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ANNUAL SURVEY OF ANTITRUST DEVELOPMENTS—THE YEAR OF THE REGULATED INDUSTRY

JOHN H. SHENEFIELD*

The commentator comes to a yearly review of antitrust developments rather as a military historian must approach a recent battle. The smoke is only just now clearing away. The battle lines have moved. But the importance of the battle is still a mystery, its turning points difficult to discern, its heroes still anonymous.

Looking back upon a year of antitrust, we know that cases have been decided, precedents established, damages awarded. How much harder it is to foretell the meaning of these developments or to predict what history may say of them. The commentator is thus keenly aware of the limitations of his role. The luxury of retrospection carries with it the obligation of humility. And yet evaluation must continue.

In the fourth year of the Burger chief justiceship, the Supreme Court for its part failed to produce much in the way of antitrust innovation. *Falstaff,*[1] the only opinion addressed to a substantive antitrust issue, yielded little that was not already known.

The Term's important antitrust cases, however, concern the relationship between regulatory policy and the philosophy of competition. As a group, they might have illuminated that interface. Instead, as a group, they served to obscure an already murky situation.

I.

Antitrust and Regulation—The Problem Posed

We in this country have traditionally relied upon the competitive market to make decisions throughout the economy. Adam Smith's

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[1]United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973).

"invisible hand" transforms individual economic choices into the wealth of the nation.

But this model is not and never has been a truly accurate description of our economy. One exception is, of course, the public sector, governed by political decisions. Its dimensions come forcibly to mind every April 15 when federal income tax returns fall due.

In addition, there is in the private sector a second major exception to the rule of decision-making by competition—the public utilities industry. The name itself suggests the concept of certain industries "affected with the public interest" and therefore subject to economic regulation by governmental authority to promote public welfare.

The economic justifications for regulation in place of competition include the notion that government must at least supervise some industries that are crucially important in terms both of absolute size and of influence upon the economy as a whole. Also, there are industries that are at least in part "natural monopolies," whose costs will be lower if monopoly is legally granted but regulated. Finally, regulation is imposed where it is concluded that competition is inefficient and possibly destructive.

In practice, no industry is completely regulated, nor is any without some regulation. Wage-price guidelines have amended the rules of competition across the entire economy. Yet even the most closely regulated of industries retains a place for private decisions, and thus at least to that extent moves to the rhythm of competition. But the price of a combination of economic policies is quite frequently a confrontation of applicable legal rules. It then becomes the task of courts to harmonize the rules and meld the policies to achieve most closely the public good as Congress either envisioned it or would have envisioned it. The attainment of that accommodation, both substantively and procedurally, is a difficult legal and institutional problem.

The procedural solution should be governed by three principles. First, the use of multiple forums to decide the same or related questions is inefficient and therefore undesirable. Second, where an agency has developed expertise relevant to the question to be decided, both efficiency and rationality favor reference of the question to that agency. Third, where such an agency has carefully addressed an issue to which its expertise is applicable, a reviewing court ought to award to the agency's conclusion a presumption of legitimacy.[2]

The substantive accommodation will inevitably result in part

[2]One obstacle to a sensible accommodation is judicial jealousy of its jurisdiction over antitrust issues. One celebrated symptom is Justice Douglas' assertion for a unanimous Court in United States v. First City Nat'l Bank, 386 U.S. 361, 367 (1967), that

from the procedural choice. Courts and agencies will probably always answer the same questions differently. But in addition, some attempt will be required, both in general and in the context of each regulated industry, to establish the necessary policy priorities.

Generally, we start with what is widely regarded as our national economic policy:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. *But even were that premise open to question, the policy unequivocally laid down by the Act is competition.*[3]

But, inevitably, when regulation for policy reasons is the order of the day, the national economic policy of competition must be weighed against applicable but competing policies.

Thus, it is not enough simply to assume in the context of regulated industries that competition is the *summum bonum*. In the communications industry, for instance, the Supreme Court has required that the regulatory agency must actually evaluate the policy of competition and its impact, rather than accepting its priority without question.[4] Thus, a FCC decision was reversed for having relied

> not on its independent conclusion, from the impact upon it of the trends and needs of this industry, that competition is desirable but primarily on its reading of national economic policy, a reading too loose and too much calculated to mislead in the exercise of the discretion entrusted to it.[5]

The best substantive decision, then, will involve the assessment of antitrust and other social and economic policies, rather than unqualified assumptions or blind faith as to proper economic policy. Indeed, there will be occasions when actions are approved that violate the policy of the antitrust laws where other economic, social and political

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"[t]raditionally in antitrust actions involving regulated industries, the courts have never given presumptive weight to a prior agency decision. . . ." Obviously, if there is no presumption, there is no point in making the agency engage in a futile procedure.

[3]Northern Pacific Ry. v. United States, 356 U.S. 1, 4 (1958) (emphasis added).

[4]FCC v. R.C.A. Communications, Inc., 346 U.S. 86 (1953).

[5]*Id.* at 95.

considerations are found to be of overriding importance.[6]

Another relevant consideration in this calculus is the fact that regulation and competition seek to achieve the same goal: the most efficient possible allocation of resources.[7] Where competition seeks to eliminate monopoly profits by keeping entry open, regulation does the same by permitting utilities to earn no more than a fair rate of return on invested capital. Where competition forces firms to be efficient in serving the consumer, regulation only recognizes for rate purposes expenses and investments that are considered prudent. Similarly, where antitrust relies upon laws against price discrimination to see that powerful purchasers do not achieve an unfair price advantage, regulation relies on the use of cost-based tests, resulting in the requirement that larger purchasers pay equitable rates. Finally, where competition gives the consumer the choice of switching patronage in the event of dissatisfaction, regulation provides agencies to which the consumer may complain.[8]

This complementariness of goals suggests that the choice between antitrust and regulation may not be quite so important as the advocates on both sides have contended. But to the extent that differences in emphasis amount to major policy choices, as they will in some circumstances, it can only be concluded that in the regulated industry context competition is not necessarily the national economic policy, and cases ought not to be decided as if it were, at least without some careful analysis.

> That there is a national policy favoring competition cannot be maintained today without careful qualification. It is only in a blunt, undiscriminating sense that we speak of competition as an ultimate good. Certainly, even in those areas of economic activity where the play of private forces has been subjected only to the negative prohibitions of the Sherman law, this Court has not held that competition is an absolute. . . .
>
> Prohibitory legislation like the Sherman Law, defining the area within which "competition" may have full play, of course loses its effectiveness as the practical limitations increase; as such considerations severely limit the number of separate enterprises that can efficiently, or conveniently, exist, the need

[6]*See* Seaboard Air Line R.R. v. United States, 382 U.S. 154 (1965); Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963); McLean Trucking Co. v. United States, 321 U.S. 67 (1944).

[7]Northern Natural Gas Co. v. FPC, 399 F.2d 953 (D.C. Cir. 1968).

[8]*See generally*, Stelzer, *Antitrust and Regulatory Policies: An Introduction and Overview*, 16 ANTITRUST BULL. 669 (1971).

for careful qualification of the scope of competition becomes manifest. Surely it cannot be said in these situations that competition is of itself a national policy.[9]

Thus, it is certain that the conflicts between regulation and antitrust will arise. Indeed, regulation itself is besieged in industry after industry by many who reason that, whatever the benefits of regulation in the past, evolving technologies which serve to break down the natural monopoly and the tendency of regulators to be dominated by the industries they seek to regulate combine to make competition the better alternative. Given the certainty of such controversies, the means of their resolution by the application of immunity concepts, moderated application of the antitrust laws and primary jurisdiction deserve some comment.

First, there is the possibility of express exemption or immunity from the antitrust laws created by statute. Examples include the Federal Communications Act[10] and the Federal Maritime Act.[11] A recurring problem in this connection is that the courts, even in the face of apparently express language of immunity, are reluctant to reach any such construction. Thus, § 7 of the Clayton Act[12] seems to confer immunity if a merger transaction has been approved by one of certain named administrative agencies. However, the Supreme Court held that despite such approval the transaction was not for that reason alone immune.[13]

Statutory immunity will be closely limited to the explicit terms of the grant, but may be given effect in most cases where there is clear statutory language and the immunity covers the entire subject of the controversy. Where the administrative agency retains continuing supervision over the transaction and its effect, and where the approval of the transaction is pursuant to a pervasive regulatory scheme, the courts will probably, though reluctantly, accede to the intent of Congress.[14]

Where there is no express immunity, there may nevertheless be an immunity implied as the result of an irreconcilable conflict between the regulatory scheme and antitrust policy. However, it is frequently said that immunity from the antitrust laws is not lightly

[9] FCC v. R.C.A. Communications, Inc., 346 U.S. 86, 91-92 (1953).

[10] 47 U.S.C.A. §§ 221(a), 222(c)(1) (1962).

[11] 46 U.S.C.A. § 814 (Supp. 1973).

[12] 15 U.S.C.A. § 18 (1973).

[13] California v. FPC, 369 U.S. 482 (1962).

[14] *See, e.g.*, Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963).

implied[15] and that only in the case of a "positive repugnancy," and then only to that extent, may the antitrust laws be repealed by implication.[16] Even so, immunity will only be granted if the "repugnancy" is clear, direct, immediately applicable to the controversy to be decided, and if the regulatory scheme provides for consideration of antitrust issues in the course of regulatory action. A key factor will often be the extent to which the administrative agency, in evaluating a particular transaction, weighs the effect upon competition in its determination of whether the transaction is in the "public interest."[17] But while antitrust policy must be evaluated, it is not necessarily conclusive.[18]

A third potential means of reconciling antitrust and regulation is through the doctrine of moderated application of the antitrust laws. Thus, where regulation does not supersede antitrust, either expressly or impliedly, there is still room for argument that the antitrust laws should be applied differently where necessary to effectuate the regulatory scheme. The Supreme Court in evaluating a rule of the New York Stock Exchange that would have been per se unlawful in the unregulated context, made special provision for the integrity of the applicable regulatory policy:

> But, under the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act. . . Although, as we have seen, the statutory scheme of that Act is not sufficiently pervasive to create a total exemption from the antitrust laws . . . it is also true that particular instances of exchange self-regulation which fall within the scope and purposes of the Securities Exchange Act may be regarded as justified in answer to the assertion of an antitrust claim.[19]

A final means of resolution of the antitrust-regulation conflict is the doctrine of primary jurisdiction. That doctrine allocates priority of opportunity to decide questions, including anticompetitive effect, in cases raising issues of fact not within the conventional experience of judges or in cases requiring the exercise of administrative discre-

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[15]California v. FPC, 369 U.S. 482 (1962).

[16]United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867 (S.D.N.Y. 1965).

[17]McLean Trucking Co. v. United States, 321 U.S. 67 (1944); Northern Natural Gas Co. v. FPC, 399 F.2d 953 (D.C. Cir. 1968).

[18]United States v. ICC (Northern Lines Merger cases), 396 U.S. 491 (1970).

[19]Silver v. New York Stock Exch., 373 U.S. 341, 360-61 (1963) (citations omitted).

tion.[20] The effect of applying the doctrine of primary jurisdiction is to provide the court and the agency with what amounts to concurrent jurisdiction, with the agency given the primary right to evaluate a challenged transaction. While the determination is subject to judicial review, it should be limited by the courts' usual deference to administrative expertise.[21] Where the statute provides for comprehensive regulation, the likelihood and extent of judicial review are to that extent diminished. But even in the case of broad judicial review, the initial determination by the agency will ordinarily be significant:

> The holding that the Board had primary jurisdiction, in short, was a device to prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court of the scope and meaning of the statute as applied to those particular circumstances.[22]

These, then, are the tools that are available for the resolution of the conflict of antitrust philosophy and regulatory policy. And thus it is of some interest to study the ways in which the Supreme Court in this past Term has sought to use them.

We examine first, as case studies, the accommodation in two industries, the electric utility industry and the banking industry. The results do not leave much room for hope that institutional efficiency and consumer welfare will be well served. In the electric utility industry, the decisions of last Term point in opposite directions. *Otter Tail*[23] is a crude attempt to maximize the role of competition at the expense of regulation. *Gulf States*,[24] on the other hand, relies upon the regulatory agency to evaluate, at least in the first instance, industry conduct in terms of its impact upon competition. The result may be to offer an escape from the implications of *Otter Tail* through recourse to a judicially mandated "pervasive scheme."

In the bank merger context, the Supreme Court's effort to deal with the potential competition doctrine in the regulated industry context resulted in an evenly divided Court and no opinion.[25] But an account of the litigation and the institutional design that produced it reveals the deep suspicion that the judiciary holds for regulation and the extent of its efforts to nullify the effects of agency determinations.

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[20] Far East Conference v. United States, 342 U.S. 570 (1952).

[21] *See, e.g.*, Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481 (1958).

[22] *Id.* at 498-99.

[23] Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

[24] Gulf States Util. Co. v. FPC, 411 U.S. 747 (1973).

[25] United States v. First Nat'l Bancorporation, Inc., 410 U.S. 577 (1973).

Immunity concepts are evaluated in the *Trans World Airlines* case[26] and the *Seatrain* case,[27] and the compromise of the doctrine of primary jurisdiction is examined in *Ricci*.[28] One looks in vain for a coherent approach to the antitrust-regulation problem in these cases. The shifting alignments, the differently accented opinions and the conflicting theories demonstrate only that an adequate rationale of accommodation is still not at hand.

II.

The Electric Utility Industry—A Case Study

Few industries are so thoroughly regulated as the electric utility industry. On the federal level, electric utilities may in certain circumstances be subject to the Public Utility Holding Company Act,[29] which gives the Securities and Exchange Commission the authority to regulate the activities of holding companies and their subsidiaries. Part I[30] of the Federal Power Act deals with licensing and related aspects of hydroelectric projects. Part II[31] of the same Act governs the interstate sale of electric energy, particularly rate regulation and transmission. In addition, the Federal Power Commission is authorized in Part II to require interconnections and wholesale service,[32] and to regulate mergers, the disposition of property and the purchase or issuance of securities. Part III[33] of the Act deals with administration, including the accounting and reporting requirements for electric utilities. Finally at the federal level, the Atomic Energy Act[34] gives the Atomic Energy Commission authority to regulate the construction and operation of nuclear-powered generating stations.[35]

In most states, regulation of electric utilities is detailed and comprehensive.[36] In the conventional regulatory scheme, the state public

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[26] Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973).

[27] FMC v. Seatrain Lines, Inc., 411 U.S. 726 (1973).

[28] Ricci v. Chicago Mercantile Exch., 409 U.S. 289 (1973).

[29] 15 U.S.C.A. §§ 79-79z-6 (1971).

[30] 16 U.S.C.A. §§ 791a-823 (1960), *as amended*, (Supp. 1973).

[31] 16 U.S.C.A. §§ 824-824h (1960).

[32] 16 U.S.C.A. § 824a (1960).

[33] 16 U.S.C.A. §§ 825-825u (1960), *as amended*, (Supp. 1973).

