SAME RULE, DIFFERENT RESULT: HOW THE NARROWING OF PRODUCT MARKETS HAS ALTERED SUBSTANTIVE ANTITRUST RULES

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It has long been recognized in antitrust cases that market definition is typically malleable and frequently outcome-determinative. In *United States v. Grinnell*, a Section 2 case, Justice Abe Fortas dissented from the definition of a market so narrow he called it a "strange red-haired, bearded, one-eyed man-with-a-limp classification."[1] In more recent years, commentators have argued both that the Court in *Grinnell* defined "excessively narrow submarkets"[2] and that those submarkets were "consistent with the evidence as to demand substitution."[3] In other words, the market could be both implausibly narrow and correct, particularly if judged by today's standards, when product markets often require multiple adjectives.

The breadth of the relevant market mattered in *Grinnell*, as it does in merger challenges brought under Section 7 of the Clayton Act, because—as the Supreme Court recognized many years ago—"market definition generally determines the result of the case."[4] Former U.S. Federal Trade Commission

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1 United States v. Grinnell Corp., 384 U.S. 563, 591 (1966) (Fortas, J., dissenting).

2 Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 COLUM. L. REV. 1805, 1807 n.4 (1990) (discussing the market defined in *Grinnell*).

3 Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129, 150 n.76 (2007) (defending the market defined in *Grinnell*).

4 Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 469 n.15 (1992).

Chairman Robert Pitofsky likewise called it "the most important single issue in most enforcement actions."[5] And former FTC Chief Economist Jonathan Baker has said the issue has determined "the outcome of more cases . . . than . . . any other substantive issue."[6] Market definition continues to play a determinative role in merger challenges today, especially as alleged markets have become narrower.[7]

The primacy of market definition in antitrust analysis—at least in the courts[8]—reflects the large number of substantive legal rules that rely, either

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[5] Pitofsky, *supra* note 2, at 1807.

[6] Baker, *supra* note 3, at 129.

[7] *See, e.g.*, FTC v. Peabody Energy Corp., 492 F. Supp. 3d 865, 886 (E.D. Mo. 2020) (granting injunction, remarking that "this Court's task is to identify the narrowest market within which the defendant companies compete"); FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 287 (D.D.C. 2020) (concluding that the FTC's failure "to properly define a market in terms of both product and geography . . . all but precludes the Court from siding with it"); *see also* FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1054 (8th Cir. 1999) (reversing district court decision granting preliminary injunction because the FTC's geographic market was too narrow); United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1110 (N.D. Cal. 2004) (denying injunction because product and geographic definitions were too narrow); United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121, 140 (E.D.N.Y. 1997) (denying preliminary injunction because "the Government failed to establish its definition of the relevant product market"); United States v. Engelhard Corp., 970 F. Supp. 1463, 1466 (M.D. Ga. 1997) (holding that the government failed to prove alleged market), *aff'd*, 126 F.3d 1302 (11th Cir. 1997); FTC v. Thomas Jefferson Univ., 505 F. Supp. 3d 522, 557 (E.D. Pa. 2020) (finding the FTC's proposed markets too narrow and denying a preliminary injunction); FTC v. Lab. Corp. of Am., No. SACV 10-1873 AG (MLGx), 2011 WL 3100372, at *15 (C.D. Cal. Mar. 11, 2011) (denying preliminary injunction, in part, because government failed to prove its alleged markets); FTC v. Foster, No. CIV 07-352 JBACT, 2007 WL 1793441 (D.N.M. May 29, 2007) (holding that FTC's market definition was too narrow). The government has won many cases using relatively narrow market definitions, even those that excluded the next closest competitor. *See, e.g.*, FTC v. Advocate Health Care Network, 841 F.3d 460, 475 (7th Cir. 2016) (defining a market of 11 out of 74 hospitals in a metropolitan area and excluding closer competitors outside of the alleged market); United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 57–58, 104 (D.D.C. 2011) (defining a market that excluded several close competitors to the merging parties).

[8] While the Agencies have long asserted that direct proof of market power relieves the plaintiff of its obligation to define a relevant antitrust market, courts continue to view market definition as a bedrock statutory requirement. *Compare* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284–85 (2018) (*Amex*) ("Here, the plaintiffs rely exclusively on direct evidence to prove that Amex's anti-steering provisions have caused anticompetitive effects in the credit card market. *To assess this evidence, we must first define the relevant market.*" (emphasis added)); United States v. Marine Bancorporation, Inc., 418 U.S. 602, 618 (1974) ("Determination of the relevant product and geographic markets is 'a necessary predicate' to deciding whether a merger contravenes the Clayton Act."); *and RAG-Stiftung*, 436 F. Supp. 3d at 291 ("Defining the relevant market is a necessary predicate to finding a Clayton Act violation.") (internal citations and quotations omitted), *with* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4, at 7 (2010) [hereinafter 2010 Horizontal Merger Guidelines], ftc.gov/os/2010/08/100819hmg.pdf (demoting the role of market definition, explaining that "[s]ome of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition," and that direct evidence "may more directly predict the competitive effects of a merger"), *and* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Remarks Before the ABA Section of Antitrust Law's 59th Spring Meeting: The Past and Future of Direct Effects Evidence 2 (Mar. 30, 2011), www.ftc.gov/sites/default/files/documents/public_statements/past-and-future-direct-effects-evi

explicitly or implicitly, upon it. For merger matters brought under Section 7 of the Clayton Act, how the decision-maker defines the ambit of the market determines both whether the merging firms are deemed competitors in the first place[9] and whether their merger would substantially diminish competition.[10] Since at least 1963, when the Supreme Court decided *United States v. Philadelphia National Bank*,[11] courts reviewing Section 7 claims have assessed the competitive effects of a transaction within, rather than across, markets.[12]

Despite the importance of market definition, the rules that govern it are flexible enough to support a range of permissible choices. As the U.S. Department of Justice Antitrust Division (together with the FTC, the Agencies) observed in a brief filed in 2015, "[f]requently, the government alleges narrow markets, the defendants describe broad markets, and the court must choose between the competing approaches."[13] The choice is often outcome-determinative, leading many to charge that market definition is "an essentially ex post choice"[14] designed "to achieve the desired results in calculating market

dence/110330aba-directeffects.pdf (arguing that an assessment of whether the Clayton Act is violated "may turn on market definition, but it doesn't have to . . . ."; "direct evidence can shed light directly" on the ultimate question).

[9] *See, e.g.*, United States v. Sabre Corp., 452 F. Supp. 3d 97, 136 (D. Del. 2020) (holding that a one-sided firm could not compete in a two-sided market as a matter of law), *vacated*, No. 20-1767, 2020 WL 4915824 (3d Cir. July 20, 2020) (per curiam); FTC v. Lundbeck, Inc., No. CIV. 08-6379 JNE/JJG, 2010 WL 3810015, at *22 (D. Minn. Aug. 31, 2010), *aff'd*, 650 F.3d 1236 (8th Cir. 2011) (concluding that the FTC failed to show that acquired products were in the same market).

[10] *See, e.g.*, United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593 (1957) ("Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition within the area of effective competition." (internal quotation marks omitted)).

[11] 374 U.S. 321 (1963).

[12] *Id.* at 370 (rejecting the suggestion that "anticompetitive effects in one market could be justified by procompetitive consequences in another"). Courts also focus upon in-market anticompetitive effects in Sherman Act cases. *See, e.g.*, *Amex*, 138 S. Ct. at 2284 (explaining that "[u]nder [the rule of reason], the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market" and defining a two-sided transaction market); FTC v. Qualcomm Inc., 969 F.3d 974, 992 (9th Cir. 2020) (evaluating "[t]he district court's consideration of anticompetitive impacts outside of the relevant markets"); *see also* United States v. Microsoft Corp., 253 F.3d 34, 51 (D.C. Cir. 2001) (en banc) (per curiam) (explaining that, under the "structural approach" to assessing market power, "monopoly power may be inferred from a firm's possession of a dominant share of a relevant market that is protected by entry barriers").

[13] United States' Pretrial Mem. at 15–16, United States v. AB Electrolux, No. 1:15-cv-01039, 2015 WL 9694688 (D.D.C. Dec. 10, 2015) [hereinafter Electrolux Pretrial Brief], www.justice.gov/atr/file/801726/download.

[14] Louis Kaplow, *Market Definition and the Merger Guidelines*, 39 REV. INDUS. ORG. 107, 124 (2011).

shares."[15] This gripe is long-standing; in the 1960s, commentators charged that "the Government has not been averse to shifting its market theories from case to case, seemingly with little justification other than making the relevant percentages more favorable to its cause."[16]

Given this broad discretion, market definition can vary not just from one case or judge to the next, but also over time, as new tools and theories gain purchase. These changes, in turn, may affect the way substantive antitrust rules are applied, even if those rules have not themselves changed. In the 1980s, for example, Robert Pitofsky objected to the Merger Guidelines of that era because they—at least in his estimation—"have tended to expand relevant markets and thus diminish apparent market power."[17] Other commentators took the opposite view of the same Guidelines, predicting narrower markets.[18] More recently, Jan Rybnicek and Josh Wright argued the 2010 Horizontal Merger Guidelines would lead to narrower markets and fewer cognizable efficiencies than was the case under the preceding Guidelines.[19]

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[15] G.E. Hale & Rosemary D. Hale, *A Line of Commerce: Market Definition in Anti-Merger Cases,* 52 IOWA L. REV. 406, 426 (1966); *see also* GEORGE E. HALE & ROSEMARY D. HALE, MARKET POWER: SIZE AND SHAPE UNDER THE SHERMAN ACT 97–103, 111 (1958) (arguing that the legal tests for market definition "are basically irrational, arbitrary and hopelessly confused"). This results-first orientation continues to appear from time to time. *See, e.g.*, Jonathan B. Baker, Dir., Fed. Trade Comm'n Bureau of Econ., Product Differentiation Through Space and Time: Some Antitrust Policy Issues, Remarks to the Antitrust and Trade Regulation Committee of the Association of the Bar of the City of New York City (Feb. 6, 1996), www.ftc.gov/public-statements/1996/02/product-differentiation-through-space-and-time-some-antitrust-policy (arguing that, when "we know, directly, that a merger or other practice is harmful," but "it is hard to draw lines around a market," then "[j]ust exactly where the market's boundaries are may not be very important" and "[a]ll that should matter to the doctrine is that the market contain the transactions or parties that are causing or suffering the consumer injury"); *accord* Tim Wu, *The* American Express *Opinion, the Rule of Reason, and Tech Platforms*, 7 J. ANTITRUST ENFORCEMENT 117, 123 (2019) (arguing that "[a]s everyone knows, it is nearly always possible to manipulate market definition to justify deciding a case in a particular direction" and therefore direct evidence of anticompetitive effects should control the analysis).

[16] Thomas M. Lewyn & Stephen Mann, *Some Thoughts on Policy and Enforcement of Section* 7 of the Clayton Act, 50 A.B.A. J. 154, 156 (1964); *see* Milton Handler & Stanley D. Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629, 649–50 (1961) (arguing that enforcers expanded and contracted markets at will "to find a market that will magnify the acquisition and thus facilitate its condemnation").

[17] Pitofsky, *supra* note 2, at 1808; *see also* Louis B. Schwartz, *The New Merger Guidelines: Guide to Governmental Discretion and Private Counseling or Propaganda for Revision of the Antitrust Laws?*, 71 CALIF. L. REV. 575, 587 (1983) (arguing that the 1982 Merger "Guidelines' treatment of substitute products . . . represents an effort to incorporate more production into the base figure so that particular firms' nominal shares will be minimized.").

[18] *See, e.g.*, Donald I. Baker & William Blumenthal, *The 1982 Guidelines and Preexisting Law*, 71 CALIF. L. REV. 311, 324–25 (1983) (hypothesizing that "we may well see narrower product markets").

[19] *See* Jan M. Rybnicek & Joshua D. Wright, *Outside In or Inside Out?: Counting Merger Efficiencies Inside and Out of the Relevant Market*, *in* 2 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE LIBER AMICORUM 443, 452 (Nicolas Charbit & Elisa Ramundo eds., 2014) ("Under the 2010 Guidelines, some efficiencies benefits that may have fallen within the relevant market

Despite the importance of market definition and occasional predictions about how policy may affect it, whether markets have actually and systematically changed in scope over time is ultimately an empirical question, and one that existing surveys have not squarely addressed.[20] This article tries to fill the gap.

Part I tests the hypothesis that product markets are frequently, and perhaps systematically, narrower today than those used by the Supreme Court to set the foundational legal rules. It finds that, of the 12 product markets defined in Section 7 cases decided by the Supreme Court,[21] half have narrowed over time, with six product markets (used in 12 Supreme Court cases)—banking, beverage containers, energy, footwear, groceries, and spices—narrowing markedly. The remaining six product markets (used in seven Supreme Court cases)—automotive paint, beer, electrical conductor, natural gas, sodium chlorate, and spark plugs—have remained more or less the same. Remarkably, none of the 12 product markets has broadened since then.[22] In other words, whereas previously the Supreme Court and lower courts defined a mix of broad and narrow markets, courts today usually define narrow ones, leaving litigants to debate whether the market is narrow or very narrow, with *Ohio v. American Express Co.* constituting the rare exception.[23]

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under the antitrust agencies' market definition exercise under earlier iterations of the Horizontal Merger Guidelines will now fall outside the relevant market."); Judd E. Stone & Joshua D. Wright, *The Sound of One Hand Clapping: The 2010 Merger Guidelines and the Challenge of Judicial Adoption*, 39 REV. INDUS. ORG. 145, 154 (2011) ("*Philadelphia National Bank* mandates this inability to balance cross-market effects. Under the 1997 Revisions, this dictate remained a curiosity of antitrust past. The 2010 Guidelines' diversion approach to market definition is likely to dramatically increase *Philadelphia National Bank*'s practical significance.").

[20] *See, e.g.*, Gregory J. Werden, *The History of Antitrust Market Delineation*, 76 MARQ. L. REV. 123 (1992) (tracing the history of market definition); Pitofsky, *supra* note 2 (same).

[21] These cases all were decided between 1956 and 1975 and therefore reflect similar legal and economic assumptions.

