* note 13, ¶ 904, at 11-14.

234. Congress has shown no reluctance to overrule or modify Supreme Court antitrust opinions. *See, e.g.*, Bank Merger Act Amendments of 1966, 80 Stat. 7 (1966), as amended, 12 U.S.C.A. § 1828(c) (1980) (responding to United States v. First Nat'l Bank & Trust Co. of Lexington, 376 U.S. 665 (1964)); Newspaper Preservation Act, 84 Stat. 466 (1970), 15 U.S.C. §§ 1801-1804 (1976) (responding to Citizens Publishing Co. v. United States, 394 U.S. 131

centralization" as a higher priority than economic efficiency in the application of section 7.[235] Until Congress reaches a new concensus on the role of economic efficiency in section 7 analysis, the political and social underpinnings of the anti-merger statute warrant continued emphasis on anti-concentration policy.

In any event, recent empirical data tend to confirm the entrenchment theory's prediction of restrictive effects on mobility and entry within an industry resulting from the linkage of the extensive financial resources of conglomerate parents with leading firms in concentrated markets.[236] In contrast, studies suggesting

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(1969)); Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97, 15 U.S.C. §§ 8a *et seq.* (1976) (responding to judicial uncertainty as to the proper role of competition in the partially regulated securities industry, as reflected in Gordon v. New York Stock Exchange, 366 F. Supp. 1261 (S.D.N.Y. 1973), *aff'd,* 422 U.S. 659 (1975); Thill Sec. Corp. v. New York Stock Exchange, 433 F.2d 264 (7th Cir. 1970), *cert. denied,* 401 U.S. 994 (1971); and Kaplan v. Lehman Bros., 371 F.2d 409 (7th Cir. 1967), *cert. denied,* 389 U.S. 954 (1967)). And yet, Congress has failed to amend § 7 in a way that would instruct the Supreme Court to give greater emphasis to efficiency considerations in § 7 analysis. Indeed, in recent years, Congress has shown a propensity to strengthen § 7, not weaken it. *See* note 65 *supra.*

235. The Supreme Court, has noted that, "Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of de-centralization. We must give effect to that decision." Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962). A year later, the same point was articulated even more forcefully in *Philadelphia Nat'l Bank:*

> We are clear . . . that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.

United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 371 (1963). *See also* United States v. Von's Grocery Co., 384 U.S. 270, 274-76 (1966). This view was reiterated with respect to conglomerates in *Procter & Gamble:* "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." FTC v. Procter & Gamble, 386 U.S. 568, 580 (1967). *Cf.* Standard Oil Co. of California v. United States, 337 U.S. 293, 309 (1949) (purported efficiency justifications present no affirmative defense to an exclusive dealing contract unlawful under § 3 of the Clayton Act). *See also* note 207 *supra.* Although these judicial interpretations of Congressional intent have been questioned by some for being "unsupported," 4 AREEDA & TURNER, *supra* note 13, ¶ 941b, at 153, the fact remains that Congress has had twenty years to clarify its position and has not deemed it necessary to do so. *See* note 234 *supra.* The opinions of the Supreme Court's "new antitrust majority" have not questioned "the traditional rule that judges should not entertain affirmative defences based on beneficial economies. . . ." Schneider, *supra* note 216, at 33.

236. Two recent studies support the predictions underlying the theory of entrenchment. Having reviewed a wave of mergers in the book publishing industry, Professor Garvin, a professor of economics at the Harvard Business School, concluded:

that conglomerate acquisitions have not resulted in accelerated concentration[237] fail adequately to consider the effects of such acquisitions on deconcentration trends which might have accelerated had the conglomerate mergers not occurred.[238] Since section 7

> Recent mergers in publishing have reinforced already existing trends in the industry, threatening to further disadvantage the independent firms. Vertical integration has increased, and with it, the opportunities for vertical control. . . . Meanwhile, wealthy conglomerates have acquired a number of small publishers, raising concern that their "long purses" will make it even more difficult for other firms to gain access to bestsellers. Both entry and mobility barriers have been raised as a result.

Garvin, *Mergers and Competition in Book Publishing,* 25 ANTITRUST BULL. 327, 360 (1980). Professor Garvin noted that the four-firm concentration level in trade book publishing actually declined during the period studied (1958-1972), but the eight-firm level increased during the same period. *Id.* at 333, Table 1. Concentration ratios in other publishing submarkets showed inconsistent trends. *Id.* at 332-33. Despite these inconclusive concentration trends, Professor Garvin reaches the quoted conclusion concerning the restructuring of this industry on the basis of a merger trend which predominantly has been conglomerate in nature. *Id.* at 350, 360-61.

