Antitrust More than a Century After Sherman: Why Protecting Competitors Promotes Competition More than Economically Efficient Mergers

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[224] Introduction

The evolution of antitrust laws in the United States, from the Sherman Antitrust Act of 1890 n1 to the Hart-Scott Rodino Antitrust Improvements Act of 1976, n2 has been disrupted throughout this country's history by a dispute as to whether antitrust legislation passed by the United States Congress should have broad or narrow implications with regard to a merger between two companies. n3 Historically, Congress has enacted antitrust legislation with broad implications, and the United States Supreme Court has applied the legislation narrowly. n4 Thus, disagreement between these two branches of the United States government has existed, n5 creating an obstacle to the evolution and effectiveness of antitrust laws in this country.

Although disagreement has existed as to the extent to which antitrust laws should be applied, the goal of antitrust legislation has been unanimously agreed upon by the two branches. That goal is to promote competition, n6 in order to provide consumers with the lowest priced and highest quality goods. n7 As such, antitrust laws are primarily concerned with preventing those mergers which have an anticompetitive effect. There are three distinct forms of mergers: vertical, horizontal, and conglomerate. n8 As discussed later in this Article, n9 of the three types of mergers, horizontal mergers present the clearest threat to competition. As such, they have historically been the main target of antitrust enforcement. n10 This Article focuses on the dispute as to whether antitrust legislation should have broad or narrow applications with regards to horizontal mergers. n11

With regards to this dispute, those in favor of narrow application of the antitrust laws argue against broad application because it is overinclusive. n12 They claim some horizontal mergers which present anticompetitive effects
may also exhibit procompetitive effects, and should therefore be permitted and not enjoined. Broad application is, therefore, overinclusive in the sense that it prohibits many procompetitive mergers, and not only those which are anticompetitive. Thus, those on this side of the debate favor narrow application, in an effort to permit those mergers whose procompetitive effects outweigh the anticompetitive effects.

Of the different procompetitive effects claimed by the proponents of limited or narrow application of the antitrust laws, economic efficiency is the one most often debated. Those in favor of narrow application argue economically efficient mergers are procompetitive, because the merger allows the post-merger firm to produce its product at a lower cost, thereby allowing the firm to lower the price consumers pay for these goods. Thus, they argue against broad application, because such an application does not take into account the economic efficiency of the merger, whereas a narrow application allows for consideration of such procompetitive effects.

Those on the opposite side of this debate argue in favor of broad application of the antitrust laws, claiming it is the best approach to ensuring all anticompetitive effects are prevented. Although economic efficiency may promote competition in the sense argued by those in favor of a narrow application, it neglects the historic and long-lasting concerns of the American people and Congress that large companies will eventually gain too much market power and ultimately control America. As such, they argue against a narrow application of the laws, because such an application does not address these concerns, and is therefore underinclusive. Based on the historical concerns of antitrust, they argue only an overinclusive approach ensures all of the anticompetitive effects of horizontal mergers are prevented, and that a narrow approach to horizontal mergers fails to address other fundamental antitrust concerns. Thus, a broad application is necessary so that all of the anticompetitive effects of horizontal mergers are prevented.

Congress has repeatedly attempted to address this fear of domination by large companies by enacting broad legislation to ensure all anticompetitive mergers are enjoined. In fact, Congress enacted new legislation, or amended previous Acts, about every twenty years to clarify this concern. However, every time Congress enacts legislation to address the antitrust concerns inherent in market control by large companies, the Court limits the legislation's reach by applying the relevant antitrust legislation narrowly. This causes Congress to respond by enacting new legislation to broaden the reach of antitrust laws so that the threat of large company domination may be better addressed. Such legislation is again met with judicial opposition in the same manner as before. Accordingly, Congress desired broad application of the antitrust laws, since only broad application protects competitors as well as promotes competition.

In sum, the issue is whether broad or narrow application of the antitrust laws is the best method by which to achieve the antitrust goals desired. This Article addresses this issue in four parts. Because an understanding of the anticompetitive effects inherent in horizontal mergers is necessary for a better examination of the relevant antitrust concerns, Part I of this Article will explain horizontal mergers, and discuss both the anticompetitive and the procompetitive effects which may result. Part II of this Article will then examine the dispute regarding the application of the antitrust laws, as well as the evolution of the horizontal merger analysis, by chronologically evaluating the actions taken by each side of the dispute. The focus will be on the actions taken by each side of the debate, and the constant shift from broad back to narrow application of the antitrust laws. Part III will examine the current approach to reviewing horizontal mergers applied by the Court, and the inconsistent approach taken by the federal agencies authorized to enforce the antitrust laws. Here, the factors evaluated to determine whether or not to enjoin a horizontal merger will be reviewed, distinguishing those which are binding on the Court from those which are not.

Since the trend is towards an emphasis on the non-binding factors, the implications of this trend on the dispute will be discussed in Part IV. Additionally, the reasons for a return to an emphasis on the binding parts will also be discussed,
explaining why broad application of antitrust laws achieves the goals of antitrust without neglecting other antitrust concerns and American values along the way. Thus, these arguments will be made to support enactment of new legislation by Congress to ensure the effectiveness of the antitrust laws. Part V will conclude this Article by explaining how the arguments presented are in agreement with Congressional concerns and are in the best interest of consumers. Further, just as Congress enacted legislation in the past to respond to the Court's decisions, it should do the same in light of the wave of mergers in the past decade and the growing trend towards an analysis of mergers which is contrary to congressional goals.

Part I. Horizontal Mergers

A. Classifying a Horizontal Merger

Generally, a merger occurs when two or more separate firms come under common ownership or control. This can occur through a stock acquisition, asset acquisition, or consolidation. Irrespective of how the merger occurs, there are three types of mergers: (1) horizontal, (2) vertical, and (3) conglomerate. A horizontal merger involves firms who are in direct competition with each other. A vertical merger involves firms in a buyer-seller relationship: a manufacturer merging with a supplier of component products, or a manufacturer merging with a distributor of its products. A conglomerate merger involves firms which are in unrelated businesses, and the merger is neither horizontal nor vertical in nature. With regards to antitrust, it is important to determine what type of merger is involved, because each involves different anticompetitive effects to a certain extent. Further, whether a proposed merger is horizontal, vertical, or conglomerate is extremely relevant in reviewing a challenged merger, because its classification also determines the analysis to apply. Thus, a merger must be classified as horizontal before determining whether or not to enjoin the merger because of the anticompetitive effects it presents.

With regards to antitrust legislation, a horizontal merger occurs where one entity acquires another, through stock acquisition, asset acquisition, or consolidation, and the entity that is acquired directly competes with the acquiring firm in the same "line of commerce" and in the same "section of the country." In other words, the merging firms are selling the same product in the same geographic market. Therefore, the two entities must be in actual and direct competition prior to the merger, for the merger to be deemed horizontal. Thus, in determining whether a proposed merger is horizontal, surrounding factors are important.

In some cases, the Court may look at the extent to which the merging companies compete for the same sales. Another factor relevant to the classification of the merger is the elasticity of demand. In other words, even though two firms do not sell exactly the same product, the products may be of such close similarity that one of the merging firms may very easily be able to produce the other firm's product.

