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The New Merger Guidelines: Guide to Governmental Discretion and Private Counseling or Propaganda for Revision of the Antitrust Laws?

Louis B. Schwartz†

“In the debates in Congress Senator Sherman himself . . . showed that among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them.”

—United States v. Aluminum Co. of America, 148 F.2d 416, 428 (2d Cir. 1945) (L. Hand, J).

“Asked at a congressional hearing if increasing concentration of wealth and power in fewer conglomerates would trouble him, [Baxter] replied, in a word, ‘No.’”


Assistant Attorney General Baxter, in discussing publication of his long-heralded Guidelines, told the Senate Judiciary Committee both that revision of the 1968 Guidelines was long overdue and that economists greeted the new Guidelines with “a big yawn.”¹ The yawning of the economists indicates that the view that not much has changed is plausible, despite the vast fluttering in the dovecotes of the law reviews, and despite the suggestion herein that the new Guidelines are part of a larger plan to roll back antitrust enforcement.

The rhetoric of economic discussion has been altered, however.² We shall now have to use the Herfindahl-Hirschman Index (HHI) to quantify market shares, squaring numbers that have until now been

† Benjamin Franklin and University Professor of Law, University of Pennsylvania. B.S. 1932, J.D. 1935, University of Pennsylvania. The author acknowledges helpful suggestions of Professors Joseph F. Brodley, Harry First, John J. Flynn, and Ralph S. Spritzer.

¹ 43 ANTITRUST & TRADE REG. REP. (BNA) No. 1074, at 231 (July 22, 1982).

² See N. Y. Times, Sept. 15, 1982, at B8, col. 4 (Interview with Assistant Attorney General William F. Baxter) (“[T]here has been a very substantial change in rhetoric. There has been some change in the reality, too, but this pales in comparison.”) [hereinafter cited as Interview].
aggregated without squaring. But market share numbers rely on a slippery data base. The line between permissible and excessive concentration has always been drawn intuitively. Non-concentration factors may still be decisive. Above all, the Department of Justice has not relinquished—it never did—its “discretion” to disregard its own Guidelines. What then is the purpose of the Guidelines and how will they in fact be employed?

I submit that the Guidelines will function principally as ideological support for whatever decision the Department wants to make in particular cases, and as propaganda to influence courts and other tribunals to follow the Department’s line. The Department’s line underwent a radical change long before the issuance of the new Guidelines, as did the viewpoint of courts and agencies quickly that were being reconstituted by a conservative national administration. Sophisticated lawyers knew even before the Guidelines were issued that merger control would be eased, particularly in the case of non-horizontal acquisitions, but the Guidelines still do not reveal exactly what one can get away with. There would be surprises in store even for such well-advised clients as Mobil Oil.

The inclination to reserve and exercise broad discretion to disregard its own published guidelines is not unique to the present administration. Under preceding administrations, the old guidelines were adequately slippery and were occasionally disregarded. Differences between the two regimes are differences of degree, not kind. Results will reflect the personalities and economic predilections of the top personnel in the enforcement agencies. This Article will document the breadth of the discretion retained by the Department and the Federal Trade Commission and will point to the danger that, under the guise of regularizing discretion, the antitrust laws are being amended without benefit of congressional action. The Chicago School economics of Professors Posner, Bork, and Baxter is on its way to establishment as law. Thus, if the Department of Justice is to be prevented from smug-

7. Consider, for example, the appointments of Professors Posner and Bork to the United States Courts of Appeals.
gling its views on prosecution policy into crystallized law that will ham-
per future attorneys general and private plaintiffs, commentators and 
advocates must continuously emphasize the nonbinding character of 
the Guidelines.

I

THE UNEXPRESSED PURPOSE OF THE GUIDELINES

The Guidelines serve three purposes. First, they facilitate private 
counseling by affording the public and affected corporations some in-
sight into the regulatory process.9 Second, they constitute a set of di-
rectives from the Assistant Attorney General to his subordinates as to 
how to select cases for active prosecution. There would be no point in 
a director of prosecution merely telling his subordinates not to bring 
untenable suits. Instead, the Guidelines—while influenced by judicial 
precedents—draw lines well within the range of legally tenable prose-
cutions, and thus indicate the manner in which the Department’s re-
sources will be allocated among such prosecutions. For that purpose 
alone, of course, the Guidelines could as well have been distributed 
only within the Division so that they could never be cited against it. 
This suggests an unexpressed third purpose—or at least a foreseeable 
and less acceptable consequence of the Guidelines: the facilitation of 
the sort of “legal smuggling” that results in the conversion of transitory 
policy into permanent legal constraints favoring antitrust defendants.

Certain characteristics of the current administration suggest that 
there is good cause to be concerned about the possibility that such legal 
smuggling will occur under the new Guidelines. The administration’s 
azeous commitment to Chicago School economics is well-known. Its 
avowed determination to correct, unilaterally, earlier judicial “error” 
thought to be too favorable to the government is evidence of the ad-
ministration’s activist nature.10 Baxter’s conception of his role is “to 
educate the public and to urge the courts to adjust to new findings 
about the effects of antitrust restrictions.”11 One wonders whether Bax-
ter believes that the “findings” of Chicago School economics are re-

Guidelines]. The purpose of the Guidelines is to state “enforcement policy,” to describe “general 
principles and specific standards normally used by the department in analyzing mergers,” and to 
“reduce . . . uncertainty” regarding enforcement policy. Id.

10. See Antitrust Chief Suggests Price-Fixing Law Won’t Be Enforced in Some Circumstances, 
Wall St. J., Sept. 10, 1982, at 4, col. 2 [hereinafter cited as Wall St. J. Article]. Baxter has charac-
terized a recent Supreme Court ruling reaffirming the per se illegality of vertical price-fixing as 
“very, very sweeping and unfortunately so.” Id. (as corrected by Corrections and Amplifications, 

revealed truth rather than an expression of politico-economic predilection. Baxter also wants the Federal Trade Commission ousted of its antitrust jurisdiction, which was conferred in 1914 precisely to authorize an administrative noncriminal extension of antitrust principles. His open hostility to laws circumscribing vertical restraints envisions the reinstatement of "fair trade" by judicial decision, despite studies demonstrating its price-inflating, anti-consumer effect and despite the direct expression of Congress' attitude toward the subject found in the repeal of the Maguire Act.

Baxter's policy of actively intervening as amicus curiae to support defendants in private civil actions is further evidence of a determination to rewrite the antitrust law in favor of defendants. The Department has not been deterred from this wrongheaded position by the declaration in section 4 of the Sherman Act of its "duty . . . to institute proceedings" nor by the clear legislative will to supplement public prosecution with "private attorneys general" through the treble damage action. In the IBM case, Baxter was even found shielding the de-


13. See Interview, supra note 2. Baxter evidently based his position on the assumption that the responsibilities and criteria of the two agencies are identical, thus rendering the FTC superfluous: "Obviously," he stated, "the surviving agency should be the one which has authority to bring criminal cases—and they do not." Id. The fact that the criminal sanctions have never been invoked against mergers is ignored.


