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DEREK BOK AND THE MERGER OF LAW AND ECONOMICS

Herbert Hovenkamp*

I. Introduction

Both the novelty and the uniqueness of the "law and economics" movement of the last fifteen years have been greatly exaggerated. Law and economics has been with us for at least a half century, in nearly every area of private and public law.1 The most outspoken protagonists of law and economics admit that economics had a presence in antitrust and regulatory policy long before the work of Ronald Coase, Lester Telser, and others inspired its expanded use in areas of private law, such as tort and contract.2 But even then, some of those who would make such an admission would argue that the courts developed a uniquely "economic approach"3 to antitrust only in the late seventies, and, since that time, have applied it only haltingly.4

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1. See, e.g., J. Commons, Legal Foundations of Capitalism (1924); R. Ely, Property and Contract in Their Relations to the Distribution of Wealth (1914); Ave-Lalle­mant, Critique of a Revision of Some Fundamental Economic Concepts, 18 MARQ. L. REV. 20 (1933); Commons, Law and Economics, 34 YALE L. J. 371 (1925); Commons, The Problem of Correlating Law, Economics and Ethics, 8 WIS. L. REV. 3 (1932); Dawson & Cooper, The Effect of Inflation on Private Contracts: United States, 1861-1879, 33 MICH. L. REV. 706, 852 (1935); Groat, Economic Wage and Legal Wage, 33 YALE L.J. 489 (1924); Healy, Economic Surplus and the Law, 6 DICTA 15 (1928); Heilman, The Corre­lation Between the Sciences of Law and Economics, 20 CALIF. L. REV. 379 (1932); Heil­man, Judicial Method and Economic Objectives in Conflict of Laws, 43 YALE L.J. 1082 (1934); Humble, Economics from a Legal Standpoint, 42 AM. L. REV. 379 (1908); Licht­man, Economics, the Basis of Law, 61 AM. L. REV. 357 (1927); Richberg, Economic Illu­sion Underlying Law, 1 U. CHI. L. REV. 96 (1933); Richberg, The Supreme Court Dis­cusses Value, 37 HARV. L. REV. 289 (1924); Solterer, Relations Between Economics and Juridical Science, 21 GEO. L.J. 9 (1932).

2. Economic analysis of property and contract has been common since the beginning of the century. See, e.g., the works by Ely and by Commons, supra note 1.


4. See, e.g., Easterbrook, On Identifying Exclusionary Conduct, 61 NOTRE DAME L. REV. 972 (1986); Gerhart, The Supreme Court and Antitrust Analysis: The (Near) Tri­umph of the Chicago School, 1982 SUP. CT. REV. 319; see also Kaplow, Antitrust, Law and Economics, and the Courts, LAW AND CONTEMP. PROBS., Autumn 1987, at 181 (argu-
Any notion that courts first adopted an economic approach to questions of antitrust policy in the late 1970's is historically myopic. What they really did was discard one particular economic model—a model heavily influenced by Harvard economist Edward Chamberlin’s *The Theory of Monopolistic Competition* and Harvard industrial organization economist Joe Bain’s *Barriers to New Competition*—and replace it with a more traditional, distinctively neoclassical, economic model, inspired most directly by the followers of Alfred Marshall, whose *Principles of Economics* carried traditional British neoclassicism to its apo­geee in 1890.6

Derek Bok’s well-known and influential article on merger policy and economics,9 published in 1960, advocated an economic approach to one particular area of federal antitrust policy, albeit a different approach from the one that Professor Richard Posner began to advocate a decade or so later.10 Bok’s approach was different, not because it was not “economic,” but because it was based on a different set of economic assumptions, many of which would lose favor with a later generation of economists. At least one recent writer has suggested that Bok’s Section 7 inaugurated a “first wave” of economic analysis in American merger policy, while the rise of the Chicago School and the publication of the revised Justice Department Merger Guidelines in 1982 signalled a second wave.11

But more than economics guided Bok’s Section 7. Bok attempted to forge a merger policy that was sensitive to Congressional concerns about rising concentration and injury to small business, as well as to more economic concerns about monopoly pricing.12 Ultimately, those two policies proved mutually incon-
sistent. By trying to follow both, the Warren Court’s merger policy became irrational and inconsistent, but only a small part of the blame for that development can be laid at the feet of Derek Bok. He had assigned himself the task—one of the most difficult for any economic policymaker in a democracy\(^{13}\)—of harmonizing the economic theory of his day with the manifestly noneconomic concerns of Congress. That he took both of these problems seriously is a tribute to his fidelity to the American principles of government, if not to the merger policy that resulted.

Legislative intent aside, the perceived economic problem of mergers had become unruly and, some believed, intractable by 1960. Derek Bok’s Section 7 attempted to make merger policy rational within the confines of an economic model that had grown so complex that no court could ever hope to measure all the factors that might be relevant to evaluating the competitive consequences of a merger. Importantly, Bok did not challenge the model itself in any fundamental way. Like Edward Chamberlin,\(^{14}\) Joe Bain,\(^{15}\) Carl Kaysen, and Donald Turner,\(^{16}\) the members of the 1955 Attorney General’s National Committee to study the Antitrust Laws,\(^{17}\) and many leading 1940’s and 1950’s economists,\(^{18}\) Derek Bok entertained a certain suspicion of the power of the “invisible hand” of the marketplace to determine optimal industry structure, price, and output.\(^{19}\) To be sure, that suspicion was tempered a good deal, and Bok believed that Congress was excessively concerned about the impact of mergers on small, less efficient businesses. Nevertheless, he concluded that mergers should be condemned at much smaller market-share levels than would generally result in condemnation today. In addition, Bok developed a set of simple presumptive merger tests, based on his own strong feelings that the economic consid-

\(^{13}\) See Hovenkamp, supra note 8, at 249-55.
\(^{14}\) See supra note 5.
\(^{15}\) See supra note 6.
\(^{16}\) C. KAYSEN & D. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS (1959); see infra notes 29-30 and accompanying text.
\(^{18}\) For names and specific works, see Bok, supra note 9, passim.
\(^{19}\) The principal sources of industrial organization and price theory upon which Bok relied were J. BAIN, INDUSTRIAL ORGANIZATION (1959); W. FELLNER, COMPETITION AMONG THE FEW (1949); and F. MACHLUP, THE ECONOMICS OF SELLERS’ COMPETITION (1952).
erations at issue in merger cases had become too complex to be taken into account in any comprehensive way in litigation.