[34] 42 U.S.C.A. §§ 2011-2296 (1973).

[35] This grant of authority is especially relevant to the interface between antitrust and regulation in this industry, because pursuant to § 105(c) of the Atomic Energy Act, the Commission is empowered to withhold or condition a license for the construction of a nuclear-powered generating station so that the utility's new facility will not "create or maintain a situation inconsistent with the antitrust laws. . . ." 42 U.S.C.A. § 2135(c)(5) (1973).

[36] *See* FPC, FEDERAL AND STATE COMMISSION JURISDICTION AND REGULATION, ELEC-

utility commission has authority to regulate retail rates, standards of service, generation and transmission facilities, service territories, financial matters (including the issuance of securities) and safety regulation. The statutory obligation to render service to all customers is an important feature and imposes the obligation to construct facilities to accommodate anticipated customer demand.

Local regulation also frequently applies to electric utilities. Even where states themselves have taken over the power to regulate utilities, normally the localities retain authority with respect to the use of streets and byways. Regulation is frequently accomplished through the granting of franchises.

This degree of comprehensive regulation was designed to protect the public interest in an industry characterized by economic rules said to be different from those prevailing in the conventional manufacturing context. For instance, electric utilities are required to invest huge amounts of capital in distribution facilities. Direct competition for patronage would require facility duplication and as a result impose on society excessive capital costs. In addition, it is generally believed that electric utility operations are characterized by substantial economies of scale. A single large electric utility can as a result render service at significantly lower costs than could several smaller utilities serving the same customers. The result is that the industry may be termed a "natural monopoly" industry, a crucial fact when evaluating the effects of competition.

Unfortunately for the industry, the Supreme Court was unimpressed both by the scope of regulation and by the nature of the industry's economics in its decision in *Otter Tail Power Co. v. United States*.[37] While on the particular facts of the case the result may have been predictable, the reach of the Court's rationale ignores the reason for regulation and, as a result, will probably produce unwelcome and unexpected results in the electric utility industry.

Otter Tail Power Company is an investor-owned utility supplying electricity at retail to consumers in portions of Minnesota, North Dakota and South Dakota. In addition to retail distribution, Otter Tail sells power at wholesale to distribution systems and wheels power[38] to customers it does not serve at retail pursuant to contract with the Bureau of Reclamation.

In recent years, several municipalities served at retail by Otter

TRIC, GAS AND TELEPHONE UTILITIES, FPC S-184 (1967).

[37] 410 U.S. 366 (1973).

[38] "Wheeling" is a term describing the concept of the transmission of power from one utility to another across the lines of an intermediate utility.

Tail expressed an interest in owning their own distribution system. The choices then open to the municipality were three: it could generate its own electricity, but only with considerable difficulty; it could purchase at wholesale from Otter Tail; or it could purchase from another utility if Otter Tail were willing to wheel the electricity across its own lines. Otter Tail refused either to sell at wholesale or to permit wheeling to these new municipal systems. The government accordingly filed a complaint charging Otter Tail with a violation of section 2 of the Sherman Act,[39] alleging monopolization and attempted monopolization of the market for the retail distribution of electric power.

At trial, the district court determined that Otter Tail had violated section 2 by working to prevent communities served at retail from converting to municipally owned distribution systems. The court found that Otter Tail's plan included refusals to sell at wholesale, refusals to wheel, the institution and support of harassing litigation designed to delay the establishment of municipal systems and, finally, the enforcement of its Bureau of Reclamation contract to preclude municipal distribution systems from access to low-cost power.[40] On appeal, the Supreme Court affirmed, 4-3.[41]

Otter Tail's brief in the Supreme Court, posing in sharpest terms the problem of reconciling the regulatory scheme with the antitrust laws, contended that the decision of the court below reflected total disregard of Congress' intent with respect to the issues of wholesale sales and wheeling. As to the first, Otter Tail argued that Congress had entrusted to the Federal Power Commission the duty of achieving the most efficient and abundant electricity supply. Section 202[42] of the Federal Power Act provided the Commission with the power to order, among other things, involuntary interconnections pursuant to statutorily defined standards. But, Otter Tail argued, the district court had disregarded these procedures and standards and had created an antitrust duty to sell power regardless of the circumstances, thus depriving the FPC of a crucial element of its jurisdiction. As to wheeling, Otter Tail argued that the district court's decision was even more repugnant to Congress' intent, clearly reflected through the nearly forty years of the Federal Power Act's history in the continued

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[39] 15 U.S.C.A. § 2 (1973).

[40] United States v. Otter Tail Power Co., 331 F. Supp. 54 (D. Minn. 1971), *aff'd in part*, 410 U.S. 366 (1973).

[41] The majority opinion was written by Douglas, J. An opinion concurring in part and dissenting in part was filed by Stewart, J., with whom Burger, C.J., and Rehnquist, J., joined. Blackmun and Powell, JJ., took no part in the consideration or decision of the case.

[42] 16 U.S.C.A. § 824a (1960).

refusal to amend the legislation to provide for wheeling.

Otter Tail also contended in its brief that the district court had mistakenly relied upon Otter Tail's litigation and political activities to support the finding of monopolization. That holding, the brief suggested, deprived Otter Tail of its constitutional rights and contravened the decisions of the Supreme Court holding the Sherman Act inapplicable to political and legislative activity.[43] Finally, Otter Tail argued that the district court had misconceived the proper application of the antitrust laws, given the industry's special economic circumstances and regulatory framework. The consequences of the holding, accordingly, would be to increase the costs and reduce the efficiency of the industry.

The government saw the case quite differently. In its view, at issue was the narrow question of whether competition between proposed municipal electric systems and investor-owned utilities was to be protected by application of the antitrust laws. The government argued that the lower court had properly concluded that an electric utility could not coerce its retail customers for the purpose of suppressing incipient competition for the distribution franchise.

The government saw the case as an opportunity to apply the antitrust laws, as the fundamental national policy, to the electric utility industry. Where, as here, Congress had not expressly declared them inapplicable, and where their application would not conflict irreconcilably with the regulatory scheme, the antitrust laws were applicable. The government sought to demonstrate that the Federal Power Act contained no language expressly immunizing the conduct at issue from the antitrust laws. Indeed, to the contrary, Part II of the Federal Power Act, it was contended, demonstrated a concern for the preservation and enhancement of actual, potential and "yardstick"[44] competition within the industry.

The Supreme Court agreed with the government. It failed to find in the Federal Power Act any basis for the contention that Otter Tail was not subject to antitrust prohibition of its refusals to deal. The Court signalled its attitude by quoting the oft-cited language that repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored.[45]

The Court then proceeded to demonstrate, at least to its own

[43]United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

[44]"Yardstick" competition describes the extent to which the performance of one firm, by example, can be used to evaluate the performance of another firm.

[45]United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 (1963).

satisfaction, that there is nothing in the legislative history of the Federal Power Act revealing a purpose to insulate electric power companies from the operation of the antitrust laws. Without citation, the Court read the history of Part II as indicating an overriding policy of "maintaining competition" to the maximum extent possible. Reciting the removal from the original legislative proposal of the language imposing a "common carrier" status on utility transmission facilities and empowering the FPC to order wheeling, the Court reached the conclusion that Congress rejected a pervasive regulatory scheme in favor of voluntary commercial relationships:

> When these relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws.[16]

The Court concluded that the limited authority of the FPC to order interconnections was not intended as a substitute for or insulation from antitrust regulation.

The Court, however, was obviously concerned about the potential for conflict between regulatory mandate and the decree of the district court. While the decree ordered "wheeling," there could be no conflict in that area, because the Federal Power Act contained no provisions for imposing a wheeling obligation and had been so interpreted by the FPC.[17] Interconnections were a different matter, however, although the Court felt no conflict was likely. It reasoned that because Elbow Lake had applied to the FPC for an interconnection and obtained it,[18] the district court's decree presented no actual conflict. Future orders, Justice Douglas pointed out, to the extent they resulted in disputes over terms and conditions, would be subject to FPC perusal. Then, quite remarkably, the Court stated:

> It will be time enough to consider whether the antitrust remedy may override the power of the Commission under § 202(b)

[16] 410 U.S. at 374.

[17] *See* Paris v. Kentucky Util. Co., 41 F.P.C. 45 (1969). *See also* Paris v. FPC, 399 F.2d 983 (D.C. Cir. 1968).

[18] Elbow Lake, one of the complaining municipalities, had applied for an interconnection with Otter Tail. The Federal Power Commission had initially ordered a short-term interconnection, Elbow Lake v. Otter Tail Power Co., 40 F.P.C. 1262 (1968), *aff'd sub nom.* Otter Tail Power Co. v. FPC, 429 F.2d 232 (8th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971), and had subsequently ordered a long-term interconnection. Elbow Lake v. Otter Tail Power Co., 46 F.P.C. 675 (1971).

> as, if and when the Commission denies the interconnection and the District Court nevertheless undertakes to direct it.[49]

Thus, without shying away, the Court confronts the logic of the lower court's ruling that the antitrust laws may not simply complement the regulatory scheme but may succeed finally in replacing it.

Once the Court had gained that ground, the finding of monopolization came easily. Justice Douglas saw the record as "abundantly clear" that Otter Tail had used its monopoly power to foreclose competition and to gain a competitive advantage in violation of the antitrust laws.[50] The use of even lawful monopoly power to suppress competition was here, as elsewhere, a violation of section 2 as an attempt to monopolize.[51] Likewise, agreements not to compete for the purpose of preserving or extending monopoly were violations of section 2.[52] The Supreme Court thus agreed with the finding of the district court that Otter Tail's only purpose in refusing to deal with the municipalities was the preservation of its retail monopoly position.

Justice Douglas was not at all concerned that with more and more municipalities turning from retail to wholesale purchases, Otter Tail would quickly be faced with its own extinction. Even if true, the Court seemed to say, such an argument was irrelevant:

> The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct.[53]

Then, however, in a paragraph that seems to double back, suggesting almost that its insertion may have been the price of obtaining a majority, Justice Douglas writes that there may be some considerations that would justify a failure to interconnect with Elbow Lake. Indeed, the Court, by discussing the "incredibility" of the Otter Tail "erosion study," which was designed to prove the cascading effect of the loss of retail business, certainly suggests that, if credible, the study would be relevant.[54]

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[49]410 U.S. at 377.

[50]*See* United States v. Griffith, 334 U.S. 100 (1948).

[51]Lorain Journal Co. v. United States, 342 U.S. 143 (1951); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927).

[52]Schine Chain Theaters v. United States, 334 U.S. 110 (1948).

[53]United States v. Arnold, Schwinn & Co., 388 U.S. 365, 375 (1967).

[54]A unanimous Court vacated the portion of the district court's order relating to litigation and remanded the matter for consideration of the question whether the conduct complained of was within the exemption created by Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), or whether it was so repetitive and obviously insubstantial that it could be considered a "mere sham" within the rule announced by California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

Justice Stewart announced the thrust of his disagreement with the majority opinion in the opening paragraphs of the dissent:

> The Court in this case has followed the District Court into a misapplication of the Sherman Act to a highly regulated, natural monopoly industry wholly different from those that have given rise to ordinary antitrust principles.[55]

The dissenters were disturbed that the District Court failed to come to grips with the significance of the Federal Power Act, "either in terms of the specific regulatory apparatus it established or the policy considerations that moved the Congress to enact it."[56] Yet these considerations, the dissent argued, were central to the disposition of the case.

Justice Stewart outlined the policies motivating Congress to enact the Federal Power Act. Congress, clearly seeking to take advantage of natural monopoly and the resulting efficiencies for the purpose of assuring an abundant suiply of electric energy, left the decision whether to wheel or sell at wholesale at least initially to the private utility. For Justice Stewart it was predictable that Otter Tail would decline to do business with towns at wholesale that it had previously served at retail.

> If the purpose of the congressional scheme is to leave such decisions to the power companies in the absence of a contrary requirement imposed by the Commission, it would appear that Otter Tail's course of conduct in refusing to deal with the municipal system at Elbow Lake and in refusing to promise to deal with the proposed system at Hankinson, was foreseeably within the zone of freedom specifically created by the statutory scheme. As a retailer of power, Otter Tail asserted a legitimate business interest in keeping its lines free for its own power sales and in refusing to lend a hand in its own demise by wheeling cheaper power from the Bureau of Reclamation to municipal consumers who might otherwise purchase power at retail from Otter Tail itself.[57]

Stewart also disapproved of the application of conventional monopolization concepts to a natural monopoly industry, indeed to an industry where monopoly was the predicate for a congressionally approved scheme of regulation. In the conventional context, Stewart pointed out, antitrust is applied to preserve competition and prevent

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[55]410 U.S. at 382.

[56]*Id.* at 383.

[57]*Id.* at 387-88 (footnote omitted).

monopoly. In a natural monopoly context, monopoly is sure to result, competition or not.

> Antitrust principles applicable to other industries cannot be blindly applied to a unilateral refusal to deal on the part of a power company, operating in a regime of rate regulation and licensed monopolies.[58]

Justice Stewart professed puzzlement at the majority's apparent confusion over the defense of business justification. Pointing out that the district court gave little credence to the prediction of business erosion but also stated that even if it were true, it would not justify violation of the law, Justice Stewart argued that

> [t]his question-begging disregard of the economic health of Otter Tail is wholly at odds with the congressional purpose in specifying the conditions under which interconnections can be required.[59]

Justice Stewart did not suggest that such considerations necessarily resulted in exemption from the antitrust laws. Indeed, because of the freedom allowed to electric utilities, the antitrust laws apply to the extent they are not repugnant to specific features of the regulatory scheme.[60] However, Stewart found a clear congressional intent and thus would have held the antitrust laws repugnant to the regulatory scheme governing wheeling and interconnections. The dissent revealed a preference for leaving regulation of electric utilities' decisions on wholesale and wheeling services to the jurisdiction of the FPC, rather than to the "invariably less sensitive and less specifically expert process of antitrust litigation."[61] Stewart thus concluded that the refusal to deal was exempt conduct, and accordingly the judgment of the district court should have been reversed.

Out of that welter of inconsistent principles on all sides, *Otter Tail*

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[58] *Id.* at 389.

[59] *Id.* at 389-90.

[60] *Id.* at 390-91 n.7.

[61] *Id.* at 391.

Stewart adds that, even if the antitrust laws are applicable to the present case, the principle of Ricci v. Chicago Mercantile Exch., 409 U.S. 289 (1973), dictates that the district court should have deferred to the FPC proceeding then in progress. *See* note 48, *supra*. Finding the regulatory authority of the FPC at least as substantial as the responsibility of the Commodity Exchange Commission in *Ricci* and arguing that the case satisfied the three *Ricci* criteria for deferral of antitrust jurisdiction to an administrative agency, Stewart can see no basis for the district court's action. Because the district court has ordered interconnection, it has to that extent preempted the FPC's authority to decide whether involuntary interconnection is justified under the enunciated statutory criteria.

emerges as a case teaching that the antitrust laws apply with full force to the electric utility industry, apparently without regard to the fact of regulation, the business justifications asserted and the nature of competition allegedly being protected. But what are we then to make of the teachings of the economists that monopoly, conferred by law because mandated by economics, is the rule of the industry? A consideration of these teachings may be crucial because they call into question the policy justification for attaching to utility industry conduct traditional antitrust consequences of monopoly status in other industries.