Although a truly horizontal merger involves two firms that produce exactly the same product and sell that product in exactly the same geographic area, mergers have been treated as horizontal in cases where the merging firms did not satisfy the above definition. In General Dynamics Corp. v. United States, the firms were considered to be direct competitors with regards to the product sold, even though one firm strip mined and the other deep mined. In United States v. Von's Grocery Co, the merging firms were deemed to be in the same geographic area, even though one of the companies was located in northeast Los Angeles and the other in the southeast region. Most noticeable, the Court in Brown Shoe Co. v. United States found that although the merging firms involved one which sold expensive high quality shoes and another which sold cheaper, lower quality shoes, the merger was still horizontal.
must be considered, resulting in a case-by-case examination of these factors. n45

B. Anticompetitive Effects

As mentioned earlier, horizontal mergers present certain inherently anticompetitive concerns due to the fact that the merger involves two companies which are in direct competition with one another. n46 It is inherently threatening to competition, because such a merger by its nature increases the market share of the post-merger firm to a percentage higher than either of the pre-merger firms separately. n47 For example, suppose in Market A there are twenty competing firms all located in Region A. If one of the firms, Firm X, which has a market share of 10%, and another firm, Firm Y, which has a market share of 7%, decide to merge, the post-merger firm, Firm XY, will have a market share of 17%. Additionally, there will no longer be twenty firms competing in Market A, but rather, there will only be nineteen. As such, certain antitrust concerns are presented every time a horizontal merger occurs.

Of the many anticompetitive effects involved in horizontal mergers, certain concerns pose a greater threat to competition than others. n48 One such anticompetitive effect and threat to competition is that the post-merger firm will obtain market share dominance, and entry of new firms will be discouraged. n49 Another concern is that the remaining market participants will also seek merger opportunities in response to a horizontal merger as a defensive measure against a firm with dominant market share power after a horizontal merger. n50 Further, smaller firms in a market where two firms have merged, are threatened by price-cutting and other unfair trade practices by the dominant firm. n51 The firm that has gained a dominant market share in a market can entertain certain trade practices which smaller firms cannot. This is due to the increase in resources available to it, which became available by the merger. Additionally, the inherent increase in market share by the post-merger firm allows the post-merger firm to obtain economic, technological, and financial superiority over other companies in the market. n52 Thus barriers to entry may be significantly increased. n53

All of these concerns involve anticompetitive effects and their impact on competitors. Therefore, implying protection of competitors is necessary to promote competition. More specifically, it is the defenseless competitors with which antitrust regulation is concerned. As will be discussed in detail later, n54 protecting competitors is one main purpose for which Congress enacted antitrust legislation, since the most competitive markets are those with the greatest number of market participants. n55

C. Procompetitive Effects

Although horizontal mergers necessarily involve anticompetitive effects, n56 the Court has indicated the possibility of procompetitive effects. n57 The Court in Brown Shoe indicated that “inadequate resources of one of the parties... may have prevented it from maintaining its competitive position.” n58 Thus, by allowing a merger in such cases, the procompetitive effect would be to make a company that cannot compete effectively and profitably able to do so, thereby allowing for a more competitive market. The Court clarified, however, the necessity of distinguishing those cases involving such mergers between small companies and those in which large companies are involved. n59

Additionally, a company may decide to merge with a competitor as a matter of survival. n60 For example, there may be a company whose management team lacks expertise, or a company with out-dated production equipment. n61 A company may also lack the technology necessary to compete against other companies who are technologically advanced. n62 In these situations, the company will likely expend more money to produce and sell the same product as one of its competitors. Consequently, the price of the product on the market will be higher, because the costs are higher. In an effort to compete in the market, the company may pursue a merger with a competitor having the management
skills it needs: the latest production equipment and facilities, or more technologically advanced systems. n63 Here, the merger may be procompetitive because it promotes competition by providing the merging company with resources it needs to compete in that market. This company is not seeking a competitive advantage, but rather, it is simply seeking to remain a competitor in the market. It is important to note that it is with regards to small competitors that procompetitive effects are examined. n64 Thus, as with anticompetitive effects, procompetitive effects are determined by their impact on the small competitors involved.

Part II: Congress v. U.S. Supreme Court

A. Congress Passes the Sherman Act of 1890

In 1890, Congress passed the Sherman Antitrust Act. Congress acted in response to the public's perception that the nation's economy was dominated by trusts, as well as its own perception that the nation's industrial power was concentrated in too few hands. n65 During the period leading up to the Sherman Act, society feared large corporations were gaining too much power and control over them, were threatening fair competition, gaining the power to control prices as they wished, and were effectively preventing individuals from starting their own businesses. n66 Thus, the Sherman Act was enacted to address these serious concerns and threats to competition. n67

Section 1 of the Sherman Act prohibits agreements, or mergers, "in restraint of trade." n68 Section 2 prohibits mergers which attempt to, or actually do, monopolize a market. n69 Section 4 grants exclusive authority to enforce the Sherman Act's provisions to the United States Department of Justice ("Justice Department") for any violations against the United States. n70 By enacting the Sherman Act, Congress was able to prevent the threat presented by the rapid growth of large corporations in America by establishing restrictions on expansion.

The language of the Sherman Act indicates that "[e]very" merger in restraint of trade is illegal. n71 As such, many questioned whether the Sherman Act was intended to prohibit only those contracts or agreements to merge which were unreasonable restraints of trade, or whether all contracts in restraint of trade should be included, regardless of the agreement's reasonableness. n72 During the years that followed, this question remained present. The Court stated in Northern Pacific Railway Co. v. United States: n73

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestricted interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive [sic] to the preservation of our democratic political and social institutions. n74

The Court's application of Section 1 of the Sherman Act neither narrowed nor broadened the reach of the Act. n75 Instead, the Court applied a per se illegality test, making all agreements which were "in restraint of trade" automatically illegal, without regard to any benefits, such as economic efficiencies, which may result from the agreement. n76 As indicated in this case, the Court agrees that although "unrestricted interaction of competitive forces" is the best way of preserving competition, preserving "democratic" values are just as important, and that the Sherman Act preserves both. n77 Thus, even though the per se test does not provide "unrestricted interaction of competitive forces," since it prohibits all agreements in restraint of trade, n78 the Court seems to understand the importance of providing a market which preserves other American values.
Although the Court understood the concerns addressed by the Sherman Act, the Court's literal application of the Sherman Act was meant to shine light on the negative impact of such an application of the Act. In [*234] what seemed to be the Court's belief that the Sherman Act was intended to prohibit all combinations in restraint of trade, and not just the ones which were unreasonable, the Court in actuality was establishing the premise for its true belief that only unreasonable restraints should be condemned. In its decision in this case, the Court was able to prove the ineffectiveness of construing the Sherman Act to include all restraints, and would later have a stronger foundation for an argument that only unreasonable restraints in trade should be included.

The Court in Standard Oil Co. of N.J. v. United States took control of the laws by applying a narrow interpretation of Section 1, instead of the literal application used in Northern Pacific Railway, whereby it could decide the validity of a challenged merger based on whether it was an "unreasonable restraint of trade." Under this new standard, the Court now had discretion in actions brought under Section 1, since determining whether the combination in question is an unreasonable restraint of trade is a question of fact, and therefore, is an area in need of judicial examination.

Even though the Court held earlier that the per se test was the best approach to horizontal mergers, since all horizontal mergers are inherently anticompetitive, the Court held contrary to that decision and established this reasonable standard in Standard Oil Co. of N.J. The new test applied by the Court, which replaced the per se illegality test, became known as the "rule of reason" test, and condemns only those mergers which create an "undue restraint on trade." Thus, the Court took a clear stand on the debate, and held that agreements will be condemned if they "had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade[,]" but rather, they were entered into for the purpose of "restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy."

In Standard Oil Co., the Court indicated that the history surrounding the enactment of the Sherman Act is conclusively evident in the Congressional debates. The Court explained that although many factors contributed to Congress passing the Act, the main cause was the thought that it was required by the economic condition of the times; that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the wide-spread impression that their power had been and would be exerted to oppress individuals and injure the public generally.

Thus, the Court implicitly indicated a drastic change in the economic condition of the United States had occurred in the years following the per se test, warranting the shift to the rule of reason test established in Standard Oil Co. The decision in the case greatly undermined Congress’ antitrust goals in enacting the Sherman Act, since the rule of reason test did not effectively address the threat of control by large companies. Although the per se test may have been too extreme with regards to vertical and conglomerate mergers, it was not extreme with respect to the inherent anticompetitive dangers which exist in horizontal mergers.