18. Wall St. J. Article, supra note 10. The outer bounds of this policy would seem to have been reached when Baxter intervened in Weyerhaeuser v. Lyman Lamb Co., 103 S. Ct. 43 (1983) (No. 81-1618) (granting government's motion to participate in oral arguments), to argue, not that the jury's verdict on liability should be set aside, but that the court's instructions on damages were defective. See High Court Permits Government to Offer Its Separate Views in Phantom Freight Case, 43 Antitrust & Trade Reg. Rep. (BNA) No. 1084, at 684 (Oct. 7, 1982). Baxter's subsequent intervention on behalf of a monopoly newspaper that had terminated its independent distributors. In its opinion sustaining the position of the distributors, the Eighth Circuit criticized the Department's economic model building, which it felt stood in contrast to the realities of the situation. See Paschall v. Kansas City Star Co., 695 F.2d 322, 328 (8th Cir. 1982).

fendant from prosecution by foreign agencies under their own laws. 21 This paradoxical inclination to provide legal aid to giant corporate defen-
dants, by an administration doing its best to cut off legal aid to the poor, must be borne in mind when appraising the wide discretion re-
tained by the Department under the Guidelines and the danger of al-
lowing the Department's guideline formulations to be smuggled into the formal law of mergers. "Smuggling" may in fact not be the most accurate term to employ in this context. Attorney General Smith, in announcing the new Guidelines, openly characterized them as dealing with whether particular mergers "violate" the antitrust laws. 22 That announcement converts the Guidelines into an avowed reinterpretation of law rather than a mere indication of how prosecutorial resources will be allocated.

Finally, a degree of skepticism with regard to the exercise of Department of Justice discretion in merger cases seems warranted when one considers the history of the Department's discretion in the related field of consent judgments. The recent consent judgment in the AT&T case, for example, evoked a remarkably instructive critique from Judge Greene. 23 He pointed out that then Attorney General Brownell had negotiated an earlier consent judgment with AT&T on the basis of AT&T's acceptance of a "token" injunction involving "no real injury to [its] business." 24 Judge Greene also noted that in the current AT&T case the Department of Justice and AT&T had sought to evade public and judicial review of the proposed consent judgment under the Tun-
ney Act, which was designed to restore public confidence in the Depart-
ment of Justice's impartial administration of consent decree nego-
tiations, 25 and that there had been extraordinary collaboration be-
tween the parties in arriving at a decree that fell well short of the gov-
ernment's decades-long effort to divest Western Electric and Bell Labs as well as operating companies. "These circumstances," he felt, "do not foster a sense of confidence that the assessment of the settlement and its implications may be left entirely to AT&T and the Department

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20. In re IBM Corp., 687 F.2d 591 (2d Cir. 1982). The Department of Justice abandoned this case after 13 years of litigation under four successive heads of the Antitrust Division.


24. Id. at 137.

25. Id. at 143-47.
II

THE DISCRETIONARY POTENTIAL OF MARKET SHARE ANALYSIS

The entire structure of the Guidelines is based on a calculation of market share percentage that will in all likelihood have a significant discretionary component. The market share calculation depends on dubious data and intuitional judgments, rather than known correlations of particular concentration figures with anticompetitive behavior. The questionable validity of the data base is sufficiently demonstrated by the unavoidably arbitrary way that multiproduct firms are allocated to particular industries for census purposes, and by the inevitable uncertainty involved in assigning a given product to one industry or another.27

Even more striking is the intuitional character of judgments as to how much concentration is excessive. Kaysen and Turner, in their pioneer effort to quantify excessive concentration,28 classified any market in which the eight largest sellers did more than one-third of the business as prima facie excessively concentrated because “in the majority of markets with which we are familiar, a smaller number of firms with larger shares of the market . . . [are] likely [to] recognize the interaction of their own behavior and their rivals' response in determining the values of the market variables.”29 Where the first eight firms have 50% or more and the first twenty firms have 75% or more, the oligopolistic response was said to be “extremely likely.”30 The judgment was based on economic modeling rather than recorded observations; the predictions (“likely” and “extremely likely” oligopolistic response) were not even loosely tied to specific probability ratios; and there was no canvass of possible alternative benchmarks.

There is little doubt that the current Department of Justice is only loosely committed to the idea that market shares dominate judgments about monopoly. One has only to look at the recent consent settlement in the AT&T case, in which the defendant's Long Lines operation was

26. Id. at 153; cf. id. at 214-16 (discussing duty of court to supervise implementation and enforcement of consent decree).
29. Id. at 27.
30. Id.
treated as being subject to effective competition\textsuperscript{31} despite the contention that it has approximately 90\% of the long distance traffic.\textsuperscript{32} Taking into account a 4\% market share for MCI and a 2\% share for Southern Pacific’s Sprint, the HHI would exceed 8100.

There are alternative benchmarks that could be explored in future efforts to formulate guidelines. For example, the Guidelines might focus directly on competitive behavior rather than market shares, although market shares would be one of the auxiliary considerations like “condition of entry” in the current Guidelines. The competitive behavior on which future guidelines might focus would be price behavior during a recent three-year period, and the principal feature to be scrutinized and quantified would be price and market share stability. A competitive market is, after all, supposed to be responsive to changing market conditions. Therefore, if one observes a market price that remains stable over long periods during which input costs or sales have gone up or down, the inference is strong that it is an administered price rather than a competitive price. Similarly, perverse price responses, such as a price increase designed to maintain revenue in a period of declining sales, would be a particularly strong indicator of the exercise of oligopoly power, and would have to be discounted in calculating the price stability index.

The advantages of a price stability index over market shares as the primary basis for guidelines include (1) their built-in reflection of the importance of substitute products and of potential extramarket competition; and (2) their built-in incentive for those who administer prices to do so in realistic relation to changing input costs. In addition, price stability probably will be more objectively determinable than the predictions of “likely” or “extremely likely” oligopolistic response made under market share analysis. The potential for an unreviewable exercise of discretion by the Antitrust Division officials would thus be reduced.

Rigidity or perverse behavior of prices also more accurately reflects many of the subtle linkages between firms—such as joint ventures, use of common pricing formulas, or habitual price leadership—that make an industry function as a unit even though it appears to be deconcentrated. The incursion of substitute products should destabilize a market. Price reductions should occur as suppliers fight to retain their market shares; if stable or higher prices persist, that perverse reaction suggests that the newcomers have joined the covert cartel. If the market is competitive, high cost producers should be the first to be displaced by substitutes, leading to a change in respective shares

\textsuperscript{31} 552 F. Supp. at 170-73.
\textsuperscript{32} Id. at 171 & n.170.
of the market leaders. Rank shift analysis would therefore be an important supplement to the price stability index as a basis for new guidelines.

One cannot predict with any assurance that oligopolists would administer their prices with greater recognition of changing input costs if they knew that the government’s merger policy was responsive to price and market share rigidity. One does not intuit that price policies are oriented to merger prospects. On the other hand, since monopoly law as well as merger law would be affected by the shift of enforcement focus from static market shares to price rigidity, one could anticipate that monopoly firms would adopt more flexible pricing strategies. In any event, it should be healthy for the government to redefine the issue in terms of factors that reflect competitive forces more directly than do equivocal market shares. My present purpose, however, is not so much to advocate a particular alternative to market share analysis, the feasibility of which must be left to economists, as to make it clear that market share analysis is neither the inevitable nor necessarily the best basis for the present or future guidelines.

Finally, on the question of the Department’s real attitude towards vertical mergers, consider the implications of the consent settlement in the AT&T case. In that case the Department attempted to break the affiliation of Western Electric and its customers, the Long Lines division and Bell Operating Companies. Western Electric supplied 88% of their equipment requirements. After decades of effort, the Department accepted a decree that left Western Electric affiliated with Long Lines. One cannot extrapolate from a consent decree that leaves undisturbed an existing affiliation to an antimerger enforcement policy. But one wonders what the current Antitrust Division would do if Western Electric, assumed here to be simply a giant supplier of telephone equipment, proposed to acquire the nation’s long distance network, which constitutes approximately two-thirds of the total national market for telephone equipment.