The result was a merger policy that was both administratively simple and hostile to many mergers that would be considered quite harmless by 1980's standards. Moreover, many subsequent judicial decisions cited Bok's work,20 several of which are considered flawed in some fundamental way by many antitrust scholars today. Then Assistant Professor Bok21 clearly did not intend all of these results.

II. The Economic Model of Bok's Section 7

Merger policy both before and during the Warren Court era was guided by different values and assumptions from today. However, the assumptions were not altogether as different as they have been described in some Chicago School literature; they certainly are not as grotesque and pernicious as the view painted in Robert Bork's The Antitrust Paradox,22 which suggests that 1960's merger policy was concerned predominantly with condemning mergers because they produced efficiencies and injured smaller, less efficient competitors as a result. Former Judge Bork would have us believe that, during the Warren era, mergers that benefitted consumers were generally illegal, while mergers that injured consumers while benefitting competitors were generally quite legal. To be sure, some cases, particularly Brown Shoe Co. v. United States,23 are consistent with that proposition, but the threat of monopoly pricing was an important concern of 1960's merger policy, just as it is today.

The chief differences between that merger policy and the policy of the 1980's are: (1) the 1960's economic model for antitrust analysis had less confidence that the market itself would discipline firms and force them to behave competitively; and (2) although the threat of monopoly pricing was an important concern of 1960's merger policy, it was not the exclusive concern; the courts tried to be attentive to Congress's directive, manifested in the legislative history of section 7 of the Clayton Act, to protect "competition" by preserving small business.24

20. See infra notes 123-24 and accompanying text.
21. He is now president of Harvard University.
23. 370 U.S. 294 (1962); see also infra notes 123-25 and accompanying text.
A. The Revolt Against Classicism

Dominant economic theory from the New Deal and the 1940's was characterized by a deep distrust of the unregulated market, undoubtedly influenced by the Great Depression of the 1930's. The seminal work of economic theory symbolizing this distrust was Edward Chamberlin's *The Theory of Monopolistic Competition*, published in 1933. The great evil in Chamberlin's economic model was product differentiation, which permitted modern manufacturing firms to avoid head-to-head competition with one another. Once a firm produced a product that was somehow different in the eyes of consumers from the products made by its competitors, the firm could count on a certain group of customers who preferred its particular brand and were willing to pay a premium for it. As a result, the firm faced a downward sloping demand curve similar to the monopolist's demand curve, although not as steep, rather than the horizontal demand curve faced by the perfect competitor.

However, the firm in Chamberlin's model was not really a "monopolist" in the pure sense—that is, it was not a firm that could set its price and output free of concern about the decisions of others. On the contrary, it faced many competitors with capabilities equal to its own. As a result, the firm competed by attempting to enhance the degree of product differentiation between its own offerings and those of other firms. It did this through stylistic or other frivolous innovations that would not have been considered cost-justified in a more perfectly competitive market. It also offered a host of services that were not competitively justified. It integrated vertically in order to place its own brand more prominently than others in front of the consumer. Perhaps most importantly, it engaged in outrageous amounts of advertising that exaggerated the difference between its own offering and those of its competitors, as well as the higher quality of its own product.

The result of all of this activity was not particularly favorable to anyone except, perhaps, to the firm's design engineers and advertising executives. Output was lower and prices were higher than they would have been under perfect competition, but as a general rule, the firms in these product-differentiated markets did not earn monopoly profits. They spent most of their antici-
pated monopoly returns on the excessive innovation, advertising, and other extraordinary efforts necessary to create and maintain the consumer perception that they had something unique to sell. Furthermore, they chronically carried wasteful excess capacity because they did not operate as price takers, but were constantly reducing output to a perceived profit-maximizing level. "Monopolistic competition" was the worst of both worlds: monopoly price and output, but only competitive rates of return.27

Like most elegant models that appear to explain just about everything, the theory of monopolistic competition influenced many subsequent thinkers who refined, extrapolated from, or critiqued the basic model. Much of the price theory and industrial organization literature of the 1930's, 1940's, and 1950's was of this sort, and the implications for antitrust policy were plain enough.28 Essentially, these implications can be summarized as: (1) A feeling that not all product differentiation, advertising, or even innovation is in the best interest of consumers or the economy; some of it may be quite pernicious; (2) A belief that non-competitive performance could result at much lower concentration levels than previously thought necessary, and that no "agreement" among the firms was necessary to produce this bad result; simple monopolistic "competition" among firms was sufficient; and (3) A much broader belief than before that large firms behave "strategically"—most particularly, that they design and price products not to please customers, but because certain price or innovation decisions might deter or delay entry by other competitors.

The monopolistic competition paradigm remained relatively robust in academic writing on antitrust policy, even as economists were becoming more critical of its underlying assumptions. For example, in the introduction to their influential 1959 book


on antitrust policy, on antitrust policy, on antitrust policy, Carl Kaysen and Donald F. Turner adopted a set of assumptions heavily influenced by the monopolistic competition paradigm. The less academic but equally influential Report of the Attorney General's National Committee to Study the Antitrust Laws implicitly made the same assumptions, although it shows some influence from economists, such as John Maurice Clark, who had become increasingly critical of the monopolistic competition model.