B. Congress Passes the Clayton Act of 1914 & the Federal Trade Commission Act of 1914

The Court's decision in Standard Oil Co. seemed to settle the debate as to whether all contracts in restraint of trade
should be condemned, which had lasted over a decade; however, Congress did not agree with the Court's belief that the economic concerns which gave rise to the enactment of the Sherman Act were no longer present. In reality, Congress actually wanted the Sherman Act to include all combinations in restraint of trade, regardless of whether or not they were reasonable, because the threat to competition posed by the "vast accumulation of wealth in the hands of corporations" was still of great concern to Congress. As such, in an effort to achieve the intended reach of the Sherman Act, and in response to "pressures from within the government and from the public at large," Congress responded to the undermining effect of Standard Oil Co. of N.J. by enacting the Clayton Antitrust Act of 1914 ("Clayton Act") and the Federal Trade Commission Act of 1914 ("FTC Act").

Section 7 of the Clayton Act prohibited stock acquisitions which were considered anticompetitive. The most important feature of the Clayton Act, and the feature which most clearly distinguishes it from the Sherman Act, was that anticompetitive mergers could now be invalidated and enjoined before actual anticompetitive effects resulted. This is because the language of the Clayton Act indicated combinations whose effect "may be" to lower competition, or which "tend to" create a monopoly should be condemned. As such, mergers could be challenged under Section 7 of the Clayton Act as combinations whose effect "may be to lessen competition" before actual anticompetitive effects resulted, or after the merger has anticompetitive effects under Section 1 of the Sherman Act as combinations "in restraint of trade."

The FTC Act created the Federal Trade Commission ("FTC" or "Commission"), and granted it the authority to enforce the provisions of the Clayton Act. Specifically, the FTC was given the power to challenge mergers which involved "unfair methods of competition" and "deceptive business practices." With regard to enforcing Section 7 of the Clayton Act, the FTC had concurrent enforcement authority with the Justice Department.

After the enactment of the Clayton Act, the new task for the Court was to determine the method by which to construe the language in the statute referring to acquisitions whose effect "may be" to lessen competition. Although by enacting the Clayton Act, Congress made it clear that it wanted broad reaching antitrust laws, the Court did not agree that broad application was the most effective way of protecting competition. It maintained its position that not all mergers should be invalidated, since some mergers have procompetitive effects. As such, in determining the meaning of "may be," the Court held in Standard Fashion Co. v. Magrane-Houston Co. that to establish that an acquisition's effect "may be to substantially lessen competition," a probability, and not mere possibility, that the merger will substantially lessen competition must be shown. The court stated:

[W]e do not think that the purpose in using the word "may" was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would under the circumstances disclosed probably lessen competition or create an actual tendency to a monopoly. That it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial.

Thus, the Court once again decided contrary to the clear intentions of Congress in the enactment of the Clayton Act and applied the statute narrowly. The Court ignored the clarified antitrust goals of Congress, and found a way to limit the antitrust laws once again.

Besides the Court's narrow interpretation of the "may be" language of the Clayton Act, the Court also took the opportunity in Thatcher Manufacturing Co. v. Federal Trade Commission to further strengthen its position in favor of limited reach of antitrust laws by interpreting another part of the statute narrowly. The language of the original Clayton Act prohibited stock acquisitions "or other share capital" of another company. In this case, the Court refused to enjoin the merger in which a company acquired all of the stock of a competitor, and then acquired the assets
of the same, before the FTC had taken any formal action against it. n112 The Court held "[t]he act has no application to ownership of a competitor's property and business obtained prior to any action by the Commission, even though this was brought about through stock unlawfully held . . . . The Commission is without authority under such circumstances." n113 Further, the Court explained only stock acquisitions which are probable to substantially lessen competition are prohibited under the Clayton Act, and asset acquisitions do not violate it. n114 Thus, the Court in essence allowed the company to avoid Section 7 by transferring the assets of the target company after a stock acquisition before the government brought an action against them. n115

In Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission, a case involving a similar situation, the Court again limited the Clayton Act by holding the FTC is without jurisdiction in a case where the acquiring company obtains title to the physical assets of the acquired company prior to the FTC's action. n116 After this case, it was clear it was of no use for the FTC to pursue actions of this sort under the Clayton Act, and from 1934 through 1950, the FTC focused on preparing recommendations [*239] for Congress to amend Section 7 of the Clayton Act. n117 Specifically, the FTC prepared a report on the merger issues, which stated,

No great stretch of the imagination is required to foresee that if nothing is done to check the growth in concentration, either the giant corporations will ultimately take over this country, or the Government will be impelled to step in and impose some form of direct regulation in the public interest. n118

The Court had found away to limit the reach of antitrust laws once again, in opposition to Congress' intent. The passage from the report issued by the Commission indicates great concerns and fears that large corporations are gaining threatening power and control, which greatly circumvents the goals of antitrust. n119 Such concerns and fears are exactly the same concerns and fears which were the reason antitrust legislation was originally passed in the Sherman era. Thus, fifty years after the Sherman Act was enacted, the antitrust concerns of the United States had yet to be addressed. Instead of evolving and expanding the antitrust laws to deal with changing times, and any new concerns which arose, the Court consistently found a way to apply the antitrust laws narrowly so as to prevent many mergers from being enjoined.

C. Congress Enacts the Celler-Kafeuver Anti-Merger Act of 1950

By 1950, a new wave of mergers increased government antitrust concerns even further, and prompted Congress to amend the Clayton Act by enacting the Celler- Kefauver Anti-Merger Act ("Celler-Kefauver Act") in 1950. n120 The Celler- Kefauver Act prohibited anticompetitive stock and [*240] asset acquisitions if "the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly." n121 The cases that followed explained the reasons Congress amended Section 7 of the Clayton Act, and for the first time, the Court took Congress' side with regards to this dispute. n122 Until these cases, the Court had expressed the importance of the rule of reason test, since it took into account the procompetitive effects of mergers, and only mergers which were unreasonable should be condemned. n123

The Celler-Kafeuver Act and the cases which came before the Court following its enactment gave the Court a clear opportunity to enforce the antitrust concerns in accordance with Congress' clearly identified purposes. Under Chief Justice Earl Warren, the Court's decisions in cases brought under the amended Section 7 of the Clayton Act were the first indications of agreement between Congress and the Court. Of the cases that followed, two are of greater significance and impact with regards to the goals of antitrust, and the importance of including the protection of competitors as part of these goals. n124
In general, the Celler-Kefauver Act was designed to improve the Clayton Act as originally passed in 1914 by: (1) covering asset as well as stock acquisitions; (2) covering vertical as well as horizontal mergers; (3) curtailing mergers while the trend is in its incipiency; (4) rejecting the application of the Sherman Act standards in actions brought under Section 7 of the Clayton Act; (5) protecting competition, not competitors; (6) refusing to adopt rigid, quantitative tests by which to determine the effects that a given merger may cause on competition; (7) reviewing a merger as it affects the particular industry; and (8) invalidating mergers which had the probable effect of lessening competition, and not certain effect. n125 Of these eight, the Court in Brown Shoe discussed, in detail, Congress' concerns of a "tendency toward concentration." n126

In Brown Shoe, the Court stated "[t]he 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." n127 Even more indicative of the Court's appreciation and understanding of Congress' concerns, is the Court's reference to an opinion by Judge Learned Hand, where he stated:

Throughout the history of these [antitrust] statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other. n128

The Court went on to state that in addition to Congress' fear of "accelerated concentration of economic power on economic grounds," Congress was also very concerned with the "threat to other values a trend toward concentration was thought to pose." n129