In addition, the utility industry is different because it is regulated. Competing policies remain to be weighed even after competition has been valued. The Federal Power Act gives the Commission the authority to order interconnections if it is "necessary or appropriate in the public interest," the quoted words themselves dispelling any notion that antitrust is the sole guide. Moreover, the language goes on to make explicit yet other standards that must be weighed. A utility is not compelled to interconnect if it would require the enlargement of generating facilities, place an undue burden on the utility or impair its ability to render adequate service to its customers.[62]

It also seems relevant to point out—though the Court failed to acknowledge this—that the competition being protected, because of the economic characteristics of the industry, may be impossible in the long run, destructive in the short run, and distorted by economic misallocations such as discriminatory subsidies and tax treatment. If the utility industry is truly a natural monopoly industry, the effect of destroying the status quo may well be to substitute for regulated private monopoly the monopoly of unregulated publicly owned utilities. In the short run, the required duplication of facilities is intolerable. Even if possible, competition may fail to produce benefits usually looked for, because the competitors on one side may be favored with discriminatory subsidies and tax treatment.[63]

The decision also points out the gross institutional inefficiency of having a multitude of decision-makers authorized to make essentially the same decision. Because Elbow Lake was successful in securing precisely the relief ordered for it by the court decree, the decision in *Otter Tail* presents a particularly vivid example of the uneconomical effect of redundancy.

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[62]16 U.S.C.A. § 824(a), (b) (1960).

[63]For a full discussion of these "subsidies," *see* Pace, *The Subsidy Received by Publicly Owned Electric Utilities*, 87 PUB. UTIL. FORT., April 29, 1971, at 19-29. For an examination of whether such subsidies are still justified, *see* Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207 (1969).

None of this is to say that the result in this case was wrong. The reasoning of the Court, however, will apply to other cases. No sensible accommodation was reached. What could have been provided—a rational recourse to the rule of reason under the doctrine of moderated application, permitting a more sophisticated and balanced antitrust approach—was denied. Instead, in a mechanistic application of antitrust theory per se, the Court appears to be indulging in the pretense that antitrust alone is the policy to be implemented. That the FPC made exactly the same decision in the request for long-term interconnections with Elbow Lake is ignored.

In consequence, *Otter Tail* hardly seems to provide an effective answer to the conflict between regulation and antitrust. The Court disagreed with the FPC's assertion of its own jurisdiction; the Court failed to follow its own precedents in yielding to the primary expertise of the agency. The result is that both court and agency are compelled to try the same issue, even if they reach the same result.

As if by design, however, the Supreme Court almost three months later decided *Gulf States Utilities Co. v. FPC*,[64] and, intentionally or not, may have pointed the way for the electric utility industry out of the *Otter Tail* thicket of conflicting jurisdictions and policies. In October, 1970, Gulf States Utilities Company applied to the FPC for authority to issue $30 million first mortgage 30-year bonds for the purpose of refunding Gulf States' then outstanding commercial paper and short-term notes. Two cities in the Gulf States service area petitioned to intervene in the proceedings before the Commission[65] and requested a formal hearing on Gulf States' application. The cities alleged that Gulf States, together with two other investor-owned utilities, had engaged in activities in violation of the antitrust and other federal laws, that the activities would in effect be supported by the financing under review and that the utilities' activities were therefore incompatible with the public interest.[66]

[64]411 U.S. 747 (1973).

[65]Pursuant to section 204 of the Federal Power Act, 16 U.S.C.A. § 824c(a) (1960), the Federal Power Commission has the power to authorize issuance of securities only if it finds that the issue: "(a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service of the public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. . . ."

[66]The cities claimed that a 1968 interconnection and pooling agreement among the intervening cities and others had been subjected to pressures, including unnecessary litigation, with the purpose of blocking a loan from the Rural Electrification Administration and thus preventing fulfilment of the pooling agreement. In addition, the pool members were forced to negotiate with the three private utilities for the use of transmission lines, which was granted only on unnecessarily restrictive conditions.

The cities thus requested a hearing before the Federal Power Commission under section 204 of the Federal Power Act. Gulf States denied any violation of the antitrust laws or any other federal statute, and asserted that the purpose of section 204 was to prevent unsound financing, not to apply antitrust policy to the electric utility industry.

On December 3, 1970, the Commission granted the cities permission to intervene but denied their request for a hearing and authorized the issuance and sale of the bonds.[67] The FPC decided that the cities' allegations were relevant to the financing, but that the agency was powerless under section 204 of the Act to consider such wrongs as might have been perpetrated. The United States Court of Appeals unanimously disagreed with the Commission and remanded the case to it for consideration of the claims raised by the cities.[68] Gulf States petitioned the Supreme Court for a writ of certiorari.

What was being challenged in effect was a court of appeals decision to the effect that the FPC's order was erroneous and plainly inconsistent with its duties as inferred by analogy from the *Denver & Rio Grande* case.[69] In that case, the Supreme Court had held that the Interstate Commerce Commission was required to consider anticompetitive consequences before approving stock issuances under section 20a(2) of the Interstate Commerce Act.[70] The court below had thus rejected the FPC's suggestion that the scope of its authority under section 204 was limited to the consideration of issues having to do with the sound financial structure of a utility applicant and its ability to live up to its public utility responsibility.[71]

Gulf States argued in the Supreme Court that Congress had granted the FPC a limited authority over securities issues in section 204 to prevent electric utilities from engaging in unsound financial practices. Section 204 was therefore not to be used as a source of continuing jurisdiction over the operations and practices of the elec-

[67]Gulf States Util. Co., 44 F.P.C. 1524 (1970).

[68]City of Lafayette v. FPC, 454 F.2d 941 (D.C. Cir. 1971).

[69]Denver & Rio Grande Western R.R. v. United States, 387 U.S. 485 (1967).

[70]49 U.S.C.A. § 20a(2) (Supp. 1973).

[71]The court below consolidated the case with a review of two Securities and Exchange Commission orders approving security issues by Louisiana Power & Light Company without a hearing on allegations by the same cities of antitrust violations similar to those raised in the Gulf States proceedings. While remanding the FPC's order, the court affirmed the SEC orders approving securities issues under section 7 of the Public Utility Holding Company Act, 15 U.S.C.A. § 79g (1971). Although the FPC has the duty to consider allegations of anticompetitive conduct in approving securities issues because it had regulatory jurisdiction over the operations of the company, the Court below found no such obligation on the part of the SEC and therefore no concomitant antitrust responsibility in this instance.

tric utility industry, and particularly not as the basis of regulatory authority to protect or establish competition throughout the industry. Gulf States contended that the Commission had fulfilled its public interest responsibility under section 204 by authorizing a securities issue on the basis of all relevant facts. In its view, the issuance and refunding of authorized short-term indebtedness raised no issues of monopolization or other violation of the Sherman Act. Accordingly, Gulf States requested the Supreme Court to reverse the result below and hold that the FPC had no jurisdiction to investigate complaints of anticompetitive effect under section 204.[72]

The Federal Power Commission argued that it had the full authority to consider antitrust allegations in connection with its regulatory authority over the operation of public utilities.[73] In addition, the Commission argued that its broad authority to investigate practices of public utitlities subject to its jurisdiction on its own motion or pursuant to any person's complaint could easily result in an investigation of allegations of anticompetitive conduct.[74] As a result, the FPC felt justified in contending that it should not be required to consider antitrust allegations in authorizing securities issues, because such transactions gave rise to no anticompetitive effects that would not come within the enumerated areas of the Commission's jurisdiction over operations. Because there was no direct connection between financing and antitrust misconduct, public utilities, already subject to multiplicitous antitrust litigation, should be spared the addition of another forum.

Justice Blackmun, writing for a majority of six, affirmed the decision of the court of appeals in remanding the case to the Federal Power Commission. The Court reasoned that because section 204 contains broad standards pursuant to which the Commission was required to discharge its authority, the "public interest" standard

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[72]The Federal Power Commission, while disagreeing with the result below, nevertheless initially opposed the grant of the petition for certiorari because it felt that it could carry out its statutory obligations unencumbered by the court's holding. However, when the Supreme Court granted certiorari, the FPC filed a brief in support of the petitioner Gulf States.

[73]Section 202, 16 U.S.C.A. § 824a (1960) (interconnections); section 203, 16 U.S.C.A. § 824b (1960) (acquisitions or mergers); sections 205 and 206, 16 U.S.C.A. § 824(d) and 824e (1960) (rates in general); section 205, 16 U.S.C.A. § 824d (1960) (unduly discriminatory rates or practices); or section 207, 16 U.S.C.A. § 824f (1960) (inadequate service).

[74]At the time its brief was filed, the Federal Power Commission was investigating allegations of anticompetitive conduct by Gulf States in a proceeding instituted under sections 202, 306 and 307 of the Federal Power Act, 16 U.S.C.A. §§ 824a, 825e, 825f (1960). City of Lafayette v. Gulf States Util. Co., F.P.C. No. E-7676 (Nov. 4, 1971).

should not be construed as containing a less broad directive than that contained in the other similarly worded and adjacent sections of the Federal Power Act. So far from requiring examination only of the financial impact of a proposed issue, section 204 should, without explicit contrary indication, be read to require that the FPC consider matters relating both to the broad purposes of the Act and the fundamental national economic policy expressed in the antitrust laws. Such an examination by the Commission serves the important function, the opinion continued, of providing a first line of defense against anticompetitive practices.

The Court saw its conclusion as reinforced by the decision in the *Rio Grande* case in which similar language in section 20A of the Interstate Commerce Act had thus been construed. Both the FPC and the ICC possess broad regulatory authority and each is charged with responsibility for considering antitrust policy. No good reason exists, in the Court's view, why the obligations of each in enforcing the antitrust law should be different.

Thus, the Court ordered the FPC to consider anticompetitive aspects of securities issues to which section 204 applies. The Court agreed with Gulf States that the Commission must not necessarily hold a hearing in every case, and that in some circumstances a case could be summarily decided. But in order to ensure the absence of an abuse of discretion, a reviewing court must be able to look at the justifications for the summary treatment. The record in the case at hand simply was not sufficiently amplified to permit the Court to determine whether the FPC was justified in rejecting the cities' contention summarily. On remand, the FPC would be expected to state the grounds for its determination.

Justice Powell wrote the dissent.[75] The dissenters were not persuaded by the majority's analysis of the statutory language or by its discussion of the regulatory context. The broad responsibility of the Commission to deal with anticompetitive practices in the power industry under other sections of the Federal Power Act suggested to them at least that there was no necessity to convert section 204 into an all-purpose antitrust section. Moreover, the Commission, sensitive to the complexities and subtleties of financing in the money markets, was justifiably unwilling to do anything to impede the process.

> In converting a special-purpose proceeding into a general-purpose one, the Court renounces an administrative interpretation of § 204 founded on the practicalities of utility financing and regulation. Although other established means are

[75]The dissent was joined in by Stewart and Rehnquist, JJ.

available for policing anticompetitive conduct, the Court imposes fresh and ill-defined obstacles to the necessary raising of capital by an industry that needs an expeditious and dependable regulatory process. And, finally, in the name of the 'public interest', it ignores the critical fact that mandating a prolonged factfinding process will preclude the Commission from vindicating those aspects of the public interest peculiarly implicated by financing proposals.[76]

The majority opinion seems weak indeed. Section 204 is given meaning by looking to adjacent sections of the statute, a position based on the "halo" effect which is justifiably controversial in this or any other context.[77] The use of this technique, plus the negative cast of the argument,[78] betrays the majority's inability to find any more persuasive basis upon which to ground its decision. In addition, the majority's position that the "lawful object" standard of section 204 also requires a check of antitrust policy is not very convincing because it establishes as significant that which is at best only implicit in section 204, in contrast to its explicit special significance in the Interstate Commerce Act.

The pure policy argument of the majority that the FPC would be a "first line of defense against those competitive practices that might later become subject to antitrust proceedings"[79] is also unpersuasive. First of all, it is significant that the FPC itself did not agree with the Court's assessment of the policy importance of such a review in connection with section 204. Second, the Court ignores the point that the same kinds of antitrust objections can be raised at more efficient points and with clearer authorization by statute under other sections of the Federal Power Act.

Finally, the use of the *Denver* precedent is weak because the fundamental point relied upon there was "common sense and sound administrative policy." As to the latter, the Court in *Denver* noted that "[b]oth ICC and this Court have read terms such as 'public interest' broadly to require consideration of . . . anticompetitive effect."[80] However, the fact that the FPC took a contrary view from that of the Court in this case is a clear basis for distinction of *Denver* and undermines its precedential value.

[76]411 U.S. at 777 (footnotes omitted).

[77]*See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

[78]"Nothing in the Act . . . suggests any less broad directive than that contained in the other similarly worded and adjacent sections." 411 U.S. at 759.

[79]*Id.* at 760.

[80]Denver & Rio Grande Western R.R. v. United States, 387 U.S. 485, 492 (1967).

The Court's announcement in *Gulf States* of the Commission's new antitrust responsibilities is somewhat misleading. First, it agrees that the FPC does not have to hold hearings. Consideration of allegations may in appropriate circumstances be deferred, a notion taken from the *Denver* case, demonstrating that the majority has accepted the timing arguments of the dissent. Yet the alternatives proposed, partial or conditional approval, seem both unnecessarily complex and vulnerable. What is inevitably a time-consuming task still must be performed and delay will be the inevitable result.

However, entirely unexpectedly, *Gulf States* may produce a dividend for the industry that is saddled with *Otter Tail.* If what the Supreme Court objected to in *Otter Tail* is the lack of comprehensiveness of the regulatory scheme, one alternative is to amend the Federal Power Act to provide the scope with which the Supreme Court would be satisfied. Another alternative is to interpret existing legislation to require the FPC to broaden its authority. That is what *Gulf States* can be read to do. If section 204 requires a broadened review of utility operations, and if the FPC is required pursuant to that section to evaluate antitrust allegations, then the scope of regulation in the electric utility industry may become 'pervasive," in accordance with the requirements of the Supreme Court in *Otter Tail.*

Gulf States requires the Commission to evaluate the antitrust implications of a proposed securities issue, even if the nexus between the securities issue and the antitrust allegations is not clear. Once having done so, the FPC is in a much stronger position to make the argument, which it could not make in *Otter Tail*, that the policy of the antitrust laws has been taken into account and balanced against other competing social policies, rather than overlooked. In the guise of requiring a "first line of defense," the Supreme Court unwittingly may have opened the way toward a more rational harmonization of antitrust and other policies, thus leading away from the chaotic and conflicting jurisdictions that *Otter Tail* for the present imposes upon the industry. If *Gulf States* does produce such an effect, it will be difficult for the Court in future cases not to credit FPC action with an immunizing effect.

