The Remarkable 50-Year Legacy of *Brown Shoe Co. v. United States*

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HAPPY 50TH BIRTHDAY TO THE MOST important merger law decision ever issued and one of the most important antitrust decisions of all time! The Supreme Court's opinion in *Brown Shoe Co. v. United States*[1] established the foundations for the evolution of merger jurisprudence over the past five decades. It also adopted market definition principles and planted the seeds for the "antitrust injury" doctrine in ways that have greatly influenced antitrust law. The opinion was controversial when issued and has been the target of constant attack over the years. While some aspects of the decision have lost their salience, other aspects have outlived their critics and been at the heart of outcomes in recent Section 7 cases. Concepts and analytical approaches first introduced by *Brown Shoe* (such as relevant submarkets within broader markets and the need to consider a wide array of market characteristics beyond market shares) are vibrant parts of today's merger law and enforcement environment. Like a chocolate and vanilla birthday layer cake, *Brown Shoe* provides something for everyone.

The *Brown Shoe* Decision

Facts. The facts giving rise to this earth-shaking antitrust event of fifty years ago describe a merger that, in 2012, would not likely attract a second look from either of today's enforcement agencies. This makes all the more remarkable the continued impact of the *Brown Shoe* opinion fifty years later.

The merger of Brown Shoe Co. and G.R. Kinney Co. was consummated in 1956. Prior to the merger, Brown Shoe was the fourth largest U.S. shoe manufacturer but had only about 4 percent of U.S. production. Kinney was an even smaller shoe manufacturer (less than 0.5 percent of U.S. production); it operated the largest U.S. family-style shoe store chain but accounted for only about 1.2 percent of all U.S. retail shoe sales.[2] Brown Shoe operated its own retail stores that competed with Kinney in some localities. In thirty-two cities, the parties' combined share of women's shoes exceeded 20 percent. In thirty-one cities, the combined share of children's shoes exceeded 20 percent and, in six of those cities, the combined share exceeded 40 percent. In one city in Kansas, the combined share for women's shoes was over 57 percent, and the combined share of children's shoes was 49 percent. In 118 cities, the combined shares of either men's, women's, or children's shoes exceeded 5 percent, while in 47 cities, the combined shares exceeded 5 percent in all three kinds of shoes.[3] The merger gave Brown Shoe control of 7.2 percent of all U.S. retail shoe stores and 2.3 percent of all U.S. retail shoe outlets.[4]

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The DOJ challenged the entire merger as anticompetitive because of (a) vertical effects through the foreclosure of Brown Shoe's manufacturing rivals from access to Kinney stores; (b) horizontal effects in manufacturing; and (c) horizontal effects in retailing. The district court, after trial, upheld the DOJ's vertical effects case, dismissed the horizontal effects case in manufacturing (which the DOJ did not appeal), and upheld the horizontal effects case in retail. The Supreme Court affirmed the findings of illegality and the district court's remedy of total divestiture.[5]

The Opinion. Chief Justice Earl Warren, delivering the opinion of the Court, began his consideration of the merits with an extended analysis of the legislative history of the 1950 amendments to Section 7.[6] According to the Court, "The dominant theme pervading congressional consideration of the 1950 amendments" was the desire to check a "rising tide of economic concentration in the American economy" in the interests of preserving local control over industry and protecting small business.[7] The key to accomplishing that objective was to provide the courts with the power to stop mergers "at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency."[8] At the same time, however, Congress also recognized that some mergers might be procompetitive.[9] In language cited in many contexts today, the Court emphasized that, "as a whole, the legislative history illuminates congressional concern with the protection of *competition*, not *competitors*, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition."[10]

In that light, the Court continued, a merger had to be "functionally viewed, in the context of its particular industry."[11] The Court thereupon dropped its famous footnote 38, with one sentence destined to become central to the evolution of Section 7 jurisprudence:

> Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger.[12]

Finally, the Court observed that "Congress used the words


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'*may* be substantially to lessen competition' to indicate that its concern was with probabilities, not certainties."[13] In short, the amended Section 7 was addressed neither to "clear-cut menaces" nor to "ephemeral possibilities"; the focus was "probable anticompetitive effect . . . ."[14]