The 1950 Celler-Kefauver amendments that expanded the coverage of section 7 of the Clayton Act had at least a few ideological roots in the same garden. As Bok noted, the amendments were not designed merely to close one or two "loopholes" in the original Clayton Act merger provision of 1914. Rather, Congress intended "to create a new statutory formula for determining the legality of mergers." Bok traced the impetus for the Celler-Kefauver amendments back to writing on economics and the corporation from the New Deal Era, particularly to Adolph Berle and Gardiner Means's The Modern Corporation and Private Property, written in 1932, which drew an ominous picture of the large corporation's search for size for its own sake, in spite of productive as well as allocative inefficiencies. For example, because the ownership and control of the corporation had become functionally separated from one another, management could no longer be trusted to maximize the corporation's profits and might wish instead to maximize its gross revenues, its market share, the number of markets in which it did business, or some other measure of managerial success. The result was a trend toward concentration unjustified by the natural, efficiency-generating forces of the neoclassical marketplace. Together, Chamberlin's Monopolistic Competition and Berle and Means's The Modern Corporation and Private Property signalled the death of the "classical" corporation and its replacement by a

29. C. KaySEN AND D. Turner, supra note 16.
30. Id. at 7-9.
32. See id. at 315-40.
33. See id. at 337-39.
34. Bok, supra note 9, at 306. The loopholes were that the original § 7: (1) applied only to stock acquisitions, not to asset acquisitions; and (2) prohibited only those mergers tending to eliminate competition "between" the merging firms—thus suggesting application only to horizontal and perhaps potential-competition mergers, but not to vertical mergers.
35. Id. (citing D. Martin, Mergers and the Clayton Act 267 (1959)).
36. See id. at 230-31.
corporation whose activities were much more intensively scrutinized and regulated by the State.38

This economic perspective resulted in an immense concern expressed in federal agency publications of the next two decades over perceived growth in corporate concentration, which was more or less assumed to be bad per se.39 Derek Bok did not make the same assumption, agreeing rather with an important 1950 study by Lintner and Butters that most of the recent mergers had involved relatively small companies and had not been particularly anticompetitive.40 At the same time, he noted that Congress had assumed that concentration was rising, and that this was bad for competition. He concluded that Congress's intentions must be honored, even if they were based on a faulty premise.41

Critics of monopolistic competition,42 The Modern Corporation and Private Property, and their progeny have argued that they were based on faulty assumptions, failed to make reliable predictions, or had very little influence on economic theory.43 Some of this criticism in the antitrust literature of the Right has to be classified as purely rhetorical, for it simply asserts the contrary as if it were truth carried down from the top of the mountain.44

In fact, as a model of market behavior, the theory of monopolistic competition has held up quite well and is probably as consistent with the data as is the Chicago School neoclassical model. The same generally must be said of the Berle and Means thesis. What it asserts is perhaps ultimately unprovable, because there


39. See Bok, supra note 9, at 231.

40. See id. at 231-32 (citing Lintner & Butters, Effect of Mergers on Industrial Concentration, 1940-1947, 32 REV. ECON. & STATISTICS 30 (1950) (concluding that the post-War merger movement generally was not harmful to competition)); see also E. MASON, Economic Concentration and the Monopoly Problem 16-43 (1957) (reaching the same conclusion as Lintner and Butters); Adelman, The Measurement of Industrial Concentration, 33 REV. ECON. & STATISTICS 269 (1951) (concluding that concentration may actually have declined).

41. Bok, supra note 9, at 234.


44. See, e.g., D. ARMENTANO, ANTITRUST AND MONOPOLY: ANATOMY OF A POLICY FAILURE 30-32 (1982).
is a mountain of evidence pointing in inconsistent directions. But even critics of Berle and Means cite evidence that tends to establish their point: for example, the management of a takeover target will frequently go to extraordinary lengths to resist, in spite of the fact that their corporation and its shareholders will benefit from the takeover.45

The one distinct advantage of neoclassicism over monopolistic competition is simplicity, in two different senses. First, the neoclassical model, particularly the hard-core Chicago School model, tends to see no great difference in the behavior of product-differentiated and undifferentiated firms—or, at least it sees much less difference than Chamberlin did. The result is that the neoclassical model purports to generalize about market behavior in a much broader way than the monopolistic competition model does. For example, the simple assumption that price approaches marginal cost, even in product-differentiated markets, is far stronger within the neoclassical model. This makes the neoclassical model more elegant, but not necessarily better for the antitrust policymaker searching for "right" answers. In the same sense, the Newtonian model of physical motion is simpler and more unified than the general theory of relativity. But in certain situations—as when one is seeking to measure the location of a star or plot the trajectory of an interplanetary space probe—the Newtonian model produces incorrect results.46

The neoclassical model is also simpler in a second important sense: it purports to make more confident and optimistic predictions about market behavior in the absence of regulatory intervention, including antitrust intervention. The neoclassical model concludes that the minimally regulated market works quite well, while monopolistic competition draws the much more pessimistic conclusion that frequent governmental constraint is necessary to maintain price, output, and product quality at the socially optimal level. In short, the neoclassical model yields a much simpler, more manageable agenda for the economic policy maker than does monopolistic competition. Bok's Section 7, written well before the Chicago School revolution in antitrust economics, attempted to devise a simplified, more consistent antitrust policy within the confines of what had, by 1960, become a substantially modified monopolistic competition model.

B. Bok's Section 7 and the Problem of Congressional Intent

Even economic models developed in the era of monopolistic competition purported to distinguish between efficiency and distributive concerns. Within such models, one was concerned about mergers because of their impact on "competition," economically defined. Thus, for example, a merger would be condemned because it tended to enhance the power of the post-merger firm to raise price above marginal cost. The determinants of that question were far more complex than they were within the classical or neoclassical models, and the policymaker in the age of monopolistic competition had far less confidence in the unregulated market than neoclassicists before and after. But the basic questions were more or less the same.

Many of the impulses reflected by Congress when it amended section 7 of the Clayton Act in 1950 were not guided by any economic model, but by the political agendas of the people who debated and voted on the new statute. Some of these impulses were manifestly "anticompetitive." For example, Congress was concerned that, to the extent that a merger increased a firm's efficiency by enabling it to reduce the costs of some input or operation, smaller competitors would be injured. These competitors were a political constituency that Congress clearly deemed worthy of protection. As a result, several suggestions appear in the legislative history that efficiency-creating mergers should be condemned, not because of their impact on consumers, which even under the Chamberlinian model would have been positive, but because they would injure smaller rivals.47

The great hostility toward mergers expressed in the 1950 Celler-Kefauver amendments rested, then, on two platforms: (1) a factual assumption, increasingly criticized by 1950's era economists, that America had experienced a recent, dramatic, and anticompetitive increase in corporate concentration;48 and (2) a set of political, or distributive, concerns generally inconsistent with

47. See, e.g., 96 CONG. REC. 16,433 (1950) (statements of Sen. O'Connor); 95 CONG. REC. 11,486 (1949) (statements of Rep. Celler). During the debate on the amendments to §§ 7 and 11 of the Clayton Act, Representative Celler stated:

Small, independent, decentralized business of the kind that built up our country, of the kind that made our country great, first, is fast disappearing, and second, is being made dependent upon monster concentration.