III.

Bank Mergers and Potential Competition—Another Case Study

No area of the antitrust laws reflects the confusion produced by the confrontation of antitrust policy and regulation more vividly than the law governing bank mergers. The history of the relationship of

antitrust to bank mergers has been from the outset confusing and incoherent, and the latest chapter, the attempt by the Department of Justice to introduce the potential competition theory into bank merger assessments, maintains the same dizzying standard of chaos.

For a full appreciation of the importance of this Term's contribution to this history,[81] it is useful to review briefly the history of antitrust in the area of bank mergers, distilling the pervasive theme of confrontation between the banking industry, its regulators and Congress on one side, and the Antitrust Division of the Department of Justice, frequently abetted and sometimes even led by the Supreme Court of the United States on the other.

Concerned by a rising tide of concentration in the banking industry, and working from the premise that the antimerger provisions of section 7 of the Clayton Act[82] did not cover bank acquisitions, Congress enacted the 1960 Bank Merger Act.[83] The Act provided for approval by one of three regulatory agencies[84] of an acquisition before consummation of the acquisition. Such approval was to be given pursuant to a set of standards that reflect a concern both for the stability of the banking industry and for the preservation of such competition as might be constructive. Among other factors, the regulatory agencies were to consider, in the evaluation of any acquisition submitted to them for their approval, the financial history and condition of the banks involved in the transaction, the fiscal soundness of the banks' capital structure and their future earning prospects, the general character of the managements and the extent to which the community's convenience and needs might be served by completion of the acquisition. At the same time, and without specifying a priority, the regulatory agency was required to consider the effect of the

[81]United States v. First Nat'l Bancorporation, Inc., 410 U.S. 577 (1973), *aff'g per curiam* 329 F. Supp. 1003 (D. Colo. 1971).

[82]15 U.S.C.A. § 18 (1973). Even though section 7 had been amended in 1950 by the Celler-Kefauver Act to cover asset acquisitions, rather than simply stock acquisitions, the amending language of the Act restricted the effect to corporations "subject to the jurisdiction of the Federal Trade Commission," thus excluding banks. *Cf.* Federal Trade Commission Act § 5, 15 U.S.C.A. § 45(a)(6) (1973).

Section 1 of the Sherman Act, 15 U.S.C.A. § 1 (1973), which prohibits unreasonable restraints of trade and has been utilized to reach acquisitions, *see, e.g.*, United States v. Columbia Steel Co., 334 U.S. 495 (1948), was also considered of limited use against bank mergers because of its applicability to only the most restrictive contracts or combinations in restraint of trade.

[83]Act of May 13, 1960, Pub. L. 86-463, 74 Stat. 129.

[84]Approval must be obtained from the Comptroller of the Currency in the case of national banks, the Federal Deposit Insurance Corporation in the case of state nonmember banks whose deposits are insured by the FDIC, and the Federal Reserve Board in the case of state member banks.

transaction on competition. Congress was silent as to the effect that the Bank Merger Act of 1960 was to have on the inapplicability of the Clayton Act to bank mergers.[85]

Thus, those familiar with these matters could only have been astonished at the Supreme Court's decision in the *Philadelphia Bank* case.[86] When the Philadelphia National Bank agreed to merge with Girard Trust Corn Exchange Bank, the resulting bank would have been the largest in the metropolitan area of Philadelphia, accounting for approximately 36% of the area's deposits. Although the Comptroller of the Currency had approved the acquisition (despite adverse reports from the Federal Reserve Board, the Attorney General and the Federal Deposit Insurance Corporation), the Department of Justice filed an antitrust suit. At the district court level, the decision went in favor of the defendant.[87] It was common knowledge, the court reasoned, that section 7 of the Clayton Act did not apply to bank mergers.[88]

Imagine, then, the surprise with which the Supreme Court's holding that the Clayton Act prohibited the merger was received. Indeed, the Department of Justice had placed so little faith in the argument that it received only scant treatment in the government's main brief and was not mentioned at all in the reply brief. The dissent, written by Justice Harlan, summed up the reaction when he said that no one would be more surprised than the government to find that the Clayton Act had "carried the day."[89]

In applying section 7 to the bank merger, the Supreme Court held that section 7, as amended, was designed to cover all kinds of acquisitions, including "the entire range of corporate amalgamations, from pure stock acquisitions to pure asset acquisitions . . . ."[90] Further, the Court held that the Bank Merger Act of 1960, being silent on the applicability of the antitrust laws, did not constitute an immunizing shield and, as a result, the merger of the parties was in violation of section 7. Without attempting to specify what lesser percentage of

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[85]Express exemption for bank acquisitions from the provisions of the Clayton Act should not have been expected since it was the consensus of statutory interpretation at the time of the passage of the Bank Merger Act of 1960 that the Clayton Act was inapplicable.

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

[87]United States v. Philadelphia Nat'l Bank, 201 F. Supp. 348 (E.D. Pa. 1962).

[88]The Court found, however, that section 1 of the Sherman Act was applicable, but held that it was not violated after a consideration of all the appropriate facts and circumstances.

[89]374 U.S. at 373 (Harlan, J., dissenting).

[90]*Id.* at 342.

deposits would imply substantial anticompetitiveness, the Supreme Court was clear that 36% was well above the level of unlawfulness, particularly in a market in which the acquisition would increase concentration by a factor of one-third.

The hostile attitude toward horizontal mergers was reflected in the Court's treatment of affirmative justifications offered in support of the acquisition. Whatever might be the weighing process required by the Bank Merger Act of 1960, the Court refused to beguiled into such a balancing in the section 7 context:

> We are clear, however, that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.[91]

The decision did not augur well for a rational accommodation of antitrust policy in the regulatory scheme. First, the Supreme Court ventured off on a frolic of its own, disregarding the thrust of the arguments in the case and making a great effort to avoid recognizing the fact of the industry's regulation. Second, the decision itself applied horizontal merger standards evolving in nonregulated industry to the banking industry, where they came close to becoming per se determinative. All of this astonished and depressed the banking industry, which had attained, it thought, a rational disposition of the confrontation between regulation and antitrust in the Bank Merger Act of 1960. But when the Supreme Court followed the *Philadelphia* case with its decision in the *Lexington* case,[92] in which it held the Sherman Act violated by a merger of the first and fourth largest banks of the area's six commercial banks, substantial pressure mounted within the industry for passage of relief legislation.

In an effort to harmonize the legitimate concerns of the banking community with those of the Antitrust Division, the Congress enacted the Bank Merger Act of 1966.[93] Congress was concerned about

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[91] *Id.* at 371.

[92] United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964).

[93] 12 U.S.C.A. § 1828(c) (1969), *as amended*, (Supp. 1973).

the possibility that bank mergers consummated prior to the decision in the *Philadelphia* case might be attacked with the aid of the new law announced by the Court, and there was also an urgent desire to rationalize the application of the competing policy considerations. The solution provided in the new Act was a scheme according to which the relevant regulatory agency had to consider the advice of the Attorney General on the anticompetitive effect of the transaction proposed, but under a set of standards relating to the "convenience and needs" of the community could legitimatize even an anticompetitive acquisition. However immunity from the application of the antitrust laws was not specified, and the Department of Justice could challenge any acquisition, even after regulatory approval, in a complaint in federal district court. The court would then be required to apply the same standards de novo as had been applied by the regulatory agency.

Thus the legislation "forgave" all bank mergers consummated prior to the date of the *Philadelphia* decision, except those resulting in monopolization or reflecting a conspiracy or an attempt to monopolize. Next, Congress provided for automatic preliminary injunctions against the consummation of future mergers challenged by the Attorney General under the antitrust laws, provided the challenge was made within 30 days of the appropriate banking agency's approval. Finally, the legislation required regulatory agencies to disapprove mergers that violated the antitrust standards expressed in the Act unless it was found that

> the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.[94]

Compromise on both sides had produced a clarification of the post-*Philadelphia* situation. The standard of anticompetitiveness was to be paramount unless clearly outweighed by competing policy considerations. The Department of Justice was permitted to challenge acquisitions even after regulatory approval. But on the other hand, banks were to be treated differently from nonregulated industries in that an anticompetitive acquisition could still be justified in the public interest and held lawful.

The enactment of the Bank Merger Act of 1966 seemed to forecast an orderly adjustment of antitrust to regulatory policies, and to provide an administrative scheme accommodating the needs of each. It

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[94] 12 U.S.C.A. § 1828(c)(5) (1969).

is conceded that this scheme is completely inefficient, requiring duplicative effort by courts and agencies alike. But on the substantive issues, the scheme has generally worked coherently, if not to the universal satisfaction of all.

In one particular area, however, involving geographic market extension acquisitions by possible potential competitors, the result has been confusion and mystery. The reason for this singular occurrence lies in the nature of potential competition doctrine, its peculiar application in a regulated industry, and the refusal by the Department of Justice to moderate its views of bank mergers given the fact that banking is a regulated industry. Unfortunately, the Supreme Court's effort last term to unravel the mystery resulted in an evenly divided court, thus affirming per curiam the district court's dismissal of the government's complaint.[95]

Potential competition theory, as it applies in the conventional manufacturing context, is embodied mainly in three Supreme Court opinions.[96] The first potential competition case to reach the Supreme Court was *United States v. El Paso Natural Gas Co.*[97] In 1957, El Paso acquired Pacific Northwest, a natural gas company that had tried but failed to secure sales contracts in the California market, but whose efforts had caused El Paso to lower its price and offer better service. The defense to the challenge was that there was no actual competition between the parties in any market.

The Supreme Court rejected this contention. The Court found that Pacific Northwest constituted a substantial factor in the California market:

> We would have to wear blinders not to see that the mere efforts of Pacific Northwest to get into the California market, though unsuccessful, had a powerful influence on El Paso's business attitudes within the State. We repeat that one purpose of § 7 was "to arrest the trend toward concentration, the tendency to monopoly before the consumer's alternatives disappeared through merger. . . ." [*quoting United States v. Philadelphia National Bank*, 374 U.S. at 367][98]

[95]United States v. First Nat'l Bancorporation, Inc., 410 U.S. 577 (1973), *aff'g per curiam* 329 F. Supp. 1003 (D. Colo. 1971).

[96]FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964). *See also* Foremost Dairies, Inc., 1961-63 Trade Reg. Rep. ¶ 15,877 (FTC 1962); Beatrice Foods Co., 1965-67 Trade Reg. Rep. ¶ 17,244 (FTC 1965).

[97]376 U.S. 651 (1964).

[98]*Id.* at 659.

Though failing to mention potential competition in specific terms, the opinion reasons that an acquisition may have an effect on competition because one of the companies, at the edge of the market, may have the incentive and the ability to enter that market. It was not as if Pacific Northwest, having never sold gas in the California market, was at the edge of a saturated market showing signs of decline. Rather, the market was healthy, incremental demands were substantial, and the number of suppliers, potential and actual, was very limited.[99]

Later that same year, the Supreme Court decided *United States v. Penn-Olin Chem. Co.*,[100] involving a joint venture between what the government alleged were two potential competitors in the sodium chlorate industry in the southeast United States market. Potential competition was important to conserve, the Court said in that case, because as a substitute for actual competition it may restrain producers from raising prices to excessive levels. Indeed, the Court suggested that potential competition may be the only compensation for the imperfection of actual competition in many markets:

> The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated.[101]

The Court reviewed the evidence indicating that both parents of the joint venture had a strong interest in entering the relevant market area and had the capacity to do so at a reasonable profit. Holding that subjective evidence as to the actual intent of the parties to enter the market was excessively difficult to procure and possibly inconclusive, the Court, addressing an issue that is important in the banking context, determined to rely upon objective factors to confirm the existence of a prima facie case. But on remand to the trial court, no new evidence was introduced on the issue of entry and the district court dismissed the government's case, finding that it was not proba-

[99] In language especially relevant to the application of potential competition theory to banking, the Court rejected as irrelevant the trial court finding that Pacific Northwest could not have entered the market because of its inability to develop a project acceptable to regulatory agencies. The opinion refers to the language of section 7 that focuses upon acquisitions which *may be* anticompetitive, and reasons that regulatory agency approval was not so improbable that the potential competition effect of Pacific Northwest was diminished.

[100] 378 U.S. 158 (1964).

[101] *Id.* at 174.

ble that either parent would have entered independently.[102]

Backed by the support from the Supreme Court in *El Paso* and *Penn-Olin*, the Federal Trade Commission felt encouraged to apply the concept of potential competition with greater freedom, supplying it a more complete rationale. In *Beatrice Foods Co.*,[103] the Commission reviewed a series of geographic market extension mergers and utilized the potential competition concept as the basis for finding unlawfulness under section 7 of the Clayton Act. The decision contains a lengthy discussion of potential competition and its influence upon market behavior.

> Thus, . . . the state of potential competition . . . may have a significant bearing on the degree to which a concentrated market will exhibit the symptoms, such as high prices, of weak or ineffective competition; and a firm not actually selling in a market, a firm that is merely a prospective or potential competitor there, may nevertheless be a significant competitive factor in the behavior of the market. It disregards business realities to view such a firm, which may be as much a real competitive factor as the firms currently selling in the market, as being entirely 'outside' the market, or to deny that, just as the elimination of an actual competitor may adversely affect the competitive structure of the market, so may the elimination of a potential competitor.[104]

The opinion does not contend that actual and potential competition are interchangeable. First, in a competitively structured, unconcentrated market, the elimination of a potential competitor is much less important for competition than the elimination of an actual competitor. Prices are already likely to be at a competitive level and the restraining effect of potential competition may well be irrelevant. Next, the adverse effects that result from an absence of actual competition are rarely cancelled out completely by the presence even of substantial potential competition. Potential competition may tend to keep prices in a concentrated market down to an entry-discouraging level, but such prices may still be substantially higher than the prices that would have resulted from vigorous direct competition among sellers already in the market.

[102]The government appealed again, claiming that the lower court had given undue weight to subjective evidence, but the dismissal was affirmed by an equally divided Supreme Court. 389 U.S. 308 (1967).

[103]1965-67 TRADE REG. REP. ¶ 17,244 (FTC 1965).

[104]*Id.* at 22,330.

Finally came *Procter & Gamble.*[105] Procter, the nation's largest manufacturer and seller of household cleansing products, acquired Clorox, which dominated the highly concentrated household liquid bleach market. Among the central grounds upon which the acquisition was eventually held unlawful by the Supreme Court was the elimination of potential competition. Once persuaded that Procter was the most likely potential entrant into the household liquid bleach market because of its enormous resources, the close relation of its products to those of Clorox, and its previous history of independent entry into related product lines, the Supreme Court discussed the influence upon market behavior that Procter's preacquisition potential competition posed:

> It is clear that the existence of Procter at the edge of the industry exerted considerable influence on the market. First, the market behavior of the liquid bleach industry was influenced by each firm's prediction of the market behavior of its competitors, actual and potential. Second, the barriers to entry by a firm of Procter's size and with its advantages were not significant. There is no indication that the barriers were so high that the price Procter would have to charge would be above the price that would maximize the profits of the existing firms. Third, the number of potential entrants was not so large that the elimination of one would be insignificant. Few firms would have the temerity to challenge a firm as solidly entrenched as Clorox. Fourth, Procter was found by the Commission to be the most likely entrant. These findings of the Commission were amply supported by the evidence.[106]

Thus the Federal Trade Commission's disapproval of the acquisition was affirmed by the Supreme Court.