Vertical Effects. The Court began its consideration of the vertical aspects of the Brown/Kinney merger with the observation that the "primary vice of a vertical merger . . . is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a 'clog on competition'"[15] and deprive "rivals of a fair opportunity to compete."'[16] But since the law forbids only mergers whose effect may be substantially to lessen competition within a particular line of commerce and section of the country, a determination of the relevant product and geographic market is a "necessary predicate" to finding a violation.[17] The Court thereupon set forth the standards for product market definition—crucially including "submarket" analysis—as follows:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. . . . The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. Because [Section 7 prohibits any merger that may substantially lessen competition in "any" line of commerce], it is necessary to examine the effects of a merger in each such economically significant submarket . . . .[18]

Applying those standards, the Court upheld the findings of three relevant product markets for this case: men's, women's, and children's shoes.[19] Separately, the Court endorsed findings that, "insofar as the vertical aspect of this merger is concerned, the relevant geographic market is the entire Nation."[20]

Next, in considering whether there was a "probable" anticompetitive effect from the vertical aspect of the merger at issue, the Court observed that "an important consideration" is "the size of the share of the market foreclosed."[21] Where the extent of foreclosure was "neither of monopoly nor *de minimis* proportions," other factors must be considered. Here, given Brown's place as the nation's fourth largest manufacturer in the shoe industry and Kinney's as the nation's largest independent chain of family shoe stores, "no merger between a manufacturer and an independent retailer could involve a larger potential market foreclosure."[22]

The Court's vertical effects analysis and conclusion were expressly influenced by its focus upon Congressional interest in avoiding "adverse effects upon local control of industry and upon small business."[23] In this "populist" light, the industry trends toward both increased concentration and vertical integration were critical facts which, "when combined with Brown's avowed policy of forcing its own shoes upon its retail subsidiaries, may foreclose competition from a substantial share of the markets for men's, women's, and children's shoes without producing any countervailing competitive, economic, or social advantages."[24]

Horizontal Effects. With respect to the horizontal case in shoe retailing,[25] the Court again deemed market definition a "necessary predicate" to an examination of competitive effects and held that the same three lines of commerce used for assessing the vertical aspects—men's, women's and children's shoes—were relevant product markets for the horizontal aspects of the merger as well.[26]

Geographic market definition, however, took a different turn. For the vertical aspects, the geographic market was the nation as a whole; for the horizontal retail analysis, the focus became submarkets consisting of "those cities with a population exceeding 10,000 and their environs in which both Brown and Kinney retailed shoes through their own outlets."[27] This was the result of the Court's application of what it deemed a Congressional prescription of "a pragmatic, factual approach to the definition of relevant market"—requiring geographic market determination to "correspond to the commercial realities" of the industry at issue and "be economically significant."[28]

As indicated above, combined market shares varied considerably among various groups of cities for which evidence was presented.[29] The Court chose, however, to underline the significance of overlaps within 118 cities where combined shares exceeded 5 percent:

> If a merger achieving 5% control were now approved, we might be required to approve future merger efforts by Brown's competitors seeking similar market shares. The oligopoly Congress sought to avoid would then be furthered and it would be difficult to dissolve the combinations previously approved. Furthermore, in this fragmented industry, even if the combination controls but a small share of a particular market, the fact that the share is held by a large national chain can adversely affect competition.[30]

The Court acknowledged that the Act protects "competition, not competitors," and thus "large integrated or chain operations" (like the merged Brown enterprise) are "not rendered unlawful by the mere fact that small independent stores may be adversely affected."[31] The "but" coming after that acknowledgment, however, became a repeated target of attack upon the entire *Brown Shoe* opinion over the ensuing several decades, as it appears to elevate populist sentiments over considerations of efficiency and consumer welfare:

> But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. 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 deconcentration. We must give effect to that decision.[32]