The other study, co-authored by Professor Willard Mueller, made the following observation with respect to the domestic food retailing industry:

> The findings provide strong confirmation of the hypothesis that large conglomerate firms not only possess the power to restructure markets but that during the period examined they succeeded in doing so. The finding that acquisitions . . . by conglomerates increase concentration may surprise many, but they are consistent with Dr. Stephen Rhoades' findings in banking.

Cotterill & Mueller, *The Impact of Firm Conglomeration on Market Structure: Evidence for the U.S. Food Retailing Industry,* 25 ANTITRUST BULL. 557, 581 (1980). Dr. Rhoades is senior economist, Federal Reserve Board. *Id.* at 581 n.44.

Another observer has noted the ability of a firm with a heavily advertised brand name to transfer consumer acceptance to new product markets, concluding that although the process is not always successful, it is being used with increasing frequency. Abrams, *Exploiting Proven Brand Names Can Cut Risk of New Products,* Wall St. J., Jan. 22, 1981, at 25, col. 1. F. M. Scherer, in his widely approved text book, concludes: "All in all, the evidence points toward a conclusion that economies of large-scale image differentiation and sales promotion are substantial in at least a fair number of industries; and they may have contributed prominently to rising market concentration." SCHERER, *supra* note 1, at 116.

In conjunction with this growing body of evidence, one should consider the inability of Purex Corp. to document any antitrust injury incurred as a result of the Procter & Gamble/Clorox merger. *See* Purex Corp. v. Procter & Gamble Corp., 419 F. Supp. 931 (C.D. Cal. 1976), *rev'd,* 596 F.2d 881 (9th Cir. 1979), *appeal after remand,* 1981-2 Trade Cas. (CCH) ¶ 64,422, at 75,072 (9th Cir. 1981). Purex's inability to prevail in this private suit was based on its failure to carry the significant burden of proving that its particular business fortunes (as opposed to competition generally) were affected by Procter & Gamble's illegal acquisition of Clorox, 596 F. 2d at 889; 1981-2 Trade Cas. (CCH) at 75,074-75. *See* note 218 *supra.*

237. *See also* Goldberg, *The Effect of Conglomerate Mergers on Competition,* 16 J. LAW & ECON. 127 (1973); White, *supra* note 1.

238. The Supreme Court endorsed this kind of "but for" analysis in FTC v. Consolidated Foods Corp., 380 U.S. 592, 598-600 (1965), where post-acquisition evidence showed that the acquired firm's market share of the dehydrated garlic market had declined by 12% following the acquisition. The Court accepted the FTC's conclusion that the firm's market

analysis of necessity focuses on probabilities,[239] there would appear to be sufficient empirical verification of the entrenchment theory to warrant the invocation of entrenchment analysis in appropriate cases. It should be recalled that entrenchment analysis is called for only when an acquiring firm is in a position to convey "unique advantages" to a leading firm in a concentrated market.[240] That the same "advantages" could be as dangerous to competition and concentration if they were exercised *de novo* through internal diversification rather than through an already established market leader does not weaken the force of the entrenchment theory. The simple answer is to paraphrase Chief Justice Marshall: "It is an *antimerger* statute which we are expounding."[241] If a merger or acquisition will likely produce one of the effects proscribed by section 7, Congress has declared it to be illegal—even if the same

share might have declined even further had it not been for the unfair leverage which Consolidated sought to exercise to benefit its new subsidiary. *See also* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 365 n.42 (1963) ("if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great. . . ."). Professors Areeda and Turner suggest that the "but for" argument has more force in analyzing a horizontal merger than it does with respect to a conglomerate one, since a conglomerate merger does not absolutely reduce the number of firms in the market. 5 AREEDA & TURNER, *supra* note 13, ¶ 1135d, at 218. If it can be shown, however, that a conglomerate acquisition is likely to raise entry barriers in ways which would insulate part of the acquired firm's market share, the fact that the abolute number of firms in the industry is unchanged does not reduce the reality of the merger's effect on competition. *Cf.* Standard Oil Co. of California v. United States, 337 U.S. 293, 308-09 (Clayton Act's "effects" clause may be violated by conduct proscribed under § 3 even though defendant's conduct has not been shown to increase its share of the relevant market, since "it is possible that [defendant's] position would have deteriorated *but for* the adoption of [the illegal practice].") (emphasis added).

239. *See* notes 256-78 *infra* and notes 91, 94 & 215 *supra* and accompanying text.

240. *See* notes 157-72 *supra* and accompanying text.