These few cases constitute the body of potential competition jurisprudence in the conventional merger context. The Department of Justice Merger Guidelines, issued in May of 1968, accept this view of potential competition as involving the existence of a concentrated market and the elimination of one of relatively few likely entrants into that market. The Guidelines predict that the Department will ordinarily challenge any merger between one of the most likely entrants into the market and

> (i) any firm with approximately 25% or more of the market;
> (ii) one of the two largest firms in the market in which the

[105] FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).
[106] *Id.* at 581.

shares of the two largest firms amount to approximately 50% or more;
(iii) one of the four largest firms in the market in which the shares of the eight largest firms amount to approximately 75% or more, provided the merging firm's share of the market amounts to approximately 10% or more; or
(iv) one of the eight largest firms in the market in which the shares of these firms amount to approximately 75% or more, provided either (A) the merging firm's share of the market is not insubstantial and there are no more than one or two likely entrants into the market, or (B) the merging firm is a rapidly growing firm.[107]

The Guidelines identify likely potential entrants by taking into account a firm's capability of entering on a competitively significant scale relative to the capability of other firms in the market and the firm's economic incentives to enter. The firm's incentives may be evidenced by the general attractiveness of the market in terms of risk and profit, any special relationship of the firm to the market, the firm's manifested interest in entry, the natural expansion pattern of the firm, or any other similarly persuasive suggestions of incentive.[108]

The Department of Justice had suffered a string of trial court failures in its attempts to apply potential competition theory to bank mergers when the *Greeley* case[109] was argued in the Supreme Court. In the first, *United States v. Crocker-Anglo National Bank,*[110] a three-judge district court found that neither party to a bank merger would have moved into the area of the other, that it was neither desirable nor feasible for either to do so, and that even if they had wanted to do so, the Comptroller of the Currency would not have permitted any of the entries needed to create a statewide system. The Comptroller had testified at trial that he would not have permitted Crocker to branch into the relevant market and further testified that, for policy reasons, important sections of the relevant market had been closed by regulatory authorities. Further, the evidence showed that competition in the market was vigorous, with at least 75 to 80 banks operating in the area. The number of banks had increased by 50% in two years and there were at least two new applications for banking offices

[107]Department of Justice Merger Guidelines, ¶ 18.

[108]*Id.* In interesting contrast to the 'convenience and needs' provisions of the Bank Merger Act, the Guidelines reject the production of economies as a justification for an anticompetitive merger. *Id.* ¶ 18(c).

[109]United States v. First Nat'l Bancorporation, Inc., 410 U.S. 577 (1973).

[110]United States v. Crocker-Anglo Nat'l Bank, 277 F. Supp. 133 (N.D. Cal. 1967).

for each permit that became available. Finally the evidence showed that the potential competitors included some of the world's largest banks and, thus, the presence or absence of one potential competitor would have no material effect upon competition in the market. The court also held that any anticompetitive consequences of the merger would be clearly outweighed by factors of "convenience and needs," including increased competition among statewide banks.

In the *Jackson* case,[111] the court decided that the merger of the second largest bank in Mississippi with the Bank of Greenwood, resulting in the second largest statewide banking organization, with a 46% market share in one Mississippi county, was not unlawful. Again the opinion highlighted the difficulty of proving the likelihood of entry in an industry where the necessity of approval by a regulatory authority always stands as an obstacle. As in *Crocker-Anglo*, substantial testimony existed that regulatory authorities, both state and federal, would not permit de novo entry until a substantial change of circumstances in the relevant geographic market had been achieved. Even assuming that the Jackson bank were a likely potential entrant, and there was substantial evidence controverting such an assumption, the court found nevertheless that there were many potential entrants and the elimination of the defendant as one would have only a minimal adverse impact upon competition. The court found that any anticompetitive effects would be outweighed by the benefits of service of the convenience and needs of the community.

Similar cases followed in Maryland[112] and Idaho.[113] Both cases evaluated the potential competition effect of a geographic market extension acquisition and found that the likelihood of de novo entry was minimal, primarily because of the difficulty of obtaining regulatory approval. Again in each case, the acquisition was said to involve significant beneficial effects that would outweigh any anticompetitive effects, thus demonstrating the merger's legality.

Finally, though the complaint was filed subsequent to the complaint in the *Greeley* case, the government went to trial in *United States v. United Virginia Bankshares, Inc.*[114] before *Greeley* came to the Supreme Court. As in the other losses, the government failed to persuade the court that the statewide bank holding company was a likely de novo entrant, or that it was one of few such likely entrants, or even that the market was sufficiently concentrated that the loss

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[111]United States v. First Nat'l Bank, 301 F. Supp. 1161 (S.D. Miss. 1969).

[112]United States v. First Nat'l Bank, 310 F. Supp. 157 (D. Md. 1970).

[113]United States v. First Nat'l Bank, 315 F. Supp. 261 (D. Idaho 1970).

[114]347 F. Supp. 891 (E.D. Va. 1972).

of a potential entrant would have an anticompetitive effect. In addition, the court found that the acquisition would have a beneficial effect in servicing the convenience and needs of the community, and that on both accounts, therefore, the acquisition was lawful.

For one reason or another, the Solicitor General failed to appeal any of these cases to the Supreme Court. Thus, at the time *Greeley* was argued, the government had tried six potential competition cases in the trial court and had lost every one, but had failed to carry any case to appellate review.[115] *Greeley* was to be the landmark case.

On July 9, 1969, First National Bancorporation, the second largest bank holding company in Colorado, applied to the Federal Reserve Board for approval of the acquisition of the First National Bank of Greeley, the second largest commercial bank in Greeley, Colorado. The Comptroller of the Currency recommended approval, but the Attorney General advised the Federal Reserve Board that the acquisition would have a significantly adverse effect upon competition.[116] The Federal Reserve Board approved the application by a 4-to-3 vote.

The government filed a civil antitrust action, claiming that the acquisition would substantially lessen competition by eliminating the acquiring bank as a potential entrant into the Greeley area, thereby removing it as an external influence on the relevant market and contributing to the trend toward dominance of the state's banking institutions by a few large holding companies.[117]

The district court began its opinion by agreeing with the government on two points contested at trial. First, it recognized commercial banking as the relevant product market. In *Philadelphia Bank*,[118] the

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[115]Statements by Antitrust Division officials blamed this curious state of affairs on "unusual factual problems" in each case. Address by Donald I. Baker, "Bank Acquisitions in New Markets: A Whiff of Clorox and Garlic," Michigan State Bar Convention, in Detroit, Michigan, Sept. 24, 1970.

[116]Advice letters from the Attorney General, until recently, usually contained one of three possible formulations. The "significantly adverse effect" letter was thought to forecast probable suit. The "substantially adverse effect" letter, though not likely to produce suit, was thought to demonstrate strong opposition by the Department of Justice. The "adverse effect" letter meant opposition but no suit. In recent months, this code has apparently been abandoned since acquisitions producing "significantly adverse effect" letters have not resulted in suits by the Department of Justice.

[117]In a later amendment to the complaint, the Department of Justice added an allegation that actual competition would be eliminated since the acquired bank would be foreclosed as a customer for correspondent banking services in Colorado. The transaction would thus contribute to the trend of foreclosure of a substantial portion of the market for correspondent banking services as the result of growing holding company ownership both of supplier and customer banks.

[118]374 U.S. 321 (1963). *See also* United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350 (1970).

Supreme Court had held that the cluster of products and services denoted by the term commercial banking was a distinct line of commerce peculiarly appropriate for measuring competition among banks. District courts in the potential competition cases had questioned that holding because it did not take into account the competitive effect of the activities of non-bank financial institutions, such as savings and loan companies, credit unions and the like.[119] Also, the district court held that the relevant geographic market was the Greeley area, as the government had contended. While the defendants had argued for a geographic market composed of the entire county surrounding Greeley, evidence at trial showed that the vast majority of the Greeley bank business came from the Greeley area, with only insignificant amounts coming from the rest of the county.

The district court then squarely held that the evidence showed that Bancorporation had no intention of entering the Greeley market if the acquisition were disapproved. There was evidence that both federal and state regulatory officers would refuse to grant a de novo charter during the foreseeable future. Further, the court found a lack of evidence to support the contention that Bancorporation had any influence on competition from its position "standing in the wings." The court thus decided that the government had failed to prove the probability of any anticompetitive effect based on the application of potential competition theory.[120]

In its briefs in the Supreme Court, the government argued that the lower court had required an unduly high standard of proof of anticompetitive effects. The district court had called for proof of probability, whereas the government noted that the language of section 7 of the Clayton Act condemned acquisitions whose effect "may be" substantially to lessen comptition.[121]

The government also criticized the lower court as having relied excessively on subjective criteria, in particular the testimony of offi-

[119]United States v. Idaho First Nat'l Bank, 315 F. Supp. 261 (D. Idaho 1970); United States v. First Nat'l Bank, 310 F. Supp. 157 (D. Md. 1970); United States v. First Nat'l Bank, 301 F. Supp. 1161 (S.D. Miss. 1969); United States v. Crocker-Anglo Nat'l Bank, 277 F. Supp. 133 (N.D. Cal. 1967).

[120]The court also failed to find evidence to support the government's second contention that the acquisition would result in vertical foreclosure of a customer in the market for the sale of correspondence services.

[121]The cases have used language of probability, rather than simply of possibility. United States v. Third Nat'l Bank, 390 U.S. 171 (1968) ("tended to lessen competition"); United States v. Von's Grocery Co., 384 U.S. 270 (1966) ("reasonable probability"); United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964) ("reasonable likelihood"). In Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962), the Court stated:

> . . . Congress used the words "may be substantially to lessen competition" to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competi-

cers of the defendants as to future plans regarding entry, rather than objective criteria in determining the substantiality of Bancorporation's role as a potential competitor. The lower court had also failed to give adequate weight to the existing concentration in the Greeley area, particularly in the context of holding company expansion throughout Colorado, and was insensitive to the need to preserve potential competitors which could deconcentrate markets by independent entry or toehold acquisition.

In their briefs in the Supreme Court, the defendants countered each of the government's arguments. First, they contended that Greeley was not "highly concentrated" in any meaningful sense, given the nature of the banking industry. Next, they argued that Bancorporation had no intention of entering the Greeley market other than through the acquisition, and that this "subjective" evidence was confirmed by the "objective" fact that the Greeley banking market was relatively unattractive. Further, Bancorporation probably could not secure a charter even if it sought one. And finally, the defendants urged that since more than 60 groups in Colorado had formed new banking organizations in the last decade, the elimination of one potential entrant could have no discernible impact on competition.

On February 28, 1973, the judgment was affirmed without opinion by an equally divided Supreme Court.[122] But far from being discouraged by the 4-4 vote in the first Supreme Court case to consider potential competition theory as applied to a bank merger, the government has clearly signalled its intention to keep trying.[123] And so it has.[124]

> tion; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act.

See also United States v. International Tel. & Tel. Corp., 324 F. Supp. 19, 30-31 (D. Conn. 1970).

[122] Powell, J., took no part in the consideration or decision of the case.

[123] *See, e.g.*, Address by Donald I. Baker, "Potential Competition in Banking: After Greeley, What?," Commercial Bank Management Program of the Columbia University Graduate School of Business, in Harriman, New York, March 19, 1973:

> The practical message from all this is that the government will continue to file cases of the general kind we have been bringing—but I expect that we shall stress to an even greater degree the importance of broad changes in statewide structure. In the long run, what is needed is a rule of law that in effect says that the largest banking organizations in the state cannot combine with other large banking organizations within those states." *Id.* at 22-23.

[124] *See, e.g.*, United States v. Connecticut Nat'l Bank, 362 F. Supp. 240 (D. Conn. 1973) (acquisition held lawful), *appeal filed*, 42 U.S.L.W. 3308 (U.S. Nov. 13, 1973) (No. 73-767); United States v. Marine Bancorporation, Inc., 1973 Trade Cas. ¶ 74,496 (W.D. Wash. 1973) (acquisition held lawful), *prob. jurisd. noted*, 42 U.S.L.W. 3226 (U.S. Oct. 15, 1973) (No. 73-38); United States v. Wachovia Corp., Civil No. ST-C-

Thus, the Supreme Court will apparently get another chance to solve this riddle during the present Term of court. Whatever the eventual outcome, any analysis of the problem must inevitably take into account the extent to which the application of conventional antitrust principles should vary because of the nature of regulation in the banking industry and the peculiar structure of the industry itself.

The potential competition theory that the government has sought to employ in its cases thus far depends upon two major assumptions: first, that a "concentrated market" is unlikely to yield the advantages of competition and, second, that the threat of entry by a potential competitor can nevertheless retrieve some of those benefits. What has not been widely realized thus far—and this is a typical problem when a court deals in regulated industry matters—is that the concepts of concentrated market and entry in the banking context do not have the same meaning as they do in the conventional manufacturing context.

In a typical manufacuturing industry, concentration can be defined by quantifying the amount of business that, in terms of market shares, each firm controls. The Department of Justice Guidelines adopted the conventional approach in defining a concentrated market as one in which the four leading firms account for at least 75% of the market.[125] The suggestion is that any market exhibiting such concentration is less likely to function effectively to produce expected consumer benefits.

However, these concepts do not transfer well into the banking context. First, market definition may be more uncertain in the case of banking than it is in the conventional context. For instance, some cases have found markets for larger or smaller borrowers and depositors.[126] More importantly, even though concentration ratios may be an index to competition in the conventional context, they may not be at all meaningful for banking. Because concentration ratios are meant to demonstrate inefficient market performance, when that linkage is not clearly present as may be the case in banking, concentration ratios should not be so crucial. In other words, if in one industry the market can easily support a multitude of entities, each attaining sufficient size to realize economies of scale, a level of concentra-

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72-40 (W.D.N.C., Dec. 1, 1972) (product extension merger wherein complaint dismissed pursuant to government motion upon termination of the acquisition agreement); United States v. Bankers Trust, Civil No. 72-830 (D.S.C., July 11, 1972); United States v. Trans Texas Bancorporation, Inc., 1972 Trade Cas. ¶ 74,257 (W.D. Tex. 1972) (holding acquisition lawful), *aff'd*, 412 U.S. 946 (1973).

[125]Department of Justice Merger Guidelines, ¶ 5.