[22] The lack of any broader markets is notable; if market scope had not systematically changed over time, we would expect the number of markets that had narrowed to roughly match the number that had broadened. Instead, we find many of the former and *none* of the latter.

[23] Indeed, given the broad markets defined in *Philadelphia National Bank* and *Brown Shoe*, the Court's decision to define a somewhat broader market in *American Express*—at least by recent standards, if not historical ones—is neither surprising nor in conflict with traditional antitrust law. *See* United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963); Brown Shoe Co. v. United States, 370 U.S. 294 (1962); Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018). *But see, e.g.*, *Hearings on Proposals to Strengthen the Antitrust Laws and Restore Competition Online Before the Subcomm. on Regulatory Reform, Commercial & Administrative Law of the H. Comm. on the Judiciary*, 116th Cong. (Oct. 1, 2020) (testimony of Sally Hubbard, Dir. of Enforcement Strategy, Open Markets Institute, Appx. A, at 20), docs.house.gov/meetings/JU/JU05/20201001/111072/HHRG-116-JU05-Wstate-HubbardS-20201001.pdf (calling for the "legislative repeal" of *Ohio v. American Express* because it "adopt[s] [the] two-sided markets construct" and purportedly requires a plaintiff to "prove a net anti-competitive harm across two different markets").

Part II describes four likely causes for the narrowing of product markets. First, the methodologies used to define markets have changed substantially over the years. As enforcers shifted their focus to differentiated products and unilateral effects, the models and tools used to define markets began to change, with the hypothetical monopolist test, diversion ratios, and upward pricing pressure becoming more common features of the market definition exercise.[24] Second, as confidence in measures of demand-side substitution improved, courts and enforcers began to de-emphasize supply-side substitution, which has been excluded entirely from the market definition exercise since the 1992 Horizontal Merger Guidelines.[25] Third, the Guidelines have emphasized some concepts, like price-discrimination markets, that can result in narrower markets.[26] Fourth, the narrowing of product markets may reflect—at least in some cases—real changes in the underlying economy, like greater product differentiation. For example, the "premium natural and organic supermarkets" at issue in *Whole Foods* did not exist when the Court decided *United States v. Von's Grocery Co.*[27]; neither did "broadline foodservice distribution to national customers."[28] Yet it is unlikely that greater differentiation can explain all, or even most, of the narrowing. Some products were already differentiated in the 1960s; there were many kinds of children's shoes, even though the Court consciously chose to lump them all together.[29] Likewise, the courts have narrowed commodity product markets like coal and spices markedly, even though the products' physical properties have not changed.

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[24] *See, e.g.*, Stone & Wright, *supra* note 19, at 150 ("The market definition analysis endorsed by the new Guidelines correspondingly favors narrower markets" than the analysis under the 1997 Guidelines because, among other things, "the [new] Guidelines' value of diversion test tends to narrow relevant markets, all else held constant."); *see* Joseph J. Simons & Malcolm B. Coate, United States v. H&R Block*: An Illustration of the DOJ's New But Controversial Approach to Market Definition*, 10 J. COMPETITION L. & ECON. 543, 554–70 (2014) (criticizing the DOJ's use of aggregate diversion ratios compared to an estimate of critical loss to assert a narrow market).

[25] *See, e.g.*, Baker, *supra* note 3, at 132–38 (discussing development of the concept of supply-side substitution from *Cellophane* to the 2000s); FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 293–99 (D.D.C. 2020) (finding that the Commission failed to prove that supply-side factors could be used to define the product market). As discussed further below, substitution of supply has not disappeared entirely, but instead factors into the analysis only *after* the market has been defined. Even if supply-side substitution is always fully considered in subsequent steps (which is no sure thing), this approach does nothing to recapture efficiencies that have been pushed out-of-market by the elimination of supply substitution in the market definition exercise.

[26] *See infra* Part III.

[27] 384 U.S. 270 (1966). Nor did "club stores," which are occasionally counted as supermarkets. *See, e.g.*, Complaint ¶ 9, Wal-Mart Stores, Inc., FTC Docket No. C-4066 (filed Nov. 20, 2002).

[28] FTC v. Sysco Corp., 113 F. Supp. 3d 1, 48 (D.D.C. 2015).

[29] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 326–28 (1962).

Whatever the cause, when a court defines product markets more narrowly today than in yesteryear, it necessarily applies substantive legal rules in a systematically different way than when those rules were first announced. Part III considers three legal rules: (1) the exclusion of out-of-market merger efficiencies; (2) the structural presumption, i.e., the market share at which a transaction becomes presumptively unlawful; and (3) the traditional emphasis upon mergers involving "overlapping" horizontal competitors.[30] Narrowing product markets have altered rules (1) and (2) in ways that favor plaintiffs, while narrowing product markets have altered rule (3) in ways that can favor either plaintiffs or defendants.

Part IV uses two examples from the banking industry, whose dual-enforcement structure provides a useful comparison, to examine whether narrower product markets have in practice altered the way enforcers apply substantive rules. Whereas the DOJ has adopted ever narrower markets during its antitrust review, the Federal Reserve Bank (FRB) has retained the 1960s-era "broad market" approach, often by broadening the geographic markets further to account for suburban sprawl. In at least two bank mergers, CoreStates/FirstUnion (1998) and BB&T/SunTrust (2020), the agencies explicitly acknowledged that this difference in methodology has led to different substantive results, with the DOJ estimating significantly greater harm and fewer cognizable efficiencies and therefore demanding larger divestitures than the FRB.[31] These examples therefore illustrate both how antitrust product markets have narrowed and how that change affects the application of legal rules like market share thresholds.

The narrowing of markets also has important policy implications. Two merit brief mention. First, because the narrowing of markets has the effect of making antitrust enforcement *more* stringent, at least on average, it cuts against the narrative that antitrust rules have become "overly lenient" since the 1980s.[32] Nor is this effect fully offset by higher market share thresholds,

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[30] For cases in which merging firms fell into separate, narrowly defined product markets, see United States v. Sabre Corp., 452 F. Supp. 3d 97 (D. Del. 2020), and FTC v. Steris Corp., 133 F. Supp. 3d 962 (N.D. Ohio 2015).

[31] *See* Robert Kramer, Chief, Litigation II Section, U.S. Dep't of Justice Antitrust Div., Address Before the ABA Antitrust Law Section: "Mega-Mergers" in the Banking Industry 3 (Apr. 14, 1999), www.justice.gov/atr/speech/mega-mergers-banking-industry (explaining that "the FRB and [DOJ] in their analysis use[d] different product markets and this [difference] played a significant role in this matter"); U.S. Dep't of Justice, Antitrust Div., *Division Update 2020*, at 19 (June 2020) [hereinafter DOJ Update 2020], www.justice.gov/file/1280196/download ("In several cases, Division staff concluded that the relevant antitrust market was narrower than the banking markets defined by the banking regulators, which underscored the need for a robust remedy.").

[32] Jonathan B. Baker et al., Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets (Apr. 30, 2020), equitablegrowth.org/wp-content/uploads/2020/04/Joint-Response-to-the-House-Judiciary-Com

as in recent years product markets have continued to narrow even as thresholds have remained unchanged.[33] This conclusion is underscored by the case studies described in Part IV, which demonstrate that, *ceteris paribus*, bank merger enforcement is more stringent when markets are drawn narrowly. Second, and relatedly, proposals to return to 1960s-era antitrust rules—which, to be clear, we do not endorse—should do so wholesale, reverting to both lower thresholds *and* broader markets.[34] Or, to borrow a phrase from Justice William Rehnquist, these proposals should avoid cherry-picking, instead taking "the bitter with the sweet."[35]

I. NARROWING MARKETS

Despite its importance, the rules that govern market definition have always been flexible enough to support a range of permissible choices. In the 1950s, the Supreme Court held both that product markets should be "drawn narrowly"[36] and that it was "improper" to define them so narrowly that only "fungible" products remained in the market.[37] The decision in *United States v. Brown Shoe Co.* confused matters further by creating a list of factors capable of supporting a definition as broad or as narrow as the fact finder desired.[38] Given this flexibility in defining a relevant market, commentators have long

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mittee-on-the-State-of-Antitrust-Law-and-Implications-for-Protecting-Competition-in-Digital-Markets.pdf; *see also* Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARV. BUS. REV. (Dec. 15, 2017), hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement ("[A]ntitrust policy and enforcement declined during the fourth cycle (late-1970s–mid-2010s) with the rise of the Chicago School of Economics in the late 1970s . . . . By the Obama administration, we had neither a popular antitrust *movement* nor many significant antitrust prosecutions."); Stacy Mitchell, *The Rise and Fall of the Word "Monopoly" in American Life*, ATLANTIC (June 20, 2017), www.theatlantic.com/business/archive/2017/06/word-monopoly-antitrust/530169/ ("Since Reagan took office, corporate concentration has increased dramatically. . . . Plenty of Americans seem to be troubled by these effects and the hands-off policy that led to them.").

[33] That is, while market share thresholds have remained approximately the same since the 1992 Horizontal Merger Guidelines, some markets have continued to narrow, such as "retail-channel" ovens, "superpremium ice cream," "premium natural and organic ice cream," and "refrigerated pickles." *See infra* notes 86–92 and accompanying text.

[34] *See, e.g.*, WILLIAM A. GALSTON & CLARA HENDRICKSON, BROOKINGS INST. , A POLICY AT PEACE WITH ITSELF: ANTITRUST REMEDIES FOR OUR CONCENTRATED, UNCOMPETITIVE ECONOMY (2018), www.brookings.edu/research/a-policy-at-peace-with-itself-antitrust-remedies-for-our-concentrated-uncompetitive-economy/ ("This suggests that antitrust enforcers should lower the threshold at which prospective mergers are subject to rigorous scrutiny."); *Restoring Antimonopoly Through Bright-Line Rules*, OPEN MARKETS INSTITUTE (Apr. 26, 2019), openmarketsinstitute.org/op-eds-and-articles/restoring-antimonopoly-bright-line-rules/ (arguing for the re-adoption of the "thresholds enumerated in the 1968 guidelines").

[35] Arnett v. Kennedy, 416 U.S. 134, 154 (1974) (Rehnquist, J., plurality opinion).

[36] Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 612 n.31 (1953).

[37] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394 (1956).

[38] 370 U.S. 294, 325 (1962) (endorsing, in addition to "interchangeability of use or the cross-elasticity of demand . . . . such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique

charged that market definition is "an essentially ex post choice"[39] designed "to achieve desired results in calculating market shares."[40]

How courts exercise this discretion has varied substantially over time. During the first 25 years after the Celler-Kefauver Act of 1950,[41] the Supreme Court defined a mix of broad product markets, such as "retail grocery" sales[42] and "children's shoes,"[43] and narrow ones like "accredited central station [alarm] service[s]"[44] and "automotive finishes and fabrics."[45] Lower courts also defined a mix of broad and narrow product markets.[46] Beginning in the 1980s, perhaps in response to the issuance of the 1982 Merger Guidelines, narrow markets became the rule. For example, the product market in grocery store mergers changed from "retail grocery" sales in the 1960s to "supermarkets" in the late 1980s and "premium natural and organic supermarkets" in the 2000s.[47] Today, agencies and courts routinely define product markets so narrowly that they require multiple adjectives, such as "the sale of superpremium ice cream products to the retail channel,"[48] "broadline foodservice distribution to national customers,"[49] "[b]randed seasoned salt products . . . (not including private or store label) sold at retail,"[50] and branded canola oil sold to retail-

production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors").

[39] Kaplow, *supra* note 14, at 124.

[40] Hale & Hale, *supra* note 15, at 426.

[41] Pub. L. No. 81-899, 64 Stat. 1125 (1950).

[42] United States v. Von's Grocery Co., 384 U.S. 270, 272 (1966).

[43] Brown Shoe Co. v. United States, 370 U.S. 294, 326 (1962) (defining three markets in all: "men's, women's, and children's shoes").

[44] United States v. Grinnell Corp., 384 U.S. 563, 571–74 (1966) (defining a product market for "the accredited central station service business").

[45] United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 594–95 (1957).

[46] *See, e.g.*, United States v. Gen. Dynamics Corp., 341 F. Supp. 534, 555 (N.D. Ill. 1972) ("[T]he energy market is the appropriate line of commerce for testing the competitive effect of the United Electric–Freeman combination."). *But see* Pitofsky, *supra* note 2, at 1808 n.9 (criticizing the "ludicrously" narrow product market for "florist foil" defined in *Reynolds Metals Co. v. FTC*, 309 F.2d 223, 227 (D.C. Cir. 1962)).

[47] *Compare Von's Grocery*, 384 U.S. at 272 (retail grocery), *and* Van de Kamp *ex rel.* Cal. v. Am. Stores Co., 697 F. Supp. 1125, 1129 (C.D. Cal. 1988) (accepting the state's proposed product market of "'supermarkets,' full line grocery stores with more than 10,000 square feet"), *aff'd in part*, 495 U.S. 271, 283 (1990) (assuming the correctness of the district court's antitrust analysis), *with* FTC v. Whole Foods Mkt., 548 F.3d 1028, 1032–33 (D.C. Cir. 2008) (finding clearly erroneous the district court's definition of a market encompassing all supermarkets and cataloguing evidence suggesting that a market for "premium, natural, and organic supermarkets ('PNOS')" was plausible); *id.* at 1043–49 (Tatel, J., concurring) (finding that the evidence strongly suggests a PNOS market).

[48] Complaint ¶ 11, Nestlé Holdings, Inc., FTC Docket No. C-4082 (filed June 25, 2003).

[49] FTC v. Sysco Corp., 113 F. Supp. 3d 1, 48 (D.D.C. 2015) (defining overlapping product markets for "broadline foodservice distribution" and "broadline foodservice distribution to national customers").

[50] Complaint ¶ 8, McCormick & Co., FTC Docket No. C-4225 (filed July 29, 2008).

ers.[51] As explained below in Part I.B, comparing the product markets used by the Supreme Court during the relatively "broad market" era to their modern equivalents suggests many product markets are narrower today.