In United States v. Von Grocery Co., a case decided a few years later, the Court again took the opportunity to reiterate and strongly emphasize Congress' well-founded concern with the threat to competition posed by market domination by large companies. n130 The opinion written by Justice Black, expressed the view of five members of the Court. n131 Another Justice concurred and wrote his own opinion, n132 two prepared a dissenting opinion, n133 and another did not participate. n134 Thus, six of the nine Supreme Court Justices agreed that a trend toward concentration is a relevant factor in determining whether a challenged horizontal merger violates Section 7 of the Clayton Act. n135

The Court began by reflecting on the ineffectiveness of antitrust laws thus far in achieving the goals and concerns Congress has repeatedly and consistently expressed. n136 The Court stated:

From this country's beginning there has been an abiding and widespread fear of the evils which flow from monopoly - that is the concentration of economic power in the hands of few. On the basis of this fear, Congress in 1890, when many of the Nation's industries were already concentrated into what it deemed too few hands, passed the Sherman Act [*242] in an attempt to prevent further concentration and to preserve competition among a large number of sellers. n137

The Court also noted an earlier case before the Court, which called attention to "the tendency of powerful business combinations to restrain competition 'by driving out of business the small dealers.' " n138 The Sherman Act, however, failed to protect small businesses, and as a result, in 1914 Congress passed the Clayton Act, since it viewed mergers as a "continuous [and] pervasive threat to small business." n139 However, companies found a way to avoid violation of Section 7 of the Clayton Act, and "mergers continued to concentrate economic power into fewer and fewer hands until 1950 when Congress passed the Celler-Kafeuver Anti-Merger Act." n140
The Court's decisions in the above two cases clearly indicated the unanimous concern of the negative impact on competition and the American economy when large companies gain such market power and control in an industry. n141 This was the first time consistency existed between the Court and Congress with regards to the importance of protecting competitors in order to promote competition. n142

D. Congress Passes the Hart-Scott Rodino Antitrust Improvement Act of 1976

The federal agencies authorized to enforce the antitrust laws are the Justice Department and the FTC. The Justice Department has the authority to enforce the provisions of the Sherman Act. n143 The broad language of the FTC Act has allowed the FTC to also be able to bring actions for Sherman Act violations. n144 With regards to the Clayton Act, the two agencies have concurrent authority to bring actions for violations, however, only the Justice Department can sue in federal court for criminal penalties, to recover damages, n145 or to obtain injunctions for violations of either the Sherman or Clayton Acts. n146 The FTC must bring administrative proceedings to obtain injunctive relief before it can bring an action in federal court. n147

The shared enforcement power between the two agencies had proven ineffective throughout the years, and as a result, Congress deemed it necessary to enhance enforcement of the antitrust laws. n148 Although the antitrust laws in effect after 1950 precisely addressed the importance of preventing mergers which may become anticompetitive in the future, the shared enforcement power of these laws between the two agencies proved to be insufficient and ineffective. In an effort to strengthen enforcement of Section 7 of the Clayton Act, Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("Hart-Scott Rodino Act") n149 Section 7a was added to the Clayton Act, and provided for a mandatory pre-merger notification by large companies. n150 This Act required parties to certain mergers to notify the FTC and the Justice Department prior to consummating the merger, and provided the circumstances which give rise to the pre-merger notification requirement, as well as the penalties for failing to do so. n152 As indicated by Congress:

[The bill will] strengthen enforcement of Section 7 by giving the government antitrust agencies a fair and reasonable opportunity to detect and investigate large mergers of questionable legality before they are consummated. The government will thus have a meaningful chance to win a pre-merger injunction . . . before the assets, technology, and management of the merging firms are hopelessly and irreversibly scrambled together, and before the competition is substantially and perhaps irremediably lessened . . . . n153

The legislative action taken by Congress was meant to assist the enforcement agencies in bringing actions for antitrust violations. n154 More importantly, the Act gives the enforcement agencies more time to investigate the anticompetitive effects and to determine whether to bring an action to enjoin the merger. n155 As such, Congress once again took action to ensure the antitrust laws were effective and to prevent the threats to competition it long tried to address. n156

By this point, the Court was clear as to the different aspects of antitrust, which necessarily includes protecting smaller competitors, in addition to promoting competition. The Court stated:

Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the [Clayton] Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. 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 decentralization. We must give effect to that decision. n157

The Commission has agreed that although mergers may benefit the economy and business in general, the negative impact which anticompetitive mergers may have is increasingly threatening. n158 The adverse effect on small business is even more threatening, since potential competition mergers n159 prevent small businesses from entering into the market. Although the Commission and the Justice Department clearly understand the inherent threat to competition posed by horizontal mergers, they jointly issued guidelines to reviewing horizontal mergers in 1992 which indicate otherwise. n160

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The jointly issued 1992 Horizontal Merger Guidelines ("Merger Guidelines") outline the approach taken by the agencies in reviewing horizontal mergers before bringing an action to enjoin it or otherwise. The analysis used by the agencies differs greatly from the opinions of the Court, and the intent of Congress. In fact, the 1992 Guidelines require more than the Court does, and as a result, the antitrust laws are currently ineffective once again. n161

Part III. Horizontal Merger Analysis

As discussed earlier, the Sherman Act was the first antitrust legislation enacted to combat anticompetitive mergers, n162 and it prohibited "[e]very combination in restraint of trade. n163 The Court later held, however, that such broad application of the Sherman Act is ineffective, and that a somewhat narrower test should be applied. n164 As a result, the "rule of reason" test was established, prohibiting only those combinations which [*246] were unreasonable restraints of trade. n165 The undermining effect of this test on the Sherman Act resulted in a failure "to protect the smaller businessmen from elimination through the monopolistic pressures of large combinations which used mergers to grow even more powerful." n166 This prompted Congress to enact new legislation - the Clayton Act - broadening the types of horizontal mergers which would be illegal. n167 Most importantly, Section 7 of the Clayton Act provided the circumstances by which a merger could be enjoined before actual anticompetitive effects resulted. n168 "Ingenious businessmen, however, soon found a way to avoid Section 7." n169 As a result, "mergers continued to concentrate economic power into fewer and fewer hands until 1950 when Congress passed the Celler-Kefauver Anti-Merger Act," which was primarily enacted to "prevent economic concentration in the American economy by keeping a large number of small competitors in business." n170 After the 1950 amendment to the Clayton Act, the analysis for determining the legality of a challenged horizontal merger has generally remained the same. However, there are certain parts of the analysis which the Court and the federal agencies approach differently.

A. The Balancing Approach

The first step in determining the legality of a horizontal merger is to classify it as such. n171 Since the Clayton Act prohibits those mergers involving firms in the same "line of commerce" and "section of the country," n172 this involves determining the relevant market. n173 After a merger is classified as horizontal for antitrust purposes, the Court must then determine the legality of the horizontal merger. The Court looks at the company's market share, n174 and the level of market concentration n175 in the relevant market. Depending on the level of the concentration in the relevant market before and after the merger, the court will determine whether the challenged merger is per se legal or illegal. n176

[*247]

If the level of concentration is above a certain threshold, the analysis will stop there, and the merger will be enjoined, since market concentration above that level is considered so likely to "substantially lessen competition" that a further examination is unnecessary. n177 If the concentration level is below the threshold, the court will proceed and
examine several non-market share factors which may make the challenged merger more likely or less likely to be anticompetitive, since the market concentration level is not alone indicative. \textsuperscript{178} The factors which have been considered by the Court include: (1) barriers to entry, (2) adequacy of irreplaceable raw materials, (3) excess capacity, (4) degree of homogeneity, (5) marketing and sales methods, and (6) the trend towards concentration. \textsuperscript{179} Upon the Court's evaluation of these factors, the Court will decide whether or not a violation of Section 7 of the Clayton Act has been established.