241. This is a paraphrase of Chief Justice Marshall's timeless admonition that the first canon of constitutional interpretation is to "never forget, that it is a *constitution* we are expounding." McCulloch v. Maryland, 4 Wheat. 316, 407 (1819) (emphasis in original). His point was that a constitution is necessarily broad and adaptable, "that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." *Id.* A corollary is that a constitution's "important objects" ought never to be diluted by loose interpretation. It has often been suggested that the federal antitrust laws have "constitutional qualities." The Supreme Court's statements to this effect are collected in Brodley, *Limiting Conglomerate Mergers, supra* note 58, at 867 & n.2. If § 7 is accorded this constitutional status, then it should be interpreted with both the flexibility and the fidelity to its "important object" that Chief Justice Marshall would have us employ in constitutional interpretation. The "important object" of § 7 is unmistakable: it is to prevent the growth of economic concentration insofar as that growth is attributable to mergers and acquisitions. It is no coincidence that the popular name of the 1950 amendments to § 7 was the "Celler Anti-Merger Act." 1950 U.S. Code Cong. Serv. 1792.

effects might have been brought about by some other action of the acquiring firm which Congress has not yet chosen to address.[242] Actually, there appears to be sound reason for Congress' preference that corporate growth come by way of internal expansion rather than through acquisitions of independent firms. In an earlier day, Professor Turner put the point this way:

> [E]xpansion of a firm by merger is less competitive in its effects than would be the corresponding expansion made by new investment. This is obvious: new investment adds to supply and capacity; the merger does not immediately, though it may lead to such addition in the long run.[243]

In addition to being economically preferable, the permissibility of internal expansion as a diversification technique answers the critics' concern about unnecessarily protecting inefficient firms from takeover threats. Any sense of insulation which inefficient managers might glean from a rule making conglomerate acquisitions more difficult would be offset by the greater competition they would encounter (or, at least, fear) if cash rich firms entered into direct competition with them. The public would benefit from the ensuing competitive battle for market share.[244] The feasibility of internal expansion as a mechanism to exploit economies of operation and as a check on inefficient markets should not be underestimated.[245] To the extent that capital is available to finance acquisitions into beckoning markets, it should be available to finance internal growth that is market justified.[246] Furthermore, to tolerate

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242. As the district court observed in *Ford,* if the same effects would follow internal expansion, they would be legal not "because the result necessarily would have been commendable, but simply because that course has not been proscribed." United States v. Ford Motor Co., 286 F. Supp. 407, 441 (E.D. Mich. 1968), *quoted with approval,* Ford Motor Co. v. United States, 405 U.S. 562, 568 (1972).

243. C. KAYSEN & D. TURNER, ANTITRUST POLICY, 135 (1959). *See also* Brown Shoe Co. v. United States, 370 U.S. 294, 345 n.72 (1962).

244. *See* notes 222 & 243 *supra* and accompanying text.

245. Procter & Gamble Co. appears successfully to have adopted a toehold entry strategy for its diversification program since it was rebuked in its Clorox acquisition. *See P & G Is Buying Ben Hill Griffin Citrus Business,* Wall St. J., Aug. 19, 1981, at 12, col. 2 ("Analysts didn't consider Ben Hill Griffin's small size or its relative anonymity—its business is mainly private label [processed fruit juice]—significant, saying that P & G's typical strategy has been to simply get a toehold in a new business as a staging point."). A successful internal diversification program is reviewed in *'Johnson Wax' Puts Out More Than Wax, and It Soon May Diversify Even Further,* Wall St. J., Dec. 26, 1980, at 22, col. 1.

246. The capital markets appear to be more impersonal and objective than conglomerate executives in their determinations of credit-worthy investments. *Cf.* 5 AREEDA & TURNER, *supra* note 13, ¶ 1108e, at 27 ("Some managers seem to value growth in assets and sales at

conglomerate acquisitions which satisfy the conditions of the entrenchment formula on the ground that they serve to put inefficient firms in more efficient hands would be in direct conflict with the dispersal-of-economic-power rationale that underlies all of our antitrust laws.[247]

In these troubled economic times, there is an understandable tendency to view the shift from national to world markets as necessitating a re-interpretation of antitrust rules so that firms may become financially strong on a global scale.[248] But the studies on economies of scale and the need to have highly concentrated industries in order to assure optimal efficiency (and thus optimal ability to compete in world markets) remain inconclusive, whether the focus be on single-plant, multi-plant, or capital-raising economies.[249] Certainly, many examples of relatively small companies successfully competing against national and international giants can be found.[250] But even if it is true that optimally efficient firms cannot coexist with de-concentrated domestic markets, it must be remembered that a lessening of competition in one market has never been held to be justified on the ground that it will lead to enhanced competition in another market.[251] The language of sec-