The Court added that, by virtue of this merger, "the largest single group of retail stores still independent of one of the large manufacturers was absorbed into an already substantial aggregation"; "Brown moved into second place nationally in terms of retail stores directly owned"; Brown thereby came to control about 7.2 percent of the nation's retail shoe stores and 2.3 percent of the nation's total retail shoe outlets.[33] "We cannot avoid the mandate of Congress that tendencies toward concentration in industry are to be curbed in their incipiency"; so, "[i]n the light of the trends in this industry we agree with the Government and the court below that this is an appropriate place at which to call a halt."[34]

Early Reactions

The business community was not pleased. The June 30, 1962, edition of *Business Week* complained that the decision "gave the broadest possible interpretation to the 1950 amendments to the Clayton Act"; "gave the trustbusters a powerful weapon by upholding a liberal interpretation of 'line of commerce'"; endorsed the theory that industries "made up of many competitors should be kept in this condition" by stopping any merger therein even if its effect on competition "is slight"; and, as a result, "there is a serious question . . . as to whether any mergers at all can now hope to escape the heavy hand of the Justice Department."[35] The December 1963 edition of *Fortune* published a scathing critique by Robert Bork and Ward Bowman, in which they concluded that the decision

> employed the theory of exclusionary practices to outlaw vertical integration that promised lower prices, the theory of incipiency to foresee danger in a presumably desirable trend that was barely started, and the theory of "social purpose" to justify the fact that it prevented the realization of efficiencies by a merger that, realistically viewed, did not even remotely threaten competition.[36]

On the other hand, there was high praise from other quarters. The esteemed Milton Handler emphasized that, although the Court invalidated both the vertical and horizontal aspects of the merger at issue, "it did not do so on the sweeping terms employed" by the lower court. The Government was "rebuffed in its efforts to convert Section 7 into a *per se* statute"; the Court served notice that every merger is unique, requiring that it be "functionally viewed, in the context of its particular industry"; and "[w]hen a particular merger is challenged, there are no facile shortcuts to the necessary factual determination of whether the challenged acquisition is reasonably likely to have the requisite anticompetitive effects in the relevant market."[37] In short, the Court stopped the government's "crusade to have merger litigation decided on the basis of naked statistics" and established the requirement to "evaluate each merger in terms of its peculiar facts in order to predict its probable competitive impact."[38]

Two young associates destined to become prominent members of the antitrust community, William Rogers and Sanford Litvack, presciently argued in 1963 that the most significant aspect of the decision may end up being footnote 65 and the language in text giving rise to it.[39] More specifically, the Court there observed that the fact that merging firms have competed in but a fraction of the geographic markets in which either has operated "does not, in itself, place their merger outside the scope of § 7" because "if anti-competitive effects of a merger are probable in 'any' significant market, the merger—at least to that extent—is proscribed."[40] Footnote 65 illustrated as follows:

> If two retailers, one operating primarily in the eastern half of the Nation, and the other operating largely in the West, competed in but two mid-Western cities, the fact that the latter outlets represented but a small share of each company's business would not immunize the merger in those markets . . . . On the other hand, that fact would, of course, be properly considered in determining the equitable relief to be decreed.[41]

Rogers's and Litvack's key insight about that footnote was its invitation to "partial divestiture" as a means of addressing anticompetitive effect in part of a transaction while enabling the rest of the transaction to proceed ahead. In short, the Court suggested "a means whereby the skillful attorney may either be able to transform an otherwise illegal merger into one which would not violate Section 7 and avoid suit or, once suit has been commenced, effectuate a settlement which will not require total and complete divestiture."[42] Of course, that scenario captures the essence of merger enforcement policy as it has evolved since at least the late 1970s to our day: the great majority of all government merger challenges are addressed through surgically negotiated divestiture orders allowing consummation of the bulk of the transactions at issue.