A. Law

The basic legal rules for market definition were put in place decades ago. In 1950, Congress revised Section 7 to prohibit any acquisition—including stock or assets—"the effect of [which] may be substantially to lessen competition, or tend to create a monopoly" in "any line of commerce . . . in any section of the country."[52] This description is somewhat different from the Sherman Act, which instead addresses "trade or commerce among the several States,"[53] although in practice courts use the same market definition rules for both statutes.[54]

The Court spent the next 15 years interpreting the new Clayton Act language and developing a body of associated legal rules. As a threshold matter, the Court recognized that the facts on the ground do not always lend themselves to a single, obvious result. In *Times-Picayune Publishing Co. v. United States*,[55] a Sherman Act case, the Court recognized that defining markets is an inexact science: "The 'market,' as most concepts in law or economics, cannot be measured by metes and bounds."[56] Similarly, in the *Cellophane* case, it noted that "[i]ndustrial activities cannot be confined to trim categories."[57]

Acknowledging these real-world nuances, the Court set out two principles that vest fact finders with substantial discretion. First, the Court explained that "a relevant market cannot meaningfully encompass [an] infinite range [of products]. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn."[58] This concept is known today as the "narrowest market" principle,

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[51] *See* Complaint ¶¶ 25–35, J.M. Smucker Co., FTC Docket No. 9381 (filed Mar. 5, 2018) (defining a market for "the sale of canola and vegetable oils . . . to retailers" but then explaining that canola and vegetable oils are separate markets clustered for convenience and that the relevant product market excludes avocado, coconut, corn, olive, peanut, and other oils, as well as private-label products).

[52] 15 U.S.C. § 18.

[53] 15 U.S.C. §§ 1, 2.

[54] *See, e.g.*, Note by the Delegation of the United States to the OECD Directorate for Financial and Enterprise Affairs, Competition Comm., Roundtable on Market Definition, DAF/COMP/WD(2012)27 (June 7, 2012), www.justice.gov/sites/default/files/atr/legacy/2012/08/22/286279.pdf (discussing market definition without distinguishing between Clayton Act and Sherman Act cases).

[55] 345 U.S. 594 (1953).

[56] *Id.* at 611.

[57] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956) (*Cellophane*).

[58] *Times-Picayune*, 345 U.S. at 612 n.31.

which both the courts and the Agencies routinely use.[59] Second, the Court cautioned against drawing the circle too narrowly, explaining that it is also improper "to require that products be fungible to be considered in the relevant market."[60] This tension—that markets should be "narrow" but not too narrow—has haunted market definition exercises ever since. Indeed, both commandments appear, almost side by side, in the current Horizontal Merger Guidelines.[61]

From the late 1950s to the mid-1970s, the Court applied these market definition principles to several Clayton Act cases. As described in more detail in Part I.B, the Court's emphasis varied somewhat from one case to the next, producing a patchwork of markets that were generally, but not always, broad.

B. PRACTICE

Although the basic legal rules for defining relevant product markets have not changed since the mid-1960s, the product market in the average Clayton Act case has narrowed. Today, the Agencies typically allege—and courts routinely find—markets that are substantially narrower than their historical counterparts.

1. *The Broad Market Era (1950–1975)*

Between approximately 1950 and 1975, the Supreme Court defined a mix of broad and narrow relevant product markets. In *Brown Shoe*, for example, the Supreme Court defined separate relevant product markets for all men's shoes, all women's shoes, and all children's shoes.[62] In doing so, the Court explicitly rejected the defendant's attempt to narrow the markets by alleging separate markets for different price tiers, concluding that "the boundaries of the relevant market must be drawn with sufficient breadth to include the competing products of each of the merging companies and to recognize competition where, in fact, competition exists" and that "further division of product

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[59] *See, e.g.*, FTC v. Peabody Energy Corp., 492 F. Supp. 3d 865, 885 (E.D. Mo. 2020) ("Crucial to the Court's conclusion is the 'narrowest market principle.' "); FTC v. Sysco Corp., 113 F. Supp. 3d 1, 26 (2015) (quoting and applying the *Times-Picayune* rule).

[60] *DuPont*, 351 U.S. at 394.

[61] 2010 Horizontal Merger Guidelines, *supra* note 8, § 4.1.1 ("Because the relative competitive significance of more distant substitutes is apt to be overstated by their share of sales, when the Agencies rely on market shares and concentration, they usually do so in the smallest relevant market satisfying the hypothetical monopolist test."); *id.* § 4 ("However, a group of products is too narrow to constitute a relevant market if competition from products outside that group is so ample that even the complete elimination of competition within the group would not significantly harm either direct customers or downstream consumers. The hypothetical monopolist test . . . is designed to ensure that candidate markets are not overly narrow in this respect.").

[62] Brown Shoe Co. v. United States, 370 U.S. 294, 326 (1962) ("Applying these considerations to the present case, we conclude that the record supports the District Court's finding that the relevant lines of commerce are men's, women's, and children's shoes.").

lines based on 'price/quality' differences would be 'unrealistic.'"[63] The Court also rejected attempts to distinguish among different kinds of children's shoes as "impractical and unwarranted."[64]

The Supreme Court also endorsed a fairly broad product market in *United States v. Philadelphia National Bank*.[65] There the district court rejected both litigants' proffered (and narrower) markets as attempts to "subdivide a commercial bank into certain selected services and functions," which if "carried to the logical extreme, would result in many additional so-called lines of commerce" but serve "no useful purpose."[66] The Supreme Court took the same view, holding that the relevant product market was "the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term 'commercial banking.'"[67] Although the Court acknowledged that the competitive dynamics varied among the products and services included in this broad market, it nonetheless concluded that "it is clear that commercial banking is a market sufficiently inclusive to be meaningful in terms of trade realities."[68] The Supreme Court applied the same "commercial banking" product market to six other bank mergers in the following 12 years,[69] in the process rejecting both broader and narrower candidate markets.[70]

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[63] *Id.*

[64] *Id.* at 328.

[65] 374 U.S. 321 (1963).

[66] United States v. Phila. Nat'l Bank, 201 F. Supp. 348, 363 (E.D. Pa. 1962), *rev'd*, 374 U.S. 321 (1963).

[67] United States v. Phila. Nat'l Bank, 374 U.S. at 356.

[68] *Id.* at 357 (internal quotations and citations omitted).

[69] *See* United States v. First Nat'l Bank & Trust Co. of Lexington, 376 U.S. 665, 667 (1964); United States v. Third Nat'l Bank in Nashville, 390 U.S. 171, 181–82 n.15 (1968) (affirming "commercial banking" product market); United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350, 360–61 (1970) (holding that the district court erred when it defined narrower product markets with a broader range of participants because "the cluster of products and services termed commercial banking has economic significance well beyond the various products and services involved"); United States v. Marine Bancorporation, Inc., 418 U.S. 602, 618–19 (1974) (noting that the district court's definition of a "commercial banking" product market was not appealed but "in any event it is in full accord with our precedents"); United States v. Conn. Nat'l Bank, 418 U.S. 656, 666 (1974) (reversing a district court finding that the relevant market included both savings banks and commercial banks, although acknowledging that the market may eventually broaden to include both types of banks, and remanding the case with instructions that "the District Court should treat commercial banking as the relevant product market"); United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 120–21 (1975) (affirming "commercial banking" product market). The Court did not reach the question in a seventh case. United States v. First City Nat'l Bank of Houston, 386 U.S. 361, 369 n.1 (1967).

[70] *See Connecticut National Bank*, 418 U.S. at 666 (rejecting a broader market that encompassed both commercial and savings banks); *Phillipsburg National Bank & Trust Co.*, 399 U.S. at 360–61 (rejecting a narrower market that did not include the full "cluster" of services traditionally included in the term "commercial banking").

Yet the Court did not always define broad markets. In the *DuPont (GM)* case, for example, the Court chose to define narrow product markets for "automotive finishes and fabrics,"[71] while the dissent argued this market was too narrowly drawn because the very same finishes and fabrics were also used in many other industries.[72] The Court also sometimes defined narrow markets in Section 2 cases, as it did in *Grinnell*, over a sharp dissent.[73]

Lower courts likewise defined a mix of broader and narrower markets. In *United States v. General Dynamics Corp.*,[74] for example, the district court defined an "energy market"[75] based on evidence of significant competition from "oil, gas, and nuclear energy."[76] Yet as Robert Pitofsky wrote, there were also "many instances" during this era in which lower courts found "excessively, and sometimes ludicrously, narrow market definitions."[77] In the late 1950s and early 1960s, for example, government enforcers successfully alleged relevant product markets for "florist foil" (a particular light-weight grade of aluminum foil), "high-priced iron golf clubs," "low-priced baseballs," and "industrial-grade rental garments."[78]

2. *Subsequent Narrowing (1980 to the Present)*

Starting in the 1980s, courts and enforcers began to define product markets in a more standardized fashion, a dynamic that remains largely true today. Although exceptions remained, standardization typically meant rejecting broad markets in favor of somewhat narrower ones, which often focused on a particular industrial or consumer good without making further distinctions.[79] For example, in the early 1980s, Frederick Rowe argued that the Agencies had

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[71] United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 594–95 (1957) ("Thus, the bounds of the relevant market for the purposes of this case are not coextensive with the total market for finishes and fabrics, but are coextensive with the automobile industry, the relevant market for automotive finishes and fabrics.").

[72] *Id.* at 648–54 (Burton, J., dissenting) (noting that the Court defined a relevant market that included products used in both automotive and non-automotive applications but arbitrarily excluded all non-automotive uses from the market share calculations).

[73] United States v. Grinnell Corp., 384 U.S. 563, 571–74 (1966); *id.* at 591 (Fortas, J., dissenting).

[74] 341 F. Supp. 534 (N.D. Ill. 1972), *aff'd*, 415 U.S. 486 (1974).

[75] *Id.* at 555 ("Based upon the extensive evidence presented at trial concerning the coal industry, its consumers and its competitors, this court is of the opinion that the energy market is the appropriate line of commerce for testing the competitive effect of the United Electric-Freeman combination.").

[76] *Id.* at 545.

[77] Pitofsky, *supra* note 2, at 1808.

[78] *Id.* at 1808 n.9 (citing Reynolds Metals Co. v. FTC, 309 F.2d 223, 227 (D.C. Cir. 1962) (florist foil); A.G. Spaulding & Bros. v. FTC, 301 F.2d 585, 588, 597 (3d Cir. 1962) (golf clubs and baseballs); United States v. Blue Bell, Inc., 395 F. Supp. 538, 543 (M.D. Tenn. 1975) (garments)).

[79] *See* Werden, *supra* note 20 (tracing the ebb and flow of market definition over time).

"scored easy triumphs against trivial horizontal deals" in markets like local towel rental services and "'vandal-resistant plumbing fixtures' used in prisons."[80] In 1986, Judge Bork wrote a decision affirming the definition of a relevant product market for "aircraft transparencies requiring, for want of a better term, 'high technology' to produce, without regard to the materials of which they are fabricated."[81] That same year, the Sixth Circuit affirmed a district court decision involving a single household appliance, the "dishwasher" market,[82] which was consistent with the way other household appliances were assessed.[83] Courts and enforcers also sometimes made further distinctions, particularly as price-discrimination markets gained purchase.[84] Although a few product markets broadened, these cases were rare and sometimes controversial.[85]

Most narrowing took place along two dimensions. First, markets narrowed to focus upon a product's next-closest substitutes, which often meant defining a market around a single price tier or product characteristic. For example, in

[80] Frederick M. Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511, 1528 (1984) (citing, *inter alia*, United States v. Acorn Eng'g Co., 1981-2 Trade Cas. (CCH) ¶ 64,197 (N.D. Cal. 1981); United States v. Mission Indus., 601 Trade Reg. Rep. (CCH) 4 (June 21, 1983)).

[81] FTC v. PPG Indus., Inc., 798 F.2d 1500, 1504–06 (D.C. Cir. 1986). As a market defined by supply-side factors, the present Guidelines may arrive at a different (presumably narrower) formulation.

[82] White Consol. Indus., Inc. v. Whirlpool Corp., 781 F.2d 1224, 1227–29 (6th Cir. 1986).

[83] *See* Press Release, U.S. Dep't of Justice, Antitrust Div. Statement on the Closing of Its Investigation of Whirlpool's Acquisition of Maytag (Mar. 29, 2006), www.justice.gov/archive/atr/public/press_releases/2006/215326.pdf (stating that the transaction was unlikely to reduce competition in various household appliance markets, including "residential clothes washers and dryers"); Final Judgment, United States v. Com. Elec. Co., 1959 Trade Cas. (CCH) ¶ 69,505 (N.D. Ohio Oct. 23, 1959), www.justice.gov/atr/page/file/1114471/download (defining "GE major appliances" subject to the judgment as "refrigerators, freezers, ranges and ovens, water heaters, dishwashers, disposals, washers, dryers, combination washer-dryers, air conditioners, and television receivers").

[84] *See, e.g.*, Complaint ¶¶ 20–26, United States v. AB Electrolux, No. 1:15-cv-01039 (D.D.C. filed July 1, 2015) (defining separate markets for different distribution channels of the same product); FTC v. Sysco Corp., 113 F. Supp. 3d 1, 48 (D.D.C. 2015) (defining a separate price-discrimination market around "national customers"); *see also* Ian Simmons, Sergei Zaslavsky & Lindsey Freeman, *Price Discrimination Markets in Merger Cases: Practical Guidance from* FTC v. Sysco, ANTITRUST, Fall 2016, at 40, 40 (2016) (arguing that the enforcement Agencies are asserting "narrow 'price discrimination markets' . . . in a growing number of merger investigations and enforcement actions").