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the expense of profits."). A recent spate of voluntary divestitures by previously aggressive conglomerates may be evidence of improvident acquisition programs embarked upon for non-efficiency motivations. *See ITT's Araskog Reverses Geneen Formula, Sheds Units to Improve Company Fortunes*, Wall St. J., April 1, 1981, at 31, col. 4; *LTV Posts Rise in Profit, Plans Spinoff of Wilson,* Wall St. J., April 30, 1981, at 8, col. 2; *Beatrice's Great Expectations for Tropicana Tempered by Host of Unforeseen Problems*, Wall St. J., Dec. 15, 1980, at 27, col. 1. Although these voluntary divestitures could be cited as proof that markets do not develop as the entrenchment theory would predict, unsatisfactory profit levels are not necessarily inconsistent with the entrenchment theory's prediction of increased barriers to entry.

247. *See* note 201-06 *supra* and accompanying text. It may be true that proxy battles are ineffective in weeding out bad management, *see* POSNER & EASTERBROOK, *supra* note 30, at 941-42, but it is not necessary to abandon the objectives of § 7 in order to improve stockholder control of internal corporate affairs. *See, e.g.*, the proposal for federal legislation on corporate governance in First, *Law for Sale: A Study of the Delaware Corporation Law of 1967*, 117 U. PA. L. REV. 861, 898 (1969).

248. *See, e.g.*, MERGERS AND ECONOMIC EFFICIENCY, *supra* note 1, at 13 (statement of J. Jasinowski, Ass't Sec'y for Policy, U.S. Dep't of Commerce); Landes & Posner, *Market Power in Antitrust Cases,* 94 HARV. L. REV. 937, 963-74 (1981) (foreign production should be taken into account more regularly in appraising the market power of merging domestic firms); L. THUROW, THE ZERO-SUM SOCIETY 146 (1980).

249. *See generally* SCHERER, *supra* note 1, at 81-118. *See also* note 192 *supra*.

250. *See, e.g., How Old-Line Jeans Producer Fashioned Survival Strategy,* Wall St. J., May 4, 1981, at 29, col. 1.

251. *See, e.g.,* United States v. Topco Associates, 405 U.S. 596, 611-12 (1972) (Brennan, J., concurring); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 370 (1963); *cf.*

tion 7 has always proscribed mergers which promise a substantial lessening of competition "in *any* line of commerce in *any* section of the country."[252] That a stronger economy or greater exports might result if a merger otherwise violative of section 7's standard of illegality were countenanced traditionally has been considered to be irrelevant.[253] Although the Supreme Court has recognized that section 7 was designed for the "protection of *competition*, not *competitors*,"[254] it has also consistently viewed the kind of competition which the Congress sought to protect as requiring "the protection of viable, small, locally owned businesses."[255] Since entrenchment analysis seeks to preserve that kind of competition, it remains an appropriate tool for implementing the policies underlying section 7.

Entrenchment analysis examines the likely effects of a merger on the market structure of a particular industry in order to provide a reasoned prediction of the merger's effect on competition. This has been shown to be consistent with the economic and social policies underlying section 7. The remaining issue concerning the doctrine's legitimacy is whether, given the peculiarly predictive nature of the doctrine, it is feasible to assess the substantiality of any anticompetitive effects which the entrenchment theory might predict in a given case.

Assessing the Substantiality of Entrenchment-Induced Effects

Problems of proof are ubiquitous in merger doctrine because of the use of the subjunctive verb "may" in the effects clause of section 7.[256] The statute requires a prediction of not only the probable

United States v. Connecticut Nat'l Bank, 418 U.S. 656, 666-67 (1974) (bank merger's effects must be analyzed in the markets where they operate primarily, regardless of broader effects). *But see* Continental T.V. v. GTE Sylvania Corp., 433 U.S. 36 (1977) (enhancement of *inter*brand competition is relevant in assessing the reasonableness of any elimination of *intra*brand competition in applying rule of reason analysis to non-price vertical distribution restraints imposed by manufacturers on dealers).

252. The language of the original § 7 is set out in note 17 *supra;* the language of the current § 7 is found in note 8 *supra.*

253. See note 235 *supra* and accompanying text.

254. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (emphasis in original).

255. *Id.* at 344. *See also* United States v. Von's Grocery Co., 384 U.S. 270, 274-76 (1966). For a brief description of the economic and social impact mergers can have on a community, *see* Byrne, *Takeovers Drain Milwaukee, Crimping the Support Firms,* Wall St. J., Sept. 15, 1981, at 25, col. 1 (southwest ed.). *See also* United States v. Falstaff Brewing Corp., 410 U.S. 526, 543 (1973) (Douglas, J., concurring).