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

tion for substantially fewer firms would indicate a dangerous situation. On the other hand, in the banking industry, where apparently fewer firms in a market are the rule in order to realize economies of scale, a higher level of concentration should not be alarming.

Thus, the defendants were able to demonstrate in the *Greeley* case that the concentration of five banking organizations in Greeley, a city of nearly 40,000, was not unusual. Of 126 freestanding cities[127] with populations of 30,000 to 50,000 in the United States, only one city, Danville, Virginia, was served by more banks, and 113 were served by fewer.[128]

However, the trend of concentration may be of greater significance than the particular level. Thus, if fewer organizations serve a community than ten years ago, even though the level of concentration is low, regulators might well be concerned. However, even if the level of concentration is high, if more banking institutions compete in the market than was the case ten years earlier, an entirely different attitude would be justified. Thus, the Supreme Court was justifiably concerned in *Philadelphia Bank* because a reduction in the number of banks in the relevant market from 108 to 42 had occurred in a 13-year period, while the market share of the seven largest banks had increased from 61% to 90%.[129] However, quite a different situation greeted the Court in the *Greeley* case, where over a ten-year period the number of commercial banking organizations in the city of Greeley rose from 3 to 4 at the time of trial, and to 5 by the time the case was argued, a 66% increase altogether.[130]

Thus, it seems fairly clear that whatever concentration ratios may mean in the conventional manufacturing context, they may stand for something quite different in the banking industry. And that difference should suggest different treatment by the courts in bank merger cases. Much the same kind of reasoning is applicable to the question of entry.

In the nonregulated context, entry is a question simply of capacity and incentive. Banks, on the other hand, require regulatory approval for entry into new markets, a fact inconvenient for the government in these cases. Thus, a crucial part of the cases tried thus far has been testimony of regulators that entry de novo into the relevant market

[127] "Free-standing" connotes cities politically not a part of a larger metropolitan area.

[128] Brief for Appellees at 5, United States v. First Nat'l Bancorporation, Inc., 410 U.S. 577 (1973).

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

[130] Brief for Appellees at 4, United States v. First Nat'l Bancorporation, Inc., 410 U.S. 577 (1973).

would not be permitted in the foreseeable future. It becomes a question, then, of trivial importance to talk of the effect of a potential entrant waiting in the wings if, to the certain knowledge of all involved, entry is impossible for lack of regulatory permission. And yet the Department of Justice continues to request the courts to consider the question of potential entry irrespective of regulatory prohibition.

Where regulators are able to take such stands, that evidence must be regarded as highly persuasive on the question of potential entry. When combined with the conservative business attitudes characteristic of bankers and the restrictive state laws governing branching in general, it is quite clear that what may support entry in industry generally may not do so at all in the banking industry.[131]

Finally, in the conventional manufacturing context, the likelihood of entry is sometimes demonstrated by past de novo entries, the inference being that if institutional policy does not preclude them and the record demonstrates their having been tried in the past, the chances are better for such entry in the future. Again this is a plausible theorem in a typical industry situation but may not be so plausible where banks are involved. A continual theme in bank development in this country has been the establishment of new branches to follow the customers as they have moved from the inner cities to the suburbs. Thus, a city bank might quite plausibly establish a new bank in the suburbs, convinced of the presence of a market and seeking to accommodate the needs of old customers in their new suburban homes. But such a calculus is entirely different from that applicable to the establishment of new banks in entirely alien territory, already occupied by local banks with customer ties. Thus, it would be wrong to assume that a bank with a record of de novo establishments in suburban communities would even consider that possibility in connection with movement into, for instance, a distant rural banking market.

Even this short recitation suggests that regulators and courts alike ought to approach the application of potential competition theory to banking with the utmost caution. Mechanical statements of rules applicable to nonregulated industries should not be accepted in the absence of proof of their accuracy in the regulated industry context. What regulators are most concerned with—and courts should be, too—is the optimum structure for the banking industry. That is

[131]In addition, to the extent the state and federal laws on usury impose an indirect ceiling on profits for at least some of a bank's operations in a particular market, normal indicia of attractiveness for entry, such as growth, may in the banking context not prove so intriguing.

surely a question as to which empirical study can contribute useful data, and the introduction of concepts most clearly applicable in different industries should probably be regarded with suspicion.

Indeed, this history of antitrust policy in the bank merger context demonstrates that the entire system of parallel regulatory and court determinations of effects on competition and satisfaction of the convenience and needs of the community to be served is incoherent and duplicative. The revealed insensitivity to the peculiar character of regulation and the special economic characteristics of the industry is predictable, although thoroughly undesirable. That difficulty could probably be cleared up by new federal legislation to repose sole and exclusive regulatory authority in a single agency with appellate review pursuant to clear standards in the appropriate federal court of appeals. While as of now such a proposal seems unlikely to be very successful, it is quite possible that the Supreme Court's answer, unless carefully considered, to the problem of potential competition theory and bank mergers may produce a drive for new legislation to achieve a more rational regulatory scheme.

While the events of the year thus produced no definitive resolution of the bank acquisition-potential competition mystery, the Supreme Court decided one case that may have much to do with the eventual outcome. In *United States v. Falstaff Brewing Corp.*,[132] by a vote of 5 to 2,[133] the Court addressed the issue of potential competition in the context of the New England beer brewing market and attempted to set forth standards for identifying the effects of potential competition. The district court's dismissal of the complaint[134] was reversed in a welter of conflicting potential competition theories, and the case was remanded for inquiry into whether the Falstaff acquisition met the Supreme Court's standards.

The geographic market extension case[135] arose in connection with the acquisition by Falstaff Brewing Corporation, a multi-state brewer aspiring to national status, of the Narragansett Brewing Company, the largest seller of beer in the market comprised by the six New England states, with approximately 16% of the market. In its com-

[132] 410 U.S. 526 (1973).

[133] The majority opinion, written by White, J., was joined in by Burger, C.J., and Blackmun, J. Douglas, J., concurred in part and Marshall, J., concurred in the result. The dissenting opinion by Rehnquist, J., was joined in by Stewart, J. Powell and Brennan, JJ., took no part in the case.

[134] United States v. Falstaff Brewing Co., 332 F. Supp. 970 (D.R.I. 1971).

[135] Seller A in a regional market may acquire Seller B of the same product in a different regional market. Such a transaction is termed a geographic market extension acquisition.

plaint, the government contended that the acquisition violated section 7 of the Clayton Act[136] because it eliminated Falstaff's potential competitive effect. Falstaff denied that it was a potential competitor and persuaded the district judge that its management had consistently determined not to enter the market unless it could do so by acquisition of a brewery with an existing system of distribution. Evidence was introduced at trial that Falstaff's management had considered alternative means of entry, including construction of a new brewery, the shipment of beer from the nearest existing Falstaff brewery in Fort Wayne, Indiana, or an acquisition of another smaller brewery on the East Coast, but that each alternative had been rejected because of significant economic and commercial disadvantages. The district judge thus concluded that the acquisition of Narragansett could not have eliminated Falstaff as a potential competitor.

There was also evidence at trial to the effect that the New England beer market was highly competitive and that Narragansett's share of the New England market had been reduced from 21.5% in 1964 to 15.5% in 1969. A corresponding increase of two leading national brewers had taken place over the same years from 16.5% to 35.8%. With these figures clearly in mind, the district judge concluded:

> It is my considered opinion that said acquisition by Falstaff will serve to improve the competitive position of the Narragansett brand of beer in the New England beer market which is intensely competitive, and enable it to compete successfully with the brands of large, national breweries which dominate said market.[137]

The trial judge thus dismissed the complaint.

On appeal, the government argued that the trial judge had applied an erroneous legal standard and that the subjective intent of the management of an acquiring company could never be conclusive as to whether that company was a potential competitor.[138] Rather, the government proposed that a careful analysis of objective economic evidence, including assessment of the potential entrant's financial capability, its economic incentive and the likelihood of success, furnished vastly more reliable information as to that company's poten-

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[136] 15 U.S.C.A. § 18 (1973).

[137] 332 F. Supp. at 972.

[138] The subjective-objective evidence test is ably discussed in Pitofsky, *Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of Penn-Olin*, 82 HARV. L. REV. 1007, 1021-30 (1969).

tial for entry into a market.

Viewing the objective evidence, the government contended that Falstaff was a significant potential entrant into the New England beer market. The capability, the interest, the incentive and the absence of significant obstacles were all clear. Falstaff, in acquiring Narragansett, eliminated the competitive effects of its role as a potential entrant and removed the possibility for deconcentration of a highly concentrated market.

Falstaff's position was quite simple. The lower court had relied upon the "credible evidence," and there was thus no issue for the Supreme Court to determine. The government had simply failed to prove by a preponderance of the evidence that Falstaff was a potential competitor in the New England beer market. There was more than ample evidence to sustain the Falstaff position that it was not a potential entrant into the New England market independently, that it was not a potential entrant by means of a "toehold" acquisition and that, standing in the wings, it did not present existing entities within the market the potential competition of the threat of entry.

The Supreme Court remanded the case for a proper assessment of Falstaff as a potential competitor. The Court's majority opinion stated that the district court's definition of potential competition was too narrow. Rather than analyze solely whether Falstaff might have entered the market de novo, the district court should have looked to see whether Falstaff, positioned as it was on the edge of the market, exerted a beneficial influence on competitive conditions in that market. Such an influence could follow, the Court pointed out, despite the nature of the Falstaff management's intent, if it were reasonable for entities already in the New England beer market to consider Falstaff a possible entrant and to act accordingly:

> The District Court should therefore have appraised the economic facts about Falstaff and the New England market in order to determine whether in any realistic sense Falstaff could be said to be a potential competitor on the fringe of the market with likely influence on existing competition.[139]

What is remarkable about this theme is that some question exists whether any evidence was introduced below bearing on the issue or, indeed, whether the government ever alleged such a theory in its complaint. Surely remand would be pointless if no relevant evidence exists. Thus it was necessary for Justice White to write a 2½-page footnote in the opinion attempting to repair this defect in the govern-

[139] 410 U.S. at 533-34.

ment's case.[140] The Court decides that the government had stated the issue adequately in its complaint, but concedes that no direct evidence had been introduced. Rather, the record was full of "circumstantial evidence" relevant to the question of anticompetitive impact through the loss of the procompetitive, on-the-fringe influence.

In a separate section, the Court expressly does not decide whether section 7 might prohibit a market extension merger without influence on the state of competition in the market. But while excluding from the scope of decision the question whether the potential for de novo or toehold entry might be relevant, Justice White then goes on to offer support for the affirmative view by citing a string of Supreme Court cases. Such support is clearly dictum, however, since the opinion concludes with a statement that the Court has not faced the question.[141]

What is significant in the Court's opinion is the absence of any questioning of the trial court's finding that Falstaff would not have entered the market de novo. Rather, the Court accepts the finding and asks the trial judge only to survey the question whether in any event actual competitors in the New England market might have acted as if the facts were to the contrary.

The two concurring opinions define positions that must have been considered, and rejected, by the Burger-Blackmun-White core of the Court's majority. Justice Douglas takes the most extreme position, arguing that on the present record a reasonable likelihood existed that the acquisition would tend to lessen competition substantially. But while he was inclined to reverse and direct the district court to enter judgment for the plaintiffs, he concurred in the Court's statement of the law governing the on-the-fringe impact of a potential competitor, and joined the judgment remanding the case for further proceedings.

After pointing out that the majority's remand leaves the trial judge with the task of reassessing "nonexistent evidence under a theory advanced by neither of the parties,"[142] the Marshall concurrence lays out a lengthy but orderly exposition of another solution to the case. If Justice White agreed with the finding of the trial judge that Falstaff was not a likely entrant into the market, such a finding could only be based on the subjective evidence produced by the defense. Justice Marshall would prefer not to rely on such evidence where more objective evidence was available. Thus, in his view, the

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[140] *Id.* at 534-36 n.13.

[141] *Id.* at 537-38.

[142] *Id.* at 546.

trial judge had applied the wrong standard in assessing a crucial legal question—whether Falstaff was a potential entrant into the market:

> I would hold that where, as here, strong objective evidence indicates that a firm is a potential entrant into a market, it is error for the trial judge to rely solely on the firm's subjective prediction of its own future conduct. While such subjective evidence is probative on the issue of potential entry, it is inherently unreliable and must be used with great care. Ordinarily, the District Court should presume that objectively measurable market forces will govern a firm's future conduct. Only when there is a compelling demonstration that a firm will not follow its economic self-interest may the District Court consider subjective evidence in predicting that conduct. Even then, subjective evidence should be preferred only when the objective evidence is weak or contradictory.[143]

Justice Marshall accordingly would remand the case for further consideration of the evidence under this standard. Although fact-finding is the peculiar province of the trial judge in the first instance, when the facts are found under a standard that is legally deficient, Justice Marshall prescribes for the appellate court the task of establishing the correct legal standard by which the facts are to be judged. He would thus remand for a new determination of facts under a standard emphasizing the probity of objective evidence.

Thus, the majority accepts the trial judge's determination that Falstaff would not have entered the market de novo or by a toehold acquisition if the acquisition were prohibited. Nevertheless, the Court asks the trial judge to search the evidence for a clue as to whether Falstaff was a potential competitor in the sense that, positioned at the edge of the market, it exercised a beneficial influence on competitive conditions in the market.

What is perhaps most significant about the court's opinion is that it does not espouse the Marshall position. Subjective evidence is not downgraded in favor of objective evidence. Perhaps the persuasiveness of the Rehnquist-Stewart dissent, which argues that all economic forecasting requires a focus on intent and thus is in essence subjective, had an impact on the attractiveness of the well-reasoned Marshall theme. But there is nothing surprising in this emphasis on intent, which is crucial to determinations in many antitrust contexts.[144] Where the prediction of future events is key, the plans or

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[143] *Id.* at 548.

[144] Intent is an essential element of cases charging attempts to monopolize under section 2 of the Sherman Act, 15 U.S.C.A. § 2 (1973), and can be a necessary element

intentions of a firm's management may be the pivotal point of proof. Where, on the other hand, the question is whether a firm, though not a likely entrant into a market in fact, may be perceived by entities already in the market as such, proof of intent hardly seems relevant. Rather, in such cases, the opinions of the competition within the market would seem more valuable, as would objective facts to which the competition has access in constructing its views.

What the case recognizes in a clear way, perhaps for the first time, is that a firm, not in fact likely to enter the market, may have just this kind of procompetitive effect at the edge of the market.[145] The result thus is that the statute's apparent focus upon companies in competition with one another is further widened. At first, the horizontal acquisition was the focus of section 7 enforcement, and the market definition portion of the case was used to widen the scope of the statute's application.[146] Then, by the device of focusing upon potential competition, the acquisition by a company at the edge of the market of a company within the market was held to be within the scope of possible prohibitions under section 7, because in the absence of the acquisition the company at the edge of the market would become an independent entrant.[147]

Now, in *Falstaff*, the Court has extended the scope of section 7 even to firms not likely entrants by an objective standard, as long as they may be erroneously perceived as such by competition already in the market. The lengths to which the Court went in justifying its remand on this ground suggest not simply that there was disagreement as to the viability of subjective evidence, but that there may have been agreement as to the necessity to emphasize the competitive influence of firms "in the wings." The inevitable result will be to broaden the number of cases in which conglomerate acquisitions

in cases alleging unreasonable restraints of trade under section 1 of the Sherman Act, 15 U.S.C.A. § 1 (1973). In addition, deliberateness, which is understood as a substitute for actual intent, plays a role in section 2 monopolization cases.