From *Brown Shoe* to the Baxter Merger Guidelines

There were two sharply conflicting themes at play in the *Brown Shoe* opinion: a populist emphasis on preserving fragmentation, local control, small business, etc., and a consumer welfare emphasis on protecting "competition, not competitors." The populist theme prevailed throughout the 1960s as *Brown Shoe* pushed the evolution of Section 7 jurisprudence in the direction of deeper reliance upon market share data,[43] gerrymandering on submarket definitions[44] and resulting condemnations of mergers that could not be seen as threatening "competition" in any meaningful sense.[45] By 1966, dissenting Justice Stewart was pushed to complain that "[t]he sole consistency" in Section 7 litigation is that "the Government always wins."[46]

That is, until 1974 when the Government lost three Section 7 cases before the Supreme Court.[47] The most important of the decisions in those cases was *United States v. General*

Dynamics Corp.[48] In an opinion by Justice Stewart, the Court upheld the lower court's dismissal of the Government's challenge to a merger between two competing coal companies with market share and concentration effects recognized as sufficient to condemn the transaction under *Brown Shoe* and its 1960s progeny. The core explanation for the Court's rejection of the Government's challenge was the Court's elevation from footnote dictum to central tenet of the following language from *Brown Shoe*: while market share and concentration statistics are "the primary index of market power," only "a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger."[49] The Court emphasized that "[e]vidence of past production does not, as a matter of logic, necessarily give a proper picture of a company's future ability to compete."[50] On the record before it, the lower court had found that the acquired company's current and future ability to compete for long-term contracts was severely limited by its lack of uncommitted reserves. The Supreme Court agreed that this fact precluded any finding of a probable anticompetitive effect from the merger at issue.[51]

The *General Dynamics* decision became a critical turning point in the evolution of Section 7 jurisprudence from a populist to a consumer welfare orientation. Ten years later, the *General Dynamics* insight—with its origin in a *Brown Shoe* footnote—became an important part of the Baxter DOJ's Horizontal Merger Guidelines, specifically in its statement that the Department "will consider reasonably predictable effects of recent or on-going changes in market conditions in interpreting market concentration and market share data."[52] By way of example, "if a new technology that is important to long-term competitive viability is not available to a particular firm, the Department may conclude that the historical market share of the firm overstates the firm's future competitive significance."[53] The Guidelines also recognized that effective pricing above competitive levels is less likely if "technological change" in the industry is rapid.[54]

Other aspects of the *Brown Shoe* decision can be found throughout the Baxter Guidelines. For example, one can reasonably characterize much of the modes of analysis for market definition as building upon the foundations for both product and geographic market definitions set forth in the *Brown Shoe* opinion.[55] On the other hand, Assistant Attorney General Baxter himself went out of his way to highlight his decision to exclude from the Guidelines one major drumbeat from *Brown Shoe*: "An industry trend toward concentration is not a factor that will be considered, even though it has been used in the past."[56] More generally speaking, the Guidelines were widely viewed as making a sharp break from *Brown Shoe* thinking:

> The new Guidelines are explicitly and unabashedly economic in approach . . . . [They] are directed at limiting the opportunity for tacit collusion among participants in a market. The grander and more generalized concerns of the past—viewing mergers as a threat to the societal fabric, for example—have been discarded . . . . [T]he social and political content of antitrust is intellectually passe, the relic of another era. . . . [S]ince *Brown Shoe*, populist concerns have become largely vestigial. . . . The key populist phrases of the Warren Court have been muffled.[57]

Brown Shoe Rebounds

Ten years later, *Brown Shoe* reemerged in a new role: a forceful constraint upon Section 7 enforcement activity. The precipitating cause was the 1992 promulgation of revised DOJ-FTC Horizontal Merger Guidelines containing a new section on "Lessening of Competition through Unilateral Effects."[58] This section appeared to invite challenges to mergers between particularly "close" competitors within markets for differentiated products solely because that closeness enables the merged firm to raise prices on one of the merging products and without need to show an anticompetitive impact in "the market" as a whole.[59]

Two district courts in 1993 rejected merger challenges along those lines for failure to account for competition from substitute products and thus failure to establish the "relevant" product market in *Brown Shoe* terms.[60] In *United States v. Gillette Co.*, the Antitrust Division argued that the merger would lessen competition in a relevant market defined as "premium refillable fountain pens"; the district court disagreed with that definition, finding that there was "ample evidence that the merged company will not be able to increase prices on premium fountain pens unilaterally."[61] And in *Pennsylvania v. Russell Stover Candies, Inc.*, the district court rejected the Commonwealth of Pennsylvania's two proffered market definitions—(i) "branded gift box chocolates" sold at drugstores and mass merchandisers and (ii) boxed chocolates—as too narrow in light of competitive conditions in the chocolate industry.[62]