[85] *See, e.g.*, Federated Dep't Stores, Inc./The May Dep't Stores Co., FTC File No. 051-0111 (2005) (Statement of the Commission) (defining markets for specific categories of goods sold by both department stores and specialty stores, rather than a market for "department stores," as the district court previously defined the market in *The Bon-Ton Stores, Inc. v. The May Dep't Store Co.*, 881 F. Supp. 860 (W.D.N.Y. 1994)); Mark D. Bauer, *Department Stores on Sale: An Antitrust Quandary*, 26 GA. ST. U. L. REV. 255, 319 (2010) (criticizing the FTC's decision in Federated/May and identifying "a homogenization of retail choices, a loss of civic identity and at least perceived disrespect by distant corporations that have usurped cherished local institutions" as "issues [that] demand further investigation by the FTC").

the early 2000s, the FTC alleged that "the sale of superpremium ice cream products to the retail channel" was a relevant product market, and that "refrigerated pickles" and "shelf-stable pickles" were in different product markets.[86] Likewise, in *Whole Foods*, the FTC alleged a market for "premium natural and organic supermarkets," which the district court rejected as too narrow but the court of appeals accepted.[87] By comparison, during the broad market era the Court rejected the defendant's attempt to define narrower shoe markets using " 'price/quality' and 'age/sex' distinctions" as "unrealistic," and found particularly laughable the suggestion that "men's shoes selling below $8.99 are in a different product market from those selling above $9.00."[88]

Second, enforcers more often defined narrow price-discrimination markets, even though those markets were hardly new.[89] Thus, for example, while the DOJ had long defined markets around specific household appliances like dishwashers, washing machines, and ovens, both before and after the rise of price-discrimination markets,[90] in *Electrolux*, it alleged both markets for individual household appliances (ranges, cooktops, and ovens) *and* price-discrimination submarkets for "contract channel" and "retail channel" purchasers of each of those same appliances.[91] The "national broadline customers" market in *Sysco* was also defined around the customers most vulnerable to price discrimination post-transaction.[92]

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[86] *See* Complaint ¶ 11, Nestlé Holdings, Inc., FTC Docket No. C-4082 (filed June 25, 2003); Complaint ¶¶ 12–13, 15(a), FTC v. Hicks, Muse, Tate & Furst Equity Fund V, L.P., FTC File No. 021-0150 (filed Oct. 22, 2002).

[87] FTC v. Whole Foods Mkt., Inc., 502 F. Supp. 2d 1, 34–36 (D.D.C. 2007), *rev'd*, 548 F.3d 1028, 1041 (D.C. Cir. 2008).

[88] Brown Shoe Co. v. United States, 370 U.S. 294, 326 (1962); *see also* United States v. Phila. Nat'l Bank, 201 F. Supp. 348, 363 (E.D. Pa. 1962) (rejecting both plaintiffs' and defendants' attempts to "subdivide a commercial bank into certain selected services and functions" as misguided because these smaller markets "would result in many additional so-called lines of commerce" but serve "no useful purpose"), *rev'd*, 374 U.S. 321 (1963).

[89] *See, e.g.*, U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § II.A, at 6 (1982) [hereinafter 1982 Merger Guidelines], www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11248.pdf ("If such price discrimination is possible, the Department will consider defining additional, narrower relevant product markets oriented to the buyer groups subject to the exercise of market power.").

[90] *See* Press Release, *supra* note 83 (finding the transaction was unlikely to reduce competition in various household appliance markets, including "residential clothes washers and dryers"); Final Judgment, United States v. Com. Elec. Co., 1959 Trade Cas. (CCH) ¶ 69,505 (N.D. Ohio Oct. 23, 1959), www.justice.gov/atr/page/file/1114471/download (defining "GE major appliances" subject to the judgment as "refrigerators, freezers, ranges and ovens, water heaters, dishwashers, disposals, washers, dryers, combination washer-dryers, air conditioners, and television receivers").

[91] Complaint ¶¶ 19–26, United States v. AB Electrolux, No. 1:15-cv-01039 (D.D.C. filed July 1, 2015) (defining separate markets for different distribution channels of the same product).

[92] FTC v. Sysco Corp., 113 F. Supp. 3d 1, 48–49 (D.D.C. 2015).

3. *Systematic Comparison*

There is therefore a growing perception that enforcers allege narrow markets and that courts typically agree,[93] particularly as the market definition exercise has become more standardized. What has been missing so far is substantial evidence that the courts and the Agencies are defining product markets in a systematically narrower way than before.

The product market definitions used by the Supreme Court in its Clayton Act cases, which were all decided between 1962 and 1975, provide a useful place to start. This sample is manageable in size, homogeneous (i.e., all cases were decided during the same era), and important given its role in setting basic substantive merger rules. As indicated below in Tables 1 and 2, in half the industries (6 of 12) and the majority of the cases (12 of 19), the courts and the Agencies define substantially narrower product markets today than the Supreme Court did during the broad market era. By comparison, *none* of the markets has broadened since then. Of the markets that have narrowed, how and when the definitional shift occurred varies.

Some markets, such as retail groceries, narrowed several times. In the 1966 *Von's Grocery* case, the Supreme Court found that the relevant product market for a merger of two Los Angeles-area grocery stores was the market for "retail grocery" sales,[94] which included small corner stores. In the 1990 case *California v. American Stores Co.*, the Supreme Court implicitly accepted a slightly narrower market for supermarkets, grocery stores of at least 10,000 square feet.[95] By 2008, in the *Whole Foods* case,[96] the Commission alleged, and the D.C. Circuit found, over a sharp dissent,[97] an even narrower market

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[93] *See, e.g.*, Electrolux Pretrial Brief, *supra* note 13, at 15–16 ("Frequently, the government alleges narrow markets, the defendant describes broader markets, and the court must choose between the competing approaches."); Baker, *supra* note 3, at 150 n.76 ("Narrow markets that cannot be described absent multiple adjectives are often ridiculed as gerrymandered—carefully crafted in order to make concentration appear high, rather than defined on a principled basis. . . . But the number of adjectives is beside the point: the issue is whether the market definition is consistent with the evidence as to demand substitution.").

[94] United States v. Von's Grocery Co., 384 U.S. 270, 272 (1966).

[95] *See id.*, *aff'g* 697 F. Supp. 1125, 1129 (C.D. Cal. 1988) (defining the relevant product market).

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

[97] *See id.* at 1051–52 (Kavanaugh, J., dissenting).

TABLE 1:
PRODUCT MARKETS DEFINED BY THE SUPREME COURT IN § 7 CASES AND MORE RECENT EQUIVALENTS

Case	Year	Relevant Product Market(s)	More Recent Equivalents
Du Pont (GM)	1957	(1) automotive finishes and (2) automotive fabrics 353 U.S. 586, 593–95 (1957)	"automotive refinishing paint" *In re* Automotive Refinishing Paint Antitrust Litig., 515 F. Supp. 2d 544, 548 (E.D. Pa. 2007) (describing plaintiff's allegations)*
Brown Shoe	1962	(1) all men's shoes (2) all women's shoes (3) all children's shoes 370 U.S. 294, 326 (1962)	"the manufacture and sale of national brand canvas shoes" Complaint ¶ 19, United States v. Converse, No. Civ. 72-2075-J (D. Mass. filed July 3, 1972) (consent) "sales of athletic shoes" Business Review Letter from A. Douglas Melamed, Acting Asst. Att'y Gen., to Kenneth A. Letzler & Lynda M. Clarizio, regarding the Apparel Industry Partnership (Oct. 31, 1996), www.justice.gov/atr/response-apparel-industry-partnership-request-business-review-letter)
Banking Cases (7 in all)	1963–1975	"[T]he cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term 'commercial banking.'" 374 U.S. 321, 356 (1963)	Separate product markets for different kinds of commercial loans, including (i) small business loans and (ii) middle market loans. Robert Kramer, "Mega-Mergers" in the Banking Industry: Address before the Am. Bar Ass'n, Wash., D.C. 3 (Apr. 14, 1999) ("We view banks as multi-product firms with different products . . . [in CoreStates/FirstUnion (1998) (consent)] we view[ed] small business and middle market lending as relevant product markets."); Press Release, Dep't of Justice, Justice Department Requires Divestitures in Order for BB&T and SunTrust to Proceed with Merger (Nov. 8, 2019) ("Today's settlement ensures that banking customers . . . will continue to have access to competitively priced banking products, including loans to small businesses.")
El Paso	1964	"production, transportation, and sale of natural gas" 376 U.S. 651, 657 (1964)	"natural gas pipeline transportation" Complaint ¶ 9, DTE Energy Co., FTC Docket No. C-4691 (filed Sept. 13, 2019) (consent) "sale of natural gas to G and SG LDC's for system supply, plus alternate fuels and energy conservation, with a submarket of indirect sale of natural gas to residential/commercial customers, plus alternate fuels and energy conservation." Ill *ex rel.* Hartigan v. Panhandle E. Pipe Line Co., 730 F. Supp. 826 (C.D. Ill. 1990)
Penn-Olin	1964	production and sale of sodium chlorate 378 U.S. 158, 161 (1964)	"the manufacture and sale of sodium chlorate" in "North America" Complaint ¶¶ 24, 27, Superior Plus Corp., FTC Docket No. 9371 (filed June 27, 2016)

Case	Year	Relevant Product Market(s)	More Recent Equivalents
Continental Can	1964	"the combined glass and metal container industries and all end uses for which they compete" 378 U.S. 411, 457 (1964)	"[1] standard 12-ounce aluminum beverage cans ('Standard Cans'), and [2] specialty aluminum beverage cans ('Specialty Cans'), which come in a variety of dimensions that differ from Standard Cans." Complaint ¶ 5, Ball Corp. & Rexam PLC, FTC Docket No. C-4581 (filed Aug. 16, 2016) (1) "the manufacture and sale of glass containers to Brewers"; and (2) "the manufacture and sale of glass containers to Distillers" Complaint ¶ 30, FTC v. Ardagh Group S.A., No. 1:13-cv-01021-RMC (D.D.C. filed June 28, 2013) (subsequently settled) "foodservice glassware" FTC v. Libbey, Inc., 211 F. Supp. 2d 34, 45 (D.D.C. 2002) (stipulated market)
Alcoa (Rome Cable)	1964	(1) "insulated aluminum conductor and insulated copper conductor" (2) "aluminum conductor (bare and insulated)" (3) copper and alum. submarkets 377 U.S. 271, 277 (1964)	"the electrical conduit market" Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 497 (1988) (§ 1 case) "copper building wire" Complaint ¶ 6, United States v. Essex Group, No. CV 78-3659-RJK (filed Sept. 21, 1978))*
Consolidated Foods	1965	"the markets for [1] dehydrated onion and [2] [dehydrated] garlic" 380 U.S. 592, 595 (1965)	"the U.S. dehydrated-onion business" Final Order, McCormick & Co., FTC Docket No. C-3468 (Oct. 26, 1993) (cited in FTC, Announced Actions for March 1, 1996) (modifying the Oct. 26, 1993 order resolving allegations that McCormick's acquisition of Haas Foods "would substantially reduce competition in the U.S. dehydrated onion business") "the manufacture and sale of branded seasoned salt products," which "include any dry branded product or product formulation (not including private or store label) sold at retail, usually in glass or plastic bottles, that consist primarily of salt, contain at least two other different herbs, spices, and/or other seasonings, and are labeled or otherwise described on the container as seasoned salt" Complaint ¶ 8, McCormick & Co., FTC Docket No. C-4225 (filed July 30, 2008)
Beer Cases - Pabst - Falstaff	1966 1973	"production and sale of beer" 384 U.S. 546, 547–48, 550–51 (1966) 410 U.S. 526, 549 (1973)	"Producer and Seller of Beer" DeHoog v. Anheuser-Busch InBev SA/NV, 899 F.3d 758, 761 (9th Cir. 2018) (private litigation concerning the SAB acquisition) "Beer" Complaint ¶ 30, United States v. Anheuser-Busch InBev, No. 16-CV-01483 (D.D.C. filed July 20, 2016) (SABMiller acquisition) (but complaint also notes segments within market); Complaint ¶ 31, United States v. Anheuser-Busch InBev, No. 13-CV-00127 (D.D.C. filed Jan. 13, 2013) (Grupo Modelo acquisition)

Case	Year	Relevant Product Market(s)	More Recent Equivalents
Von's Grocery	1966	"the retail grocery market" 384 U.S. 270, 272 (1966)	"the retail sale of food and other grocery products in supermarkets" Complaint ¶ 8, Koniklijke Ahold, N.V., FTC Docket No. C-4588 (filed July 22, 2016) (consent); Complaint ¶ 10, Cerberus Institutional Partners V, L.P., FTC Docket No. C-4504 (filed Jan. 27, 2015) (Alberton's/Safeway consent) "Premium natural and organic supermarkets" FTC v. Whole Foods Markets, 548 F.3d 1028, 1037–41 (D.C. Cir. 2008) "Supermarkets" California *ex rel.* Van de Kamp v. Am. Stores Co., 697 F. Supp. 1125, 1129 (C.D. Cal. 1988), *aff'd in relevant part*, 872 F.2d 837, 841 (9th Cir. 1990), *rev'd on other grounds*, 495 U.S. 271 (1990)
Ford Motor	1972	(1) "original equipment . . . spark plugs" (2) "aftermarket" spark plugs 405 U.S. 562, 565 (1972)	(1) "original equipment" and (2) "replacement" spark plugs Stitt Spark Plug Co. v. Champion Spark Plug Co., 840 F.2d 1253, 1254–55 (5th Cir. 1988) (§§ 1, 3 claims)) "spark plugs" Information, United States v. NGK Spark Plug Co., Ltd., No. 2:14-cr-20949-MOB-DRG (E.D. Mich. filed Aug. 19, 2014)*
General Dynamics	1974	"the energy market," which includes "interfuel competition" among coal, natural gas, oil, uranium, "and other forms of energy."** 341 F. Supp. 534, 555–56 (N.D. Ill. 1972), *aff'd*, 415 U.S. 486, 510–11 (1974)	"an economically significant submarket of SPRB coal only" FTC v. Peabody Energy Corp., 492 F. Supp. 3d 865, 901 (E.D. Mo. 2020) "no broader and no narrower than SPRB [Southern Powder River Basin] coal" FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 123 (D.D.C. 2004)

Note: When litigated cases were not available (or sufficiently recent), we rely upon the plaintiff's allegations (e.g., in price-fixing cases) or a complaint accepted as part of a consent order. We recognize that these sources may be less reliable than a litigated finding of fact, but believe they are still probative, particularly when taken as a whole.
* Price-fixing cases. Under the per se rule, these cases do not require the definition of a market, but they often include analogous allegations about market shares or volumes of commerce.
** District court finding. The Court did not reach the question on appeal, although the dissent would have defined both a broad "energy market" and a narrower "coal" submarket. *See General Dynamics*, 415 U.S. at 513–15 (Douglas, J., dissenting).