256. *See generally* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362 (1963);

future effect a merger will have on competition, but the substantiality of that effect as well.[257] A plaintiff need not show that substantial adverse effects on competition are certain; "probabilities," to be distinguished from "ephemeral possibilities," will suffice.[258] Attempts to further refine this subjective standard have been unsuccessful.[259] In applying the "probability test," the Supreme Court historically has been guided by its understanding of the congressional intent in section 7 "[to arrest] mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency . . . [and thus] to brake this force at its outset and before it gathered momentum."[260] This has led the Court to accept reasonable predictions of anti-competitive consequences without elaborate proof as to the "probability" that the alleged adverse consequences would in fact occur, or that the alleged consequences would be "substantial" if they did occur. The Court has indicated that to require more certain predictions would frustrate the "incipiency" standard built into the Act.[261]

Bok, *supra* note 202; Brodley, *Potential Competition Mergers, supra* note 59 at 8-9; Turner, *supra* note 49, at 1318-19.

257. The statutory standard for illegality is whether "the effect of [a] merger may be substantially to lessen competition or tend to create a monopoly." 15 U.S.C. § 18 (1976) (amended 1980). Application of this standard "necessarily requires a prediction of the merger's impact on competition, present and future." F.T.C. v. Procter & Gamble Co., 386 U.S. 568, 577 (1967). The required prediction is no different for conglomerate mergers than it is for horizontal mergers. *Id. See* note 251 *supra* and accompanying text.

258. Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962). *See* notes 91, 94 & 215 *supra* and accompanying text.

259. In *Marine Bancorporation,* the "new antitrust majority" reminded Justice Marshall of his earlier articulation of the standard as being whether a lessening of competition is "sufficiently probable and imminent" to warrant condemnation. United States v. Marine Bancorporation, Inc., 418 U.S. 602, 623 n.22 (1974). Despite their agreement on the standard, the nine Justices split five to four on its application. The majority found the government's case to be "considerably closer to 'ephemeral possibilities' than to 'probabilities.'" *Id.* at 623.

260. Brown Shoe Co. v. United States, 370 U.S. 294, 317-18 (1962).

261. *See* United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963), where the Court found it desirable to design a test which "lightens the burden of proving illegality . . . with respect to mergers whose size makes them inherently suspect in light of Congress' design in § 7 to prevent undue concentration." *Id.* at 363. Although *Philadelphia National Bank* was a horizontal merger case, a similarly "light burden has been imposed in vertical and conglomerate cases." *See* United States v. Penn-Olin Chemical Co., 378 U.S. 158, 170-72, 174-77 (1964) (conglomerate); United States v. Aluminum Co. of America, 233 F. Supp. 718, 729-30 (E.D. Mo. 1964), *aff'd per curiam,* 382 U.S. 12 (1965) (vertical). Congress' apparent willingness to sacrifice some economic efficiency if necessary to achieve its pro-competition/anti-accumulation-of-power objectives supports the Court's construction of the statutory standard. *See* notes 201-05 & 235 *supra* and accompanying text. Since antitrust law does not prohibit a firm's exercise and enjoyment of real efficiency advantages in a program of inter-

This is not to suggest that the "substantiality" question should be resolved by an intuitive reaction against large mergers. But any case satisfying all four elements of the entrenchment theory[262] will likely involve a very large firm[263] seeking to acquire a leading firm in an already concentrated industry. In such a setting, virtually any adverse effect on competitive relationships within the affected industry could be qualitatively "substantial," since competitive conditions in such an industry prior to the acquisition would have been unhealthy.[264] Any existing or potential competition within an oligopolistic market warrants special protection.[265] By focusing attention on the pre-existing quality of competition in the acquired firm's industry and, perhaps, the historical trend toward concentration in that industry,[266] courts may find a benchmark against which to appraise the significance of the effects which are predicted to follow a challenged acquisition.

If the acquired firm is already dominant in an oligopolistic industry, as in *Procter & Gamble*,[267] any incremental advantages conferred on that firm might properly be considered qualitatively substantial. The incremental barriers to entry generated by such an acquisition would threaten a substantial reduction of competi-

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nal diversification and expansion, there is little risk that society will be deprived of the benefits attributable to a firm's efficiency if an acquisition it proposes is prohibited. *See* notes 243-47 *supra* and accompanying text. On the other hand, if a merger which is reasonably likely to aggravate concentration trends in a given industry is permitted, there is considerable risk that society will experience some of the deleterious consequences which Congress associated with the growth of private economic power. The more recent merger opinions of the Supreme Court's "new antitrust majority" are not to the contrary. *See* notes 213-16 & 235 *supra* and accompanying text.

