

Same Rule, Different Result:

How the Narrowing of Product Markets Has Altered Substantive Antitrust Rules

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Market definition remains a critical part of most antitrust cases, despite attempts to obviate it. While many commentators have argued that a particular policy change may theoretically broaden or narrow antitrust markets, and thereby affect substantive antitrust enforcement, none has empirically tested the hypothesis. This article does so—albeit crudely—for one class of antitrust cases, mergers. It finds that, *in practice and on average*, product markets in Clayton Act cases have narrowed since the 1960s and 1970s. This narrowing is not necessarily desirable or undesirable, but it is real. Causes and implications of this narrowing are then explored, including its effect on legal rules like the structural presumption and the rule against out-of-market efficiencies. Two examples from the banking industry illustrate how narrowing can affect substantive antitrust outcomes, with the Department of Justice’s narrower market definition finding greater competitive harm, counting fewer efficiencies, and requiring more divestitures than the Federal Reserve Bank’s broader markets. This divergence suggests that Clayton Act rules are applied in a systematically different way today. As a result, it may be more appropriate to apply these rules—especially the rule against out-of-market efficiencies—to product markets akin in size to those in Philadelphia National Bank and other foundational cases. This divergence suggests that Clayton Act rules are applied in a systematically different way today. As a result, it may be more appropriate to apply these rules—especially the rule against out-of-market efficiencies—to product markets akin in size to those in Philadelphia National Bank and other foundational cases.

It has long been recognized that market definition is both 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,

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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 Federal Trade Commission (FTC) 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.⁷

The primacy of market definition in antitrust analysis—at least in the courts⁸—reflects the large number of substantive legal rules that rely, either explicitly or implicitly, upon it. For

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).

⁵ Pitofsky, *supra* note 2, at 1807.

⁶ Baker, *supra* note 3, at 129.

⁷ See, e.g., *FTC v. Peabody Energy Co.*, No. 4:20-cv-00317 (E.D. Mo. Sept. 28, 2020); *United States v. Sabre Corp.*, No. 1:19-cv-01548-LPS (D. Del. Apr. 8, 2020) (holding 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. Rag-Stiftung*, 436 F. Supp. 3d 278 (D.D.C. 2020).

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 it as a bedrock statutory requirement. Compare *Ohio v. American Express Co. (Amex)*, 138 S. Ct. 2274, 2284-85 (2018) (“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)) and *Rag-Stiftung*, 436 F. Supp. 3d 291 (“Defining the relevant market is a necessary predicate to finding a Clayton Act violation because the proposed merger must be one which will substantially lessen competition within the area of effective competition.” (internal citations and quotations omitted)), with U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL

merger matters brought under Section 7 of the Clayton Act, how the decisionmaker defines the ambit of the market determines both whether the merging firms are deemed competitors in the first place⁹ 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 Courts also focus upon in-market competitive effects in Sherman Act cases.¹³

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 (DOJ or Division) (collectively with the FTC, the “Agencies”) observed in a brief filed in 2015, “[f]requently, the government alleges narrow markets, the defendant describes broad markets,

MERGER GUIDELINES, § 4, at 7 (issued Aug. 19, 2010), *available at* https://www.ftc.gov/system/files/documents/public_statements/804291/100819hmg.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, *The Past and Future of Direct Effects Evidence: Remarks before the ABA Section of Antitrust Law’s 59th Spring Meeting*, Mar. 30, 2011, https://www.ftc.gov/sites/default/files/documents/public_statements/past-and-future-direct-effects-evidence/110330aba-directeffects.pdf (arguing an assessment of whether the Clayton Act is violated “may turn on market definition, but it doesn’t have to,” and that “direct evidence can shed light directly” on the ultimate question).⁹ *See, e.g., Sabre*, No. 1:19-cv-01548-LPS (holding a one-sided firm could not compete in a two-sided market as a matter of law).

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”).