It is very difficult now for small business to compete against the financial, purchasing, and advertising power of the mammoth corporations.

Id.

48. See supra notes 39-40 and accompanying text.
economic efficiency. The latter overwhelmed the legislative history. To anyone preoccupied "with the economic consequences of monopoly power," wrote Bok, "the curious aspect of the debates is the paucity of remarks having to do with the effects of concentration on prices, innovation, distribution, and efficiency." The word "competition" in the debates "appeared to possess a strong socio-political connotation which centered on the virtues of the small entrepreneur to an extent seldom duplicated in economic literature."

Bok recognized the value of these noneconomic concerns in the Celler-Kefauver Amendments and attempted to take them seriously. He noted that "although truth is the preeminent aim of economic study it can be only one of several goals in law." But he responded to the expressed concerns of Congress in an odd, inconsistent way that was to have a pernicious influence on later Supreme Court opinions, as well as those of lower courts. In trying to be sensitive to both economic theory and the Congressional mandate, Bok first minimized the benefits that might accrue from increased efficiency—assuming in the process that such efficiencies, if they were to be found, were a good thing. Then, in a set of inconsistent arguments, he treated the efficiencies that might result from mergers as if they were obvious and, at least under some circumstances, anticompetitive.

In responding to the economic arguments in favor of permitting relatively substantial mergers because of their efficiency-creating potential, Bok answered that the cost savings that could be achieved through merger could also be achieved through internal expansion. Further, since horizontal mergers involve the acquisition of existing plants, and not the construction of newer or larger ones, they simply do not generate the kinds of intraplant economies that Bok believed were most important.

Bok generally adopted the view of economies of scale expressed in Bain's influential Barriers to New Competition, which had concluded that: (1) the principal kind of scale economy relevant to antitrust policy was the single-plant production economy; and (2) in most industries, all the important economies of scale could be attained at relatively small market shares,

49. Bok, supra note 9, at 236.
50. Id. at 236-37.
51. Id. at 227-28.
53. Bok, supra note 9, at 319.
most generally on the order of five percent or less. Bok discussed multiplant economies, which can be created by merger, only briefly but concluded that they could be achieved by alternative routes, such as expansion, contracting out, or joint venture. He finally determined that "[t]here is little basis for concluding that the achievement of lower costs as such should give rise to favored treatment under section 7," but he based his conclusion on the intent of Congress, which he felt obliged to follow, rather than on economics. In this case, "[t]he possibility of lower costs was brushed aside in the legislative deliberations," and there was "every reason to believe that Congress preferred the noneconomic advantages of deconcentrated markets to limited reductions in the cost of operations."

In the second related but inconsistent set of arguments, Bok appeared to concede substantial efficiencies that might result from mergers but regarded them as harmful when they occurred. For example, he appeared to approve of the government's argument in the Brillo case that a challenged merger would produce substantial cost reductions, the result of which would "divert substantial business from the other companies," as well as Brillo's argument, in response, that the merger was harmless because it was not particularly efficient and the postmerger firm would not steal customers from anyone. Bok found the issue of "whether lower prices in this context would be harmful or beneficial to the public interest" to be full of "difficulties," but the difficulties he cited were ones of proof rather than principle. For example, he suggested that it would be very difficult to establish whether the benefits that low prices produced for consumers outweighed the injuries that would accrue to competitors. Later, he suggested that "critical cost savings may give a merger far greater significance than its size would imply" and thus justify quicker condemnation.

54. See Bok, supra note 9, at 329 (citing J. Bain, supra note 6, at 53-113).
55. Id. at 319 & n.278.
56. Id. at 318.
57. Id. (citing 95 Cong. Rec. 11,486 (1949) (remarks of Rep. Celler) and 95 Cong. Rec. 11,496 (1949) (remarks of Rep. Boggs)).
59. Bok, supra note 9, at 265.
60. See id. at 265-66.
61. Id. at 278.
When Bok developed his own presumptive standards, he stated a concern with mergers "which lower costs, increase financial strength, or otherwise enhance the power of the leader, since all such acquisitions might encourage or facilitate domination of rival firms." Ambiguously, he suggested that mergers that lower production or transportation costs are socially beneficial, while those that facilitate larger advertising or promotional budgets, or larger stockholder dividends, are harmful. In fact, his principal concern in the development of market share standards for the acquiring firm was not the ability of the post-merger firm to raise price above marginal cost, but rather its ability to "dominate" rivals. That is, he tended to regard even the horizontal merger as an "exclusionary" practice, rather than one that merely facilitated the exercise of the power to raise prices to anticompetitive levels.

Such indecisiveness about efficiency helped to produce the terrible schizophrenia in 1960's merger cases concerning the appropriate role of cost savings. Only the most ham-handed analysis would condemn mergers precisely because they produced cost savings that might injure competitors—but a few decisions even did that. In Federal Trade Commission v. Procter and Gamble, which condemned a potential competition merger between a household chemical producer and a liquid bleach manufacturer, Justice Douglas drew the fairly innocuous conclusion that "[p]ossible economies cannot be used as a defense to illegality," because Congress had "struck the balance in favor of protecting competition." The Court noted that one effect of the merger was that the postmerger Clorox Company could take advantage of multiproduct advertising discounts unavailable to competitors that produced only liquid bleach; but the merger was actually condemned under an early version of the "potential competition" doctrine because it reduced the potential for competition that might have occurred had Procter and Gamble entered the bleach market by building its own new plant.

62. Id. at 276.
63. Id.
64. Id. at 321.
65. See infra text accompanying note 105.
67. Id. at 580.
68. Id. at 573-74.
70. See 386 U.S. at 581.
Some lower courts were less circumspect. For example, in Allis-Chalmers Manufacturing Co. v. White Consolidated Indus­tries, the Third Circuit granted a preliminary injunction against a conglomerate merger between a company that made electric equipment and one that made steel mills because the merger would produce a company with the unique advantage that it would manufacture a fully wired mill, ready to operate. The court believed that this would give the firm an unfair com­petitive advantage over others in the market. Likewise, in Pu­rex Corp. v. Proctor and Gamble, a private antitrust action based on the same merger that was condemned by the Supreme Court in Federal Trade Commission v. Procter and Gamble, the court opined that the plaintiff, a rival bleach manufacturer, might recover damages based on injuries that accrued to it because of the acquired firm’s increased efficiency. “Although such economies may be unobjectionable in isolation,” the court con­cluded, “they may be the basis of . . . liability if they serve as part of the mechanism by which an illegal merger lessens compe­tition.” The court did not explain how efficiencies might lessen competition; how they might injure competitor Purex was fairly clear.