33. See, e.g., Joskow, Structural Indicia: Rank-Shift Analysis as a Supplement to Concentration Ratios, 42 REV. ECON. & STAT. 113 (1960); A. KAPLAN, BIG ENTERPRISE IN A COMPETITIVE SYSTEM ch. 7 (1964).
34. Schmalensee, supra note 27, at 1804-07, discusses nonmarket-share indicators of market power, including persistent high profitability and predatory behavior.
III
THE SCOPE OF DEPARTMENTAL DISCRETION

A. Explicit Reservation of Free Choice by the Antitrust Division

The statement of purpose and underlying policy in section I of the Guidelines explicitly recognizes the Department’s discretionary role beyond the standards:

[I]t is not possible to remove the exercise of judgment from the evaluation of mergers . . . the standards represent generalizations to which some exceptions are inevitable. In appropriate cases, the Department will challenge mergers that are competitively objectionable under the general principles of the Guidelines regardless of whether they are covered by the specific standards.37

The general principles and specific standards are described as those “normally” used, and the potential for “exceptional” cases is recognized throughout the Guidelines.38 The Department affirms its freedom, in a litigating context, to introduce evidence unrelated to factors identified in the standards. Certainly, equal freedom will be accorded to defendants. Thus, the gap between case law and the Guidelines will become more evident as time passes, and the role of departmental discretion will become more manifest. The reserved discretion is also emphasized in the opening section of the Guidelines.39 The Guidelines are declared to outline present enforcement policy, subject to revision without notice, on the basis of “economic studies” or subsequent judicial decisions.40

Inevitably, legislation employs terms with a range of meanings and potential applications. The Guidelines are no exception; indeed, they repeatedly signal opportunities for the Department to give a strict or liberal interpretation of its own criteria. Apart from the inherent ambiguities in market share analysis and in predictions of the price consequences of a merger, which will be discussed below,41 we may note as examples of built-in discretion the avowed intention to treat “cases falling just above and just below a threshold” as presenting “comparable competitive concerns”42 and the announced willingness to move against vertical mergers on the basis of a “somewhat lower concentration” than 1800 HHI in some circumstances.43

38. See, e.g., the exclusion “except in extraordinary cases” of “efficiencies” as a mitigating factor. Id. § V(A), 47 Fed. Reg. at 28,502, 71 CALIF. L. REV. at 665 (emphasis added).
40. Id. § I & n.3, 47 Fed. Reg. at 28,494 & n.3, 71 CALIF. L. REV. at 649 & n.3.
41. See infra text accompanying notes 44-52.
B. Discretion in Measuring Concentration

1. Discretion in Measuring Market Shares

The new Guidelines, like the old, center attention on the level of concentration as measured by each firm's percentage of total offerings or on the availability of a product in a geographically delimited market. As Professor Areeda has pointed out, however, "[i]t cannot be emphasized too strongly that market definition and the assessment of defendant's share of that market give, at best, only a suggestion of defendant's market power."44 The shift in the new Guidelines from relying directly on market share percentages to calculating the HHI, which involves the squares of the percentages, accentuates the problematic nature of market share analysis—even though it is right in principle to give extra weight to the shares of a few large firms confronting an array of smaller firms. It is easy, however, to exaggerate the significance of the change and to lose sight of the large element of discretion incorporated in the shift. Whether the shift is of practical importance will depend on the cutoff points chosen by the Department, and we are assured by the Administration that no "revolutionary" change has been effected.45 To the extent the HHI does make a change, that change is the product of an arbitrary departmental choice of the exponent "2" rather than, for example, "3" (in which case the raw percentages would be cubed) or "1.5." I have seen no demonstration that one exponent rather than another better reflects the anticompetitive nature of a market structure.46

Moreover, the Department reserves for itself the right to choose the data base upon which the market shares will be calculated:

Market shares can be expressed in terms of dollar sales, physical unit sales, physical capacity, or (in natural resource industries) physical reserves. The availability of data often will determine the measurement base. Where a choice is possible, the Department will use the measurement base that is the best indicator of the likely effect of the merger on market power.47

Another interesting discretionary choice embodied in the Department's measurement of concentration was the election to treat some potential entrants as already in the market, thus enhancing the base figure with which firms' sales would be compared, and reducing nomi-

46. See, e.g., Calkins, supra note 3, at 416.
nal percentage shares.48 For example:

If a firm has existing productive and distributive facilities that could easily and economically be used to produce and sell the relevant product within six months in response to a small but significant and non-transitory increase in price, the Department will include those facilities in the market.49

A 5% increase is "hypothesize[d] as a first approximation" of such a price increase; but the percentage may vary depending on the width of the normal profit margin in the relevant business.50 That makes sense, since a 5% rise in prices in the retail grocery business, where profit margins are in the neighborhood of 1%, would strongly attract potential entrants, whereas a 1% markup might be unattractive in a business where markups are typically 25%. However, the need to determine what percentage markup would be attractive to potential entrants in a particular business underscores the illusory precision of the 5% benchmark and the breadth of administrative discretion retained. The Department's initial efforts to persuade the courts to accept its economic speculations have not been successful.51

Only a portion of the potential entrant's productive facilities will be included in the market; that portion will be determined by the decisionmaker's estimate of how much of that capacity is "likely" to be diverted to the market within six months in response to a 5% price increase. For example, if the full output of those facilities is committed to other customers, by contract or marketing considerations, the mere physical possibility of diverting some of the supply to the market under consideration will not result in the inclusion of these "foreign" facilities in the market-share calculus. It is manifestly difficult to make a plausible estimate of the fraction of a foreign supplier's facilities likely to be diverted to a particular market. When one thinks about the problem in an international context, where trade patterns depend on such variables as exchange rates and controls, fluctuating transportation rates, national subsidies, the interrelationships of trade and politics, and countertrade arrangements, it becomes evident that forecasts of diversion will be nothing but guesses colored by politico-economic bias.52

48. Id. § II(B)(I), 47 Fed. Reg. at 28,495, 71 CALIF. L. REV. at 652.
49. Id.
50. See also id. § II(B)(I) n.18, 47 Fed. Reg. at 28,495 n.18, 71 CALIF. L. REV. at 652 n.18 (cross-referring to id. § II(A) n.10, 47 Fed. Reg. at 28,495 n.10, 71 CALIF. L. REV. at 651 n.10).
2. Discretion in Measuring Diversion

Potential diversion of productive capacity is of course relevant to a consideration of how accurately market shares indicate market power. A firm currently supplying even 100% of a market has virtually no freedom to overprice if it is surrounded by other firms poised to slip effortlessly into the competitive arena. But this kind of restraint on a dominant supplier has generally been evaluated by examining the condition of entry rather than by manipulating the market share calculation. That is what the Department proposes to continue to do with regard to potential new entry that would require construction of new facilities or “substantial” modification of existing facilities. Presumably the Department will also follow that tactic in relation to potential entry that might be stimulated only by a 6% price rise or following a seven-month delay.

Logically, it ought to make no difference whether the decisionmaker bases his decision on a higher market share discounted by ease of entry or a lower market share calculated by treating potential entrants as already in the market. Practically and rhetorically, however, a significant advantage has been given to defendants, and departmental discretion has been reinforced. This advantage is comparable to the advantage afforded to investors in regulated utilities by the rate base system of regulating rates. If the investors' reward is to be increased, it should make no difference whether this is accomplished by increasing the percentage rate of return or by increasing the rate base. Politically, however, it is much easier to achieve the increase by recalculating the rate base rather than by overtly increasing the percentage return, since the recalculation process is less easily understood by the public.