TABLE 2: SUMMARY STATISTICS

Product Market	Count by		Industries
	Cases	Industries	
Narrowed	12	6	Banking; Beverage Containers; Coal; Grocery Stores; Shoes; Seasonings
Constant	7	6	Automotive Finishes; Beer; Electrical Conductors; Natural Gas; Sodium Chlorate; Spark Plugs
Broadened	0	0	
Total	19	12	

for the "operation of premium natural and organic supermarkets."[98] Beverage container product markets also exhibit a sequential narrowing trend, moving from (1) a product market for "the combined glass and metal container industries and all end uses for which they compete" in the 1960s[99] to (2) separate product markets for particular uses of glass containers (for foodservice, brewery, and distillery use) in 2002 and 2013[100] and (3) specific sizes and shapes of metal containers in 2016.[101]

Other markets narrowed quickly and then stayed narrow, such as coal mining. In the early 1970s case *United States v. General Dynamics Corp.*,[102] the district court concluded that the relevant market for assessing the competitive effects of a merger of two coal miners was "interfuel" competition among

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[98] *Id.* at 1037–41 (Brown, J.). There is some evidence the product market has since broadened to include Wal-Mart supercenters and online grocery delivery services. *See* Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Remarks for "Merger Control in USA" Panel at GCR Interactive: Merger Control 11 (Oct. 21, 2020), www.ftc.gov/system/files/documents/public_statements/1583814/wilson_remarks_at_gcr_merger_control_2020.pdf ("As an example, consider the case of supermarkets. At one time, only grocery stores were included in the product market. Eventually, Wal-Mart and other superstores were added to the list of market participants. Now, as a result of the pandemic, perhaps online ordering and delivery should lead to an expanded list of market participants."); *see also* Complaint ¶ 9, Wal-Mart Stores, FTC Docket No. C-4066 (filed Nov. 20, 2002) (including "supercenters" and "club stores" in the "supermarket" market in Puerto Rico only); Complaint ¶¶ 11–12, Koninklijke Ahold, N.V., FTC Docket No. C-4588 (filed July 22, 2016) (excluding club stores and other retailers from the "supermarket" market).

[99] United States v. Cont'l Can Co., 378 U.S. 441, 457 (1964).

[100] *See* FTC v. Libbey, Inc., 211 F. Supp. 2d 34, 45 (D.D.C. 2002) (parties stipulated the relevant product market was "food service glassware"); Complaint ¶ 30, FTC v. Ardagh Group S.A., No. 1:13-cv-01021-RMC (D.D.C. filed July 17, 2013) (alleging the relevant product markets were "(1) the manufacture and sale of glass containers to Brewers; and (2) the manufacture and sale of glass containers to Distillers").

[101] Complaint ¶¶ 5, 9, Ball Corp., FTC Docket No. C-4581 (filed June 28, 2016) (defining one product market for "standard 12-ounce aluminum beverage cans" and a separate cluster market for various kinds of "specialty aluminum beverage cans" that "come in a variety of dimensions" but can be clustered for convenience).

[102] 341 F. Supp. 534 (N.D. Ill. 1972), *aff'd*, 415 U.S. 486 (1974).

different energy sources—including coal, natural gas, and uranium—used to generate electricity.[103] The Supreme Court affirmed without reaching the question of how to define the relevant product market.[104] The dissenters, however, argued that there may be both a relevant market for energy and a relevant submarket for coal.[105] Yet in another merger of coal mines in the early 2000s, *Arch Coal*, the FTC alleged a market for "8800 BTu coal" from the Southern Powder River Basin (SPRB) in Wyoming[106] and the district court found a market for all SPRB coal.[107] In 2020, the FTC alleged the same SPRB coal product market in a second transaction involving Arch Coal, which the district court provisionally accepted when it granted a preliminary injunction.[108] In this last case, the court emphasized that its finding was dictated primarily by "the 'narrowest market principle'" in *Brown Shoe*.[109]

The same dynamic also appears in the banking cases. Whereas the Supreme Court defined a broad cluster market in seven different cases between 1963 and 1975, the DOJ eventually moved to narrower categories for checking, savings, and trust products, as well as different kinds of customers.[110] The DOJ's approach has been consistent for many years, aided by the 1995 Bank Merger Guidelines, which the DOJ may soon revise.[111]

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[103] *Id.* at 545–46.

[104] United States v. Gen. Dynamics Corp., 415 U.S. 486, 510–11 (1974).

[105] *Id.* at 517–22 (Douglas, J., dissenting).

[106] FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 121 (D.D.C. 2004) (recounting plaintiff's argument before the court).

[107] *Id.* at 119–23.

[108] FTC v. Peabody Energy Co., 492 F. Supp. 3d 865 (E.D. Mo. 2020).

[109] *Id.* at 896. This conclusion is odd for two reasons. First, the district court defined overlapping broad and narrow product markets, while the narrowest market principle requires the definition of only one product market. *See, e.g.*, Werden, *supra* note 20, at 194–95 ("The Guidelines' Smallest Market Principle states that the one and only relevant market for the antitrust market subsequence and the corresponding candidate market sequence 'generally' is the smallest element in the antitrust market subsequence, that is, the only one contained in each of the others."). Second, the district court cited *Brown Shoe* for this point, even though the Court there defined relatively broad markets and pointedly rejected the defendants' attempt to make narrower distinctions, such as price tiers. *See Peabody*, 492 F. Supp. 3d at 886 (citing Times Picayune Pub. Co. v. United States, 345 U.S. 594, 612 n.31 (1953); Brown Shoe Co. v. United States, 370 U.S. 294 (1962)); *see also supra* notes 58–61 and accompanying text.

[110] *See, e.g.*, U.S. Dep't of Justice, Bank Merger Competitive Review § 2 (1995), www.justice.gov/sites/default/files/atr/legacy/2007/08/14/6472.pdf (using separate HHI calculations for two different sizes of "commercial and industrial loans"); *Antitrust Division Banking Guidelines Review: Public Comments Topics & Issues Guide* U.S. DEP'T OF JUSTICE, ANTITRUST DIV. (Oct. 28, 2020), www.justice.gov/atr/antitrust-division-banking-guidelines-review-public-comments-topics-issues-guide ("Depending on the transaction, the Division generally reviews three separate product markets in banking matters: (1) retail banking products and services, (2) small business banking products and services, and (3) middle market banking products and services.").

[111] *See* Press Release, U.S. Dep't of Justice, Antitrust Div., Antitrust Division Seeks Public Comments on Updating Bank Merger Review Analysis (Sept. 1, 2020), www.justice.gov/opa/pr/antitrust-division-seeks-public-comments-updating-bank-merger-review-analysis.

A few markets initially stayed constant and then narrowed, such as food products. In *FTC v. Consolidated Foods Corp.*,[112] the Supreme Court defined separate markets for dehydrated onions and dehydrated garlic.[113] The FTC was still applying these market definitions in 1993, when it resolved allegations that an acquisition by McCormick & Co. would harm competition in the "U.S. dehydrated onions business."[114] Although market definitions involving onions and garlic have not been assessed since then, the FTC has taken a narrower approach in other food and seasoning transactions, including a 2008 consent order with McCormick that limited the market to branded salt products sold at retail, explicitly excluding chemically identical store-brand and private-label products.[115]

II. POTENTIAL CAUSES

At a high level, much of this narrowing may be attributable to four factors: (1) the growing use of economic tools, particularly as the primary focus of merger analysis shifted from coordinated to unilateral effects, and from homogeneous to differentiated products;[116] (2) a concomitant increase in reliance on demand substitution metrics, culminating in the nearly complete exclusion of supply substitution from market definition; (3) additional limitations intro-

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[112] 380 U.S. 592 (1965).

[113] *Id.* at 595 (reporting the merging parties' shares of the market for the "manufacture of dehydrated onion and garlic").

[114] *See* Press Release, Fed. Trade Comm'n, Announced Actions for March 1, 1996 (Mar. 1, 1996), www.ftc.gov/news-events/press-releases/1996/03/announced-actions-march-1-1996 (reporting that the agency had granted McCormick's petition "to modify a 1993 consent order" that resolved allegations that an acquisition "would substantially reduce competition in the U.S. dehydrated onion business").

[115] Complaint ¶ 8, McCormick & Co., FTC Docket No. C-4225 (filed July 30, 2008) (alleging a relevant product market for "the manufacture and sale of branded seasoned salt products," which "include any dry branded product or product formulation (not including private or store label) sold at retail, usually in glass or plastic bottles, that consist primarily of salt, contain at least two other different herbs, spices, and/or other seasonings, and are labeled or otherwise described on the container as seasoned salt").

[116] *See, e.g.*, Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49, 54 (2010) ("The introduction of unilateral effects in the 1992 Guidelines reflected and anticipated a shift in merger enforcement away from relatively homogeneous industrial commodities and towards more differentiated products."); *see also* Malcolm B. Coate & Shawn W. Ulrick, *Unilateral Effects Analysis in Differentiated Product Markets: Guidelines, Policy, and Change*, 48 REV. INDUS. ORG. 45 (2016); Daniel P. O'Brien & Abraham L. Wickelgren, *A Critical Analysis of Critical Loss Analysis*, 71 ANTITRUST L.J. 161, 184 (2003) (concluding that the assumption "that high pre-merger margins imply broader markets and/or a smaller likelihood of anticompetitive effects" is "generally not consistent with basic economic theory" for differentiated products); Michael L. Katz & Carl Shapiro, *Critical Loss: Let's Tell the Whole Story*, ANTITRUST, Spring 2003, at 49, 50 (proposing refinements to critical loss analysis that tend to validate the definition of "narrower markets"); James A. Keyte, *Market Definition and Differentiated Products: The Need for a Workable Standard*, 63 ANTITRUST L.J. 697, 698 (1995) ("The difficulty [in defining markets] lies in determining how close a potential substitute must be in order to be included in the market.").

duced in successive Guidelines; and (4) changes in the underlying economy itself.

First, economists developed an array of new tools—like the hypothetical monopolist test (HMT)—that made it ever easier to identify smaller pockets where demand substitution might be limited.[117] In 1982, the FTC responded to the DOJ's release of the Merger Guidelines by lamenting that "direct evidence of cross-elasticities is generally unavailable" and endorsing the continued use of *Brown Shoe* indicia.[118] Whether to use the HMT or *Brown Shoe* indicia may sound academic, but the choice can affect how the courts and the Agencies apply the "narrowest market" principle. Under *Brown Shoe*, the analysis begins with the set of all products deemed similar to either product of the merging parties;[119] under the HMT, on the other hand, the analysis begins with a narrower set of products—just those sold by the merging parties.[120] After several refinements, particularly as analysis shifted from coordinated to unilateral effects and from homogeneous to differentiated products,[121] today the hypothetical monopolist test is the leading econometric tool the courts and the Agencies use to define markets.[122]

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[117] For a summary, see Werden, *supra* note 20.

[118] Fed. Trade Comm'n, Statement Concerning Horizontal Mergers 12 (1982), *reprinted in* Trade Reg. Rep. (CCH) No. 546, at 71 (June 16, 1982) (special supplement to 2 Trade Reg. Rep. (CCH) ¶ 4225 (Aug. 9, 1982)).

[119] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962) ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist . . . . [t]he boundaries of [which] may be determined by examining [the *Brown Shoe*] indicia . . . .").

[120] *See, e.g.*, Fed. Trade Comm'n & U.S. Dep't of Justice, Commentary on the Horizontal Merger Guidelines 5 (2006), www.justice.gov/atr/file/801216/download ("The Guidelines' method for implementing the hypothetical monopolist test starts by identifying each product produced or sold by each of the merging firms. Then, for each product, it iteratively broadens the candidate market by adding the next-best substitute. A relevant product market emerges as the smallest group of products that satisfies the hypothetical monopolist test.").

[121] Indeed, there are some indications the Agencies may have shifted towards unilateral effects analysis as the courts became more skeptical of coordinated effects analysis, and therefore less likely to enjoin transactions. *See, e.g.*, Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 235, 238 (Robert Pitofsky ed., 2008) (arguing that *Baker Hughes* substantially "eroded" the structural presumption, thereby prompting the Agencies to issue the 1992 Horizontal Merger Guidelines and advance unilateral effects analysis).

[122] *See, e.g.*, David Scheffman, Malcolm Coate & Louis Silvia, *Twenty Years of Merger Guidelines Enforcement at the FTC: An Economic Perspective*, 71 ANTITRUST L.J. 277 (2003) (tracing the evolution of economic tools at the FTC since the DOJ's 1982 Guidelines and related FTC statement); FTC v. Sysco, Inc., 113 F. Supp. 3d 1, 33 (D.D.C. 2015) ("One of the primary methods used by economists to determine a product market is called the 'hypothetical monopolist test.'").

Along with the overarching change in enforcement emphasis, these tools often define markets more narrowly than they had been before. For example, critical loss analysis proponents argue that approach may be used—particularly with additional refinements—"to support a finding of narrower markets" when profit margins are high.[123] Likewise, former FTC Chairman Joseph Simons has argued that the 2010 Merger Guidelines' use of the Lerner Index in the market definition exercise "produces extremely narrow markets."[124]

These tools also still rely—often implicitly—upon how the market is defined. For example, diversion ratios are sometimes assumed from firms' market shares, which in turn depend upon market definition.[125] Perhaps recognizing this weakness, the 2010 Merger Guidelines assert that "[d]iagnosing unilateral price effects based on the value of diverted sales need not rely on market definition or the calculation of market shares and concentration."[126] Even if they need not in theory, they often do in practice, including in the model the DOJ offered in *AT&T*.[127]

Commentators who predicted that the growing use of statistical tools would lead to "narrower product markets than those to which we have become accustomed" have been proven correct.[128] These tools typically suggest narrow markets, particularly for differentiated goods.[129] For example, in the 2010 Merger Guidelines, the Agencies declared that "[d]efining a market broadly . . . can lead to misleading market shares" and "[m]arket shares of different

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[123] Katz & Shapiro, *supra* note 116, at 50 ("Our central result is that an aggregate diversion ratio greater than the critical loss creates a presumption that the candidate product market is in fact a relevant antitrust market. This implies that, all other things being equal, higher pre-merger margins, which lead to a low critical loss, tend to support a finding of narrower markets."); *see also* Werden, *supra* note 20, at 214–15 (describing the possibility that some models may "overestimate" demand elasticities and "result[ ] in overly narrow markets").