[145]*Compare* United States v. Continental Can Co., 378 U.S. 441 (1964). *See also* Ford Motor Co. v. United States, 405 U.S. 562 (1972); FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964).

[146]For expansive approaches to the problem of market definition, *see, e.g.*, United States v. Pabst Brewing Co., 384 U.S. 546 (1966) (government's failure to prove geographic market not a cause for dismissal). United States v. Continental Can Co., 378 U.S. 441 (1964) (metal and glass containers a single line of commerce); Brown Shoe Co. v. United States, 370 U.S. 294 (1962) (medium high-priced shoes and low-priced shoes the same line of commerce).

[147]FTC v. Proctor & Gamble Co., 386 U.S. 568 (1967); United States v. Wilson Sporting Goods Co., 288 F. Supp. 543 (N.D. Ill. 1968).

can be challenged, while making proof of a violation of section 7 easier. A poll of the competition within the marketplace, who must in pursuit of their own economic welfare, object to entry of new competition by acquisition of an entity already in the market, will almost always be favorable to the government's position. Falstaff may have avoided losing the battle by saving the probative value of subjective evidence; but when the Supreme Court put in issue the competitive influence of Falstaff, not in the marketplace, but in the perceptions of its competitors, Falstaff may have lost the war.

IV

Express and Implied Immunity—Hughes Tool and Seatrain

Of all the methods of accommodating antitrust policy to a regulatory scheme, the grant of express immunity by statutory enactment is the neatest. The agency is required by statute to evaluate a particular transaction pursuant to defined standards. The effect on competition is usually explicitly, sometimes only implicitly, included. But once having done its duty, the approval by that agency of the transaction confers an insulating immunity so that collateral attack by the government or other interested parties in federal district court is precluded. The standards of appellate review are those traditional in the administrative agency context. So long as the action of the agency is within the scope of the statutory immunity, the antitrust laws cannot intrude in a different forum.

Just such a case was decided this Term by the Supreme Court in *Hughes Tool Co. v. Trans World Airlines, Inc.*[148] The case arose out of the relationship between Hughes Tool and TWA. During the Second World War, Hughes Tool began to acquire TWA stock and, as a result, in 1944 sought authorization for control from the Civil Aeronautics Board.[149]

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[148] 409 U.S. 363 (1973).

[149] Section 408 of the Federal Aviation Act, 49 U.S.C.A. § 1378 (1963), *as amended*, (Supp. 1973), makes illegal mergers, consolidations and other transactions without the approval of the Civil Aeronautics Board. Section 408(a)(5), 49 U.S.C.A. § 1378(a)(5), requires the approval of the Board when "any person engaged in any other phase of aeronautics" seeks to acquire control of any air carrier in any manner whatsoever. Section 408(b), 49 U.S.C.A. § 1378(b), authorizes and directs the Board to approve acquisitions of control that are in the "public interest" and prohibits approval of any transactions "which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier" not a party to the transaction. Section 102 of the Act requires that in assessing the public interest and the public convenience and necessity, the Board should consider, among other things, "[c]ompetition to the extent necessary to assure the sound development of an air

Section 414 of the Federal Aviation Act relieves from the operation of the antitrust laws any person affected by any order under section 408 "insofar as may be necessary to enable such person to do anything authorized, approved or required by such order."[150] This was the statutory context in which the Civil Aeronautics Board issued a series of decisions reviewing the control of TWA by Hughes Tool. In 1944 the CAB authorized control of nearly 50% of the outstanding stock of TWA.[151] The 1948 and 1950 decisions of the CAB concern the continuing relationship between TWA and Hughes Tool. Following detailed hearings inquiring into every area of the company's activities, including the differences between managements with respect to the acquisition of new flight equipment, the Board first asserted its jurisdiction and then approved the complete control of TWA by Hughes Tool subject to certain conditions.[152] In 1960, the CAB approved a major proposal for the acquisition of equipment which involved fundamental changes in the TWA-Hughes Tool relationship.[153] During the years 1944 through 1960, every acquisition of equipment and every financing required Board approval, and each received such approval.

Some time after the 1960 approval TWA, no longer under the control of Hughes Tool, filed suit alleging violations of the antitrust laws and the resulting injury of its business. The complaint, as analyzed by the court of appeals, concerned the conduct of Hughes Tool as the controlling stockholder during the years 1955-1960. In those years, when the commercial air industry was converting to jet aircraft, Hughes Tool in a series of five transactions was alleged to have diverted or delayed or otherwise mishandled the delivery of some 63 jet aircraft, with resulting lost profits. The complaint thus charged violations of sections 1 and 2 of the Sherman Act, and sections 3 and 7 of the Clayton Act.[154] It requested treble damages of $105 million, divestiture and other injunctive relief.

After a series of intricate lower court maneuvers over a period of years, a default judgment was entered for over $145 million with interest at the rate of 7½%. Following opinions confirming the award

transportation System properly adapted to the needs of the foreign and domestic commerce of the United States . . . ." 49 U.S.C.A. § 1302 (1963).

[150]49 U.S.C.A. § 1384 (1963).

[151]Transcontinental & Western Air, Inc., 6 C.A.B. 153 (1944).

[152]Transcontinental & Western Air, Inc., 9 C.A.B. 381 (1948); Trans World Airlines, Inc., 12 C.A.B. 192 (1950).

[153]Trans World Airlines, Inc., 32 C.A.B. 1363 (1960).

[154]15 U.S.C.A. §§ 1, 2, 14 and 18 (1973).

of damages,[155] the court of appeals affirmed.[156] A petition and a cross-petition for certiorari were then filed.[157]

Hughes Tool argued in the Supreme Court that the Federal Aviation Act portrayed a congressional intention to leave the CAB free to balance the anticompetitive effects of an acquisition of control against other factors relevant to the public interest, and gave antitrust immunity to approved control relationships on the conditions that the Board has required. This broader spectrum of considerations, beyond the limited scope of the antitrust laws, was the public interest standard defined by Congress. The intrusion of courts via construction of the antitrust laws into the realm of administrative discretion would lead to the collison of two regimes. Hughes Tool went on to argue that the acts for which TWA was awarded damages were not antitrust violations but at most state law claims for mismanagement. In addition, the measure of damages was faulty because TWA was not required by the lower courts to establish a causal relationship between the antitrust violations and the injuries suffered as required by section 4 of the Clayton Act.[158]

TWA argued that the legislative history of the Federal Aviation Act made it evident that the scope of CAB orders under section 408, and therefore the scope of any exemption under section 414, is limited to acquisitions of control and contemplates no approval of subsequent conduct, let alone approval of anticompetitive effects of unlawful conduct. Thus, the abuse of control charged in TWA's complaint was outside the Board's regulatory powers and the Board had no jurisdiction to consider the matter. The Federal Aviation Act provides relief from the antitrust laws only to the extent "necessary" to enable accomplishment of any action approved by such an order. But, TWA argued, since the CAB had no statutory authority to exempt from the antitrust laws action other than with respect to the acquisition of control itself, the Board's order had no insulating effect. Because these matters were beyond the scope of Board jurisdiction, there was by definition no interference by the courts with the regulatory scheme.[159]

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[155]Trans World Airlines, Inc. v. Hughes, 308 F. Supp. 679 (S.D.N.Y. 1969); Trans World Airlines, Inc. v. Hughes, 312 F. Supp. 478 (S.D.N.Y. 1970).

[156]Trans World Airlines, Inc. v. Hughes, 449 F.2d 51 (2d Cir. 1971).

[157]The cross-petition by TWA concerned the calculation of damages, interest and costs of suit.

[158]15 U.S.C.A. § 15 (1973).

[159]A memorandum was filed for the CAB as amicus curiae. The memorandum took the position that the CAB's orders authorizing Hughes Tool's control of TWA and permitting certain inter-company transactions did not immunize the conduct alleged

Justice Douglas, writing for the majority, concluded that the regulatory authority of the CAB covered the acts and practices alleged in the TWA complaint and that therefore the complaint should be dismissed.[160] The Court did not hold that the Federal Aviation Act completely displaced the antitrust laws.[161] However, in this case, the CAB had authorized acquisition of control of an air carrier by another corporation, and had continued specifically to authorize such transactions between the parent and the subsidiary as were in the public interest. Thus, the way in which that control was exercised was through the supervision of the CAB and not by the federal courts pursuant to the antitrust laws.

> The control which CAB is authorized to grant or deny under § 408 involves an appraisal of the impact of that control in terms of monopoly and competition; and the ongoing supervision entrusted to the CAB by § 415 is broad enough to put all transactions between parent and subsidiary—as originally conceived or subsequently exercised—under CAB supervision.[162]

Chief Justice Burger, writing the dissenting opinion, argued that the majority's decision went beyond the Supreme Court's prior decisions uniformly holding that repeal of the antitrust laws to accommodate other federal regulatory statutes was to be implied only if necessary to make the regulatory scheme work and even then only to the minimum extent necessary. Thus, the reach of the decision beyond the activities solely within the air carrier market left the dissenters uneasy:

> It is most unlikely that the concerns Congress expressed would have been put to rest by extending the new authority's preemptive antitrust responsibilities under § 408 beyond the air transportation market into every market that might happen to be touched by transaction with an air carrier.[163]

Failing to find either an explicit grant of jurisdiction in the Federal

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in the complaint. In addition, it contended that the application of antitrust remedies in the case did not conflict with the Board's exercise of its power and responsibilities under the Federal Aviation Act.

[160]The majority opinion was joined in by Brennan, Stewart, White, Powell and Rehnquist, JJ. Burger, C.J., filed a dissenting opinion in which Blackmun, J., joined. Marshall, J., took no part in the consideration or decision of the cases.

[161]*See* Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963).

[162]Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 387-88 (1973).

[163]*Id.* at 402.

Aviation Act reaching the actions alleged in the TWA complaint, and not persuaded that the absence of such authority was irrelevant to Hughes Tool's liability, Burger found the reasoning of the majority faulty and contended that the judgment of the court of appeals should be affirmed.

Whereas the Supreme Court in *Hughes Tool* found immunity from antitrust on the grounds of express exemption in the Federal Aviation Act, the Court was less impressed with the insulating capacity of section 15 of the Shipping Act[164] in another case last Term, *FMC v. Seatrain Lines, Inc.*[165]

In the fall of 1970, two steamship companies had submitted to the Federal Maritime Commission an agreement providing for a sale of assets from one to the other. The companies sought a determination as to whether the agreement was subject to the requirements and resulting antitrust immunity found in section 15 of the Shipping Act. Following publication, Seatrain Lines, Inc., another steamship company, protested the approval of the agreement and requested a hearing. The Commission denied the request for a hearing and approved the agreement. Seatrain then petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the Commission's order. Before that court, the United States, a statutory respondent, raised the jurisdictional question as to whether the Commission's statutory authority covered the acquisition.

The court of appeals ruled[166] that the Commission lacked jurisdiction under section 15 of the Shipping Act to approve merger agreements. Its conclusion was based both on the language and context of section 15 and on the legislative history of the provision. Subsequent congressional enactments did not, in the court's view, reflect a legislative recognition or a grant of Commission jurisdiction in the area. The Federal Maritime Commission then filed a petition for a writ of certiorari.[167]

In its brief in the Supreme Court, the FMC argued that an agreement for the acquisition of assets of one carrier by another was precisely the kind of agreement over which the Commission was given

[164]46 U.S.C.A. § 814 (Supp. 1973).

[165]411 U.S. 726 (1973).

[166]Seatrain Lines, Inc. v. FMC, 460 F.2d 932 (D.C. Cir. 1972).

[167]While Seatrain Lines, Inc., opposed the petition, the United States did not, although it agreed with the court of appeals' determination. However, because of the importance of the administration of the antitrust laws and the Shipping Act, and the conflict between the view of the District of Columbia Circuit and that of the Ninth Circuit in Matson Navigation Co. v. FMC, 405 F.2d 796 (9th Cir. 1968), the government did not oppose the granting of the writ of certiorari in the case.

jurisdiction by section 15 of the Shipping Act.[168] The Commission took the position that the acquisition of assets of one competitor by another was literally an agreement "controlling, regulating, preventing, or destroying competition." The Commission rejected the decision of the lower court that an acquisition, which is essentially a single, discrete event, could not come within the ambit of section 15 because it was not an ongoing agreement, which some had construed the language of section 15 to require.

The Commission argued that the legislative history of section 15 did not suggest any basis for the position that the language of the section should not be interpreted literally. Congress was aware of acquisitions in the shipping industry and seemed to have provided for their coverage by enacting the Shipping Act. Furthermore, congressional action after enactment of the Shipping Act supported the application of that statute to acquisition agreements. For instance, in 1950, Congress amended section 7 of the Clayton Act to include asset as well as stock acquisitions, and exempted from the Act's coverage transactions duly consummated pursuant to authority given by various federal agencies. When the amendment was originally proposed by the House, it did not include the FMC among the agencies enumerated in the exemption paragraph. That omission was called to the attention of the Senate and when the bill was subsequently enacted, the FMC was included. Thus, contended the Commission, since section 7 deals only with acquisitions, the inclusion of the Commission

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[168]Section 15 of the Shipping Act of 1916, 46 U.S.C.A. § 814 (Supp. 1973) provides in pertinent part:

> Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement.
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> . . . .
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> Every agreement, modification or cancellation lawful under this section . . . shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and acts supplementary thereto [the Sherman Act and accompanying procedural provisions].

in the exemption provision would have been meaningless if the Commission had no authority to "duly consummate" those types of transactions.

Finally, the Commission argued that acquisition agreements should be scrutinized by a tribunal knowledgeable in the procedures of balancing antitrust considerations with shipping industry factors. The ideal of effective and uniform regulation of the maritime industry did not permit, the Commission argued, a division of regulatory authority between different government agencies. Thus, the Commission's role was to evaluate antitrust policy together with other competing policies "in full accord with the kind of accommodation between antitrust and regulatory objectives approved by this Court. . . ."[169]

Seatrain responded by saying that the Commission lacked jurisdiction under section 15 to approve an agreement of acquisition. The specific language of section 15 does not give such authority, because it did not bestow a continuing Commission obligation to oversee potential antitrust violations; nor did the legislative history of section 15 or the principles of statutory construction lead to a contrary conclusion. Even if there were some ambiguity in the statute, Seatrain argued that the Court was bound to resolve it against antitrust immunity because the antitrust laws represent basic national economic policy to be applied except in the clearest cases of exemption.[170]

The Supreme Court agreed with Seatrain.[171] Speaking for a unanimous court, Justice Marshall concluded that by enacting section 15, Congress had not intended to give the Commission power to insulate from antitrust application those merger or acquisition agreements imposing no ongoing responsibility on the Commission. Instead, the focus of Congress was upon those agreements creating ongoing rights and responsibilities and therefore continuous Commission supervision.