III. Bok’s Section 7 and the Problem of Judicial Rulemaking

Post-Chamberlinian, product-differentiated markets were far more complex than classical and neoclassical markets. The eval­uation of mergers in them was accordingly more complex as well. Product differentiation, economies of scale and distribution in

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72. See id. at 518.
73. 596 F.2d 881 (9th Cir. 1979) (remanding to district court for further proceedings), judgment for defendant aff’d, 664 F.2d 1105 (9th Cir. 1981), cert. denied, 456 U.S. 983 (1982).
74. See supra text accompanying notes 66-70.
75. 596 F.2d at 888.
firm size, barriers to new entry, and structural conduciveness to strategic behavior became increasingly relevant to merger policy. Most economists of Bok's day believed that this panoply of factors had to be taken into account in merger cases, for each factor was relevant to the thing the court was supposed to decide: whether, on balance, a merger was competitive or anticompetitive. Bok argued that this insistence on analyzing every factor was unrealistic, given the institutional limitations of the courts. 76 Furthermore, it was unnecessary, for a few presumptive rules could produce reasonably accurate results. Bok suggested that the economists' hostility toward such simple rules sprang largely from criticisms of Supreme Court merger decisions of the 1930's and 1940's, which had disavowed any economic approach in merger cases, concentrating instead on such factors as the parties' intent or fault. 77 Bok believed that the Supreme Court was now ready for a merger policy with a bona fide economic content, provided it could be simply administered. 78

The antitrust bar and legal academics who knew something about economics had generally been siding with the economists and incorporating one complexity after another into merger analysis. One of the most important policy documents to show this influence is the 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws, 79 composed by a large group of lawyers, law professors, and economists chaired by Stanley N. Barnes 80 and S. Chesterfield Oppenheim. 81 The Committee's statement on merger policy listed a complicated network of relevant factors to be taken into account, including the size of the companies and the size differences among companies in the market, the degree of vertical integration, the "uses of the product," and the "significance of the product under study in the output or in the purchases of different companies;" methods of sales and price interrelationships; barriers to entry; opportunities and techniques of product innovation; limitations on supply resources and economies of scale; and the "long-run supply and demand picture." 82 No effort was made to assess the relative strength of these factors, to suggest whether all should

76. Bok, supra note 9, at 347.
77. See id. at 347-48.
78. See id. at 348-49.
79. REPORT, supra note 17.
80. At that time, Barnes was head of the Antitrust Division of the Department of Justice.
81. At that time, Oppenheim was a Professor of Law at the University of Michigan.
82. REPORT, supra note 17, at 126.
be balanced against one another or whether some, such as absence of significant entry barriers, should be dispositive. No effort was even made to indicate how a court was supposed to collect the information. "The really striking aspect of the discussion is the lack of any suggestion as to the manner in which these factors may be applied in any given case," Bok complained of the report. Nevertheless, the Committee majority appeared quite confident that if courts and the enforcement agencies took this array of factors into account, merger analysis would be more accurate than it had been in the past.

"At the very heart of this paper," Bok wrote, "stands the conviction that economists, as well as lawyers, lack the knowledge to make predictions concerning the probable consequences of many . . . mergers . . . ." He then offered the rather startling conclusion that more information could actually make judicial decisions about mergers less accurate, particularly if the information were presented in the unstructured way suggested by the Attorney General's Committee. Although economic models might be correct in the abstract, the "normal theoretical problems" of measurement of the relevant factors, such as the degree of cost savings that a merger might produce or the extent of entry barriers, "become much more imposing when they arise in the context of litigation." Bok noted, for example, that economists were forever making simplifying "assumptions and rough judgments" and incorporating them as premises into their models in order to make the analysis less ambiguous. But the judge cannot simply assume that the largest firm is the price leader, that the elasticity of demand is low, or that economies of scale are of this or that magnitude. Each of these elements must be

83. Bok, supra note 9, at 257.
84. The Committee then rather optimistically concluded:
   All of such facts cannot and need not be investigated in each case; only those relevant in particular market contexts, and obtainable at reasonable cost, should become a part of the record. In certain cases the relevant facts that can be obtained at reasonable cost may still leave gaps in the information that would be helpful in reaching greater certainty as to the competitive consequences of an acquisition. While sufficient data to support a conclusion is required, sufficient data to give the enforcement agencies, the courts and business certainty as to competitive consequences would nullify the words "Where the effect may be" in the Clayton Act and convert them into "Where the effect is."

REPORT, supra note 17, at 126.
85. Bok, supra note 9, at 228.
86. Id. at 295 ("[T]here are reasons for suspecting that a consideration of all relevant factors may actually detract from the accuracy of decisions made under section 7.").
87. Id. at 290.
88. Id.
established in a litigation process very poorly calculated to arrive at economic truth. 89

Bok's own economic model for predicting the consequences of mergers was as complex as anyone's. 90 He distinguished, however, between "theoretical" and "empirical" modes of economic market analysis and suggested that merger policy needed to be guided largely by the latter. 91 Although the theoretical analysis was useful, it had practical application only to relatively gross changes in market structure. Even a large merger affected overall market structure in only modest ways. 92 On the other hand, while the empirical studies lacked a framework and thus made generalization difficult, Bok believed they nevertheless had the capacity to make realistic predictions in specific cases. Unfortunately, the state of empirical research was such that little useful information had been produced, except concerning very highly concentrated markets where most mergers would have been condemned anyway. 93 Finally, and perhaps most importantly, Bok noted that none of the economic models took into account the "wider range of [noneconomic] interests that to Congress seemed critically important" in merger analysis. 94

Bok was not the only person in 1960 to be concerned about the knowledge-assembling and economy-directing capabilities of governmental institutions. In fact, the 1950's and 1960's were decades of unprecedented soul-searching about regulatory government. 95 That same year, SEC Chairman James M. Landis issued his sharply critical Report on Regulatory Agencies to the President-Elect, 96 noting the poor record of federal agencies in achieving their goals for a number of reasons, both political and organizational.