Although private parties may also bring an action under Section 7 of the Clayton Act, \textsuperscript{180} the difficulties in doing so have resulted in most actions being brought by the federal agencies authorized to do so. \textsuperscript{181} As such, the approach taken by the Justice Department and the FTC are extremely relevant to the evaluation of the effectiveness of antitrust legislation. In deciding whether or not to bring an action in federal court under Section 7 of the Clayton Act, the agencies apply an analysis similar to that applied by the Court; however, certain differences exist, leaving the concerns and goals of Congress unaddressed, and the legislation ineffective.

The approach taken by the agencies is outlined in the Merger Guidelines jointly issued by the agencies. \textsuperscript{182} First, the agencies, like the Court, determine the relevant market and evaluate the market structure, looking at the market share of the merging firms before and after the merger, as well as the degree of market concentration. \textsuperscript{183} However, the level of concentration is under no circumstances conclusive as to the legality of the merger, even if the level of market concentration is extremely high. \textsuperscript{184} Instead, the agencies always proceed with a review of the non-market share factors, and must establish actual anticompetitive effects exist before bringing an action in federal court. \textsuperscript{185} Further, the agencies do not consider the trend towards concentration as a factor, even though the Court has emphasized the importance of this factor and has repeatedly interpreted the antitrust laws to require it. \textsuperscript{186}

Most significantly, the Merger Guidelines expressly indicate that economic efficiency will be considered as a mitigating factor. \textsuperscript{187} The Court has never examined the economic efficiency of a challenged merger as a mitigating factor to justify an otherwise anticompetitive horizontal merger. \textsuperscript{188} The consideration of economic efficiency, and not the trend toward concentration, as well as the requirement of showing actual anticompetitive effects, have made the Agencies' approach to reviewing horizontal mergers much more stringent than the Court's approach. Since it is much more difficult for private parties to succeed in an action brought under Section 7, the antitrust legislation as currently applied is shifting away from Congress' intentions, and more importantly, away from accomplishing the goals and purposes of antitrust once again.

Part IV. Time for Change in the Anticompetitive Effects Analysis of Horizontal Merger

Although the Court has never changed its position after the Brown Shoe and Von's Grocery cases, and has agreed with Congress that protection of competitors is one of the main goals of antitrust legislation, \textsuperscript{189} lower courts have indicated mergers may be justified if substantial evidence of such efficiencies is shown. \textsuperscript{190} Additionally, the 1992 Horizontal Merger Guidelines expressly indicate the agencies will consider a claim of economic efficiency by the merging firms in determining whether or not the Government will challenge a merger in federal court. \textsuperscript{191} As such, the trend is towards permitting horizontal mergers if they are economically efficient, even if the post-merger impact involves anticompetitive effects.

In other words, even if the proposed merger presents post-merger anticompetitive concerns, such concerns may be outweighed, and the proposed merger validated, if the merger creates economic efficiencies for the post-merger entity. The problem, however, is that although economically efficient mergers may, in some cases, actually promote competition, \textsuperscript{192} the resulting growth in large companies and increase in market concentration raises the concerns
contemplated by Congress. Therefore, the trend is towards an approach to reviewing the validity of horizontal mergers which is clearly contrary to Congress' goals and intentions, and as such, congressional action is necessary to clarify Congress' concerns once again, and provide antitrust laws which will better address these long existing concerns.

A. The Need for a Return to an Emphasis on the Binding Factors

Consideration of economic efficiencies is not binding on the Court, as is consideration of the trend toward concentration. The agencies, however, do not consider the binding factor, but rather, the agencies place emphasis on economic efficiencies. A claim of economic efficiency is not only a non-binding factor on the Court, but is also contrary to the purposes of antitrust legislation - to protect competitors in order to promote competition. It is evident from the history of antitrust legislation that the goals of such legislation are better preserved by applying the antitrust laws broadly, so as to not allow claims of economic efficiency as a justification for an otherwise anticompetitive merger.

Not enjoining mergers on the basis of their claimed economic efficiency will eventually result in large companies controlling markets and the American economy, just as they have in the past. Since protecting small businesses is clearly a purpose of all antitrust legislation enacted by Congress and since the trend is towards an approach neglecting this purpose, it is necessary for Congress to enact new legislation or amend past legislation to ensure its well-founded goals and concerns are better addressed.

B. The Need for Congressional Action Yet Again

The current approach to reviewing horizontal mergers is to apply the balancing approach to all situations, with the trend towards a consideration of the economic efficiency of horizontal mergers. Courts examine the procompetitive effects of a merger to determine whether the procompetitive effects outweigh the anticompetitive effects. A more effective approach would be to not apply the balancing approach in reviewing all challenged mergers, but rather, to apply the balancing approach only in reviewing horizontal mergers involving small businesses. In reviewing horizontal mergers of larger companies, economic efficiency should not be considered as a factor, neither by the Court nor the enforcement agencies. Although economic efficiency may in fact promote competition, it should only be considered procompetitive when the economic efficiency will benefit small companies. This approach will address all of the antitrust concerns in this country, without neglecting the purpose of all of the antitrust legislation enacted by Congress. Thus, congressional action is necessary to clarify Congress' antitrust goals, and to establish a precise analysis for mergers involving companies having a market share above a specific level. Distinguishing between small and large businesses, and applying a more lenient standard for companies below a certain threshold (i.e., the balancing approach for companies below the threshold), is a recommendation soundly found pursuant to Congress' purpose and goals in enacting antitrust laws.

Although economic efficiency may be a procompetitive effect of horizontal mergers, the benefit to large companies is substantially greater than the benefit to smaller ones. Further, it is not the purpose or goal of antitrust laws to make the most successful companies and the biggest competitors even more powerful by making them more economically efficient, but rather, to promote competition by maintaining the highest degree of competition in all markets, keeping market participants in constant battle. Competitive markets will result in the lowest prices to consumers, since the competing firms will strive to find ways to lower marginal costs in order to sell their product at the best price to consumers. Although merging with a direct competitor is one way of achieving this, the alternative options available to large companies, which are not as often available to small companies, is one of many reasons to justify a
more stringent review of a horizontal merger involving large companies.

Part V. Conclusion

All of the major concerns arising from horizontal mergers today are the same concerns which existed and gave rise to the Sherman Act, the Clayton Act, and the amendments that followed. Those include "the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, [and] the facility for combination which such organizations afforded." Congress has repeatedly enacted broad reaching antitrust legislation, in an effort to prevent anticompetitive effects as much as possible. In doing so, it is clear that Congress has realized, time and time again, limited reach results in the many anticompetitive mergers being validated or left unchallenged. It is also evident Congress desires broad reaching legislation, since broad application of the statutes best preserves the highest degree of competition. This is so, even though many mergers which are not necessarily anticompetitive may be enjoined or prohibited in doing so. It seems all but rational for this dispute as to the reach of antitrust laws to exist rather than Congress, the Court, and the federal antitrust enforcement agencies strategically supplementing each other in order to fulfill the goals first established more than 100 years ago, and which have not been realized.


n3 See infra pt. III (discussing the broad antitrust legislation, and the narrow interpretation and application of such by the Court).

n4 See infra pt. III (discussing the broad antitrust legislation, and the narrow interpretation and application of such by the Court).

n5 See infra pt. III (discussing the differing viewpoints of Congress and the Court).

n6 Robert H. Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 Hastings L.J. 65, 67 (1982) (Lande states that, "[I]t is unanimously agreed that Congress enacted these laws to encourage competition . . . .").

n7 Earl W. Kintner, Federal Antitrust Law vol. 1, § 4.18 (Anderson Publg. Co. 1980) ("The Sherman Act of 1890 was intended to promote the general principle of 'full and free competition' in interstate and foreign commerce."); see also Constance K. Robinson, Mergers and Acquisitions, in 46th Annual Antitrust Law Institute, PLI Corporate Law and Practice Course Handbook Series Number 6223, 303, 309 (2005) ("Merger enforcement in the United States is based on the core principle that competition is what provides consumers with the benefits of lower prices and better quality goods.").