As one observer noted, those decisions were pointed reminders that market definition "has been a 'necessary predicate' for any" Section 7 claim ever since *Brown Shoe*; the lesson from them was that "the more choices available to consumers in industries with differentiated products, the more likely the market will be defined broadly or anticompetitive effects will not be found"; and, most importantly, the *Brown Shoe* prescription of "reasonable interchangeability remains the guiding principle after all."[63]

By the latter part of that decade, however, the FTC discovered how a different aspect of the *Brown Shoe* discussion of market definition standards could powerfully support unilateral effects challenges: the "submarket" concept as applied to particularly close competition between parties within a broader market. This was indeed the ground on which the FTC persuaded courts to enjoin three mergers in the late 1990s. In *FTC v. Staples, Inc.*, the Commission challenged the merger of two leading office supplies superstores in 1997, arguing that these firms competed most directly within a submarket of office supplies superstores that sell consumable office products.[64] The district court agreed, relying on the "practical indicia" set forth in *Brown Shoe*.[65] Notably, the court found that office superstores restrained one another's prices far more than other competing retailers that also sold consumable office products.[66]

One year later, in 1998, the FTC challenged two mergers that would combine the four leading drug wholesalers, in *FTC v. Cardinal Health, Inc.*[67] The court agreed with the FTC's proffered relevant product market of wholesale drug distribution despite competition from other forms of drug distribution, finding that wholesale drug distribution was a "distinct submarket" within the "larger market of drug delivery."[68] And in 2000, the FTC sought to enjoin a merger between two leading loose leaf tobacco manufacturers, despite competition from moist snuff tobacco product manufacturers, in *FTC v. Swedish Match North America, Inc.*[69] Relying on *Brown Shoe*'s submarket construction, the court agreed with the FTC that the relevant product market in which to analyze the merger was loose leaf tobacco and not all smokeless tobacco.[70] It concluded: "While the Court believes there is some degree of competition between, and overlapping consumer usage of, moist snuff and loose leaf tobacco, the weight of the evidence read in light of *Brown Shoe*'s indicia convinces the Court that loose leaf chewing tobacco constitutes a distinct relevant product market."[71] As one of us observed in 2001, the decisions in these cases breathed "new life into the hoary and much-maligned 'submarket' doctrine emanating from" *Brown Shoe*; "submarket is no longer a dirty word, and *Brown Shoe* indicia have come back to respectability in merger law."[72]

Seven years later, the close affinity between unilateral effects analysis and *Brown Shoe* submarket doctrine deepened all the more as the D.C. Circuit Court of Appeals blessed the FTC's challenge to the merger of Whole Foods and Wild Oats for its impact upon a core group of supermarket customers who "decided that natural and organic is important."[73] Before endorsing the agency's market definition of "premium natural and organic supermarkets," however, the court of appeals observed that, "[i]nexplicably, the FTC . . . asserts a market definition is not necessary in a § 7 case . . . in contravention of the statute itself."[74] The FTC suggested that market definition is just a "means to an end" to "enable some measurement of market power"; but that is "not the only purpose of a market definition" because "only 'examination of the particular market—its structure, history[,] and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger.'"[75]

Center-Stage Today

Controversy over the continued relevance of *Brown Shoe* pronouncements on market definition is at the heart of the most important Section 7 developments of the past two years. Alarm bells rang as the agencies rolled out the 2010 version of Horizontal Merger Guidelines,[76] which were criticized for downplaying or even "marginalizing" the role of market definition in merger analysis and replacing adherence to the established rule of reasonable interchangeability with a new and untested focus upon "upper pricing pressure" upon one or more of the merging parties' products.[77] Not so, according to the DOJ's Acting Assistant Attorney General in a November 2011 address: "We continue to apply traditional merger analysis techniques to our matters," exemplified by the agency's "successful challenge to the proposed merger between H&R Block and Tax Act," in which "the court focused on product market definition."[78]