By the time Bok wrote Section 7, government merger enforcement agencies had already acknowledged their own limitations and attempted to simplify merger analysis. But the effort was

89. See id.
90. See, e.g., id. at 239 (discussing effects of product homogeneity on competition).
91. Id. at 240.
92. Id. at 241.
93. Id. at 247.
94. Id. at 248.
96. J. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (1960) (printed for the Senate Committee on the Judiciary, 86th Cong., 2d Sess.).
heavily influenced by the government’s agenda, which, in 1960, was apparently to prevent as many mergers as possible. The Antitrust Division had begun to rely on a single phrase in the House Report on the Celler-Kefauver Amendments to the effect that, under amended section 7, mergers were to be governed by the same test that the Supreme Court had developed for other sections of the Clayton Act. 97 The other section that the Antitrust Division had in mind was section 3, 98 which applied to tie-ins and exclusive dealing agreements, both vertical arrangements. The government wished to apply to both horizontal and vertical mergers the same “quantitative substantiality” test that the United States Supreme Court had established for exclusive dealing a year before the Celler-Kefauver amendments were passed. 99 Under that test, a merger would presumably be illegal any time the acquired firm had a market share greater than six or seven percent. 100 The government’s argument was that because merger analysis was very complex, a simple presumptive rule was necessary for judicial administration. 101 Why a rule that was assumed to work for vertical arrangements should be presumptively valid for horizontal mergers as well the government did not say.

Bok agreed with the government’s argument for a simple presumptive rule but believed that a more sophisticated one could be developed without producing the kinds of complexities that economists’ analysis of mergers had come to entail. Most importantly, he seemed to have a commitment, not shared by the enforcement agencies, that “beneficial” mergers were possible and should be permitted or perhaps even encouraged. 102

97. See Brief After Trial for Plaintiff at 83, United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S.D.N.Y. 1958) (No. 115-328) (relying on H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8 (1949) (stating that the tests under amended § 7 “are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act”)).


99. Standard Oil Co. v. United States, 337 U.S. 293, 298 (1949) (establishing the test); see Handler, Quantitative Substantiality and the Celler-Kefauver Act—A Look at the Record, 7 MERCER L. REV. 279 (1956) (concluding that Congress did not intend the quantitative substantiality test to be applied to mergers).

100. Bok, supra note 9, at 250. Respecting horizontal mergers, such a test might indicate illegality any time the postmerger firm’s aggregate market share exceeded six or seven percent.

101. Interestingly, the Federal Trade Commission responded that the quantitative substantiality test should not be applied in FTC merger cases because, as an administrative agency, it had the power to make finer judgments than the courts. Id. at 250-51. Bok, however, found it irrational that two agencies having concurrent power to enforce § 7 would use different standards. Id. at 251.

102. Id. at 272-73.
On the question of economic and statistical information, Bok suggested that less is better than more, unless the additional information could be shown to make decisions reached in litigation more accurate. When information overload is a real threat and each piece of information indeterminate, knowing more does not necessarily mean more accurate decisions; in fact, it may undermine our ability to reach them. 103

All of this was complicated by the fact that merger policy was concerned with two different economic problems, which Bok identified as "dominance" and "concentration." 104 The dominance problem concerned the postmerger firm's ability to injure its rivals, while the concentration question considered the likelihood of oligopoly pricing in the postmerger market. As noted above, 105 Bok accepted the prevailing belief of the day that even horizontal mergers should be regarded as "exclusionary" practices. That is, the chief concern with them was not their short-run ability to produce higher prices, but rather the power of the postmerger firm to injure rivals. Furthermore, he implicitly relied on economic theories claiming that such practices were a threat at market shares much lower than they are currently believed to make single-firm monopoly pricing or tacit collusion possible.

The presumption that the anticompetitive threat of horizontal mergers is principally "exclusionary" rather than "collusive" is generally the reverse of the one entertained today. Horizontal mergers in concentrated markets are condemned in the 1980's because of the threat of tacit coordination of prices when the postmerger firm's market share is substantially less than twenty percent. However, today few people would be concerned about predatory pricing by the postmerger firm unless it were very large, perhaps having a market share on the order of sixty percent. 106 As a result, any horizontal merger worthy of condemnation as exclusionary would be condemned on ordinary collusion-facilitating grounds.

Bok believed that, in most cases, the threat of dominance was the greater one and that, as a result, presumptive merger rules should be concerned with "increases in the spread between the market shares of the first firm and its nearest competitor," 107 particularly if the acquiring firm was the largest firm in the mar-

103. See id. at 273.
104. Id. at 279.
105. See supra text accompanying notes 64-65.
107. Bok, supra note 9, at 281.
ket. His basic presumption was fundamentally hostile. Section 7 was "most likely to achieve the objectives which underlay its amendment" if rules were drawn "in such a way that the burdens of our ignorance fall upon the merging firms and not upon the public interest in maintaining competition and restraining monopoly power." Bok suggested that the dominant firm in a market should be forbidden from acquiring a firm with a market share of greater than two or three percent. When the acquiring firm was not the dominant firm, then the danger of collusion became relatively more important, and the danger of dominance became relatively less. Even here, Bok felt obliged to yield to the Congressional understanding that growing concentration was as problematic in "fragmented" industries as it was in "highly oligopolized" ones. As a result, merger policy should be concerned relatively less with absolute concentration in the market affected by the merger, and relatively more with the increases that result from the merger itself. Thus, a merger that increased the market share of the postmerger firm by seven percent, in a market where no premerger firm had a market share higher than ten percent, was more suspect than a merger in a market with three firms with twenty percent each, but which increased the postmerger firm's market share by only four or five percent. Further, Bok believed that, since oligopoly was inherently a phenomenon that looked at all the firms in a market and not merely at the parties to a merger, it would be very difficult to devise a test based principally on the fear of increased likelihood of oligopoly pricing.