Market share analysis also has a strong hold on the judicial imagination. Judge Learned Hand, for example, felt it necessary to attribute a 90% market share to the Aluminum Company of America, even though some remarkably good substitutes for virgin aluminum ingot were excluded from the calculation. An agency strategy that can

55. Under such a system, investors' reward is computed as a percentage rate of return applied to a calculation of the value of the rate base, which is the value of the investors' capital contribution. See Schwartz, Inflation and Utility Rate Regulation, 1982 UTAH L. REV. 89, 95.
56. See id.
57. See United States v. Aluminum Co. of Am., 148 F.2d 416, 424-25 (2d Cir. 1945).
have the effect of lowering nominal market shares will combine nicely with conventional judicial benchmarks of “excessive” concentration to ease the path to mergers. Moreover, since 5% and six months are not inscribed in stone, and since predictions of likely diversion of potentially competing capacity—whether made by Division economists, businessmen, or purchasable experts—are as insubstantial as gossamer, the effects of administrative discretion will be very broad indeed.

The shift in analytic style has adverse administrative and judicial implications. Limited Antitrust Division resources must be reallocated to amass relevant data for new calculations and predictions of at best dubious utility. The mesmerism of numbers is intensified. The sad spectacle of the “battle of the experts” is extended. Decision is correspondingly delayed. The relative advantage of big merging firms, which can afford to play such needlessly complicated games, is enhanced. And for what? Market share analysis is the beginning, not the end, of the problem of identifying excessive economic power. The Warren Court’s strongest decisions regarding the significance of market shares created no more than a presumption of illegality—that could be rebutted only too easily. If the Assistant Attorney General in charge of the Antitrust Division wishes to tell his staff which cases to investigate and to tell corporate executives when their expansionist proclivities will invite governmental scrutiny, he would do better to stick to relatively simple benchmarks. But if the aim was to enlarge discretion and to exert atmospheric pressure for reinterpretation of the antimerger laws to favor mergers, the shift in analytic style was well chosen.

The Guidelines’ treatment of substitute products, like their treatment of potential entry by extra market producers, represents an effort to incorporate more production into the base figure so that particular firms’ nominal shares will be minimized. At the same time Departmental discretion is preserved and enhanced by making the decision to include or exclude particular substitutes turn on business predictions that must be mainly guesswork:

In general, the Department seeks to identify a group of products such that a hypothetical firm that was the only present or future seller of those products could raise price profitably. That is, assuming the buyers could respond to an increase in price for a tentatively identified product group only by shifting to other products, what would happen? If readily available alternatives were, in the aggregate, sufficiently attractive to enough buyers, an attempt to raise price would not prove

58. See United States v. Philadelphia Nat’l Bank, 374 U.S. 321, 363-66 (1963); cf. Brown Shoe Co. v. United States, 370 U.S. 294, 322 n.38, 343 (1962) (market shares called the “primary index of market power” and “one of the most important factors to be considered.”).
The provisional market will then be expanded by adding other products to the extent that a 5% nontransitory price increase in the provisional market would cause a “significant percentage of the buyers” to shift to the substitute within one year. The process of expanding the provisional market must now be continued, since new product definition entails further substitution possibilities, some of which will and some of which will not take place within a year, attracting a “significant percentage of buyers.” As in the case previously discussed, the 5% figure is only a first approximation. This offers a horrifying prospect of model building by economists as a prelude to decision by the Antitrust Division whether to oppose a plausibly anticompetitive merger.

Whatever the practical impact of this delusively mathematical technique, the overriding discretionary freedom of the Department in its prosecution policy indicates that a striking ideological change has taken place, apparently directed more toward “educating” courts than toward regularizing administrative action. This can best be appreciated by contrasting the new Guidelines’ approach and the traditional judicial approach. The alternative to the proposed infinitely regressive formula for determining the product market is the multimarket analysis, which the courts long ago evolved. A market may be divided into submarkets. The existence of submarkets is determined by actual patterns of trade, rather than by hypothetical future switching of customers or by the possibility that suppliers might alter their production habits. The submarket analysis is a sophisticated recognition that, while market shares may be an essential, if crude, proxy for market power, “the market” is an analytic construct, not a feature of the cosmos. It is possible to construct many markets on the basis of the same data, each resulting in different market shares, each throwing some light on the elusive question of excessive economic power. That Congress favors this approach is shown by the fact that when the United States Supreme Court adopted overly comprehensive market boundaries for steel products, in part based on production flexibility, Congress v. Columbia Steel Co., 334 U.S. 495, 510-11 (1948).
gress enacted the Celler-Kefauver Anti-Merger Act of 1950 to undo the effect of that decision.65

Monopoly law rather than merger law may be the real target of the novel market definition offered by the Guidelines. Judge Learned Hand’s decision in United States v. Aluminum Co. of America (Alcoa), 66 has long been the bete noire of Chicago School economists. Judge Hand had the temerity and wit to hold that Alcoa has to be regarded as a monopolist if section 2 of the Sherman Act is to be given any effect at all. Alcoa had been the only American producer of aluminum ingot for decades, even after the expiration of controlling patents and the dissolution of a world aluminum cartel. Judge Hand, in reaching his conclusion, committed the Chicago sin of excluding secondary ingot from the market, based on evidence that some users would not buy recycled aluminum and that the prices of virgin and recycled aluminum diverged to some extent. The Guidelines, by contrast, unequivocally declare that “[i]f ... recycled or reconditioned products represent good substitutes for new products, the Department will include in the market firms which recycle or recondition those products.”67 General Motors will surely welcome this addition of used car dealers to its list of nominal competitors.

Similarly, Judge Hand refused to include the capacity, above actual imports, of foreign producers even though those producers had been supplying approximately 10% of the American demand. Under the Guidelines, the market includes not only the divertible capacity of foreign producers of identical products, but also their capacity to produce “good substitutes.”68 In general, the geographic market is treated in a manner parallel to the product market: a provisional market is expanded on the basis of predicted responses to hypothetical price increases.

Also contrary to Alcoa is the flat declaration in the Guidelines that “[c]aptive production and consumption of the relevant market by vertically integrated firms are part of the overall market supply and demand.”69 On the other hand, the Alcoa opinion focuses on a market of actual transactions in ingot, although it recognizes the power of a vertically integrated firm to influence ingot supply and demand by internal decisions with regard to the level of its fabricating activities.70

65. See Bethlehem Steel, 168 F. Supp. at 593 n.34.
66. 148 F.2d 416 (2d Cir. 1945).
69. Id. § II(B)(3), 47 Fed. Reg. at 28,495, 71 CALIF. L. REV. at 653.
70. Alcoa, 148 F.2d at 424.
3. Discretion in Measuring Price Discrimination

The Department's measurement of market concentration will be substantially affected by its discretionary treatment of price discrimination as an element in market definition. If the Department believes that for some buyers the range of substitutes is narrower than for other buyers, so that a supplier can charge them a discriminatory higher price, the Department will consider defining narrower product markets oriented to such vulnerable buyer groups. The Department takes the occasion of this reference to price discrimination in the context of market definition to declare its well-known belief that price discrimination by a monopolist is benign—the Robinson-Patman Act to the contrary notwithstanding—because it enables the monopolist to expand output (through lower prices and higher sales to customers who can turn to substitutes), “thus reducing the resource misallocation associated with market power.” Without pausing to assay the Division’s ability to measure resource misallocation corrected or created by a monopolist’s exercise of the power to discriminate, we may note here the Division’s indifference to that concern of the antitrust laws that Congress and the courts often have recognized, namely, the injustice to and impairment of competition between rival traders paying different prices to a monopolist that is nobly engaged in improving the allocation of resources by making price concessions to powerful customers.