[124] Joseph J. Simons, Comments to the Federal Trade Commission and Department of Justice Antitrust Division, HMG Review Project—Comment, Project No. P092900: Margins in Merger Analysis 9 (June 4, 2010), www.ftc.gov/sites/default/files/documents/public_comments/horizontal-merger-guidelines-review-project-proposed-new-horizontal-merger-guidelines-548050-00019/548050-00019.pdf (describing the effect of using the Lerner Index for market definition, including in critical loss analysis). *But see* Katz & Shapiro, *supra* note 116 (endorsing, with adjustments, the use of critical loss analysis to define "narrower markets"); O'Brien & Wickelgren, *supra* note 116 (endorsing the same).

[125] United States v. AT&T Inc., 310 F. Supp. 3d 161, 235 (D.D.C. 2018) (explaining that DOJ's expert "calculated a diversion rate for each of the local geographic markets based on an assumption that subscribers 'move to the other [distributors], in each local market, to the other distributors proportional[ly] to their marketshare'" (quoting the transcript of Professor Shapiro's trial testimony)).

[126] 2010 Horizontal Merger Guidelines, *supra* note 8, § 6.1.

[127] *See AT&T*, 310 F. Supp. 3d at 235 (using market shares as a proxy for diversion ratios).

[128] *See* Baker & Blumenthal, *supra* note 18, at 324–25 ("If the '5%' quantitative test in fact supplants horseback testimonial judgments as the basis for market definition, we may well see narrower product markets than those to which we have become accustomed.").

[129] *See, e.g.*, Katz & Shapiro, *supra* note 116, at 50 (endorsing these "narrower markets").

products in narrowly defined markets . . . often more accurately reflect competition between close substitutes."[130] The Agencies therefore argued that "properly defined antitrust markets often exclude some substitutes to which some customers might turn in the face of a price increase even if such substitutes provide alternatives for those customers."[131] To underscore the point, the Agencies also noted that the markets they define "are not always intuitive and may not align with how industry members use the term 'market.'"[132]

In short, newer economic techniques facilitated and magnified the Agencies' philosophical shift in focus, from coordinated effects in what were seen as homogenous markets to unilateral effects in what are seen as differentiated markets.[133] In the aggregate, these changes discount competition from more distant but previously in-market alternatives, supporting the definition of narrower markets.[134]

Second, the Agencies and many courts no longer consider supply substitution when defining markets. In the 1984 Merger Guidelines, the DOJ asserted that, when defining markets, "it is necessary to evaluate both the probable demand responses of consumers and the probable supply responses of other firms."[135] This passage was deleted from the 1992 Guidelines, which instead declared that "[m]arket definition focuses solely on demand substitution factors"[136] and supply substitution is relevant only as a mitigating factor in subsequent steps in the analysis.[137] The 2010 Merger Guidelines retained the 1992 formulation,[138] which the courts routinely follow today.[139] For example, in

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[130] 2010 Horizontal Merger Guidelines, *supra* note 8, § 4.

[131] *Id.*

[132] *Id.*

[133] *See, e.g.*, Carl Shapiro, *Mergers with Differentiated Products*, ANTITRUST, Spring 1996, at 23, 24 (1996) ("It is fair to say that economic analysis of differentiated-products mergers at the Division typically focuses on unilateral effects, unless there are structural factors facilitating collusion following the merger or there is a history of collusion in the industry. This emphasis represents a significant shift in a fairly short period of time.").

[134] *See, e.g.*, Katz & Shapiro, *supra* note 116, at 50 (endorsing techniques that confirm "narrower markets").

[135] U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines § 2 (1984), www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11249.pdf.

[136] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 1.0 (1992, revised 1997) [hereinafter 1997 Horizontal Merger Guidelines], www.ftc.gov/sites/default/files/attachments/merger-review/hmg.pdf.

[137] *Id.* ("Supply substitution factors—i.e., possible production responses—are considered elsewhere in the Guidelines.").

[138] *See* 2010 Horizontal Merger Guidelines, *supra* note 8, § 4.

[139] *See, e.g.*, FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 293–94 (D.D.C. 2020) (citing and applying the current approach set out in the 2010 Horizontal Merger Guidelines); FTC v. Whole Foods Mkt., 548 F.3d 1028, 1039 (D.C. Cir. 2008) (Brown, J.) (assessing only demand-side substitution); *id.* at 1043–44 (Tatel, J., concurring) (same).

FTC v. RAG-Stiftung,[140] the FTC argued that supply substitution supported a broader product market that included several complementary grades of hydrogen peroxide.[141] Citing the 2010 Merger Guidelines, the district court recognized a very limited exception to the general rule that market definition considers only demand substitution and concluded the FTC had not established the three conditions necessary to consider supply substitution.[142]

The present approach has both detractors and defenders. Some critics charge that a demand-only approach lacks "intuitive economic logic" and generates "peculiar if not anomalous" markets.[143] Defenders argue that "it can be both difficult and confusing" to consider supply alongside demand,[144] explicitly favoring narrower markets to ensure simplicity and clarity.[145]

The *Whole Foods* case illustrates how ignoring supply substitution can narrow markets. There, the district court found the relevant product market "is not premium natural and organic supermarkets . . . as argued by the FTC but . . . at least all supermarkets."[146] The district court rested this finding upon several factors, including evidence that conventional supermarkets had developed organic private labels to better compete with Whole Foods and Wild

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[140] 436 F. Supp. 3d 278 (D.D.C. 2020)).

[141] *Id.* at 292.

[142] *See id.* at 293–94 (defining the three conditions as showing supply substitution is "(1) nearly universal among the firms selling one or more of a group of products, (2) easy, and (3) profitable" (quoting 2010 Horizontal Merger Guidelines, *supra* note 8, § 5.1 & n.8) (internal citations and quotation marks omitted)); *id.* at 293–99 (concluding that the FTC has not shown that "swinging" capacity is "nearly universal," "easy," or "profitable" and therefore "the FTC cannot combine standard, specialty, and pre-electronics grades in a relevant product market to analyze the anticompetitive effects of the proposed merger").

[143] Kenneth G. Elzinga & Vandy M. Howell, *Geographic Market Definition in the Merger Guidelines: A Retrospective Analysis*, 53 REV. INDUS. ORG. 453, 465–66 (2018).

[144] Baker, *supra* note 3, at 134.

[145] *Id.* at 135–36 (arguing that if the relevant product market in hypothetical merger of copper electrical conductor manufacturers "is broadened to include all [electrical] conductors, the resulting low market shares may mislead by improperly suggesting that the merger of copper conductor firms would be unlikely to create a competitive problem"). Notably, Baker therefore appears to reject the combined copper and aluminum conductor market the Supreme Court defined during the broad market era. *See* United States v. Aluminum Co. of Am., 377 U.S. 271, 274–77 (1964) (defining a combined market for aluminum and copper conductor and a submarket for "bare and insulated aluminum conductor").

[146] FTC v. Whole Foods Mkt., Inc., 502 F. Supp. 2d 1, 34 (D.D.C. 2007), *rev'd*, 548 F.3d 1028 (D.C. Cir. 2008).

Oats[147]—that is, they were repositioning,[148] a traditional supply-side factor.[149] On appeal, the D.C. Circuit did not credit evidence of supply-side substitution,[150] while in dissent Judge Kavanaugh emphasized that the repositioning of both premium, natural, and organic supermarkets and conventional supermarkets made the retail grocery industry "an industry in transition."[151] Thus, both the district court and Judge Kavanaugh believed supply-side factors favored a broad product market, while the appellate majority viewed substitution of supply as either irrelevant (Judge Brown) or unfounded (Judge Tatel), leading the court to define the (likely) market narrowly.[152]

Third, successive Merger Guidelines have introduced additional restrictions that do not appear in the Supreme Court cases. For example, Donald Baker and William Blumenthal recognized years ago that the 1982 Guidelines "stray[ ] from the case law . . . in the selection of the '5%' and 'one year'" standards in the hypothetical monopolist test.[153] They also predicted that if these standards were adopted (as they have been), "we may well see narrower product markets than those to which we have become accustomed."[154] The 1982 Guidelines likewise provided for "additional, narrower . . . markets" defined around buyers subject to price discrimination.[155]

Fourth, the industries themselves may have changed. Grocery shopping has changed as stores have grown in size. Firms may also have increased their degree of differentiation, investing in unique services and capabilities, which

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147 *Id.* at 36 ("Conventional supermarkets like Delhaize, Publix, Safeway and Wegmans consider Whole Foods to be a significant competitor in the marketplace. In attempting to compete with Whole Foods for consumers interested in natural and organic products, stores like Safeway, Kroger and even Trader Joe's have developed so-called private labels—Safeway's 'O' organic label being prime among them. Whole Foods has responded in kind and designed its own private label programs, primarily to compete against other supermarkets, particularly for the kind of cross-over shoppers previously discussed.").

148 *Id.* at 24 ("The evidence also shows that Whole Foods' supermarket competitors have paid attention to Whole Foods' success and to the changing consumer demands for fresh, natural and organic foods. . . . Many conventional supermarkets have been refocusing their strategies and repositioning their formats to respond to the changes in consumer demands.").

149 2010 Horizontal Merger Guidelines, *supra* note 8, § 6.1 ("Repositioning is a supply-side response that is evaluated much like entry, with consideration given to timeliness, likelihood, and sufficiency.").

150 *See* FTC v. Whole Foods Mkt., 548 F.3d 1028, 1044 (D.C. Cir. 2008) (Tatel, J., concurring in the judgment). Judge Brown's opinion does not mention it.

151 *Id.* at 1054–55 (Kavanaugh, J., dissenting).

152 *Id.* at 1039–40 (Brown, J.) (finding "FTC's evidence delineated a PNOS submarket" that excluded "conventional supermarkets"); *id.* at 1049 (Tatel, J., concurring) (finding "at this preliminary stage, the FTC's evidence plainly establishes a reasonable probability that it will be able to prove its asserted market").

153 Baker & Blumenthal, *supra* note 18, at 324.

154 *Id.* at 324–25.

155 1982 Merger Guidelines, *supra* note 89, § II.A, at 6; *see* Baker & Blumenthal, *supra* note 18, at 326.

may in turn reduce demand substitution for at least some customers.[156] Yet changes in the underlying industries are unlikely to fully explain the rise of multi-adjective product markets. For example, commodities like coal and salt have changed little, if at all, over the years, even as courts have defined those markets more narrowly. In these cases, and likely many others, the two factors described above have played a large role.

In sum, several factors may explain why relevant product markets have narrowed significantly—in practice and on average—since the Supreme Court set out the basic Clayton Act rules. Some of this narrowing may reflect real changes in the underlying markets, like greater product differentiation. In other cases, however, product markets have narrowed due to changes in the process by which markets are defined, and in particular by the mutually reinforcing decisions to focus solely upon demand substitution and to deploy new statistical models to measure it.

III. SUBSTANTIVE CHANGES AFFECTED BY NARROWING MARKETS

Narrowing markets affect the way several other substantive antitrust rules are applied. This Part briefly sketches three: (1) the exclusion of out-of-market merger efficiencies, (2) the structural presumption, and (3) the traditional emphasis upon mergers involving "overlapping" horizontal competitors.[157] As described further below, narrowing product markets tend to alter the operation of these rules in ways that, *ceteris paribus*, favor plaintiffs.

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[156] Relatedly, there is some evidence that local concentration ratios have fallen as large players have increased their geographic footprints or increased productivity. *See, e.g.*, Chang-Tai Hsieh & Esteban Rossi-Hansberg, *The Industrial Revolution in Services* 4 (Nat'l Bureau of Econ. Rsch. Working Paper No. 25968, 2019) (finding that "rising concentration in [services, wholesale, and retail] is entirely driven by an increase [in] the number of local markets served by the top firms"); Esteban Rossi-Hansberg, Pierre-Daniel Sarte & Nicholas Trachter, *Diverging Trends in National and Local Concentration* (Fed. Rsrv. Bank of Richmond, Working Paper 18-15R, 2019), www.richmondfed.org/-/media/richmondfedorg/publications/research/working_papers/2018/pdf/wp18-15.pdf (same); *see also* Geoffrey Manne, *What If Rising Concentration Were an Indication of More Competition, Not Less?*, TRUTH ON THE MARKET (Dec. 14, 2019), truthonthemarket.com/2019/12/14/what-if-rising-concentration-were-an-indication-of-more-competition-not-less/ (analyzing these working papers and collecting other research on the topic).

[157] Although there are several proposals to tighten merger rules for firms in different (but adjacent) markets, none of them acknowledges or assesses the extent to which this alleged defect could be addressed by defining broader (*e.g.*, 1960s-era) markets. *See, e.g.*, Randy M. Stutz, *We've Seen Enough: It Is Time to Abandon* Amex *and Start Over on Two-Sided Markets*, AM. ANTITRUST INST. 2 (Apr. 2020), www.antitrustinstitute.org/wp-content/uploads/2020/04/Amex-Commentary-4.21.20-Final.pdf (arguing (1) that the district court opinion in *Sabre* was "clearly incorrect" because it ignored competition between the firms, and (2) that the district court should have used the narrowest market principle to define several "overlapping or nested markets").

A. EFFICIENCIES

The move toward narrower relevant product markets has affected the way courts assess efficiency claims in two ways.

1. *Out-of-Market Merger Efficiencies*

First, as former FTC Commissioner Joshua Wright and his co-authors recognized a few years ago,[158] narrower markets push some otherwise cognizable merger efficiencies outside the relevant market. As explained above, the Supreme Court held in *Philadelphia National Bank* that "anticompetitive effects in one market [cannot] be justified by procompetitive consequences in another,"[159] a holding that both the courts and the Agencies have characterized as precluding the "cross-market" or "multi-market" balancing of competitive effects and the consideration of out-of-market efficiencies.[160] Yet, back then the relevant product market for banking mergers was "the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term 'commercial banking.'"[161] Likewise, the relevant geographic market was the four-county Philadelphia area,[162] which the Court defined for the express purpose of avoiding "the indefensible extremes of drawing the market either so expansively . . . or so narrowly."[163]

The rule against out-of-market merger efficiencies should be understood within this context. As such, it may be inappropriate to apply the out-of-market rule verbatim when the market is defined very narrowly. A more workable solution, and one consistent with the Court's original formulation, would aggregate harms and efficiencies into product markets akin in size to

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[158] *See* Rybnicek & Wright, *supra* note 19, at 452 ("Under the 2010 Guidelines, some efficiencies benefits that may have fallen within the relevant market under the antitrust agencies' market definition exercise under earlier iterations of the Horizontal Merger Guidelines will now fall outside the relevant market."); Stone & Wright, *supra* note 19, at 154 ("*Philadelphia National Ban*k mandates this inability to balance cross-market effects. Under the 1997 Revisions, this dictate remained a curiosity of antitrust past. The 2010 Guidelines' diversion approach to market definition is likely to dramatically increase *Philadelphia National Bank*'s practical significance.").