¹³ *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.*, No. 19-16122, at *30 (9th Cir. Aug. 11, 2020) (evaluating “[t]he district court’s consideration of anticompetitive impacts outside the relevant markets”); *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”).

and the court must choose between the competing approaches.”¹⁴ The choice is often outcome-determinative, leading many to charge that market definition is “an essentially ex post choice”¹⁵ designed “to achieve the desired results in calculating market shares.”¹⁶ 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.”¹⁷

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.”¹⁸ Other commentators took the opposite view of the same

¹⁴ United States’ Pretrial Mem. at 15-16, *United States v. AB Electrolux*, No. 1:15-cv-01039 (D.D.C. filed Dec. 18, 2015), available at <https://www.justice.gov/atr/file/801726/download> [hereinafter *Electrolux Pretrial Brief*].

¹⁵ Louis Kaplow, *Market Definition and the Merger Guidelines*, 39 REV. INDUS. ORG. 107, 124 (2011).

¹⁶ 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 G.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., FTC Bureau of Econ., *Product Differentiation Through Space and Time: Some Antitrust Policy Issues*, Address to the Antitrust and Trade Regulation Committee of the Association of the Bar of the City of New York City, Feb. 6, 1996, <https://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 “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).

¹⁷ 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 Cellar-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629, 649-50 (1961) (arguing enforcers expanded and contracted markets at will “to find a market that will magnify the acquisition and thus facilitate its condemnation”).

¹⁸ 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 the Revision of the Antitrust Laws?*, 71 CAL. L. REV. 575, 587 (1983) (arguing 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.”)

Guidelines, predicting narrower markets.¹⁹ More recently, 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.²⁰

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.²¹ 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 twelve product markets defined in Section 7 cases decided by the Supreme Court,²² half have narrowed over time, with six product markets (used in twelve 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

¹⁹ See, e.g., Donald I. Baker & William Blumenthal, *The 1982 Guidelines and Preexisting Law*, 71 CAL. L. REV. 311, 324-25 (1983) (“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.”).

²⁰ See Jan M. Rybnicek & Joshua D. Wright, *Outside In or Inside Out?: Counting Merger Efficiencies Inside and Out of the Relevant Market*, [at *12-13], in 2 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE – LIBER AMICORUM (2014) (“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.”); 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, [*16] (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.”).

²¹ 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).

²² These cases all were decided between 1956 and 1975, and therefore reflect similar legal and economic assumptions.

remained more or less the same. Remarkably, none of the twelve has broadened.²³ 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.²⁴

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 and diversion ratios becoming commonplace.²⁵ 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.²⁶ Third, the *Guidelines* have emphasized some concepts, like price-discrimination

²³ 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.

²⁴ 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. *But see, e.g.*, Testimony of Sally Hubbard, Dir. of Enforcement Strategy, Open Markets Institute, Before the House Judiciary Comm., Subcomm. on Regulatory Reform, Commercial and Antitrust Law, Appx. A, at 20, Oct. 1, 2020, <https://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”).

²⁵ *See also, e.g.*, Stone & Wright, *supra* note 20, at *8 (“The market definition analysis endorsed by the new Guidelines correspondingly favors narrower markets” than under the 1997 Guidelines because, among other things, “the [new] Guidelines’ value of diversion test tends to narrow relevant markets, all else held constant.”).

²⁶ *See, e.g.*, Baker, *supra* note 3, at 133-38 (discussing the concept from *Cellophane* to the 2000s); *FTC v. Rag-Stiftung*, 436 F. Supp. 3d 278, 293-99 (D.D.C. 2020) (finding 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 was 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.

markets, that can result in narrower markets.²⁷ 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 *Von’s*;²⁸ neither did “broadline foodservice distribution to national customers.”²⁹ 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.³⁰ Likewise, the courts have narrowed commodity product markets like coal and spices markedly, even though the products’ physical properties have not changed.