4. Discretion in Assessing Vertical Mergers

A final remarkable exercise of discretion affecting the putative mathematical computation of market concentration appears in the Guidelines' discussion of vertical mergers. Non-horizontal mergers, vertical or conglomerate, present a unique problem for those who would draw the line of legality with primary reference to market shares and concentration: these referents are not changed by a non-horizontal merger. Only firm ownership changes in such mergers. If a shoe manufacturer buys an important shoe distributor, the number of shoe manufacturers, the number of shoe distributors, and their respective market shares remain as before. For some Chicago School economists, that ends the inquiry: the competitive process cannot be affected by a mere change of ownership. But others, including the drafters of the new

72. Id.
73. See Report of President Nixon's Task Force on Productivity and Competition, [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 413, at X-6 (June 10, 1969) (Stigler, Chairman) (discussing conflicting views, including the declaration that “it is wholly inplausible that vertical integration places entering firms at a disadvantage” because an enterprise “cannot afford to sell to or buy from an affiliate if there are more efficient alternative means of supply and distribution.
Guidelines, take the view that although non-horizontal mergers are “less likely” to create competitive problems, they are not “invariably innocuous.” Inquiry shifts to the effect of the vertical merger upon barriers to entry. The lesson in official economics found in this portion of the Guidelines is no radical departure from ideas heretofore developed by the courts and the Federal Trade Commission. One is to look at perceived and actual potential competition, take account of the large market share of the acquiring firm (“entrenchment”) and the small market share of the acquired firm (“toehold”), and consider the number and power of potential entrants who remain at the edge of the market.

There is an innovation, however, in the Department’s proposed analysis of the barrier to entry represented by the increased capital requirement for entering two markets simultaneously. The Department recognizes that vertical integration may preempt a distribution system needed by the nonintegrated supplier. Such a supplier would therefore have the capital burden of building a parallel distribution system in order to remain in the manufacturing or supply business. The unique aspect of the Department’s response is its criterion of the adequacy of the distribution facilities remaining open to the nonintegrated manufacturer after his rival has captured an important distributor by vertical merger: “The Department is unlikely to challenge a merger [where postmerger noncontrolled distribution facilities] would be sufficient to service two minimum-efficient-scale plants in the primary market.”

In an academic environment, the Department’s response to the capital requirement problem would surely evoke gasps of admiration from shiny-eyed economics majors, who will proceed to construct hypothetical plants at hypothetical locations, to posit interest rates and depreciation schedules, to allocate costs between joint products, and in general to engage in meaningless model making. In this exercise, adequacy of the available distribution capacity for the two hypothetical plants must take account not only of independent distributors but also of the capacity of the newly acquired, formerly independent distributor, which will not be wholly preempted by the acquiring manufacturer. After all, Kinney did not switch wholly to Brown Shoes after available...”).} But cf. Report of President Johnson’s Task Force on Antitrust Policy, [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 411, at 15-17 (Supp. May 27, 1969) (Neal, Chairman) (recognizing foreclosure potential).

75. Id. § IV(A), 47 Fed. Reg. at 28,499, 71 CALIF. L. REV. at 660.
76. Id. § IV(B), 47 Fed. Reg. at 28,500, 71 CALIF. L. REV. at 662.
77. Id. § IV(B)(1)(a), 47 Fed. Reg. at 28,500, 71 CALIF. L. REV. at 662.
78. Id. § IV(B)(1)(a) n.45, 47 Fed. Reg. at 28,500 n.45, 71 CALIF. L. REV. at 662 n.45.
Brown acquired Kinney.\textsuperscript{79} Presumably, potential as well as actual alternative distribution arrangements—such as mail-order or door-to-door selling—should be counted, especially if they can be inaugurated within six months at moderate cost. Moreover, our busy model builders are committed to making the models reflect any efficiency gains resulting from the merger\textsuperscript{80} (but not efficiency losses imposed on nonintegrating firms).

As if all this were not enough to cloud the issue so as to frustrate any challenge to the Department’s exercise of discretion under the Guidelines, the Department undertakes two additional rituals:

1. [T]he Department will consider both the degree of similarity in the essential skills in the primary and secondary markets and the degree of specialization of the capital assets in the secondary market.\textsuperscript{81}

2. [The Department will consider whether there is such a difference in the capacities of minimum-efficient-scale plants in the primary and secondary markets [as would] cause a significant increase in the operating costs of the entering firm.\textsuperscript{82}

This mind-numbing inquiry will be extended to ascertain whether an “outside market” would exist for the surplus product of the larger of the disparate minimum-efficiency plants.\textsuperscript{83}

The dubiety of a judgment on such issues by the Department (or by a court in litigation) is manifest. At the same time, it will be extremely difficult for adverse parties or courts to either controvert or review such judgments.\textsuperscript{84} Respondents’ (but more likely protestants’) representations to the Department, officially invited by these passages in the Guidelines, will have all the credence that a Department economist, functioning in the obscurity of prelitigation discretion, wants to give them.

The Department, perhaps not entirely sanguine about its ability to gauge likelihood of entry and survivability of independents in a field dominated by vertically integrated firms, has adopted an odd rule of thumb favoring the maintenance of at least three rival firms with entry.

\textsuperscript{79} Brown Shoe Co. v. United States, 370 U.S. 294, 332 (1962).

\textsuperscript{80} Guidelines § V(A) & n.53, 47 Fed. Reg. at 28,502 & n.53, 71 CALIF. L. REV. at 665 & n.53 (only in “close” cases where another firm already enjoys such efficiencies, which cannot be achieved except by merger).

\textsuperscript{81} Id. § IV(B)(1)(b)(i), 47 Fed. Reg. at 28,501, 71 CALIF. L. REV. at 665.

\textsuperscript{82} Id. § IV(B)(1)(b)(ii), 47 Fed. Reg. at 28,501, 71 CALIF. L. REV. at 665.

\textsuperscript{83} Id. n.47, 47 Fed. Reg. at 28,501 n.47, 71 CALIF. L. REV. at 663 n.47.

\textsuperscript{84} But compare the temerity of the United States Court of Appeals for the Second Circuit, which reversed the Federal Trade Commission’s finding that a British manufacturer already established in Canada had the know-how to invade the United States market, and so could not be considered an actual potential entrant. BOC Int’l Ltd. v. FTC, 557 F.2d 24, 28-30 (2d Cir. 1977).

\textsuperscript{Cf.} Brodley, Potential Competition Mergers: A Structural Synthesis, 87 YALE L.J. 1, 5 (1977) (Supreme Court has embraced rules of such “fearsome complexity” that enforcement efforts have been obstructed).
advantages "comparable" to those of the potential entrant. Like most of the doctrine now enshrined in the Guidelines, the rule of three lacks experiential basis, and its logic is far from self evident. One powerful and likely entrant would seem to be as effective a restraining influence as three smaller potential entrants; the Guidelines themselves recognize and even emphasize, through the shift to the Herfindahl-Hirschman Index, the importance of high market shares of leading firms. The rule of three is in any event not quite so firm as its numerical character suggests; the relevant section of the Guidelines envisions decreases below three and flexible responses to situations where the entering firm's advantage over other potential entrants may be less than comparable. Even if three comparable firms remain at the edge of the market, the potential entrant may be in trouble if the Department finds out that the firm had made an actual decision to enter de novo before opting for the acquisition alternative, or if the acquired firm has 20% of the market.