262. The four elements involve (1) the acquisition of a leading firm in a concentrated industry (2) by a firm capable of conveying an "unfair advantage" upon the acquired firm, with (3) the advantage being unique in the acquired firm's industry, so that (4) it reasonably may be predicted that actual or potential competitors will be intimidated from competing aggressively against the newly acquired firm. *See* notes 157-95 *supra* and accompanying text.

263. The acquiring firm conceivably could be less than giant in size. *See* notes 165, 174-77 *supra* and accompanying text.

264. *See* notes 208-09 *supra* and accompanying text. Of course, the court would still have to be satisfied that there is a reasonable probability that adverse effects will occur.

265. *See* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 365 n.42 (1963).

266. While the court must attempt to predict the effect of a merger in light of the probable *future* development of an industry, United States v. General Dynamics Corp., 415 U.S. 486 (1974), past trends and conditions are relevant to that analysis. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 332-33, 344-46 (1962).

267. FTC v. Procter & Gamble Co., 386 U.S. 568 (1967). *See* notes 76-77 *supra* and accompanying text.

tive vitality in that market.[268] But even if the acquired firm is not substantially larger than the other firms in its industry, and even if the acquired firm's industry is not exceptionally concentrated, the likelihood that other firms within the industry would also pursue a course of acquisitions might substantially worsen the prospects for competition in that industry.[269] Because of the first acquisition, the industry might seem measurably more likely to become or remain the kind of oligopoly that section 7 was intended to retard.[270]

A noticeable trend toward concentration within an industry may also establish with greater certainty the substantiality of likely entrenchment effects. This principle is well established in horizontal and vertical merger cases,[271] and it would seem equally relevant to conglomerate merger analysis. In non-conglomerate cases, analysis normally is directed toward the acquired firm's industry, although in vertical cases the relevant line of commerce may be that of either the acquired or the acquiring firm.[272] Similarly, conglomerate merger analysis usually will focus on the market in which the acquired firm competes, although, as with vertical mergers, anticompetitive effects in any market in which the acquiring firm competes may establish a violation of section 7.[273] But even if the focus is

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268. *See* General Foods Corp. v. FTC, 386 F.2d 936, 946 (3d Cir. 1967), *cert. denied,* 391 U.S. 919 (1968). *See also* notes 116-21 *supra* and accompanying text.

269. *See* text accompanying notes 189-94 & 210-11, discussing "triggering effect."

270. The Third Circuit in *General Foods* seems to have taken this view. The court emphasized how the acquisition of S.O.S. Company would transform the soap pad industry from a closely balanced duopoly to either a dominant/subservient oligopoly arrangement or, if the other duopolist sought a protective merger, a doubly entrenched duopoly arrangement. General Foods Corp. v. F.T.C., 386 F.2d 936, 945-46 (3d Cir. 1967), *cert. denied,* 391 U.S. 919 (1968).

271. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 332, 345-46 (1962).

272. *Compare, e.g.,* Reynolds Metals Co. v. F.T.C., 309 F.2d 223 (D.C. Cir. 1962) (focus on acquired firm's market), *with* United States v. E.I. duPont de Nemours & Co., 353 U.S. 586 (1957) (focus on the acquiring firm's market).

273. In *Marine Bancorporation,* 418 U.S. 602 (1974), Justice Powell stated: "[I]n no previous §7 case has the Court determined the legality of a merger by measuring its effects on areas where the acquired firm is not a direct competitor." *Id.* at 621. This statement apparently overlooks United States v. E.I. duPont de Nemours & Co., 353 U.S. 586 (1957), as well as United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964). Perhaps Justice Powell intended to limit his statement to banking cases. It also appears that Justice Powell's unwillingness to consider effects in markets in which the acquired firm did not compete was premised as much on a failure of proof as on unacceptability of the theory. Justice Powell stated:

> There has been no persuasive showing that the effect of the merger on a statewide basis may be substantially to lessen competition within the meaning of §7 . . . . To assume, on the basis of essentially no evidence, that the challenged merger will tend to produce a statewide linkage of oligopolies is to espouse a *per*

strictly on the acquired firm's industry, if that industry is experiencing a trend toward concentration, that aspect of entrenchment theory which focuses on the entrenchment of the industry generally[274] would take on special significance in assessing the substantiality of the effects of the acquisition. By the same token, if the acquired firm's industry is experiencing or is likely to experience a wave of takeovers by conglomerate firms, the more recent studies[275] suggest that the rapid fire replacement of previously single-industry oligopolists by multi-industry conglomerates may produce a substantially less competitive industry.[276] The tendency of a merger to contribute to the entrenchment of already obtained concentration levels in an oligopolistic industry might reasonably be accorded more significance than the absolute percentage gains in concentration attributable to that merger would suggest.