[159] United States v. Phila. Nat'l Bank, 374 U.S. 321, 370 (1963).

[160] *See, e.g.*, Daniel A. Crane, *Balancing Effects Across Markets*, 80 ANTITRUST L.J. 397, 397 (2015) (discussing what he calls the "market-specificity rule").

[161] United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350, 359 (1970); *Philadelphia National Bank*, 374 U.S. at 356 ("We have no difficulty in determining the 'line of commerce' (relevant product or services market) and 'section of the country' (relevant geographical market) in which to appraise the probable competitive effects of appellees' proposed merger. We agree with the District Court that the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term 'commercial banking,' . . . composes a distinct line of commerce.").

[162] *Philadelphia National Bank*, 374 U.S. at 359 (finding "the four-county area in which appellees' offices are located would seem to be the relevant geographical market").

[163] *Id.* at 361.

those in *Philadelphia National Bank* and assess the net effect of the proposed transaction within these broader markets.[164] Indeed, the Court's recent decision in *American Express* suggests the Court may already be moving in this direction, at least in Sherman Act cases.[165]

2. *Magnitude of Offsetting Merger Efficiencies*

Since *FTC v. H.J. Heinz Co.*,[166] narrower markets have also changed the magnitude of offsetting merger efficiencies a defendant must prove. Two dimensions of that case are relevant here.

First, the D.C. Circuit adopted a sliding scale for assessing merger efficiency claims that becomes more exacting as markets narrow and market shares increase. In general, the court said defendants must show only that the likely cognizable efficiencies exceed the likely anticompetitive effects and therefore are unlikely to "substantially . . . lessen competition . . . in any line of commerce."[167] But when the market is highly concentrated, the court said—following the approach first set out in the 1997 Merger Guidelines[168]—the merging parties must prove not just efficiencies, but "extraordinary efficiencies."[169] This appears to mean the magnitude of those efficiencies that remain in the relevant market must substantially exceed the magnitude of

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[164] In theory, this approach could be employed by both the courts and the Agencies. In court, it would be a legal question of how best to interpret the holding of *Philadelphia National Bank*, which could account for the broad scope of the market there. The Agencies could do so either as a matter of law (following the same method just discussed) or as an exercise of prosecutorial discretion. *See, e.g.*, 2010 Horizontal Merger Guidelines, *supra* note 8, § 10, at 30 n.14 ("In some cases . . . the Agencies in their prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s).").

[165] *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285–87 (2018) (defining, in a Section 1 case, a broader "two-sided transaction market" to account for closely related competitive effects and rejecting the district court's finding (and DOJ's argument) that the effects fell in separate markets and therefore could not be aggregated).

[166] 246 F.3d 708 (D.C. Cir. 2001).

[167] *See id.* at 713; 1997 Horizontal Merger Guidelines, *supra* note 136, § 4; *see also* 15 U.S.C. § 18.

[168] 1997 Horizontal Merger Guidelines, *supra* note 136, § 4, at 32 ("When the potential adverse competitive effect of a merger is likely to be particularly large, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive.").

[169] *Heinz*, 246 F.3d at 720.

harms.[170] Although this rule started in the D.C. Circuit,[171] it is now also binding circuit precedent in the Third and Ninth Circuits[172] and has been followed by trial courts in the Sixth and Seventh Circuits.[173]

Second, merging parties in highly concentrated markets face a heightened evidentiary burden when seeking, almost always in vain,[174] to prove efficiencies. As the court explained in *Heinz*, "given the high concentration levels, the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior."[175] Although one hopes that the court conducts a rigorous analysis in every case,[176]

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[170] *See id.*; *see also* 1997 Horizontal Merger Guidelines, *supra* note 136, § 4, at 32 ("The greater the potential adverse competitive effect of a merger . . . the greater must be the cognizable efficiencies in order for the Agency to conclude that the merger will not have an anticompetitive effect in the relevant market."). Notably, the D.C. Circuit managed to dismiss even the very large production efficiencies in *Heinz*—approximately 22.3% of the acquired firm's variable manufacturing costs—as failing the merger specificity requirement. *See Heinz*, 246 F.3d at 721–22.

[171] *See Heinz*, 246 F.3d at 720; United States v. Anthem, Inc., 855 F.3d 345, 349 (D.C. Cir. 2017) ("[W]e hold that the district court did not abuse its discretion in enjoining the merger based on Anthem's failure to show the kind of extraordinary efficiencies necessary to offset the conceded anticompetitive effect of the merger in the fourteen Anthem states: the loss of Cigna, an innovative competitor in a highly concentrated market.").

[172] *See* FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 347 (3d Cir. 2016) ("In order to rebut the prima facie case, the Hospitals must show either that the combination would not have anticompetitive effects or that the anticompetitive effects of the merger will be offset by extraordinary efficiencies resulting from the merger." (citing *Heinz*, 246 F.3d at 718–25)); Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 790 (9th Cir. 2015) ("Because § 7 seeks to avert monopolies, proof of 'extraordinary efficiencies' is required to offset the anticompetitive concerns in highly concentrated markets." (citing, *inter alia*, *Heinz*, 246 F.3d at 720–22)).

[173] *See* FTC v. Advocate Health Care, No. 15 C11473, 2017 WL 1022015, at *12 (N.D. Ill. Mar. 16, 2017) ("Where the merger would result in high market concentration levels, as in this case, the defendants must provide proof of 'extraordinary efficiencies' based on a 'rigorous analysis' that ensures that the proffered efficiencies represent more than 'mere speculation and promises about post-merger behavior.'" (quoting *Heinz*, 246 F.3d at 720–21)); FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069, 1089 (N.D. Ill. 2012) ("Moreover, '[h]igh market concentration levels require proof of extraordinary efficiencies . . . and courts generally have found inadequate proof of efficiencies to sustain a rebuttal of the government's case.'" (quoting United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 89 (D.D.C. 2011))); FTC v. ProMedica Health Sys., Inc., No. 3:11 CV47, 2011 WL 1219281, at *57 (N.D. Ohio Mar. 29, 2011) ("Efficiencies must be 'extraordinary' to overcome high concentration levels." (quoting *Heinz*, 246 F.3d at 721–22)).

[174] The recent challenge to the T-Mobile/Sprint merger may well be the first case in which efficiencies played a determinative role. *See* New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 208 (S.D.N.Y. 2020) (concluding that "the efficiencies are sufficiently verifiable and merger-specific to merit consideration as evidence that decreases the persuasiveness of the prima facie case").

[175] *Heinz*, 246 F.3d at 721.

[176] Furthermore, some believe the 2010 Merger Guidelines' baseline approach is already unduly stringent. *See, e.g.*, Daniel A. Crane, *Rethinking Merger Efficiencies*, 110 MICH. L. REV. 347, 356–57 (2011) ("The Guidelines implicitly treat efficiencies and anticompetitive risks

the *Heinz* court appears to have believed that even greater rigor is necessary when markets are narrow and market shares are high.

Combined, these two effects are greater than the sum of their parts. Because markets have narrowed, merging parties that previously could have carried their burden by showing efficiencies must now prove "extraordinary efficiencies" under a particularly "rigorous analysis." In other words, as markets narrow and market shares increase, defendants must produce stronger proof of much larger efficiencies. The obligation, if actually applied this way, likely forecloses an efficiencies defense in many narrow market cases.[177]

B. Competitive Overlaps

The extent to which relevant product markets have narrowed also has implications for other aspects of merger analysis. Consider two that cut in opposite directions.

First, narrower markets can make it more likely that two firms that compete in the same broad market—such as "retail supermarkets" or "coal"—are not viewed as horizontal competitors. For example, one firm may fall out of the market entirely. For this reason, courts have long cautioned against drawing market boundaries too narrowly. For example, in *Philadelphia National Bank*, the Court declined to consider only the banking patterns of "the smallest customers" because this evaluation would draw geographic markets "so narrowly as to place appellees in different markets."[178] It likewise declined to consider only the banking patterns of the largest customers, many of whom used banks based in New York City.[179]

This result may be particularly likely in dynamic markets. In these markets, competitors often seek to "leapfrog" each other by introducing products with new and different features. In the short run, an entrant's product may be differentiated from existing products sold by others. Yet incumbents may—and in such markets often do—quickly "catch up" by introducing similar fea-

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asymmetrically by insisting that efficiencies be proven to a very high degree of certainty in order to justify a merger whereas risks need not be proven with great certainty in order to block a merger.").

[177] Of course, demonstrating cognizable efficiencies remains an uphill battle for merging parties. *See, e.g.*, Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Breaking the Vicious Cycle: Establishing a Gold Standard for Efficiencies, Remarks to the Bates White Antitrust Webinar (June 24, 2020), www.ftc.gov/system/files/documents/public_statements/1577315/wilson_-_bates_white_presentation_06-24-20-_final.pdf.

[178] United States v. Phila. Nat'l Bank, 374 U.S. 321, 361 (1963).

[179] *See id.*

tures to their own products. Therefore, in some cases, narrower markets may result in relatively *less* aggressive antitrust enforcement, at least in theory.[180]

Second, whereas in some cases narrowing the product market will exclude one of the merging firms, in other cases it will just exclude some of their competitors, thereby pushing up the merging parties' combined market share. Because market shares are an input in many economic models used to measure anticompetitive effects, like diversion ratios, economic models may be more likely to find harm in narrow markets.

C. THE STRUCTURAL PRESUMPTION

Narrow markets may also be more likely to trigger a structural presumption of unlawfulness, which "has been critical for effective horizontal merger enforcement."[181] Embodied in both the case law and the 2010 Merger Guidelines,[182] when the presumption is triggered, it shifts the burden from the plaintiff and requires the defendant to prove that the transaction is lawful.[183] As the Court recognized in *Philadelphia National Bank*, the very case that established the presumption, the size of the relevant market can affect the market share calculations.[184] When product markets shrink, as it appears many have, then the number of competitors declines, thereby increasing the market share of each firm that remains in the market. Because the structural presumption is triggered whenever certain market share thresholds are met, the presumption is more likely to apply when markets are narrow. Perhaps ironically, the structural presumption is a product of the broad market era

[180] As described immediately below, in some cases the result may be the same level of antitrust enforcement. For example, if the broad market includes the merging parties and 8 significant competitors, while a narrower market includes only one of the merging parties, then the transaction is likely lawful under either definition.

[181] Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996, 1997 (2018).

[182] *See, e.g.*, United States v. Baker Hughes Inc., 908 F.2d 981, 982 (D.C. Cir. 1990) ("By showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition." (citing United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 120–22 (1975) and *Philadelphia National Bank*, 374 U.S. at 363)); 2010 Horizontal Merger Guidelines, *supra* note 8, §§ 2.1.3, 5.3 (explaining that "[m]ergers that cause a significant increase in concentration and result in highly concentrated markets are presumed [by the Agencies] to be likely to enhance market power" and setting out specific thresholds).

[183] *See, e.g.*, Douglas H. Ginsburg & Joshua D. Wright, Philadelphia National Bank*: Bad Economics, Bad Law, Good Riddance*, 80 ANTITRUST L.J. 377 (2015).

[184] *See Philadelphia National Bank*, 374 U.S. at 361 (endorsing a market definition approach that "avoids the indefensible extremes of drawing the market either so expansively as to make the effect of the merger upon competition seem insignificant" or "so narrowly as to place appellees in different markets").

generally,[185] and of a case in which the courts defined a broader market than either party sought.[186]

The district court in the recent *Peabody* case clearly explained the relationship between market breadth and the structural presumption. The court said that its "task is to identify the narrowest market within which the defendant companies compete that qualifies as a relevant product market" because "competitive harm in *any* relevant product market is enough to make out a prima facie case for violation of the Clayton Act, and because potential harms to competition will likely be less apparent in a broader, less concentrated market than in a narrower included market."[187] The court then defined both a broad energy fuel market that included coal, natural gas, and renewable resources and a narrower, overlapping market for SPRB coal; the narrower market definition triggered a structural presumption of illegality.[188]

Narrowing markets also increases the probability of triggering a corollary to the structural presumption. In recent years courts have repeated an emerging modern maxim: "[T]here can be little doubt that the acquisition of the second largest firm in the market by the largest firm in the market will tend to harm competition in that market."[189] If narrowing markets means that there are fewer other firms in the market, it becomes more likely, all else equal, that a given merger will combine the first- and second-largest firms in the relevant market.[190]

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[185] *See, e.g.*, Hovenkamp & Shapiro, *supra* note 181, at 1997 ("Since the Supreme Court's landmark merger decision in *United States v. Philadelphia National Bank*, challengers have mounted prima facie cases against horizontal mergers that rest on the level and increase in market concentration caused by the merger.").

[186] *See* United States v. Phila. Nat'l Bank, 201 F. Supp. 348, 363 (E.D. Pa. 1962) (rejected both the litigants' proffered (and narrower) markets as attempts to "subdivide a commercial bank into certain selected services and functions," which if "carried to the logical extreme, would result in many additional so-called lines of commerce" but serve "no useful purpose"), *rev'd on other grounds*, 374 U.S. 321, 356 (1963) (affirming the district court's finding of a relevant product market for "the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term 'commercial banking.' ").

[187] FTC v. Peabody Energy Co., 492 F. Supp. 3d 865, 885–86 (E.D. Mo. 2020).

[188] *Id.* at 886.