n8 See infra pt. I(A) (defining horizontal, vertical, and conglomerate mergers).
n9 See infra pt. I(B) (explaining the reasons why horizontal mergers pose a greater threat to competition than vertical and conglomerate mergers).

n10 Kintner, supra n. 7, at vol. 4, § 33.7 ("Horizontal mergers historically have been the target of traditional antitrust enforcement since merger or acquisition among direct competitors presents the clearest danger to open competition.").

n11 The author plans to write a separate article discussing these issues as they pertain to vertical and conglomerate mergers.

n12 See infra pt. IV (discussing the arguments in favor of broad application).


n14 Lande, supra n. 6, at 142-50; see also Brodley, supra n. 13, at 1042-53.


n16 Kintner, supra n. 7, at vol. 4, § 34; see Brodley, supra n. 13, at 1025 ("[E]conomic efficiency refers to a decision or event that increases the total value of all economically measurable assets in the society or total social wealth."). There are three basic components of economic efficiency: (1) production efficiency, (2) innovation efficiency, and (3) allocative efficiency. Id. Brodley states: Production efficiency is achieved when goods are produced using the most-cost effective combination of productive resources available under existing technologies. Innovation efficiency is achieved through the invention, development, and diffusion of new products and production processes that increase social wealth. Allocative efficiency is achieved when the existing stock of goods and productive output are allocated through the price system to those buyers who value them most, in terms of willingness to pay or willingness to forgo other consumption. Id.; see generally Thomas A. Piraino, Jr., A New Approach to the Antitrust Analysis of Mergers, 83 B.U. L. Rev. 785 (2003).

n17 See infra pt. III (discussing the reasons Congress enacted antitrust legislation).

n18 See infra pt. V (discussing the arguments in favor of narrow application).

n19 See infra pt. III (discussing Congress’ antitrust concerns regarding the protection of small businesses).

n20 See infra pt. III (discussing Congress’ antitrust concerns regarding the protection of small businesses).

(discussing the reasons Congress enacting the antitrust laws and the events following their enactment).

n22 See infra pt. III (discussing the broad antitrust legislation, and the narrow application by the Court after every Act of Congress regarding antitrust laws).

n23 See infra pt. III (discussing the broad antitrust legislation, and the narrow application by the Court after every Act of Congress regarding antitrust laws).

n24 See infra pt. III (discussing the broad antitrust legislation, and the narrow application by the Court after every Act of Congress regarding antitrust laws).

n25 See infra pt. III (discussing Congress' desire to protect of competitors in an effort to promote competition).

n26 See infra pt. II(D) (discussing enforcement of the antitrust laws by the United States Department of Justice and the Federal Trade Commission).

n27 Kintner, supra n. 7, at vol. 4, § 34.2.

n28 A stock or asset acquisition is either the purchase of a block of stock or assets or the purchase of all of a company's stocks or assets. Norman D. Moore, Dictionary of Business, Finance, and Investment 5 (Investor's Sys., Inc. 1975).

n29 Id.

n30 Consolidation is the combining of two or more separate businesses into one. Id. at 97.

n31 Kintner, supra n. 7, at vol. 4, § 33.7.

n32 Id. at § 33.8.

n33 Id. at § 33.9.

n34 Id. at § 34.2 ("Because of the diverse criteria which have evolved in connection with different kinds of acquisitions, it is necessary to consider the particular context in which a merger occurs.").

n35 See generally id. at §§ 35-36 (discussing the far more lenient standard applied to conglomerate mergers, and the similar yet different analysis applied to vertical mergers).

n36 Id. at § 34.2.
n37 Kintner, supra n. 7, at vol. 4, § 34.2; see also 15 U.S.C. § 18 (enacted under the Clayton Act of 1914, 38 Stat. 730 (1914)).

n38 Kintner, supra n. 7, at vol. 4, § 34.2.

n39 See U.S. v. Continental Can Co., 378 U.S. 441, 462-63 (1964) (Even though one firm manufactured cans and the other bottles, the lower court in this case found the merger to be horizontal, since there was intense competition between can manufacturers and bottle manufacturers for certain markets.). In another case, one of the merging firms manufactured heavy grade steel, and the other manufactured light grade steel. U.S. v. Columbia Steel Co., 334 U.S. 495, 510-11 (1948). Here, however, evidence presented showed the two firms had submitted in total 8,786 bids for various projects, only 166 of which were made by both firms for the same project. Id. at 515 n. 13. Accordingly, the court did not review the proposed merger under the horizontal merger analysis, since the extent to which the firms competed for the same jobs was insufficient. Id. at 515-16.

n40 Kintner, supra n. 7, at vol. 4, § 33.11; see Mark Hirschey, Fundamentals of Managerial Economics 23 (Jack W. Calhoun et al. eds., 8th ed., Thomson South-Western 2006) (providing an in-depth explanation of the concept of elasticity of demand).

n41 See generally U.S. v. Aluminum Co. of Am., 377 U.S. 271 (1964) (finding that because one company manufactured aluminum and copper conductor, and the other larger company manufactured only aluminum conductor, that it could be easy for the larger company to manufacture copper conductor as well since the same methods of production are used).


n44 See generally 370 U.S. 294 (1962).

n45 Although surrounding factors are important, the Court's treatment of mergers as horizontal, even when they are not precisely such, indicates the Court's desire to enjoin anticompetitive mergers. The inherent anticompetitive effects of horizontal mergers has resulted in a more stringent examination of such mergers than vertical or conglomerate mergers, which do not as often pose anticompetitive concerns. Thus, the Court's attempt, in the above cases, to treat the mergers as horizontal, indicates the Court's desire to increase the likelihood of enjoining these mergers, since the horizontal merger analysis will be applied.

n46 See supra pt. I(A) (discussing the classification of horizontal mergers); see also Kintner, supra n. 7, at vol. 4, § 34.3.

n47 Kintner, supra n. 7, vol. 4, § 33.7.

n48 Id. at § 34.3.


n52 See Von's Grocery, 384 U.S. at 275, 277 (stating the importance of protecting small businesses as a purpose of antitrust).

n53 Kintner, supra n. 7, at vol. 4, § 34.3 ("[A] merger may increase entry barriers by creating a resulting firm with substantial advantages over present competitors and prospective entrants."); see also id. at § 34.10 (providing a more in-depth discussion and examination of barriers to entry).

n54 See infra pt. III (explaining Congress' desire to protect small competitors in order to promote the highest degree of competition).

n55 Von's Grocery, 384 U.S. at 274-75.

n56 See supra pt. II(B) (discussing anticompetitive effects of horizontal mergers).

n57 See Brown Shoe, 370 U.S. at 325; see also Kintner, supra n. 7, vol. 4, § 34.4.

n58 Brown Shoe, 370 U.S. at 346.

n59 Id. at 331.

n60 See Kintner, supra n. 7, at vol. 4, § 34.4 n. 26 (citing U.S. v. Third Natl. Bank in Nashville, 390 U.S. 171, 175, 192 (1968) (management failed to recruit young talent, and argument was made that merger was a necessary means for securing such talent; however, party failed to show that there existed no alternative means for securing the talent).

n61 Kintner, supra n.7, at vol. 4, § 34.4.

n62 Id.

n63 See id. at n. 27 (citing e.g. U.S. v. Intl. Harvester Co., 564 F.2d 769, 772 (7th Cir. 1977) ("new production facilities")).

n64 Id.
n65 Von's Grocery, 384 U.S. at 275, 277; see also William Meade Fletcher, Fletcher Cyclopaedia of the Law of Private Corporations vol. 10A, § 4981 (West Group 2002) ("[T]he main cause which led to the legislation was the fear engendered by the enormous development of corporate organization and the vast accumulation of wealth in the hands of corporations."); see generally Kintner, supra n. 7, at vol. 1, ch. 4 (providing an overview of the history of the Sherman Act).


n67 54 Am. Jur. 2d Monopolies and Restraints of Trade § 1.