The rule of three is further undermined by the Department's ambivalent attitude towards its responsibility for efficiency. Some harsh things are said about the extreme difficulty of appraising efficiency claims. "Except in extraordinary cases," efficiency will not be considered as a mitigating factor in favor of mergers otherwise challengeable under the Guidelines. On the other hand, the Department lapses into its more typical Chicago School frame of mind in announcing that where "substantial economies are afforded by vertical integration" it will be disinclined to challenge the merger, and in that case "it might be economically perverse and inequitable to the remaining independent firms to deny them the ability to integrate through merger." In short, one vertical merger may trigger acceptance of others, and industry trends and patterns of vertical integration will be allowed to fulfill themselves regardless of foreclosure consequences to remaining independent suppliers. There is, of course, no reason why such an analysis should not apply equally to exclusive dealing contracts. Nothing in the Guidelines flies more directly in the face of congressional intent and of unchallenged Supreme Court doctrines that treat industrywide trends and triggering effects as considerations ad-

86. Id. § IV(A)(3)(a), 47 Fed. Reg. at 28,500, 71 CALIF. L. REV. at 661. Cf. id. § III(A)(1) nn.31-32, 47 Fed. Reg. at 28,497 nn.31-32, 71 CALIF. L. REV. at 656 nn.31-32 (indicating examples of market shares that would produce increases in concentration close to the 100 and 50 point thresholds).
88. Id.
91. Id. § IV(B)(I)(c) n.49, 47 Fed. Reg. at 28,501 n.49, 71 CALIF. L. REV. at 664 n.49.
verse to vertical integration.\textsuperscript{92}

5. \textit{Implications}

Whole arrays of precedents are brought within range of the Department's artillery and stand to be decimated if the Department's analytic innovations, despite their presentation as statements of Department enforcement policy, are allowed to seep into judicial decisions interpreting the antitrust law. Would decisions on professional sports monopolies\textsuperscript{93} survive reexamination on the basis of predictions as to shifts of patronage from one sport to another in response to hypothetical increases in ticket prices? Will recreation markets be drawn broadly enough to include broadcasts as well as live performances, books in rivalrous confrontation with magazines, phonograph records, and casino gambling? How far along this silly line we go will be a function of, in part, executive discretion. A Smith/Baxter Department of Justice will not bring or support a cellophane monopoly case,\textsuperscript{94} but will instead honor Justice Reed's opinion for the 4-3 majority in that case, with its absurd market construct of "flexible packaging materials" that included brown wrapping paper and aluminum foil.\textsuperscript{95} There will be no future \textit{Grinnell}\textsuperscript{96} case, distinguishing as a separate submarket central alarm systems from other technological alternatives; no future \textit{Rome Cable}\textsuperscript{97} case, distinguishing the insulated aluminum conductor market from the insulated copper conductor market. \textit{Brown Shoe},\textsuperscript{98} if not already deceased, will be dead, considering the infinite possibilities of substitute production of footwear by the makers of men's, women's, and children's, high- and low-priced shoes.

Perhaps the most disturbing aspect will be the Department's reactionary influence as it carries out its avowed purpose to proselytize the courts through intervention on behalf of defendants in private litigation. If the Department can help it, there will be no more decisions like \textit{Columbia Metal Culvert Co. v. Kaiser Aluminum \\& Chemical Corp.},\textsuperscript{99} holding steel and concrete culverts to be separate submarkets, or \textit{Greyhound Computer Corp. v. IBM},\textsuperscript{100} recognizing a separate market for


\textsuperscript{93} \textit{E.g.}, International Boxing Club v. United States, 358 U.S. 242, 249-52 (1959) (market for championship boxing matches distinct from other professional boxing matches, wrestling matches, professional sports generally, and other entertainment).


\textsuperscript{95} \textit{See} L. SULLIVAN, supra note 92, \S 16, at 53-58.


\textsuperscript{97} United States v. Aluminum Co. of Am. (Rome Cable), 377 U.S. 271 (1964).

\textsuperscript{98} Brown Shoe Co. v. United States, 370 U.S. 294 (1962).


\textsuperscript{100} 559 F.2d 488 (9th Cir. 1977), \textit{cert. denied}, 434 U.S. 1040 (1978).
computer leasing despite IBM's contention that in the computer industry, leasing and sale are close commercial alternatives.

In the final analysis, then, the Guidelines are an elaborate and costly pretense of science masking an intuitional or philosophically biased discretionary judgment. A gestalt response based on anecdotal evidence and plausible anxieties of firms directly threatened by a merger would be more reliable. Such evidence should be admissible in litigation, and can be more easily provided by small business competitors of the merging firms. It should outweigh statistical mumbo-jumbo if the courts are not to accede to the Department's purpose to lead them by the nose to a regressive revision of the antitrust laws.

C. Nonmarket Share Considerations

I have been examining up to this point the market share analysis that is basic to the new Guidelines. I have argued that the new approach is not so much a constraint on Departmental discretion as it is an economic brief for judicial relaxation of antitrust control of mergers. The Guidelines' treatment of decisional factors other than market shares supports that thesis. The nonmarket share factors are numerous, vague, largely incommensurable, shot through with escape clauses to preserve the Department's freedom of action, and impossible to aggregate for decisional purposes on any basis other than intuition or economic bias. In combination, the market share and nonmarket share criteria essentially provide for a major shift to a Sherman Act rule of reason approach to concentration of economic power. This approach defies Congress' will as expressed in section 7 of the Clayton Act of 1914 and reemphasized in the Celler-Kefauver Anti-Merger Act of 1950,101 legislation that was directed precisely against that approach.

The Guidelines put nonmarket share factors in a distinctly subordinate role, to be considered only in close cases and only "as they relate to the ease and profitability of collusion."102 This contrasts with the Federal Trade Commission's commendable recognition that market share data provides only a "preliminary surrogate measure of market power," which, while important, must be supplemented by evaluation of other factors. This "more refined treatment" would take account not only of potential for collusion, as in the Department's Guidelines, but also of conditions conducive to the exercise of individual firm market power.103 Moreover, the FTC is responsive to "overall social and political ramifications of economic concentra-

103. FTC Statement Concerning Horizontal Mergers § III (June 14, 1982), reprinted in
tion.” The Guidelines blandly assert that “incorporation of noncompeteive concerns into antitrust analysis [is] inconsistent with the mandate contained in the antitrust laws.”

Condition of entry is the most important nonmarket share factor, and the divergence between the Department of Justice and the Federal Trade Commission on “other factors” is attributable in part to the fact that the Department’s Guidelines treat some potential entrants as already part of the market under the HHI formula. Potential entry, accordingly, has been discussed above, and it remains only to consider the Guidelines’ treatment of other nonmarket share factors. These are homogeneity, substitutes, market characteristics that facilitate collusion, and market performance (profitability and market share stability). In a sense, all evaluation of non-horizontal mergers turns on condition of entry and nonmarket share evaluation.

1. Homogeneity

Since price collusion is easier if the relevant product is homogeneous, the Department will scrutinize with special care mergers involving such products. It seems unlikely that many such cases will occur under the Department’s generous definition of relevant product as including good substitutes. The extent of the Department’s retained discretion is indicated by the Guidelines’ suggestion that homogeneity may be negated by the prevalence of “complicated terms in addition to price” (such as warranties, delivery schedules, or credit) and by a context of “rapid technological change.” Under the Guidelines, today’s homogeneity may be vitiated by tomorrow’s development.

2. Substitutes

“Substitutes” beyond those directly included in the definition of relevant product—and perhaps even those as well—must be evaluated. The possibility and profitability of collusion will vary depending on “whether the next-best substitute is only slightly or significantly inferior to the last product included in the relevant product . . . [or]

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104. Id. § II, TRADE REG. REP. (CCH) No. 546, at 74.
105. Guidelines § V(B) n.54, 47 Fed. Reg. at 28,502 n.54, 71 CALIF. L. REV. at 665 n.54.
106. See supra text accompanying note 53.
109. Id. § III(C)(1)(a) n.36, 47 Fed. Reg. at 28,498 n.36, 71 CALIF. L. REV. at 658 n.36. Cf. id. n.37, 47 Fed. Reg. at 28,498 n.37, 71 CALIF. L. REV. at 658 n.37 (showing that an apparent heterogeneity can be negated by the prevalence of bidding on basis of detailed buyer specifications).
whether the next-most-distant seller is only slightly or significantly farther away than the last seller included in the geographic market.”