Whatever the cause, when a court today defines product markets more narrowly today than in yesteryear, it necessarily applies substantive legal rules in a systematically different way than when they were first announced. Part III considers three legal rules: (i) the exclusion of out-of-market efficiencies; (ii) the structural presumption, *i.e.*, the market share at which a transaction becomes presumptively unlawful; and (iii) the traditional emphasis upon mergers involving “overlapping” horizontal competitors.³¹ Narrowing product markets have altered rules (i) and (ii) in ways that favor plaintiffs, while narrowing product markets have altered rule (iii) 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

²⁷ See *infra* Part III.

²⁸ Nor did “club stores,” which are occasionally counted as supermarkets. See, *e.g.*, Compl. ¶ 9, *In re Wal-Mart Stores, Inc.*, No. C-4066 (F.T.C. Nov. 20, 2002), available at <https://www.ftc.gov/sites/default/files/documents/cases/2003/02/walmartamigocmp.pdf>.

²⁹ *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 48 (D.D.C. 2015).

³⁰ See *Brown Shoe Co. v. United States*, 370 U.S. 294, 326-28 (1962).

³¹ For cases in which merging firms fell into separate, narrow product markets, see *United States v. Sabre Corp.*, No. 1:19-cv-01548-LPS (D. Del. Apr. 8, 2020), and *FTC v. Steris Corp.*, 133 F. Supp. 3d 962 (N.D. Ohio 2015).

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.³² 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.³³ Nor is this effect fully offset by higher market share thresholds, as in recent years product markets have continued to narrow even as thresholds have

³² See Robert Kramer, Chief, Lit. II Section, U.S. Dep’t of Justice Antitrust Div., Address before the Am. Bar Ass’n: “Mega-Mergers” in the Banking Industry, at 3, Apr. 14, 1999, available at <https://www.justice.gov/atr/speech/mega-mergers-banking-industry> (explaining “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., 2020 Division Update, at 19 (June 2020), available at <https://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.”).

³³ 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, available at <https://equitablegrowth.org/wp-content/uploads/2020/04/Joint-Response-to-the-House-Judiciary-Committee-on-the-State-of-Antitrust-Law-and-Implications-for-Protecting-Competition-in-Digital-Markets.pdf>; see also, e.g., Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARV. BUS. REV., Dec. 15, 2017, available at <https://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.”); Sally Hubbard, *The Rise and Fall of the Word “Monopoly” in American Life*, THE ATLANTIC, June 20, 2017, available at <https://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.”).

remained unchanged.³⁴ 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, adopting both lower thresholds *and* broader markets.³⁵ Or, to borrow a phrase from Justice William Rehnquist, these proposals should avoid cherry-picking, instead taking “the bitter with the sweet.”³⁶

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” 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 Or, as the U.S. Department of Justice Antitrust Division (DOJ or Division) observed in a brief filed in 2015, “[f]requently, the government alleges narrow markets, the defendant describes broad markets, and the court must

³⁴ 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 87-93 and associated text.

³⁵ *See, e.g.*, WILLIAM A. GALSTON & CLARA HENDRICKSON, BROOKINGS INSTITUTION, A POLICY AT PEACE WITH ITSELF: ANTITRUST REMEDIES FOR OUR CONCENTRATED, UNCOMPETITIVE ECONOMY, Jan. 5, 2018, <https://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.”); Open Markets Institute, Restoring Antimonopoly Through Bright-Line Rules, Apr. 26, 2019, <https://openmarketsinstitute.org/op-eds-and-articles/restoring-antimonopoly-bright-line-rules/> (arguing for the readoption of the “thresholds enumerated in the 1968 guidelines”).

³⁶ *Arnett v. Kennedy*, 416 U.S. 134, 154 (1974) (Rehnquist, J.) (plurality opinion).