n68 15 U.S.C. § 1. Section 1 of the Sherman Act states: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000 or by imprisonment not exceeding ten years, or by both said punishments, in the discretion of the court. Id.

n69 Id. at § 2. Section 2 of the Sherman Act states: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. Id.

n70 Id. at § 4. Section 4 of the Sherman Act states: The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of section 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Id.

n71 Id. at § 1.

n72 Fletcher, supra n. 65, at § 4982.


n74 Id. at 4.

n75 15 U.S.C. § 1 (the court in the Northern Pacific Railway Co. case neither expanded nor limited the Act because it was applied liberally).
n76 N. P. Railway, 356 U.S. at 6-8.

n77 Id. at 4.

n78 Id. at 4-8.

n79 Hypothetically, suppose Michelle and Peter are driving in a car, and they reach a point on the road where they must turn either left or right. Peter believes they should turn left, while Michelle believes they should turn right. Peter strongly believes they must turn left because he knows that, although turning right is the fastest route to their destination, there is construction on that road shortly after they turn. As a result of the construction, they will eventually have to turn around and go back to their current location to turn left. Michelle wants to go right because she has driven this route many times in the past, and because she is aware that if they turn left, it will take them an additional hour to get to their destination. Nonetheless, Peter does not tell Michelle about the fact that the road she wished to take is closed for construction. Instead, Peter decides to show Michelle she is wrong by agreeing with Michelle to turn right. By doing so, he will show her why his route choice was better, instead of simply arguing with her until she agreed to turn left. They eventually turned right and had to return back to their current location, and pursue Peter's choice, since they had tried Michelle's choice and it had failed. The Court has acted much like Peter did in this hypothetical. The author argues that instead of telling Congress the Sherman Act was too broad at the first opportunity it had to interpret the statute, the Court chose to show Congress the Sherman Act should be applied narrowly. In the hypothetical above, Peter knew that even if they hit the closed road, there was still a third route to take, which was also shorter than his choice. However, Peter wanted to turn left, not because it was the best route to their destination, but because he wanted to drive down a specific road to see if his friend was home. Thus, in actuality, Peter had personal reasons for wanting to turn left. Like Peter, the Court had its own personal reasons for wanting a limited reach of the Sherman Act. The Court could have interpreted the Act neither broadly nor narrowly, but rather, somewhere in the middle. The United States government is based on the theory of balance of powers. The author of this Article believes this balance is most beneficial to this country when the different branches of Government meet somewhere in the middle in achieving their goals, rather than the attitude that either one branch has its way, or the other. It is arguably better if both branches achieve some of their goals, than only one branch trying to achieve all of its goals at the expense of the other.

n80 Stand. Oil Co. of N.J. v. U.S., 221 U.S. 1, 64 (1911) (holding that although the Sherman Act prohibits "every" merger in restraint of trade, "every" includes only those mergers or combinations which are "unreasonable").

n81 See Kintner, supra n. 7, at vol. 4, § 34.2 (providing rationale for unreasonable standard).

n82 See generally Standard Oil, 221 U.S. at 1-82.


n84 See generally Standard Oil, 221 U.S. at 1-82.

n85 See Kintner, supra n. 7, at vol. 4, § 34.3 (indicating certain anticompetitive effects usually result from
horizontal mergers, such as: "(1) the combined market share percentage of the merged enterprises will exceed
that previously enjoyed by either of the two parties to the merger; (2) the new firm will have larger assets; and
(3) the number of competitors in the relevant market(s) will be reduced by one.").

n86 Standard Oil, 221 U.S. at 49.

n87 Fletcher, supra n. 65, at § 4982. "Under the rule of reason announced by the Supreme Court, only an
unreasonable restraint of trade is a violation of Section 1 of the Sherman Act, and whether a restraint is
unreasonable is a question of fact." Id. at note 11; see also Thomsen v. Cayser, 243 U.S. 66, 84-85 (1917)
(holding "it is the effect of the rule that only such contracts and combinations are within the act as, by reason of
their intent or the inherent nature of the contemplated acts, prejudice the public interest by unduly restricting
competition or unduly obstructing the course of trade.").

n88 See generally Standard Oil, 221 U.S. at 1-82.

n89 Id. at 58.

n90 Id. at 50.

n91 Id.

n92 See supra pt. I(B) (discussing the anticompetitive effects of horizontal mergers).

n93 Id.

n94 Standard Oil, 221 U.S. at 50.

n95 Kintner, supra n. 7, at vol. 4, § 33.1.

n96 Standard Oil, 221 U.S. at 46-47.


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 substantially lessen competition between the corporation whose stock is so acquired and the corporation
making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly
of any line of commerce. No corporation shall acquire, directly or indirectly, the whole or any part of the stock
or other share capital of two or more corporations engaged in commerce where the effect of such acquisition . . .
may be to substantially lessened competition between such corporation, or any of them, whose stock or other
share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a
monopoly of any line of commerce. Id.


n101 Id.

n102 15 U.S.C. § 41. Section 45(a) of the FTC Act states: Unfair methods of competition in or affecting
commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful. The
Commission is hereby empowered and directed to prevent persons, partnerships, or corporations from using
unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting
commerce. Id.

n103 Section 45(a) of the FTC Act states: (1) Unfair methods of competition in or affecting commerce, and
unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful. (2) The
Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using
unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting
commerce. Id.

n104 Id.

n105 15 U.S.C. § 14; see also Kintner, supra n. 7, at vol. 4, § 33.8.

n106 Kintner, supra n. 7, at vol. 4, § 33.8.


n109 Id. at 355-56.


n112 Thatcher Mfg., 272 U.S. at 559-60.

n113 Id. at 561.
n114 Id. at 559.

n115 See id. at 562-63.


n117 Kintner, supra n. 7, at vol. 4, § 33.2; see also Lande, supra n. 6, at 126-27. "A 1948 study by the FTC describing the post-World War II merger movement concluded that corporate acquisitions from 1940 to 1947 had caused the disappearance of almost 2,500 firms with total assets of more than five billion dollars, representing approximately 5.5% of all manufacturing assets in the United States at the time.” Id. at 130 (citing Fed. Trade Commn., Report of the Federal Trade Commission on the Merger Movement: A Summary Report 17 (U.S. Govt. Printing Off. 1948)).

n118 Fed. Trade Commn., supra n. 117, at 68.

n119 Id.

n120 15 U.S.C. § 18 (enacted under the Celler- Kefauver Anti-Merger Act of 1950, 38 Stat. 731 (1950)); compare Pub. L. No. 63-212, § 7, 38 Stat. 730, 731-32 (1914) with Pub. L. No. 81-899, § 7, 64 Stat. 1125, 1125-26 (1950). The original statute and the principle changes made to it by the Celler-Kefauver Amendment to Section 7 are indicated below. The italicized portions indicate the language that was added to Section 7, and the bracketed portions indicate the language that was deleted by the Amendment. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be [to] substantially to 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 to tend to create a monopoly [of any line of commerce]. Pub. L. No. 63-212, § 7, 38 Stat. 730, 731-32 (1914); Pub. L. No. 81-899, § 7, 64 Stat. 1125, 1125-26 (1950).


n122 See infra pt. II(C) (discussing Brown Shoe and Von's Grocery).

n123 See supra pt. II(A) and (B) (discussing the Court's narrow interpretation of the Sherman Act and the Clayton Act, and the rationale supporting it).

n124 Kintner, supra n. 7, at vol. 4, § 33.3.

n125 Brown Shoe, 370 U.S. at 316-23.

n126 Brown Shoe, 370 U.S. at 344-46. Most significantly, the Court indicated it ”cannot avoid the mandate of Congress that tendencies toward concentration in industry are to be curbed in their incipiency[.].” Id. at 346.
n127 Id. at 315.

n128 Id. at 316 n. 28 (citing U.S. v. Aluminum Co. of Am., 148 F.2d 416, 429 (1945)).