The opinion in the *H&R Block* case, issued one week before those remarks, contained no less than nine citations to *Brown Shoe*.[79] In one robust footnote, the court acknowledged recent suggestions that, as a "'matter of applied economics, evaluation of unilateral effects does not require a market definition in the traditional sense at all'";[80] responded that as "a legal matter, however, a market definition may be required by Section 7,"[81] and noted it "is not aware of any modern Section 7 case in which the court dispensed with the requirement to define a relevant product market . . . ."[82] The court in *H&R Block* went on to conclude, in reliance on *Brown Shoe*, that digital do-it-yourself tax preparation is a relevant submarket distinct from assisted tax preparation by a tax professional and manual or self tax preparation on pen-and-paper.[83]

Perhaps the most dramatic Section 7 development within the past year is the Eighth Circuit's affirmance of a district court's dismissal of an FTC challenge to Lundbeck's acquisition of NeoProfen, a drug for treatment of a heart condition in premature babies.[84] Lundbeck already owned the only other drug approved for that condition, Indocin IV. Two days after the acquisition of NeoProfen, Lundbeck raised the price of Indocin IV by 1300 percent.[85] Despite that strong and "direct" evidence of anticompetitive effect, the appeals court upheld the district court's finding that the two drugs were not within the same market based on testimony to the effect that there is very low cross-elasticity of demand or price elasticity between them.[86] As highlighted by the agency's rehearing petition,[87] an amicus brief in support of it,[88] and a separate statement issued by FTC Commissioner J. Thomas Rosch,[89] the court misread an "or" as if it were an "and" in the following key passage from *Brown Shoe*: "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."[90] The result in *Lundbeck* was a complete disregard of interchangeability of use as a sufficient independent ground for product market definition in the case at hand. Chief Justice Warren would not be pleased.

On November 22, 2011, the Eighth Circuit denied the rehearing petition.[91] On January 20, 2012, the Commission announced that it did not intend to seek review in the U.S. Supreme Court despite agreeing with Commissioner Rosch that "the result in this case was profoundly wrong . . . ."[92] Commissioner Rosch's separate statement expressed chagrin over missing this opportunity to enable the Court to clarify what it said about market definition fifty years ago.[93]

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Robert Pitofsky observed in 1985 that "[m]erger enforcement in the United States has often been erratic and always controversial."[94] As we have sought to illustrate in this article, the Supreme Court's *Brown Shoe* opinion has contributed more than its share—more than any other Section 7 development—to support both parts of that comment. Both erratic and controversial are apt descriptions for the huge swings in merger enforcement outcomes from the Wild West of the 1960s to the more restrained 1970s and 1980s, the ups and downs during the 1990s and 2000s, and today's increasingly disciplined and sophisticated array of techniques available to identify likely anticompetitive effects. Over this stretch, *Brown Shoe* law has lost its original populist bent—protecting small business, local control, etc.—and matured into wise, mainstream guiding principles up to the task of driving the further evolution of merger law over the years ahead. So, in this 50th anniversary year, liberals and conservatives, Chicago and Post-Chicago denizens, everyone across the noisy and disparate antitrust landscape can join hands in this robust salute: Happy Birthday and Long Live *Brown Shoe*!

1 Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

2 *Id.* at 298, 303.

3 *Id.* at 342–43.

4 *Id.* at 345.

5 *Id.* at 304, 346.

6 *See* Celler-Kefauver Antimerger Act of 1950, Pub. L. No. 81-899, 64 Stat. 1125 (codified as amended at 15 U.S.C. § 18).

7 *Brown Shoe*, 370 U.S. at 315–16.

8 *Id.* at 317.

9 *Id.* at 319.

10 *Id.* at 320.

11 *Id.* at 321–22.

12 *Id.* at 322 n.38.

13 *Id.* at 323.

14 *Id.*

15 *Id.* at 323–24 (quoting Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 314 (1949)).

16 *Id.* at 324 (quoting H.R. REP. No. 1191, 81st Cong., 1st Sess. 8).

17 *Id.* (quoting United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593 (1956)).

18 *Id.* at 325.

19 *Id.* at 326.

20 *Id.* at 328.