³⁷ *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 612 n.31 (1953) (“drawn narrowly”); *United States v. E.I. DuPont 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[,] . . . practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors”).

choose between the competing approaches.”³⁹ Given this flexibility, commentators have long charged that market definition is “an essentially ex post choice”⁴⁰ designed “to achieve the desired results in calculating market shares.”⁴¹

How courts exercise this discretion has varied substantially over time. During the first 25 years after the Celler-Kefauver Act of 1950,⁴² the Supreme Court defined a mix of broad product markets, such as “retail grocery” sales⁴³ and “children’s shoes,”⁴⁴ and narrow ones like “accredited central station alarm services”⁴⁵ and automotive finishes and fabrics.⁴⁶ Lower courts also defined a mix of broad and narrow product markets.⁴⁷ Beginning in the 1980s, perhaps in

³⁹ United States’ Pretrial Mem. at 15-16, *United States v. AB Electrolux*, No. 1:15-cv-01039 (D.D.C. filed Dec. 18, 2015), available at <https://www.justice.gov/atr/file/801726/download> [hereinafter *Electrolux Pretrial Brief*].

⁴⁰ Louis Kaplow, *Market Definition and the Merger Guidelines*, 39 REV. INDUS. ORG. 107, 124 (2011).

⁴¹ 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 G.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”); 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) (arguing “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”); Milton Handler & Stanley D. Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629, 649-50 (1961) (arguing enforcers expanded and contracted markets at will “to find a market that will magnify the acquisition and thus facilitate its condemnation”). This results-first orientation continues to appear from time to time. See, e.g., Jonathan B. Baker, Dir., FTC Bureau of Econ., *Product Differentiation Through Space and Time: Some Antitrust Policy Issues*, Address to the Antitrust and Trade Regulation Committee of the Association of the Bar of the City of New York City, Feb. 6, 1996, <https://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 “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).

⁴² Pub. L. 81-899, 64 STAT. 1125 (1950).

⁴³ *United States v. Von’s Grocery Co.*, 384 U.S. 270, 272 (1966).

⁴⁴ *Brown Shoe*, 370 U.S. at 326 (defining three markets in all: “men’s, women’s, and children’s shoes”).

⁴⁵ *United States v. Grinnell Corp.*, 384 U.S. 563, 571-74 (1966) (defining a product market for “the accredited central station service business”).

⁴⁶ *United States v. DuPont de Nemours & Co.*, 353 U.S. 586, 594-95 (1957).

⁴⁷ 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)).

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.⁴⁸ Today, agencies and courts routinely define product markets so narrowly that they require multiple adjectives, such as “the sale of superpremium ice cream to the retail channel,”⁴⁹ “broadline foodservice distribution to national customers,”⁵⁰ “branded seasoned salt products . . . (not including private or store label) sold at retail,”⁵¹ and branded canola oil sold to retailers.⁵² 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

⁴⁸ *Compare Von's Grocery*, 384 U.S. at 272 (retail grocery), *Van de Kamp ex rel. California v. American Stores, Inc.*, 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*, 495 U.S. 271, 283 (1990) (assuming the correctness of the district court’s antitrust analysis), and *FTC v. Whole Foods Market*, 548 F.3d 1028, 1043-49 (D.C. Cir. 2008) (opinion of Brown, J.) (finding clearly erroneous the district court’s definition of a market encompassing all supermarkets and cataloguing evidence suggesting a market for “premium, natural, and organic supermarkets” (PNOS) was plausible); *id.* at 1043-49 (Tatel, J., concurring in the judgment) (finding the evidence strongly suggests a PNOS market).

⁴⁹ Complaint ¶ 11, *Nestle Holdings, Inc.*, Dkt. No. C-4082, available at

<https://www.ftc.gov/sites/default/files/documents/cases/2003/06/dreyercomplaint.htm>

⁵⁰ *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 48 (D.D.C. 2015) (defining overlapping product markets for (i) “broadline foodservice distribution” and (ii) “broadline foodservice distribution to national customers”).

⁵¹ Compl. ¶ 8, *McCormick & Co., Inc.*, No. C-4225 (F.T.C. filed July 30, 2008).