Where products are “highly differentiated,” presumably by trademark and advertising, consumer perceptions of substitutability must be considered. Like so much else in the Guidelines, these would be appropriate elements of a rule of reason approach to mergers, but they lack the clarity required for expeditious preliminary selection of cases deserving departmental attention or for guidance of private counsel.

3. Market Characteristics Facilitating Collusion

The Guidelines are especially sophisticated in discussing market characteristics that facilitate explicit or tacit collusion. Such characteristics include information that facilitates delivered pricing and sanctions against chiseling by cartel participants. In a market exhibiting such characteristics, a reduction in the number of firms resulting from merger will further enhance the likelihood and effectiveness of collusion, making challenge by the Department more likely. The availability of detailed information about each firm’s individual transactions is such a characteristic, as has been recognized since the early “open competition” trade association cases. But the Guidelines, uncharacteristically, go further insofar as the trade association cases rested on evidence of collective seller sponsorship of the arrangements for disseminating such information. The Department proposes to respond even where the information is disseminated by buyers, or by the government, the press, or any other source. The Department thus appears to have accepted the Supreme Court’s borderline decision in United States v. Container Corp. of America, applying the Sherman Act to an informal exchange of information on selling prices among competing sellers. We may be sure, however, that the Department will not follow Justice Douglas’ language about “per se” illegality. The Department also appears to adhere to the remarkable position taken by predecessors in the bad old days of the Democrats that exchange of pricing information among oligopolists is so conducive to tacit price-fixing that individual firms may be enjoined even from reading such

116. Id. at 337.
information that comes to them legitimately.\textsuperscript{117} Appearances are deceiving, however; these were horizontal price-fixing cases, not merger cases. The Department would certainly invoke its discretion to disregard such nonmarket factors in merger cases not deemed close.

The bare circumstance that transactions in the relevant market are typically small and frequent will be weighed against a merger, on the theory that the more numerous the transactions the more opportunities for surveillance of a competitor’s behavior.\textsuperscript{118} With this bit of theoretical bravura, the Department’s academic economists may have outdone themselves. The characteristic of small size and high frequency of transactions has equivocal significance. If it presents more opportunities for surveillance, it also reduces the significance of each transaction as an indicator of policy, and makes it harder to synthesize from multiple transactions, each perhaps on distinctive terms, a discernible commercial policy to be followed or disciplined. Frequent small transactions would also seem to be associated with deconcentrated markets and easy entry. The significance given to this factor may even have the perverse effect of differentially favoring merger of very large firms if, as seems likely, such firms operate in markets characterized by huge lumped transactions. Equivocal criteria are, of course, out of place in articulating departmental policy, although apt for maintaining freedom of action.

In contrast to the treatment of information, delivered pricing and other marketing practices that indicate or facilitate collusion are given grudging recognition in the Guidelines. The practice of delivered pricing will count in departmental decisionmaking only if it is mandatory and adopted by substantially all firms in the market.\textsuperscript{119} The elimination by merger of an independent firm that has been “unusually disruptive and competitive” will affect the Department only after it has determined that “performance might plausibly deteriorate because of the elimination of one disruptive firm.”\textsuperscript{120}

4. \textit{Market Performance}

The Guidelines appear to commit the Department to a complex evaluation of market performance as a prerequisite to antimerger litigation, thus adopting Justice Harlan’s concurring opinion in the \textit{Clorox}
case.\textsuperscript{121} This entails inquiry into stability of market shares of leading firms and into the possibility that excessive profits have been realized.\textsuperscript{122} No one could deny that entry by way of merger into a quite competitive market is less antipathetic to the goals of antitrust than would be similar entry into an oligopolized market, where de novo competition has at least the possibility of disrupting market shares and follow-the-leader pricing. But an approach that focuses on whether the entered market is \textit{adequately} competitive (competitiveness is, of course, a continuum) would, if adopted by the courts and the FTC, be a regression to the Sherman Act rule of reason standard that Congress meant to replace by section 7 of the Clayton Act.

The new Guidelines propose to construe the failing firm defense strictly.\textsuperscript{123} Consistent with the general Chicago School line, the Department announces its indifference to considerations other than competition.\textsuperscript{124} Thus, it would not sanction a failing-firm merger merely to protect the jobs of workers or to preserve the vitality of a one-industry town, and in fact would not even consider such circumstances in close cases.\textsuperscript{125} The competitive analysis set forth requires not only imminent insolvency but also the absence of alternatives that might preserve the failing firm as a competitive factor without an anticompetitive merger, namely, reorganization under the Bankruptcy Act or merger with a noncompetitor presumably at a lower price than an intraindustry acquirer would be willing to pay. In other words, investors in a failed enterprise would have to pay a penalty rather than be rescued at the expense of competition.\textsuperscript{126}

This apparent rigor, however, begins to soften in the text and to collapse in the world of actual discretionary decision. It is announced that an anticompetitive disposition of an unincorporated division of a financially healthy parent may qualify for the failing-firm defense, and that even a healthy division may have the benefit of the failing-firm defense if the parent company is in financial trouble.\textsuperscript{127} Investor rescue noses out public competition policy in such cases. That gratifying bailout of failed investments favors large firms, and is comparable to the subsidy given to a giant corporation by allowing it to offset the losses suffered by a failing subsidiary against taxable revenues from other parts of the corporate empire.

\textsuperscript{121} FTC v. Procter & Gamble Co., 386 U.S. 568, 581 (1967).
\textsuperscript{123} Id. § V(B), 47 Fed. Reg. at 28,502, 71 CALIF. L. REV. at 665.
\textsuperscript{124} Id. n.54, 47 Fed. Reg. at 28,502 n.54, 71 CALIF. L. REV. at 665 n.54.
\textsuperscript{125} Cf. id. § III(C), 47 Fed. Reg. at 28,498-99, 71 CALIF. L. REV. at 657-12, discussed \textit{supra} in text accompanying note 102 (nonmarket share factors will be only considered in close cases).
\textsuperscript{126} Id. § V(B) n.54, 47 Fed. Reg. at 28,502 n.54, 71 CALIF. L. REV. at 665 n.54.
\textsuperscript{127} Id. § V(B) n.57, 47 Fed. Reg. at 28,502 n.57, 71 CALIF. L. REV. at 666 n.57.
The ultimate in discretionary relief for failing firms was manifested in Attorney General Smith's decision, under the Newspaper Preservation Act, \(^{128}\) to provide antitrust immunity to two Seattle newspapers that sought to join their commercial and printing operations.\(^{129}\) In that case there was no danger that the financially troubled partner in this joint operating agreement would cease publication, in view of the wealth of its parent, the Hearst newspaper chain. This fact, however, was treated as irrelevant, despite the obviously limited purpose of the Newspaper Preservation Act to maintain independent editorial voices. That Hearst made no effort to find an independent buyer for the Seattle Post-Intelligencer counted for naught in Smith's view because he read the Act—contrary to Baxter's recommendation—as calling for "case-by-case [determination] based upon a weighing of all relevant factors and without application of particular per se rules"\(^{130}\)—a perfect formula for unbridled discretion. The federal district court in Seattle has, in litigation brought by private parties, adopted the Baxter rather than the Smith view.\(^{131}\)

D. The Vanishing Clayton Act

The Guidelines virtually ignore section 7 of the Clayton Act. That section is treated as indistinguishable from the Sherman Act,\(^{132}\) despite Congress' expressed intention in 1914, and again in 1950, to cast the antimerger net more widely. Notably, where the Sherman Act forbade mergers only if an unreasonable restraint of trade would result, the criterion under the Clayton Act became whether "the effect may be substantially to lessen competition."\(^{133}\) The inquiry was thus shifted from demonstrable restraint to plausible risk. Section 7's explicit reference to effect was a direct rejection of the view that good intentions, i.e., business justifications, might save a merger that would otherwise be condemned because of its probable anticompetitive effect. Thus, the desire of management to expand and diversify its markets or to achieve the efficiencies of vertical integration, which had saved from Sherman Act condemnation U.S. Steel's acquisition of the assets of Consolidated


\(^{129}\) See Seattle Newspaper Joint Operating Agreement Gets Green Light from Attorney General Smith, ANTITRUST & TRADE REG. REP. (BNA) No. 42, at 1257 (June 17, 1982).