n129 Id. at 316.

n130 Von's Grocery, 384 U.S. at 274-75.

n131 Id. at 271-80.

n132 Id. at 280-81. Justice White's opinion pointed out that "the merger not only disposed of a substantial competitor but increased the concentration in the leading firms." Id. at 281 (emphasis added).

n133 Id. at 281-304. Justice Stewart wrote a dissenting opinion, with whom Justice Harlan joined. Id. at 281.

n134 See id. at 271. Justice Fortas did not participate. See id.

n135 See generally id.

n136 Id. at 274-75.

n137 Id.

n138 Id. at 274 (citing U.S. v. Trans-Missouri Freight Assn., 166 U.S. 290, 323 (1897). Chief Justice Warren went on to cite a later decision by Judge Learned Hand, in 1945, indicating that "[t]hroughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." Id. at 274-75 n. 7 (citing Aluminum Co. of America, 148 F.2d at 429).

n139 Id. 274-75.

n140 Id. at 275.

n141 In both cases, the Court provided an elaborate discussion of the concerns of Congress, as well as Congress' preference to protect small competitors rather than allow the large companies to gain too much power, even if it results in somewhat higher priced goods on the market. See infra n. 171 and accompanying text.

n142 Compare supra pt. II(A) and (B) (discussing the Court's interpretation of the Sherman Act and the Clayton Act contrary to Congress' intentions) with pt. II(C) (discussing the Court's appreciation of Congress' concerns and intentions in amending the Clayton Act, and the consistent application of the amended Clayton Act
in accordance with these intentions).


n144 Id. at § 45.

n145 Id. at § 15a.

n146 Id. at § 25.

n147 Id. at § 45.

n148 Kintner, supra n. 7, at vol. 4, § 33.5.


n150 Id.; see Kintner, supra n. 7, at vol. 5, ch. 41 (providing a detailed explanation and discussion of the pre-merger notification).


n152 Id. at § 18a(a), (g).


n154 Kintner, supra n. 7, vol. 4, § 33.4.


n156 See supra pt. II (discussing the relevant antitrust laws and the reasons why Congress enacted them).

n157 Brown Shoe, 370 U.S. at 344.

n158 The Federal Trade Commission has indicated: Most mergers actually benefit competition and consumers by allowing firms to operate more efficiently. But some are likely to lessen competition. That, in turn, can lead to higher prices, reduced availability of goods or services, lower quality of products, and less innovation. Indeed, some mergers create a concentrated market, while others enable a single firm to raise prices. Fed. Trade Commn., http://www.ftc.gov/bc/compguide/mergers.htm (last visited Mar. 26, 2009).

n159 A potential competition merger is the acquisition of a company that is planning to enter a market and
compete with the acquiring company. Id.

n160 Compare 57 Fed. Reg. 41 (Apr. 2, 1992) [hereinafter 1992 Horizontal Merger Guidelines] with U.S. Dept. of Just., 1984 Merger Guidelines § 3.5 (1984) (available at http://www.usdoj.gov/atr/hmerger/11249.pdf). The 1984 Merger Guidelines state that: The primary benefit of mergers to the economy is their efficiency-enhancing potential, which can increase the competitiveness of firms and result in lower prices to consumers. Because the antitrust laws, and thus the standards of the Guidelines, are designed to proscribe only mergers that present a significant danger to competition, they do not present an obstacle to most mergers. As a consequence, in the majority of cases, the Guidelines will allow firms to achieve available efficiencies through mergers without interference from the Department. Some mergers that the Department otherwise might challenge may be reasonably necessary to achieve significant net efficiencies. . . . Cognizable efficiencies include, but are not limited to, achieving economies of scale, better integration of production facilities, plant specialization, lower transportation costs, and similar efficiencies relating to specific manufacturing, servicing, or distribution operations of the merging firms. The Department may also consider claimed efficiencies resulting from reductions in general selling, administrative, and overhead expenses, or that otherwise do not relate to specific manufacturing, servicing, or distribution operations of the merging firms, although, as a practical matter, these types of efficiencies may be difficult to demonstrate. In addition, the Department will reject claims of efficiencies if equivalent or comparable savings can reasonably be achieved by the parties through other means. The parties must establish a greater level of expected net efficiencies the more significant are the competitive risks identified in Sections 3. U.S. Dept. of Just., 1984 Merger Guidelines § 3.5 (1984) (available at http://www.usdoj.gov/atr/hmerger/11249.pdf).


n162 See supra pt. II (discussing the promotion of competition as an important purpose of antitrust laws to prevent anticompetitive effects of horizontal mergers).


n164 Standard Oil, 221 U.S. at 87 (holding that although the Sherman Act prohibits "every" merger in restraint of trade, "every" includes only those mergers or combinations which are "unreasonable").

n165 Id.

n166 Von's Grocery, 384 U.S. at 274-75.

n167 Id. at 275.
n168 Id.

n169 Id.

n170 Id.

n171 See supra pt. I(A) (explaining the factors examined by the Court to determine whether a merger is horizontal for antitrust purposes).


n173 Kintner, supra n. 7, at vol. 4, § 33.11 (providing an explanation of how to determine the relevant product market according to the "line of commerce" language of the Clayton Act); Kintner, supra n. 7, at vol. 4, § 33.12 (providing an explanation of how to determine the relevant geographic market according to the "section of the country" language of the Clayton Act).

n174 Kintner, supra n. 7, at vol. 4, § 34.7 (providing an in-depth explanation of how the market shares of the merging firms is evaluated).

n175 Kintner, supra n. 7, at vol. 4, § 34.8 (providing an explanation of how the level of market concentration is examined in a particular industry).

n176 Phila. Natl. Bank, 374 U.S. at 363; see also Kintner, supra n. 7, at vol. 4, § 34.6.


n178 Id. at 364.

n179 Id.


n181 Kintner, supra n. 7, at vol. 4, § 33.17.

n182 1992 Horizontal Merger Guidelines, supra n. 160, at § 0.

n183 Id. at § 1.0.

n184 Id. at § 1.52.
n185 Id. at § 2.0.

n186 Kintner, supra n. 7, at vol. 4, § 34.9 (providing a discussion of the trend toward concentration, which is not discussed in the 1992 Merger Guidelines).


n188 See generally U.S. v. Citizens of S. Natl. Bank, 422 U.S. 86 (1975) (the last case in which the Court ruled on the standards for judging the legality of a merger).

n189 See infra pt. II(C) (discussing the cases following the Celler-Kefauver Anti-Merger Act of 1950).


n192 See infra pt. V (discussing the arguments in favor of narrow application).


n194 See supra pt. II(C) (discussing the Brown Shoe and Von's Grocery cases).


n196 See supra pt. II (discussing the purpose of each antitrust law enacted by Congress).

n197 Lande, supra n. 6, at 67.

n198 See supra pt. II (discussing the history of antitrust, and the goals and purposes of antitrust legislation).

n199 See infra pt. III (explaining the Court's balancing approach to horizontal mergers).

n200 See Brodley, supra n. 13, at 1025 (providing an in-depth analysis of the economic efficiency of horizontal mergers, and the arguments in favor of it).

n201 Large companies usually have a larger market share before the merger. If they merge with another firm, they are even more efficient, and as a result, they have even more market power. Although this may result in lower prices for consumers, in the long-run, it is also very possible for these firms to obtain the type of market
control that antitrust laws were made to prevent. By distinguishing large firms from small ones, the goal of promoting competition is best preserved, since the smaller firms will become more competitive in the market, thus preventing complete market domination by large companies in the long-run. See generally infra pt. II.

n202 See supra pt. II (discussing different antitrust legislation enacted by Congress).

n203 Standard Oil, 221 U.S. at 50.

n204 See supra pt. II (discussing different antitrust legislation enacted by Congress).

n205 Von’s Grocery, 384 U.S. at 276-77.