Likewise, Bok wrote into his rules Congress's concern with concentration trends, suggesting that mergers should be more suspect in markets that had steadily been growing more concentrated. As critics of the Warren Court era merger policy have pointed out, concentration trends often indicate that, owing to changes in technology or modes of distribution, economies of scale in a particular industry are more substantial than they had been previously. The result is that the market has room for fewer optimally sized firms than before, and it will experience a "trend" toward concentration by either exit or merger until

108. Id. at 307-08.
109. Id. at 308.
110. Id. at 310.
111. Id. at 311.
112. See id. at 314-16.
113. For discussion, see H. HOVENKAMP, supra note 26, at § 11.6; IV P. AREEDA & D. TURNER, supra note 69, ¶ 914, at 82 n.5 (1980).
equilibrium is restored. Bok suggested that no merger by large firms other than the dominant firm should be permitted if the combined market shares of the two to eight largest firms\textsuperscript{114} after the merger were increased by seven to eight percent or more over shares existing five to ten years before the merger.\textsuperscript{115} Under this rule, all premerger increases in concentration, whether by expansion or acquisition, were treated more or less alike.

Bok suggested a presumptive rule that no acquisition of a firm with a market share larger than five percent be permitted.\textsuperscript{116} Bok also would have included a provision against a merger with a particularly "disturbing" firm that was forcing competition in the market, if the purpose of the merger was to eliminate that firm’s competition.\textsuperscript{117} In the *Maryland & Virginia Milk Producers Association* case,\textsuperscript{118} the Supreme Court condemned a merger under this theory. A similar "disruptive" firm provision is written into the 1984 Justice Department Merger Guidelines.\textsuperscript{119}

Finally, Bok attempted to account for Congress’s concern that acquisitions of failing firms be permitted, lest those firms be driven out of business, even if such acquisitions would violate the presumptive merger rules he had suggested. Bok noted that the defense would often be raised against government merger challenges unless it were limited so as to permit acquisition only of firms likely to fail if the acquisition had not occurred.\textsuperscript{120} Bok suggested that prediction of business failure was generally easier than the prediction of the impact of a merger on competition, and that the greater the risk that the merger would injure competition, the stronger the evidence must be that the acquired firm was failing.\textsuperscript{121} He also believed that the defense should be rejected presumptively if there were alternative prospective buyers for the failing firm, unless those buyers intended to use the

\textsuperscript{114} Bok permitted the government to select the number, provided that the number selected included the acquiring firm. Bok, *supra* note 9, at 313.

\textsuperscript{115} *Id.* at 313-18.

\textsuperscript{116} *Id.* at 328. Compare George Stigler’s proposals in Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. Pa. L. Rev. 176, 182 (1955), which would have forbidden per se any acquisition yielding a postmerger market share exceeding 20%, and permitted any merger yielding a postmerger firm whose market share was less than 5 to 10%. In between, mergers were to be studied by the agencies on a case-by-case basis.

\textsuperscript{117} Bok, *supra* note 9, at 323-24.


\textsuperscript{119} Department of Justice, Antitrust Division, 1984 Merger Guidelines, § 3.44(c) (horizontal mergers), § 4.222 (nonhorizontal mergers), 49 Fed. Reg. 26,823 (1984).

\textsuperscript{120} Bok, *supra* note 9, at 342.

\textsuperscript{121} *Id.* at 343.
firm's productive assets in a different market, or to scrap them.122

IV. CONCLUSION

Bok's Section 7 was cited by the Supreme Court in six merger decisions123 and numerous times by the lower courts.124 Many of the Supreme Court decisions citing Bok are on nearly everyone's short list of repudiated Warren Court antitrust decisions to-

122. Id. at 345-47.
123. United States v. General Dynamics Corp., 415 U.S. 486, 507 (1974) (citing Bok on the failing company defense); Citizen Publishing Co. v. United States, 394 U.S. 131, 136 n.2 (1969) (including in a string cite on the failing company defense a cite to Bok, supra note 9, at 339); FTC v. Procter and Gamble Co., 386 U.S. 568, 588-89 (1967) (Harlan, J., concurring) ("It is also argued that the large company generates psychological pressure which may force smaller ones to follow its pricing policies, and that its very presence in the market may discourage entrants or make lending institutions unwilling to finance them." (citing Bok, supra note 9, at 275)); United States v. Von's Grocery Co., 384 U.S. 270, 287 n.12, 301 n.33 (1966) (Stewart, J., dissenting) (citing Bok for support of the premise that a decline in the number of competitors does not necessarily entail a reduction in competition and for the proposition that too harsh a merger rule will discourage future, efficiency-producing mergers); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362-64 (1963) (relying in part on Bok for the development of presumptive standards); Brown Shoe Co. v. United States, 370 U.S. 294, 312 n.19 (1962) (citing Bok for a review of the legislative history of the Celler-Kefauver amendments); see also Baker & Blumenthal, The 1982 Guidelines and Preexisting Law, 71 CALIF. L. REV. 311, 333 n.83 (1983) (concluding that the Supreme Court's analysis in Philadelphia Nat'l Bank "owes a substantial intellectual debt" to Bok's article, because of its adoption of a simple prima facie test for the legality of mergers).
124. Included among these are: Kaiser Aluminum & Chem. Corp. v. FTC, 652 F.2d 1324, 1333 (7th Cir. 1981) (noting that 1950 amendments call for stricter scrutiny of mergers than the old Clayton Act did); United States Steel Corp. v. FTC, 426 F.2d 592, 606 n.32 (6th Cir. 1970) (comparing academic discussions of the failing company defense); A. G. Spalding & Bros. v. FTC, 301 F.2d 585, 625 n.34 (3d Cir. 1962) (relying on Bok for the court's refusal to transplant the "quantitative substantiality" doctrine from § 3 of the Clayton Act to § 7); Crown Zellerbach Corp. v. FTC, 296 F.2d 800, 826 n.31, 830 n.39 (9th Cir. 1961) (discussing the "quantitative substantiality" doctrine and the effect on competition of loss of one substantial firm in the market); Erie Sand & Gravel Co. v. FTC, 291 F.2d 279, 281 (3d Cir. 1961) (discussing the failing company defense); United States v. Black and Decker Mfg. Co., 430 F. Supp. 729, 782 n.97 (D. Md. 1976) (discussing the failing company defense); United States v. M.P.M., Inc., 397 F. Supp. 78, 95 (D. Colo. 1975) (discussing the failing company defense); Kirihara v. Bendix Corp., 306 F. Supp. 72, 87 n.56 (D. Haw. 1969) (discussing the legislative history of the Celler-Kefauver amendments concerned with protecting small business); United States v. President Nat'l Bank, 280 F. Supp. 1, 9-10 (E.D. Pa. 1968) (discussing numerous factors relevant to merger analysis); United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867, 929 n.170 (S.D.N.Y. 1965) (string citation); id. at 941 n.198 (suggesting a five-to ten-year period over which to observe merger history to determine whether undue increases in concentration are likely); United States v. Ingersoll-Rand Co., 218 F. Supp. 530, 551 (W.D. Pa. 1963) (discussing the effect on competition of loss of one substantial firm).
day, but several of those citations were not to Bok’s substantive proposals. The 1968 Merger Guidelines issued by the Department of Justice also show strong influence from Bok. These Guidelines, which were not revised until the 1982 Guidelines replaced them, were an important guide to Antitrust Division merger enforcement policy for several years, although their influence waned in the 1970’s. Unlike Bok, who was much more concerned with single-firm dominance than with the likelihood of collusion in the postmerger market, the Guidelines expressed equal concern with both, albeit ambiguously. According to the Guidelines, the principal purposes of horizontal merger policy were:

(i) preventing elimination as an independent business entity of any company likely to have been a substantial competitive influence in a market; (ii) preventing any company or small group of companies from obtaining a position of dominance in a market; (iii) preventing significant increases in concentration in a market; and (iv) preserving significant possibilities for eventual deconcentration in a concentrated market.

The Department’s policy on mergers in markets exhibiting a trend toward concentration during those years appears to have been lifted straight from Bok’s article:

Such a trend [toward concentration] is considered to be present when the aggregate market share of any grouping of the largest firms in the market from the two largest to the eight largest has increased by approximately 7% or

127. Thomas E. Kauper, head of the Antitrust Division from 1972 to 1976, recalls that the Division paid “little attention” to the Guidelines during that period. “We were well aware that the Guidelines needed revision, but in the Watergate period, with a weakened administration, that did not seem a politically sensible thing to do.” Professor Kauper also noted: [W]hat strikes me is that Bok’s piece had a significant impact on the decision to issue guidelines at all. Bok’s willingness to point the way to the use of numerical standards, it seems to me, really set the stage for the issuance of a set of guidelines which made some degree of sense and had some element of practicality to them.
128. Merger Guidelines, supra note 126, at 20,523.
more of the market over a period of time extending from any base year 5-10 years prior to the merger. . . . The Department will ordinarily challenge any acquisition, by any firm in a grouping of such largest firms showing the requisite increase in market share, of any firm whose market share amounts to approximately 2% or more.129

The Guidelines’ basic market-share standards for assessing horizontal mergers show Bok’s influence only a little less. Like Bok, the Department was more concerned with the market share of the merging partners than with the underlying level of market concentration. It accorded “primary significance to the size of the market share held by both the acquiring and the acquired firms.”130 The Guidelines, however, regarded mergers in highly concentrated markets as somewhat more suspicious than those in unconcentrated markets and proposed harsher standards for evaluating them.131 The differences were not dramatic except in the case of very large firms. In a highly concentrated market, for example, the Department would permit a firm with a ten percent market share to acquire only a firm whose market share was two percent or less, while, in a “less highly concentrated” market, the ten percent firm could acquire a firm as large as four percent. But, in highly concentrated markets, any firm holding greater than a fifteen percent market share would be prohibited from acquiring even the tiniest firm, while, in a less concentrated market, that prohibition applied only to acquiring firms whose market shares exceeded twenty-five percent. Finally, the Department appeared to accept Bok’s proposal that no firm be permitted to acquire a firm whose market share exceeded five percent,132 and his proposal that acquisitions by “disruptive” firms with a history of forcing competition in a market be viewed with greater hostility.133

In their influential treatise, Antitrust Law, Areeda and Turner explicitly rejected Bok’s proposal that courts should be much more hostile toward mergers in markets exhibiting a trend toward concentration.134 However, they agreed with Bok that the

129. Id.
130. Id.
131. Id.
132. See id. (discussing the market share standards).
133. Id. at 20,524.
134. IV P. AREEDA & D. TURNER, supra note 69, at ¶ 914.
amount of concentration in a market was not particularly relevant to merger policy, except in close cases.\textsuperscript{135}

Most of the earlier citations to Bok's work were "expansionist"—that is, they cited \textit{Section 7} for its analysis of the legislative history of the 1950 Celler-Kefauver amendments or as a justification for using market share evidence to condemn mergers.\textsuperscript{136} Recent decisions, on the other hand, have cited Bok's article for its conclusions about the inability of courts to deal with difficult economic issues unless the courts are willing to make certain simplifying assumptions.\textsuperscript{137}

Bok's single law review article enjoyed an extraordinary amount of influence. That its influence today is less than it was two decades ago in no way diminishes the great achievement of Bok's \textit{Section 7}. It demonstrates only that economic science as well as law presents the antitrust policymaker with questions of both value and fact; the changes that antitrust policy has experienced since 1960 are mainly a revolution of value.

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\textsuperscript{135} See \textit{id.} at \textsuperscript{!!} 912-913.

\textsuperscript{136} See \textit{supra} notes 123-24 (listing of decisions citing Bok's article).

\textsuperscript{137} See, \textit{e.g.}, United Air Lines v. CAB, 766 F.2d 1107, 1121 (7th Cir. 1985) (Posner, J.); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.); see also United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362 (1963), (relying on Bok for the proposition that economic data are "complex and elusive" and that businessmen must be able to "assess the legal consequences of a merger with some confidence"). In the process, the Court developed virtual per se rules based on market share; in this case, a postmerger market share of 30\% was too high. \textit{Id.} at 364-65. The test proposed by C. Kayser & D. Turner, \textit{supra} note 16, at 133, was postmerger market share exceeding 20\%, as was the test proposed by Stigler, \textit{supra} note 116. Bok had not developed an equivalent rule based on postmerger market share alone.