A final question on the substantiality issue is whether any incremental lessening of competition attributable to a merger's entrenchment effects should be aggregated with other types of competitive impact predicted to accompany a merger. In view of the incipiency standard built into section 7, aggregation of probable effects would seem to be justified.[277] Where the task is to draw lines between probabilities and possibilities, two or more credible theories might warrant a conclusion that the combined effects would have a "substantial" effect on competition, especially if

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se rule against market extension mergers like the one at issue here.

418 U.S. at 622-23. It is possible that a more persuasive record could be produced today, as economists continue to explore the theory of conglomerate power and interdependence. *See* note 236 *supra* and accompanying text. There is reason to believe the Supreme Court would not lightly dismiss a more compelling record. *See* notes 144-56 *supra* and accompanying text.

274. *See* notes 97-98 *supra* and accompanying text.

275. *See* note 236 *supra* and accompanying text.

276. *See* notes 189-94 & 236 *supra* and accompanying text. This argument is distinguishable from that rejected by the district court in United States v. International Tel. & Tel. Co., 324 F. Supp. 19, 51-54 (D. Conn. 1970), *appeal dismissed*, 404 U.S. 801 (1971). *See* notes 52-54 *supra* and accompanying text. There, the government was contending that the mergers contributed to rising aggregate concentration without reference to any particular industry. In comparison, the theory of conglomerate interdependence is capable of focusing on the acquired firm's particular industry, looking for any recent increase in concentration or oligopolistic behavior that may be attributable to the absorption of the industry into the hands of conglomerate firms.

277. Commissioner Elman advocated this approach in his dissent to the FTC's opinion in *General Foods*, 69 F.T.C. 380 (1966), suggesting that his opinion for the Commission in *Procter & Gamble*, 63 F.T.C. 1465 (1963) had employed this approach. *See* notes 108 & 116 *supra* and accompanying text.

competition in the market is already impaired.[278]

A Proposal for a More Sensitive Analysis of Entrenchment Effects in Conglomerate Merger Cases

Periods of heightened merger activity tend to generate legislative proposals which would establish presumptions of illegality based upon the size of the participating firms or some other quantitative formulae.[279] One frequently advanced proposal would attack the acquisition of a leading firm in a concentrated market by a "large" firm.[280] There are obvious practical obstacles to articulating[281] and then enacting[282] such a legal standard. Unlike these proposals, however, revival of the entrenchment doctrine would require no legislative action. The revival of entrenchment analysis as an effective approach for assessing the competitive impact of conglomerate mergers merely requires a recommitment to the principles enunciated by the Supreme Court in the mid-1960's, principles which were sensitive to the legislative policy of arresting in its incipiency any trend toward concentration or reduced competition in an industry.[283]

Under the entrenchment analysis advocated here, mergers would not be condemned merely because the firms involved were large and there existed a trend toward aggregate concentration in the economy. Illegality would be premised on a reasonable assessment of probable changes in competitive relationships within an identifiable market due to a specific merger. The analysis would be no more conjectural than classical horizontal and vertical merger anal-

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278. An approach allowing the aggregation of effects predicted by the various § 7 theories would be most relevant in product extension and market extension cases, in which a combined analysis under both the potential competition doctrine and the entrenchment doctrine is particularly appropriate.

Although Professors Areeda and Turner have rejected this aggregation approach, 5 Areeda & Turner, *supra* note 13, ¶ 1147, at 264-74, the Supreme Court has not yet had an opportunity to express an opinion on it. FTC v. Procter & Gamble Co., 386 U.S. 568 (1967), was not treated by the Court as an aggregation case. *See* notes 81 & 92-96 *supra* and accompanying text. The *ITT* cases, in which the Government's case relied partially on the aggregation of effects, were settled while pending on appeal. *See* note 54 *supra* and accompanying text. *Marine Bancorporation* involved only the potential competition theory. United States v. Marine Bancorporation, Inc., 418 U.S. 602, 623 n.23 (1974).

279. *See* note 69 *supra* and accompanying text.

280. *See, e.g.*, S. 600, § 2(c), 96th Cong., 1st Sess. (1979); Neal Report, *supra* note 64.

281. *See generally* Baker & Grimm, *supra* note 42.

282. *See* notes 49-65 *supra* and accompanying text.