⁵² *See* Compl. ¶¶ 25-35, *J.M. Smucker Co.*, No. 9381 (F.T.C. 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, the relevant product market excludes avocado, coconut, corn, olive, peanut, and other oils, and private label products are excluded from the market).

commerce ... in any section of the country.”⁵³ This description is somewhat different from the Sherman Act, which instead addresses “trade or commerce among the several states,”⁵⁴ although in practice courts use the same market definition rules for both statutes.⁵⁵

The Court spent the next fifteen 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*,⁵⁶ 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.”⁵⁷ Similarly, in the *Cellophane* case it noted that “[i]ndustrial activities cannot be confined to trim categories.”⁵⁸

Acknowledging these real-world nuances, the Court set out two principles that vest factfinders 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.”⁵⁹ This concept is known today as the “narrowest market” principle, which both the courts and the Agencies routinely use.⁶⁰ Second, the Court cautioned against drawing the circle too narrowly, explaining that it is also improper “to require that products be fungible to

⁵³ 15 U.S.C. § 18.

⁵⁴ 15 U.S.C. §§ 1, 2.

⁵⁵ See, e.g., Note by the Delegation of the United States to the OECD Directorate for Financial and Enterprise Affairs, Competition Cmte., Roundtable on Market Definition, DAF/COMP/WD(2012)27, June 7, 2012, available at <https://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).

⁵⁶ 345 U.S. 594 (1953).

⁵⁷ *Id.* at 611.

⁵⁸ *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 395 (1956).

⁵⁹ *Times-Picayune*, 345 U.S. at 612 n.31.

⁶⁰ See, e.g., *FTC v. Peabody Energy Co.*, No. 4:20-cv-00317 (E.D. Mo. Sept. 28, 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).

be considered in the relevant market.”⁶¹ 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.⁶²

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 (i) all men’s shoes, (ii) all women’s shoes, and (iii) all children’s shoes.⁶³ In doing so, the Court explicitly rejected the defendant’s attempt to narrow

⁶¹ *DuPont*, 351 U.S. at 394.

⁶² 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, at 8 (“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 (see Section 4.1.1) is designed to ensure that candidate markets are not overly narrow in this respect.”).

⁶³ 370 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.”).

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 lines based on ‘price/quality’ differences would be ‘unrealistic.’”⁶⁴ The Court also rejected attempts to distinguish among different kinds of children’s shoes as “impractical and unwarranted.”⁶⁵

The Supreme Court also endorsed a fairly broad product market in *United States v. Philadelphia National Bank*.⁶⁶ There the district court 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.”⁶⁷ 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.’”⁶⁸ 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.”⁶⁹ The Supreme Court applied the same “commercial banking” product

⁶⁴ *Id.*

⁶⁵ *Id.* at 327-28.

⁶⁶ 374 U.S. 321 (1963).

⁶⁷ *United States v. Philadelphia Nat’l Bank*, 201 F. Supp. 348, 363 (E.D. Pa. 1962).

⁶⁸ *Philadelphia Nat’l Bank*, 374 U.S. at 356.

⁶⁹ *Id.* at 357 (internal quotations and citations omitted).

market in the following twelve years to six other bank mergers,⁷⁰ in the process rejecting both broader and narrower candidate markets.⁷¹

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,”⁷² while the dissent argued this market “was too narrowly drawn because the very same finishes and fabrics were also used in many other industries.”⁷³ The Court also sometimes defined narrow markets in Section 2 cases, as it did in *Grinnell* over a sharp dissent.⁷⁴

Lower courts likewise defined a mix of broader and narrower markets. In *United States v. General Dynamics Corp.*,⁷⁵ for example, the district court defined an “energy market”⁷⁶ based

⁷⁰ *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 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, 618-619 (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. Connecticut 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 & So. 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. See *United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 369 n.1 (1967).