For Marshall the crucial point was whether to interpret the language of section 15 of the Shipping Act to include merger agreements, which, he acknowledged, could be thought of as preventing competition[172] as described in that section:

[169]FMC v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 245 n.4 (1968).

[170]California v. FPC, 369 U.S. 482 (1962); United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956).

[171]Respondents Pacific Far East Lines, Inc., the Oceanic Steamship Company (the companies involved in the acquisition agreement), and the United States took positions in the Supreme Court essentially identical to that of Seatrain.

[172]In an interesting footnote, the opinion points out that the Commission had taken the position originally in denying Seatrain's application for a hearing that Seatrain had

> Without more, we might be inclined to agree that many merger agreements probably fit within this category. But a broad reading of the third category would conflict with our frequently expressed view that exemptions from antitrust laws are strictly construed . . . and that "[r]epeals of antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions."[173]

The reluctance of the Court except in the clearest cases to override the antitrust policy had led, Marshall continued, to the construction of the Shipping Act as conferring only a limited antitrust exemption in light of the fact that "antitrust laws represent a fundamental national economic policy."[174]

This reluctance to increase the number of cases subject to potential antitrust immunity seemed, in the Court's view, to be confirmed both by the structure of the Act and by the legislative history. When Congress wanted to invest a regulatory commission with authority to immunize merger transactions, it did so clearly and unambiguously.[175] Thus, the Court refused to construe the ambiguous provisions of section 15 so broadly. Finding that the Commission had overstepped the limits that Congress placed on its jurisdiction, the Court affirmed the judgment of the court of appeals.

Thus, the Term's output on the subject of immunity is apparently not consistent. In both *Hughes Tool* and *Seatrain*, the scope of the statutory exemption had elements of ambiguity. Yet the results of the two cases point in opposite directions. Admittedly, approval of a one-time merger would deprive the FMC of an opportunity to regulate any resulting impact on competition. Apparently a unanimous Court felt that Congress, if it had intended such coverage for the immunizing authority of the FMC, could have made its meaning plainer. By contrast, the CAB has continually monitored Hughes Tool's control of TWA, which must have been significant since otherwise the case

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failed to allege adequately how the acquisition would "destroy" competition. Yet in the Supreme Court the Commission was claiming jurisdiction over the agreement because it was one "preventing" competition. FMC v. Seatrain Lines, Inc., 411 U.S. 726, 732 n.7 (1973).

[173] 411 U.S. at 732-33 (citations omitted).

[174] Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 218 (1966).

[175] The Court cited the Panama Canal Act, 49 U.S.C.A. § 5 (14) (1959) (expressly dealing with mergers involving water carriers operated through the Panama Canal); Interstate Commerce Act, 49 U.S.C.A. § 5(2)(a)(i) (1959); Federal Communications Act, 47 U.S.C.A. § 222(b)(1) (1962); Civil Aeronautics Act, 49 U.S.C.A. § 1378(a)(1) (1963).

could have been decided simply by reference to the *Panagra* precedent.[176] But by the same token, CAB immunization of activities by corporations outside the air carrier industry seems unlikely, and yet this is what *Hughes Tool* portends.

In short, immunity, where expressly granted, is reliable only if no ambiguity exists in the statutory grant. Whether this approach to immunity is faithful to the legislative intent is dubious indeed. The only safe conclusion is that in order to overcome judicial reluctance to defer to regulatory agencies, Congress must word its legislation so as to leave the courts with no choice whatsoever.

V.

Ricci—The Compromise of Primary Jurisdiction

Ricci v. Chicago Mercantile Exchange[177] provides another example of the way in which the courts and the regulatory agencies can work out a harmonious relationship, serving the interests of regulation without subverting the policies of antitrust. The device used was the doctrine of primary jurisdiction.

The case arose when Ricci, who had purchased a membership in the Chicago Mercantile Exchange using borrowed funds, found his membership transferred to another, without notice and hearing, through utilization of a blank transfer authorization which had previously been revoked. Ricci filed a complaint against the Exchange and its officers, and against the Siegel Trading Company, which had loaned him the money to make the initial purchase of the membership, charging a conspiracy in violation of the Sherman Act. The theory of the case was that the course of conduct violated the rules of the Exchange and the Commodity Exchange Act and was undertaken pursuant to an unlawful conspiracy aimed at restraining Ricci's business. As a result of the conduct, Ricci was excluded from trading on the Exchange for a month, at the end of which time he purchased another membership at a considerably higher price than the transferred membership had previously cost.

The district court dismissed the complaint. The court of appeals reversed that judgment, but because the challenged conduct was subject to the jurisdiction of the Secretary of Agriculture or the Commodity Exchange Commission pursuant to the Commodity Exchange Act, the court directed a stay of further proceedings to permit administrative action.[178]

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[176] Pan American World Airways v. United States, 371 U.S. 296 (1963).
[177] 409 U.S. 289 (1973).
[178] Ricci v. Chicago Mercantile Exch., 447 F.2d 713 (7th Cir. 1971).

The Commodity Exchange Act[179] makes the dealing in commodity futures a crime except when undertaken as a contract market pursuant to statutory criteria and following authorization by the Secretary of Agriculture.[180] Such contract markets must file by-laws, rules and regulations, and they have the express statutory duty to enforce all such prescriptions relating to the nature of the contracts of sale and the minimum financial standards and reporting requirements for merchants who are members of such markets. Where the rules of government are not properly enforced or where the provisions of the Act are being violated, the Commission, composed of the Secretaries of Agriculture and Commerce and the Attorney General, is authorized upon notice and hearing and subject to judicial review to suspend or revoke the designation of the exchange as a contract market.

Justice White, writing for the majority,[181] saw the case as an example of the recurring problem arising when conduct within the reach of the antitrust laws is also within the scope of another regulatory statute. The opinion begins the discussion of the accommodation between regulation and antitrust with a review of *Silver v. New York Stock Exchange*.[182] In *Silver*, damages were sought when a firm's wire connections with Exchange members were terminated without notice or hearing under Exchange rules adopted pursuant to the Securities Exchange Act of 1934.[183] The Act provided that the SEC had general power to approve or disapprove Exchange rules but that it had no authority to deal with challenges to specific applications. Indeed, the statute conferred no express exemption from the antitrust laws on the Exchange or its activities. Thus the conduct challenged was not within the jurisdiction of the administrative agency but was nevertheless claimed to be immune from antitrust challenge by virtue of the general regulatory scheme imposed by the Act.

Because the Court declined to hold the Exchange Act ousted the antitrust laws and supplanted them with the self-regulatory scheme, the question then became the extent to which the "character and objectives of the duty of exchange self-regulation contemplated by the Securities Exchange Act are incompatible with the maintenance

[179] 7 U.S.C.A. § 1 *et seq.* (1964).

[180] 7 U.S.C.A. § 6 and 6(h) (1964).

[181] The majority opinion was joined in by Brennan, Blackmun and Rehnquist, JJ. Burger, C.J., concurred in the opinion. Marshall, J., wrote a dissenting opinion, joined in by Douglas, Stewart and Powell, JJ. Douglas, J., also wrote a separate dissenting opinion.

[182] 373 U.S. 341 (1963).

[183] 15 U.S.C. § 78(a) *et seq.* (1971).

of an antitrust action."[184] The Court conceded that the policy of self-regulation implied the necessity of restraints of trade that might well be unreasonable absent sanctions by the Act. It finally concluded that nothing in the terms or policy of the Act required or contemplated that the Exchange be permitted to impose serious deprivations without notice and opportunity for action, and that neither the statute nor Exchange rules posed any legal barrier to the antitrust action.

Because, as the Court said in *Silver*, the SEC had no authority to review specific instances of enforcement of Exchange rules and, accordingly, no need to consider any problem of conflict or co-extensiveness of coverage with agency power, a different case would arise if there had been jurisdiction in the Commission requiring a decision concerning exemption from the operation of antitrust laws. The majority of the Court saw *Ricci* as that "different case." Although the issue of exemption was not decided, the Court agreed with the court of appeals that there is administrative authority to examine the dispute in the light of the regulatory scheme and the rules of the Exchange, and that accordingly, antitrust action should be stayed until the administrative officials have had opportunity to act.

The majority opinion in *Ricci* pins its conclusion on three related premises. First, there is the requirement for examination into the question whether the Commodity Exchange Act or any of its provisions are incompatible with the maintenance of an antitrust action in the *Silver* sense. Next, it is apparent that some facets of the dispute are within the statutory jurisdiction of the Commission. And finally, adjudication of that dispute by the Commission is likely to be of aid in resolving the immunity question.

But the Court is careful to point out that it does not decide that the Commodity Exchange Act is the exclusive instrument for the regulation of the Exchange and its members and indeed past cases would appear to foreclose any such conclusion. Nor does the Court decide that Congress intended to confer general immunity on the Exchange and its members with respect to conduct within the scope of the authority of the Commission or the Secretary of Agriculture. Indeed, the Act contains no categorical exemption and the administrative authority does not appear to focus on competitive considerations.

As to the first premise of the Court's referral of the matter to the Commission, it is obvious that the majority is concerned that the Act may limit the applicability of the antitrust laws in this case. It acknowledges that Congress has expressed its intention to regulate the

[184]Silver v. New York Stock Exch., 373 U.S. 341, 358 (1963).

dealings in commodity futures through an exchange with membership rules and has provided an enforcement scheme to review the transactions here attacked.

> If the transfer of Ricci's membership was pursuant to a valid rule, the immediate question for the antitrust court is whether the rule itself and Ricci's exclusion under it are insulated from antitrust attack.[185]

The Court is also confident that prior agency adjudication of the dispute will help in ultimately deciding whether the Commodity Exchange Act forecloses the antitrust suit, "a matter that seems to depend in the first instance on whether the transfer of Ricci's membership was in violation of the Act for failure to follow exchange rules."[186] But inevitably the determination of this issue poses questions of fact and questions about the scope, meaning and significance of membership rules.

These are all matters that ideally should be dealt with in the first instance by those especially familiar with the industry, its peculiar practices and the economic characteristics of the market place involved. Such determinations are typically those entrusted to administrative agencies. In this case Congress has delegated the authority to the Commodity Exchange Commission pursuant to statute.

> We should recognize "that the courts, while retaining the final authority to expound the statute, should avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern." Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481, 498 (1958). . . . Affording the opportunity for administrative action will "prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court of the scope and meaning of the statute as applied to [these] particular circumstances." *Ibid.*[187]

The Marshall dissent proceeds on the premise that the Commission probably lacks the statutory power to resolve the issue in the lawsuit. Thus, he concludes that instead of balancing the costs and benefits of judicial referral to the agency, the Court has mechanically applied the standard of judicial deference despite substantial proba-

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[185]Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 303 (1973).

[186]*Id.* at 305.

[187]*Id.* at 305-06. *See also* Deaktor v. Schreiber & Co., 479 F.2d 529 (7th Cir.), *rev'd and remanded sub nom.* Chicago Mercantile Exch. v. Deaktor, ___ U.S. ___, 38 L. Ed. 2d 344 (1973).

bility that the agency will have nothing to contribute. Justice Marshall then reasons that an agency cannot have primary jurisdiction over a dispute over which it lacks jurisdiction in the first place, and that the petitioner may well be forced to engage in a lengthy exhaustion of his administrative remedies only to be told at the end of the road that the regulatory agency had no jurisdiction to consider his complaint.

Marshall then examines the statutory scheme and finds that there is no means by which the petitioner can require the Commission or the Secretary of Agriculture to consider his case. In addition, even if proceedings are instituted, the statute does not necessarily permit the petitioner to participate. Thus, Marshall is concerned that if the Commission should resolve the case against the petitioner without his participation, given the rule that such proceedings may not be collaterally attacked when the case returns to the court,[188] the antitrust case will likewise have been resolved without his being able to participate. On the other hand, if the district court should undertake consideration of the issue de novo, the Commission's decision would have been for naught.

Marshall is mindful of the importance of judicial deference to agency jurisdiction, particularly in those areas where responsibility and knowledge overlap. But he is concerned that in this case reference to the administrative agency will produce no benefits and will entail large costs:

> Where the plaintiffs have no means of invoking agency jurisdiction, where the agency rules do not guarantee the plaintiff a means of participation in the administrative proceedings, and where the likelihood of a meaningful agency input into the judicial process is remote, I would strike a balance in favor of the immediate court action.[189]

The case thus makes no decision on the issue of immunity but seeks the assistance of the regulatory agency in interpreting the statutory scheme, including the Exchange rules, and in preparing the ground for court action. Although the issue in *Silver* is not involved,[190] the Court seeks to make use of the specialized agency to provide an informed basis upon which to achieve the accommodation between antitrust and the regulatory scheme. Justice Douglas points out in his

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[188] *See, e.g.*, Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62 (1970).

[189] 409 U.S. at 321 (Marshall, J., dissenting).

[190] The absence of this issue in *Silver* was crucial to the concurrence of Burger, C.J., in the majority opinion. 409 U.S. at 308 (separate opinion).

dissent, as does Justice Marshall in his, that the process will inevitably take time which could be avoided by neglecting to consult the Commission and making the decisions at the Supreme Court level. But in the long run the short cut suggested by Douglas and Marshall is less efficient simply because the Supreme Court cannot be as expert in particular areas as the regulatory agencies; nor should it take the time to make that effort. The result, then, of free-wheeling Supreme Court decisions in this area will inevitably be the sacrifice of knowledgeable and truly balanced decisions. This is indeed a high price to pay for the dubious virtue of speed.

VI.

Conclusion

Although the Term produced little in the way of consistent analysis of the problem of accommodation of antitrust and regulatory policies, a careful review of the cases cannot help but bring home certain lessons. As always, Congress is perhaps less careful in its statutory drafting than it should be, thus giving the courts ample opportunity for avoiding congressional intent. The remedy lies as much in the Congress, then, as it does in the courts.

But in fairness Congress should not have to assume that its intent will be subverted by the courts unless the judges have no choice. Nevertheless, as happened in this Term, the courts in their enthusiastic pursuit of the goal of competition throughout the economy have not always been faithful to congressional intent.

Quite simply, it is congressional intent that should govern the question of accommodation. Because the weighing of conflicting policies is peculiarly within the province of the legislature, or pursuant to delegation, of the administrative agency, the courts would be well advised to listen to both legislature and agency more closely. Antitrust policy is a valid component of the public interest, and the courts have taken care to see that it is not forgotten. But the public good consists of many components, and it has not been thought to be the role of the judiciary to choose between them. Perhaps if this Term's cases in the regulation-antitrust area teach anything, it is the virtue of judicial modesty.

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