283. *See* notes 17-32, 91, 94, 215, 235 & 260-61 *supra* and accompanying text.

ysis.[284] As in those areas, entrenchment analysis would call for courts to look not simply at the likely future of the acquired *firm*, to see if it may become more dominant, but also at the acquired firm's *industry as a whole*, to see whether there might be a probable substantial lessening of competition in that industry. Disturbing entrenchment effects could be shown even without predicting either the creation of one overly dominant firm or a significant increase in concentration in the acquired firm's industry. The entrenchment doctrine of the 1960's has been found here not necessarily to be confined to "entrenchment-of-the-dominant-firm" or "disproportionate resources/giant-among-pygmies" situations.[285] Section 7 of the Clayton Act is as surely violated if a non-competitive market *structure* in an entire industry becomes entrenched because of a merger as it is when a single, already dominant *firm* in an industry becomes entrenched. Hopefully, the courts—and the enforcement agencies—will learn to recognize both situations. To do so would only do justice to the deconcentration policy which Congress consistently has pursued in its merger control legislation.[286]

The proposal here is simply to bring the incipiency concern to the same level of importance in conglomerate merger analysis that it traditionally has been accorded in horizontal and vertical merger analysis. Significantly, the entrenchment analysis advocated here would provide an avenue for examining pure conglomerate mergers not otherwise assailable under traditional theories.[287] There is no reason why all of the conditions required to invoke the entrenchment doctrine could not exist and be demonstrated in a non-market extension or product extension situation.[288]

CONCLUSION

The task upon which this article embarked was to consider whether the entrenchment doctrine might be revived as a coherent, economically defensible theory under which a significant number or class of conglomerate mergers might be shown to violate the "ef-

284. *See* notes 33-37 & 212 *supra* and accompanying text.

285. *See* notes 97-98 *supra* and accompanying text.

286. *See* notes 201-12 *supra* and accompanying text.

287. *See* notes 54-60 & 167 *supra* and accompanying text.

288. Although the pure conglomerate transaction narrows the range of possible advantages that might be conveyed by the acquiring firm to the acquired firm, capital advantages certainly could be found in many pure conglomerate transactions. On the significance of capital advantages, *see* SCHERER, *supra* note 1, at 104-08.

fects" clause of existing section 7. The entrenchment doctrine was found to be capable of identifying suspect acquisitions when the following four conditions simultaneously obtain: (1) the acquired firm is a leading firm in a concentrated industry,[289] (2) the acquiring company is in a position to bestow upon the acquired firm a previously unavailable significant competitive advantage,[290] (3) the competitive advantage is not available (except through merger) to the other firms in the acquired firm's industry,[291] and (4) the competitive advantage reasonably can be expected to alter competitive relationships so as to dampen competitive attitudes displayed in the acquired firm's industry (by increasing oligopolistic behavior and/or heightening barriers to entry).[292] Adverse treatment of entrenchment effects was found to be appropriate in view of the legislative policies underlying section 7 and related antitrust laws.[293] Finally, several factors were suggested which would be helpful in appraising the substantiality of any entrenchment-induced effects in a case by case analysis.[294] Several of the very recent "megamergers" would appear to be candidates for the proposed entrenchment analysis.[295] The cases which might be reached under the formula set out here would include many of those acquisitions which various legislative proposals have recommended should be proscribed under a "large firm/leading firm" prohibition,[296] but without the need for additional legislation.

Professor Bork has said that the "congealing of the economy" into a few corporate hands is merely a "hobgoblin" that "never comes to pass."[297] One might wonder whether the current merger wave is different in kind than any in the past, and about the cost, in terms of *all* of the values underlying federal antitrust policy, if we should discover a few years from now, say on the one-hundredth anniversary of the passage of the Sherman Act, that the hobgoblin was real after all. Perhaps employment of entrenchment analysis will help to assure that these fears are never realized.

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289. *See* notes 152-62 *supra* and accompanying text.

290. *See* notes 163-72 *supra* and accompanying text.

291. *See* notes 173-77 *supra* and accompanying text.

292. *See* notes 178-95 *supra* and accompanying text.

293. *See* notes 197-255 *supra* and accompanying text.

294. *See* notes 256-78 *supra* and accompanying text.

295. The Societe National Elf Acquitaine/Texas Gulf, Standard Oil (Ohio)/Kennecott, Fluor/St. Joe Minerals, and Standard Oil (California)/Amax mergers, involving an aggregate of $9.9 billion, all raise substantial entrenchment issues. *See* note 4 *supra.*

296. *See* notes 64 & 279 *supra* and accompanying text.

297. R. BORK, THE ANTITRUST PARADOX 202 (1978).