⁷¹ See *Connecticut Nat'l Bank*, 418 U.S. at 666 (rejecting a broader market that encompassed both commercial and savings banks); *Phillipsburg Nat'l 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”).

⁷² *United States v. DuPont 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.”).

⁷³ *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).

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

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

⁷⁶ *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.”).

on evidence of significant competition from “oil, gas, and nuclear power.”⁷⁷ Yet as Robert Pitofsky once wrote, there were also “many instances” during this era in which lower courts defined “excessively, and sometimes ludicrously, narrow market definitions.”⁷⁸ 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.”⁷⁹

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.⁸⁰ For example, in the early 1980s Frederick Rowe argued that the Agencies had “scored easy triumphs against trivial horizontal deals” in markets like local towel rental services and “vandal-resistant plumbing fixtures” used in prisons.⁸¹ 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.”⁸² That same year, the Sixth Circuit affirmed a district court decision involving a

⁷⁷ *Id.* at 545.

⁷⁸ Pitofsky, *supra* note 2, at 1808.

⁷⁹ *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)).

⁸⁰ See Werden, *supra* note 21 (tracing the ebb and flow of market definition over time).

⁸¹ 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)).

⁸² *FTC v. PPG Indus.*, 798 F.2d 1500, 1504-06 (D.C. Cir. 1986) (Bork, J.). As a market defined by supply-side factors, the present Guidelines may arrive at a different (presumably narrower) formulation.

single household appliance, the “dishwasher” market,⁸³ which was consistent with the way other household appliances were assessed.⁸⁴ Courts and enforcers also sometimes made further distinctions, particularly as price-discrimination markets gained purchase.⁸⁵ Although a few product markets broadened, these cases were rare and sometimes controversial.⁸⁶

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 the early 2000s the FTC alleged that “the sale of superpremium ice cream to the retail channel” was a relevant product market, and that “refrigerated pickles” and “shelf-stable pickles” were in different product markets.⁸⁷ Likewise, in *Whole Foods* the FTC alleged a market for “premium natural and organic supermarkets,”

⁸³ *White Consol. Indus. v. Whirlpool*, 781 F.2d 1224, 1227-29 (6th Cir. 1986).

⁸⁴ See Press Release, U.S. Dep’t of Justice, Department of Justice Antitrust Division Statement on Closing of Its Investigation of Whirlpool’s Acquisition of Maytag, Mar. 29, 2006, available at https://www.justice.gov/archive/atr/public/press_releases/2006/215326.htm (finding the transaction was unlikely to reduce competition in various household appliance markets, including “residential clothes washers and dryers”); Final Judgement, *United States v. Commercial Elec. Co.*, 1959 Trade Cas. ¶ 69,505 (N.D. Ohio Oct. 23, 1959), available at <https://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”).

⁸⁵ See, e.g., Compl. ¶¶ 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 et al., *Price Discrimination Markets in Merger Cases: Practical Guidance from FTC v. Sysco*, 31 ANTITRUST at 40, 40 (Fall 2016) (arguing the enforcement agencies are asserting “narrow ‘price discrimination markets’ . . . in a growing number of merger investigations and enforcement actions”).

⁸⁶ See, e.g., Fed. Trade Comm’n, *Federated Department Stores, Inc./The May Department Stores Company*, 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 did in *The Bon-Ton Stores, Inc. v. The May Department Store Company*, 881 F. Supp. 860 (W.D.N.Y. 1994)); Mark D. Bauer, *Department Stores on Sale: An Antitrust Quandary*, 26 GA. STATE 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 investigation by the FTC”).