21 *Id.*

22 *Id.* at 331–32.

23 *Id.* at 333.

24 *Id.* at 334.

25 As indicated above, the lower court dismissed the DOJ's challenge to the horizontal overlap in shoe manufacturing, and the DOJ did not appeal from that portion of the lower court's decision. As the Supreme Court characterized the findings, "[T]he merger of Brown's and Kinney's *manufacturing* facilities was economically too insignificant to come within the prohibitions of the Clayton Act . . . ." *Id.* at 335 (emphasis added).

26 *Id.* at 335–36.

27 *Id.* at 339.

28 *Id.* at 336–37.

29 *See supra* text accompanying note 3.

30 *Brown Shoe*, 370 U.S. at 343–44.

31 *Id.* at 344.

32 *Id.*

33 *Id.* at 345–46.

34 *Id.* at 346.

35 BUS. WK., June 30, 1962, at 160.

36 Robert Bork & Ward Bowman, *The Crisis in Antitrust*, FORTUNE, Dec. 1963, at 197.

37 Milton Handler, *Fifteenth Annual Review of Antitrust Developments* 17 RECORD ASS'N B. CITY OF NY 411, 433, 437 (1962).

38 *Id.* at 440.

39 William F. Rogers & Sanford M. Litvack, Brown Shoe*: The Guidance of a Footnote*, 1963 WASH U. L.Q. 192, 193 (1963).

40 *Brown Shoe*, 370 U.S. at 337.

41 *Id.* at 337 n.65.

42 Rogers & Litvack, *supra* note 39, at 199.

43 *See, e.g.*, United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

44 *See, e.g.*, United States v. Pabst Brewing Co., 384 U.S. 546 (1966).

45 *See, e.g.*, United States v. Von's Grocery Co., 384 U.S. 270 (1966).

46 *Id.* at 301.

47 *See* United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974); United States v. Marine Bancorporation, 418 U.S. 602 (1974); United States v. Connecticut Nat'l Bank, 418 U.S. 656 (1974).

48 *General Dynamics*, 415 U.S. 486 (1974).

49 *Id.* at 498 (quoting *Brown Shoe*, 370 U.S. at 322 n.38).

50 *Id.* at 501.

51 *Id.* at 503–04.

52 U.S. Dep't of Justice, Merger Guidelines § 3.21 (1984) [hereinafter 1984 Merger Guidelines], *available at* http://www.justice.gov/atr/hmerger/11249.pdf. The Baxter DOJ promulgated its first set of Merger Guidelines in 1982.

53 *Id.*

54 *Id.* § 3.411 n.23.

55 *See id.* §§ 2.11, 2.12, 2.21 (product market principles); *id.* §§ 2.31, 2.32 (geographic market principles).

56 William Baxter, *Responding to the Reaction: The Draftsman's View*, 71 CALIF. L. REV. 618, 630 (1983).

57 Donald I. Baker & William Blumenthal, *The 1982 Guidelines and Preexisting Law*, 71 CALIF. L. REV. 311, 317–18, 320 (1983).

58 U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 2.2 (1992), *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf.

59 *Id.*

60 See United States v. Gillette Co., 828 F. Supp. 78 (D.D.C. 1993); Pennsylvania v. Russell Stover Candies, Inc., No. 93-1972, 1993 WL 145264 (E.D. Pa. May 6, 1993).

61 *See Gillette*, 828 F. Supp. at 84.

62 *See Russell Stover*, 1993 WL 145264, at *10–11.

63 James A. Keyte, *Market Definition and Differentiated Products*, ANTITRUST, Fall 1993, at 19, 22.

64 FTC v. Staples, Inc., 970 F. Supp. 1066, 1074 (D.D.C. 1997).

[65] *Id.* at 1075 (discussing *Brown Shoe*, 370 U.S. at 325).

[66] *Id.* at 1075–76.

[67] FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 45 (D.D.C. 1998).

[68] *Id.* at 47.

[69] FTC v. Swedish Match No. Am., Inc., 131 F. Supp. 2d 151, 153–54 (D.D.C. 2000).

[70] *Id.* at 156.