\(^{130}\) Id. at 1258.


Steel,\textsuperscript{134} would in principle be irrelevant under the Clayton Act. Effect was to be judged not merely by the impact on competition of the particular merger before the court, but also by the likelihood that approval of the merger would trigger similar mergers by other firms in the industry. Trends toward concentration would be stopped "in their incipiency."\textsuperscript{135} Anticompetitive consequences in a relevant market would not, under the Clayton Act, be outweighed by procompetitive consequences in another market.\textsuperscript{136} The courts recognized that Congress had sought to narrow the scope of issues and evidence in merger cases, so that they could be disposed of expeditiously without the extended and inconclusive litigation entailed by the Sherman Act rule of reason.\textsuperscript{137} That the Sherman and Clayton Acts embody different standards of legality is also supported by the fact that different sanctions are prescribed. Violation of the Sherman Act is a felony, while the Clayton Act has no criminal sanction. Even the treble damage consequences differ since the government's victory in a section 7 case, based on what the consequences of a merger may be, will not set up a prima facie case of actual injury to a private plaintiff.\textsuperscript{138}

V

The Role of the FTC

Not only do the Guidelines ignore the distinction between the Sherman and Clayton Acts,\textsuperscript{139} but it is also clear that Baxter is determined that there shall be no FTC administrative discretion to apply standards stricter than his own,\textsuperscript{140} and that no doctrinal error favorable to strict enforcement shall occur in private litigation.\textsuperscript{141} Despite his hostility, however, the FTC is not about to go away, even if it is now under the sway of Chairman Miller and other Reagan appointees. The Commission has its own guidelines history, including some honorable attempts to set guidelines for mergers in particular industries.\textsuperscript{142} It is

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  \item \textsuperscript{134} United States v. Columbia Steel Co., 334 U.S. 495 (1948).
  \item \textsuperscript{135} Brown Shoe, 370 U.S. at 346. The new Guidelines make a passing reference to "incipiency". Guidelines § I, 47 Fed. Reg. at 28,494, 71 CALIF. L. REV. at 650. However, the concept appears to have had no significant influence on the substance of the criteria.
  \item \textsuperscript{136} See Philadelphia Nat'l Bank, 374 U.S. at 370-71.
  \item \textsuperscript{137} See, e.g., id. at 362 ("we must be alert to the danger of subverting congressional intent by permitting a too-broad economic investigation").
  \item \textsuperscript{138} Cf. Gottesman v. General Motors Corp., 436 F.2d 1205 (2d Cir.) (where question of private injury from § 7 violation not litigated in government's case, plaintiff has burden of proving damages in subsequent treble damage suit), cert. denied, 403 U.S. 911 (1971).
  \item \textsuperscript{139} See supra note 132.
  \item \textsuperscript{140} See supra note 13 and accompanying text.
  \item \textsuperscript{141} See supra text accompanying note 18.
conscious both of its independent antitrust enforcement power, under section 11 of the Clayton Act,143 and of its responsibility to supplement antitrust prohibitions with cease-and-desist orders under section 5 of the Federal Trade Commission Act to vindicate "the spirit of the antitrust laws," not simply the letter of the law.144 The latest expression of Congress' will, in the FTC Improvements Act of 1980,145 underwrites the Commission's power and independence by extending its jurisdiction to activities affecting commerce, and by vesting in the Commission, rather than the Department of Justice, power to handle litigation relating to its cease-and-desist orders.

The Commission has been careful to distance itself from the Department of Justice Guidelines in several significant respects. In a published statement issued simultaneously with the new Guidelines, but confined in scope to horizontal merger policy, the Commission endorsed revision of the 1968 Guidelines in light of subsequent enforcement experience and more recent economic research.146 The Commission pledged only to give considerable weight to the Department of Justice's revision, and individual Commissioners reserved decision as to specific issues.147 The Commission pointed out, for example, that market share analysis should not be the sole determinant of excessive economic concentration.148 Market realities, according to the FTC statement, justify "greater consideration of evidence beyond mere market shares," and deference to "Congress' concern about the overall social and political ramifications of economic concentration."149 "[I]ndustrywide conditions rather than firm specific characteristics"150 are to be the focus of inquiry, so that trends and volatility of market shares will count more in the decision of the Commission than in the Department of Justice administration of its Guidelines.

Among seemingly significant divergences between Department of

144. Compare FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) (FTC "does not arrogate excessive power to itself if . . . it . . . considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws") with Beatrice Foods Co., [1965-67 FTC Complaints & Orders Transfer Binder] TRADE REG. REP. (CCH) ¶ 17,244 (FTC Apr. 26, 1965) (divestiture of unincorporated firms acquired by respondent ordered under § 5 of the Clayton Act, notwithstanding that § 7 of the Act is limited to acquisitions of corporate stock or assets).
146. FTC Statement, supra note 103, § I, TRADE REG. REP. (CCH) No. 546, at 73.
147. Id. n.1, TRADE REG. REP. (CCH) No. 546, at 73 n.1.
148. See supra text accompanying note 103.
149. FTC Statement, supra note 103, § II, TRADE REG. REP. (CCH) No. 546, at 73.
150. Id., TRADE REG. REP. (CCH) No. 546, at 76.
Justice and FTC merger criteria are those relating to market definition. For example, the Commission promises to be more inclined to recognize submarkets.151 “Long-held patterns of trade and industry perceptions” will count.152 The Commission does not adopt the Department of Justice’s unequivocal incorporation of foreign capacity into the geographic market if it can be diverted to demand in the United States, although some consideration will be given to such potential competition.

Of course, the range of discretion open to the FTC is at least as broad as that claimed by the Department of Justice. Therefore the practical significance of the divergences mentioned will depend on the predilections of the Commissioners, and may be nil.

CONCLUSION

No one can deny that the Department of Justice as well as the FTC enjoy and must exercise a large degree of discretion in selecting cases for prosecution. At some point, however, the exercise of untrammeled discretion based largely on an economic and political ideology not shared by the legislature becomes a usurpation of power. Mr. Justice Holmes once remarked that “[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”153 So also may it be said that the Sherman Act did not enact the economics of Professors Posner, Bork, or Baxter. Indeed, if such an enactment were possible it would be time to think of enacting a constitutional amendment that would forbid the “establishment” of sectarian economics as a religion.

151. Id. § IV, TRADE REG. REP. (CCH) No. 546, at 84 (adverting to price disparities among alleged substitutes, purchaser preferences for distinct uses, and distinctive physical characteristics).
152. Id., TRADE REG. REP. (CCH) No. 546, at 85.