⁸⁷ See Complaint ¶ 11, *Nestle Holdings, Inc.*, Dkt. No. C-4082, available at <https://www.ftc.gov/sites/default/files/documents/cases/2003/06/dreyercomplaint.htm>; *Complaint ¶¶ 12-13, 15(a), FTC v. Hicks, Muse, Tate & Furst Equity Fund V, L.P.*

which the district court rejected as too narrow but the court of appeals accepted.⁸⁸ 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."⁸⁹

Second, enforcers more often defined narrow price-discrimination markets, even though those markets were hardly new.⁹⁰ 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,⁹¹ 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.⁹² The "national broadline customers" market in *Sysco* was also defined around the customers most vulnerable to price discrimination post-transaction.⁹³

⁸⁸ *FTC v. Whole Foods Market, Inc.*, 502 F.Supp.2d 1, 34-36 (D.D.C. 2007), *rev'd*, 548 F.3d 1028, 1041 (D.C. Cir. 2008) (Brown, J.).

⁸⁹ *Brown Shoe*, 370 U.S. at 326; *see also* *United States v. Philadelphia 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"), *aff'd*, 374 U.S. 321 (1963).

⁹⁰ *See, e.g.*, U.S. DEP'T OF JUSTICE, MERGER GUIDELINES § II.A (1982), *available at* <https://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.").

⁹¹ *See* Press Release, U.S. Dep't of Justice, Department of Justice Antitrust Division Statement on Closing of Its Investigation of Whirlpool's Acquisition of Maytag, Mar. 29, 2006, *available at* https://www.justice.gov/archive/atr/public/press_releases/2006/215326.htm (finding the transaction was unlikely to reduce competition in various household appliance markets, including "residential clothes washers and dryers"); Final Judgement, *United States v. Commercial Elec. Co.*, 1959 Trade Cas. ¶ 69,505 (N.D. Ohio Oct. 23, 1959), *available at* <https://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").

⁹² Compl. ¶¶ 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).

⁹³ *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 48 (D.D.C. 2015).

3. Systematic Comparison

There is therefore a growing perception that enforcers allege narrow markets and that courts typically agree,⁹⁴ 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, homogenous (*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.

⁹⁴ See, e.g., Electrolux Pretrial Brief, *supra* note 39, at 15-16 (“Frequently, the government alleges narrow markets, the defendant describes broad markets, and the court must choose between the competing approaches.”); Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129, 150 n.76 (2007) (“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.”).