[71] *Id.* at 165.

[72] Robert A. Skitol, *Merger Litigation in the Clinton Years: The Section 7 Jurisprudential Legacy*, ANTITRUST REP., Jan. 2001, at 9–10.

[73] FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1039 (D.C. Cir. 2008).

[74] *Id.* at 1036 (citing *Brown Shoe*, 370 U.S. at 324).

[75] *Id.* (quoting *Brown Shoe*, 370 U.S. at 322 n.38).

[76] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

[77] *See, e.g.*, James A. Keyte & Kenneth B. Schwartz, *"Tally-Ho!": UPP and the 2010 Horizontal Merger Guidelines*, 77 ANTITRUST L.J. 587, 588–94, 597–98, 600–04 (2011); Comments of the ABA Section of Antitrust Law on the Proposed Revised DOJ-FTC Horizontal Merger Guidelines 6–8 (June 4, 2010), *available at* http://www.ftc.gov/os/comments/hmgrevisedguides/548050-00026.pdf; Comments of General Electric Company et al. on the Proposed Revised DOJ-FTC Horizontal Merger Guidelines 11–12 (June 4, 2010), *available at* http://www.ftc.gov/os/comments/hmgrevisedguides/548050-00028.pdf; Comments of Verizon Communications, Inc. et al. on the Proposed Revised DOJ-FTC Horizontal Merger Guidelines 2 (June 4, 2010), *available at* http://www.ftc.gov/os/comments/hmgrevisedguides/548050-00022.pdf.

[78] Sharis A. Pozen, Acting Assistant Att'y Gen., Antitrust Div. U.S. Dep't of Justice, Developments at the Antitrust Division and the 2010 Horizontal Merger Guidelines—One Year Later 17, 19–23 (Nov. 17, 2011), *available at* http://www.justice.gov/atr/public/speeches/277488.pdf.

[79] United States v. H&R Block, Inc., No. 11-00948, 2011 WL 5438955, at **7, 8, 9, 12, 13, 47 (D.D.C. Nov. 10, 2011).

[80] *Id.* at *47 n. 35 (quoting 4 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 913a, at 660 (3d ed. 2009)).

[81] *Id.* (citing *Brown Shoe*, 370 U.S. at 324).

[82] *Id.*

[83] *Id.* at **12–13.

[84] FTC v. Lundbeck, Inc., 650 F.3d 1236, 1238 (8th Cir. 2011).

[85] *Id.*

[86] *Id.* at 1241–42.

[87] *See* Petition for Rehearing En Banc, FTC v. Lundbeck, Inc., Nos. 10-3458 & 10-3459 (Oct. 3, 2011), *available at* http://www.ftc.gov/os/caselist/0810156/111003lundbeckpetition.pdf.

[88] *See* Brief of Amicus Curiae American Antitrust Institute in Support of Rehearing En Banc, FTC v. Lundbeck, Inc., Nos. 10-3458 & 10-3459 (Oct. 13, 2011).

[89] *See* Separate Statement of Commissioner J. Thomas Rosch, FTC v. Lundbeck, Inc., FTC File No. 0810156 (Oct. 3, 2011), *available at* http://www.ftc.gov/os/caselist/0810156/111003lundbeckroschstmt.pdf.

[90] *Brown Shoe*, 370 U.S. at 325 (emphasis added).

[91] Order, FTC v. Lundbeck, Inc., Nos. 10-3458 & 10-3459 (Nov. 22, 2011).

[92] Statement of Chairman Jon Leibowitz et al., FTC v. Lundbeck, Inc., FTC File No. 0810156 (Jan. 20, 2012), *available at* http://www.ftc.gov/os/closings/publicltrs/120120lundbeck-jdl-brill-ramirez.pdf.

[93] *See* Statement of Commissioner J. Thomas Rosch, FTC v. Lundbeck, Inc., FTC File No. 0810156 (Jan. 20, 2012), *available at* http://www.ftc.gov/os/closings/publicltrs/120120lundbeck-rosch.pdf.

[94] ROBERT PITOFSKY, *Foreword*, MERGERS IN THE NEW ANTITRUST ERA v (1985).