[189] FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1043 (D.C. Cir. 2008) (Tatel, J., concurring) (quoting FTC v. Whole Foods Mkt., Inc., 502 F. Supp. 2d 1, 8 (D.D.C. 2007)); FTC v. Sysco Corp., 113 F. Supp. 3d 1, 87–88 (D.D.C. 2015) (quoting *Whole Foods*, 548 F.3d at 1043); FTC v. Staples, Inc., 190 F. Supp. 3d 100, 138 (D.D.C. 2016) (quoting *Sysco*, 113 F. Supp. 3d at 88 (quoting *Whole Foods*, 548 F.3d at 1043)); *see also* FTC v. Wilh. Wilhelmsen Holding ASA, 341 F. Supp. 3d 27, 59 (D.D.C. 2018) (quoting *Whole Foods*, 548 F.3d at 1043, in a parenthetical); *Peabody*, 492 F. Supp. 3d at 912 (likewise quoting *Whole Foods*, 548 F.3d at 1043, in a parenthetical).

[190] This is particularly true today given the 2010 Merger Guidelines' focus upon close substitutes and differentiated products.

The *Whole Foods* case illustrates both of these dynamics. As discussed earlier, the FTC argued for a narrow product market that included only premium, natural, and organic supermarkets (PNOS), and the defendant urged the court to find a broader market that included conventional supermarkets. As both the district court and the court of appeals noted, the "case hinge[d]—almost entirely—on the proper definition of the relevant market."[191] If the market was narrow, then concentration was high, the structural presumption applied, and the transaction was likely unlawful. If the market was broad, then concentration was low, the structural presumption did not apply, and the transaction was likely lawful. Moreover, the FTC rested its entire case on the structural presumption and its corollary,[192] and these were the controlling considerations in the final judgment of the D.C. Circuit.[193]

IV. CASE STUDIES

Two case studies in the banking industry further illustrate how narrowing markets have quietly changed substantive antitrust rules. Under U.S. law, banking mergers are reviewed concurrently by both the sector-specific regulator, the FRB, and the DOJ. Both must give their approval.

The first case, FirstUnion/CoreStates, illustrates how narrower product and geographic markets can exclude otherwise cognizable efficiencies. In 1998, Philadelphia National Bank's corporate successor (CoreStates) was acquired by another large bank (FirstUnion). The FRB and DOJ both reviewed the transaction but defined radically different product and geographic markets. The FRB began with the product market fixed by the Supreme Court in *Philadelphia National Bank*—commercial banks—and then broadened it to include thrift institutions (at a discounted weighting), which they believed "have become, or have the potential to become, significant competitors of commercial banks."[194] Reflecting what it viewed as significant industry developments, the

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[191] *Whole Foods*, 548 F.3d at 1043 (Tatel, J., concurring) (internal citations and quotation marks omitted).

[192] *Id.* at 1037 (Brown, J.) ("Because of the concentration in the supposed PNOS market, the FTC urged the district court to hold the merger 'presumptively unlawful,' and this was its sole reason for blocking the merger.").

[193] *See id.* (discussing the presumption of unlawfulness); *id.* at 1043 (Tatel, J., concurring) ("I agree with the district court that this case hinges—almost entirely—on the proper definition of the relevant product market, for if a separate natural and organic market exists, there can be little doubt that the acquisition of the second largest firm in the market by the largest firm in the market will tend to harm competition in that market.") (internal citations and quotation marks omitted).

[194] Press Release, Fed. Rsrv. Sys., *In re* First Union Corp., Order Approving the Merger of Bank Holding Companies 16 n.22 (Apr. 13, 1998) [hereinafter First Union/CoreStates FRB Order], www.federalreserve.gov/boarddocs/press/bhc/1998/199804133/199804133.pdf; *see also id.* at 8 ("The Board and the courts traditionally have recognized that the appropriate product market for evaluating bank mergers and acquisitions is the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) offered by banking institu-

FRB also defined a broader geographic market encompassing nine counties near Philadelphia, as compared with the four-county area the Supreme Court had used in 1963.[195] The DOJ, in contrast, broke the "cluster" of commercial banking services into narrower single-product markets—savings accounts, checking accounts, and so forth.[196] The DOJ also narrowed the relevant geographic market, rejecting the FRB's nine-county market and the Supreme Court's earlier four-county market in favor of a narrower two-county area.[197]

Consistent with the theory described in Part III above, these different market definitions meant the DOJ and FRB applied the same substantive legal rules in materially different ways. The FRB found that the transaction, as modified by the divestiture of 23 bank branches (accounting for $866.9 million in deposits[198]), "would not be likely to result in a significantly adverse effect on competition" and would generate "public benefits" such as "increased consumer convenience and gains in efficiency."[199] The FRB therefore cleared the transaction and proposed divestiture. In contrast, the DOJ found significant competitive harm and required the parties to divest 32 branches (accounting for $1.1 billion in deposits)[200]—nine more branches (and $210 million more in deposits) than the FRB had required. And, having drawn markets narrowly, the DOJ did not publicly mention efficiencies at all.[201]

The DOJ publicly acknowledged that the way it defined markets affected its legal conclusion. In a speech the year after the merger closed, Robert Kramer, who oversaw the DOJ review, explained that "the FRB and [DOJ] in

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tions." (citing, *inter alia*, *Philadelphia National Bank*)); *see also* Kramer, *supra* note 31 (describing the FRB's approach to product and geographic market definition in First Union/CoreStates as "the broad market" approach).

[195] First Union/CoreStates FRB Order, *supra* note 194, at 14–15 & n.21 (Order Approving the Merger of Bank Holding Companies) (attached to the Board's press release from the same day) (noting the four-county area defined in *Philadelphia National Bank*, to which some commenters argued the Board "is bound in this case," but instead concluding "the suggested market definitions are too narrow" and defining a nine-county market instead).

[196] *See* Kramer, *supra* note 31 (explaining that, in First Union/CoreStates, the DOJ rejects the cluster product market approach used in *Philadelphia National Bank* because "[w]e view banks as multi-product firms with different products that consumers do not find to be good substitutes for one another" and that these narrower product markets have "ramifications for geographic market definition," which is also narrower than in *Philadelphia National Bank*).

[197] *Id.* (noting both *Philadelphia National Bank*'s four-county and the FRB's nine-county geographic markets but explaining the DOJ "ended up believing that the transaction created a competitive problem" in "Philadelphia and close in Delaware county" and "[t]he best proxy we had for that area was the entire 2 county area").

[198] First Union/CoreStates FRB Order, *supra* note 194, at 16–17.

[199] *Id.* at 23, 50.

[200] *See* Press Release, U.S. Dep't of Justice, Justice Department Approves First Union/CoreStates Merger After Parties Agree to $1.1 Billion Divestiture in Pennsylvania (Apr. 10, 1998), www.justice.gov/archive/atr/public/press_releases/1998/1630.pdf (describing the relevant market defined by the DOJ).

[201] *See id.*

their analysis use[d] different product markets and this [difference] played a significant role in this matter."[202] He also characterized the FRB's analysis as the "broad market" approach.[203]

The second case, BB&T/SunTrust, illustrates how narrower markets can increase measures of concentration and anticompetitive effects. In 2019, BB&T announced it planned to acquire SunTrust and form a new bank to be called Truist Financial.[204] As with the First Union/CoreStates transaction, both the DOJ and the FRB undertook antitrust reviews and the two agencies again defined the relevant antitrust markets differently. The Board continued to include thrift institutions in the relevant product market and to define wider geographic banking markets.[205]

Different market definitions once again produced different results. As the DOJ put it, "In several cases, Division staff concluded that the relevant antitrust market was narrower than the banking markets defined by the banking regulators, which underscored the need for a robust remedy."[206] The DOJ "negotiated the divestiture of 28 branches in 3 different states with approximately $2.3 billion in deposits."[207] These divestitures included two branches in Franklin County, Virginia,[208] which the DOJ apparently defined as a separate geographic market but the FRB included in a broader Roanoke-area market.[209] The FRB found this market to be unconcentrated, with an HHI below

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[202] Kramer, *supra* note 31; *see also* Note, Tim McCarthy, *Refining Product Market Definition in the Antitrust Analysis of Bank Mergers*, 46 DUKE L.J. 865, 868 (1997) (noting the divergence and observing that "[b]ecause the Division's method is intended to determine whether any of these several submarkets may be susceptible to anticompetitive effects, its scrutiny is now widely regarded as more stringent than that of the Fed").

[203] Kramer, *supra* note 31.

[204] Rachel Louise Ensign & Allison Prang, *BB&T to Buy SunTrust in Largest Bank Deal Since the Financial Crisis*, WALL ST. J. (Feb. 7, 2019), www.wsj.com/articles/suntrust-bb-t-to-combine-in-all-stock-merger-11549537817.

[205] *See* Order, Fed. Rsrv. Sys., *In re* BB&T Corp., Order Approving the Merger of Bank Holding Companies at 8 n.24 (Nov. 19, 2019) [hereinafter BB&T/SunTrust FRB Order], www.federalreserve.gov/newsevents/pressreleases/files/orders20191119a1.pdf (defining geographic markets more broadly than MSAs and including thrift institutions at a discounted weight); *id.* app. II (listing each banking market).

[206] DOJ Update 2020, *supra* note 31, at 19.

[207] *Id.* at 19–20.

[208] *See* Press Release, U.S. Dep't of Justice, Antitrust Div., Justice Dep't Requires Divestitures in Order for BB&T and SunTrust to Proceed with Merger (Nov. 8, 2019) [hereinafter DOJ BB&T/SunTrust Press Release], www.justice.gov/opa/pr/justice-department-requires-divestitures-order-bbt-and-suntrust-proceed-merger (including, in Attachment A, a list of divested branches, including two in Franklin County, VA).

[209] *See id.* Attach. A (listing divestitures in Franklin County but none of the other jurisdictions included in the FRB's Roanoke market); BB&T/SunTrust FRB Order, *supra* note 205, app. II, at 79 (defining the "Roanoke, Virginia" geographic market as "[t]he independent cities of Bedford, Roanoke, and Salem; Botetourt, Craig, Franklin, and Roanoke counties; and the portion of Bedford County west of Route 43, all in Virginia").

the threshold at which the DOJ had "informed the Board" it would challenge a transaction,[210] whereas the DOJ's narrower market apparently yielded a larger HHI that exceeded the stated divestiture threshold.[211]

In both cases, the DOJ's narrower product and geographic markets increased market shares enough to trigger the structural screens it uses to identify circumstances warranting divestiture. Both cases also illustrate how narrower markets have altered the way regulators apply facially constant rules. In FirstUnion/CoreStates, the DOJ's narrower markets appear to have pushed more of the efficiencies—which the FRB credited—outside the relevant market. It also caused DOJ to require more than $200 million in divestitures that a sister agency deemed unnecessary under a broader product market definition. In BB&T/SunTrust, "Division staff concluded that the relevant antitrust market was narrower than the banking markets defined by the banking regulators, which underscored the need for a robust remedy"—requiring a multibillion-dollar divestiture.[212] In at least one market, Franklin County, Virginia, the DOJ's narrow market definition triggered a structural presumption and a divestiture while the FRB's broad market did not. Nonetheless, Senator Elizabeth Warren criticized the DOJ for not defining markets narrowly enough.[213]

V. CONCLUSION

There is now, perhaps for the first time, empirical evidence that markets have in fact narrowed—in practice and on average—since the Supreme Court decided the canonical Section 7 cases. As a theoretical matter, this narrowing

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[210] BB&T/SunTrust FRB Order, *supra* note 205, app. II, at 79 (calculating a post-merger HHI in the Roanoke market of 1757); *id.* at 9 n.26 ("The DOJ has informed the Board that a bank merger or acquisition generally would not be challenged (in the absence of other factors indicating anticompetitive effects) unless the post-merger HHI is at least 1800 and the merger increases the HHI by more than 200 points.").

[211] *Compare* DOJ BB&T/SunTrust Press Release, *supra* note 208 ("Under their agreement with the Justice Department, the companies have agreed to divest SunTrust branches in . . . Franklin County, Virginia."), *with* BB&T/SunTrust FRB Order, *supra* note 205, at 79 (describing a "Roanoke, Virginia" market that includes Franklin and four other counties and has a "[r]esulting HHI" of 1757); *id.* at 9 n.26.

[212] DOJ Update 2020, *supra* note 31, at 19.

[213] *See* Letter from Senator Elizabeth Warren to Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div. (Oct. 16, 2020), www.justice.gov/atr/page/file/1330251/download ("The Division currently analyzes the impact of a proposed transaction on competition within three separate product markets: retail banking products and services, small business products and services, and middle-market banking products and services. While this approach is preferable to that of the banking agencies, which rely on a *cluster market* approach that uses an overly simplistic measure of deposits as a proxy to estimate overall activity in a market, it still lacks the specificity needed to ensure that there is not a reduction in the quantity or availability of banking products used by lower-income households. . . . The 2019 approval of the merger for Branch Banking and Trust Company (BB&T) and SunTrust Bank (SunTrust) revealed the inadequacy of current DOJ merger guidelines.").

raises the specter that courts may apply substantive merger rules like the structural presumption and efficiencies analysis in a systematically different way than when those rules were first announced. Cases from the banking industry, whose dual-enforcement structure provides a useful means of comparison, likewise suggest that narrower markets can affect substantive outcomes. There, narrower markets led to more stringent enforcement and larger divestitures.

Depending upon the reader's perspective, narrowing markets may be cause for either celebration or worry. Compared to their 1960s counterparts, today's markets are the product of more coherent economic thinking, which makes the analysis more consistent and predictable. Yet that consistency also means litigants are left to debate whether markets are narrow or very narrow. And narrowing markets, in turn, have significantly altered the way courts apply several bedrock merger rules.

A newfound realization that markets have narrowed, and substantive antitrust rules have changed as a result, may also inform antitrust policy. First, proposals to return to earlier merger rules should be consistent; if enforcers should return to 1960s-era concentration thresholds, presumably they should also return to broader 1960s-era product markets.[214] Second, because markets have narrowed substantially, we may need to reconsider the way we think about overlaps and efficiencies. For example, courts applying the *Philadelphia National Bank* rule against out-of-market efficiencies fail to recognize that in that case both the district court and the Supreme Court expressly rejected precisely the kind of narrow product markets that are now routine, and therefore that the Court envisioned an efficiencies analysis fundamentally different than what the courts apply today.

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[214] To be clear, we do not endorse a return to 1960s-era antitrust enforcement, let alone *Von's Grocery* and *Pabst Brewing*.