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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	“automotive refinishing paint” (Compl. ¶ 39, <i>In re Automotive Refinishing Paint Antitrust Litigation</i> (E.D. Pa. filed 2004))*
Brown Shoe	1962	(1) all men's shoes (2) all women's shoes (3) all children's shoes	“the manufacture and sale of national brand canvas shoes” (Complaint ¶ 19, <i>United States v. Converse</i> (D. Mass. 1972) (consent)) “sales of athletic shoes” (Business Review Letter to the Apparel Industry Partnership) (Oct. 31, 1996)
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.’”	Separate product markets for savings, checking, and trust accounts, as well as several separate markets for commercial loans. <i>United States v. CoreStates</i> (1998) (consent); <i>United States v. BB&T</i> (2020) (consent)
El Paso	1964	“production, transportation, and sale of natural gas”	“natural gas pipeline transportation” (Complaint ¶ 9, <i>DTE Energy Co.</i> (F.T.C. 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. (<i>State of Ill ex rel. Hartigan v. Panhandle Eastern Pipe Line Co.</i> , 730 F. Supp. 826 (C.D. Ill. 1990);
Penn-Olin	1964	production and sale of sodium chlorate	“the manufacture and sale of sodium chlorate” in “North America” (Compl. ¶¶ 24, 27, <i>Superior Plus Corp.</i> , No. 9371 (F.T.C. filed June 27, 2016))
Continental Can	1964	“the combined glass and metal container industries and all end uses for which they compete”	“[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.” (Compl. ¶ 5, <i>Ball/Rexam</i> (F.T.C. 2016)) (1) “the manufacture and sale of glass containers to Brewers”; and (2) “the manufacture and sale of glass containers to Distillers” (Compl. ¶ 30, <i>FTC v. Ardagh Group S.A.</i> (D.D.C. filed July 13, 2013) (subsequently settled)) “foodservice glassware” (<i>FTC v. Libbey, Inc.</i> , 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	“the electrical conduit market” (<i>Allied Tube v. Indian Head, Inc.</i> , 486 U.S. 492 (1988) (Section 1 case)) “copper building wire” (Compl. Para. 6, <i>U.S. v. Essex Group</i> (1978))*
Consolidated Foods	1965	“the markets for [1] dehydrated onion and [2] [dehydrated] garlic”	“the U.S. dehydrated-onion business” (Compl., <i>McCormick & Co., Inc.</i> , filed 1993) (see also 1995 petition in case no. C-3468) “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” (Compl. ¶ 8, <i>McCormick & Co., Inc.</i> , No. C-4225 (F.T.C. filed July 30, 2008))
Beer Cases - Pabst - Falstaff	1966 1973	“production and sale of beer”	“Producer and Seller of Beer” (<i>DeHoog v. Anheuser-Busch InBev SA/NV</i> , 899 F.3d 758 (9th Cir. 2018)) “Beer” (Compl. ¶ 30, <i>United States v. Anheuser-Busch InBev</i> (D.D.C. 2016) (SABMiller acquisition)) (but complaint also notes segments within market); Compl. ¶ 31, <i>United States v. Anheuser-Busch Inbev</i> (D.D.C. 2013) (Grupo Modelo acquisition))
Von's Grocery	1966	“the retail grocery market”	“the retail sale of food and other grocery products in supermarkets” (Compl. ¶ 8, <i>Koniklijke Ahold, N.V.</i> , No. C-4588 (F.T.C. 2016) (consent); Compl. ¶ 10, <i>Cerberus Institutional Partners V, L.P.</i> , No. C-4504 (F.T.C. 2015) (Alberton's/Safeway consent)) “Premium natural and organic supermarkets” (<i>FTC v. Whole Foods Markets</i> , 548 F.3d 1028, 1037-41 (D.C. Cir. 2008)) “Supermarkets” (<i>California v. American Stores</i> , 495 U.S. 271 (1990))
Ford Motor	1972	(1) “original equipment spark plugs” (2) “aftermarket spark plugs”	(1) “original equipment” and (2) “replacement” spark plugs (<i>Stitt Spark Plug Co. v. Champion Spark Plug Co.</i> , 840 F.2d 1253 (5th Cir. 1988)) “spark plugs” (Information, <i>United States v. NGK Spark Plug Co., Ltd.</i> , No. 2:14-cr-20949 (E.D. Mich. filed Aug. 19, 2014))*
General Dynamics	1974	“interfuel competition” among coal, natural gas, oil, uranium, “and other forms of energy.”**	“an economically significant submarket of SPRB coal only” (<i>FTC v. Peabody</i> (E.D. Mo. 2020)) “SPRB [Southern Powder River Basin] coal” (<i>FTC v. Arch Coal</i> (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 latter 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, though the dissent would have defined both a broad “energy market” and a narrower “coal” submarket. *See General Dynamics*, 415 U.S. at 513-15.

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	

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,⁹⁵ which included small corner stores. In the 1990 case *California v. American Stores Co.*,⁹⁶ the Supreme Court implicitly accepted a slightly narrower market for “supermarkets,” grocery stores of at least 10,000 square feet.⁹⁷ By 2008, in the *Whole Foods* case,⁹⁸ the Commission alleged, and the D.C. Circuit found over a sharp dissent,⁹⁹ an even narrower market for the “operation of premium natural and organic supermarkets.”¹⁰⁰ Beverage container product markets also exhibit the

⁹⁵ *United States v. Von’s Grocery Co.*, 384 U.S. 270, 272 (1966).

⁹⁶ 495 U.S. 271 (1990).

⁹⁷ *See id.*, *affirming* 697 F. Supp. 1125, 1129 (C.D. Cal. 1988) (defining the relevant product market as such).

⁹⁸ *FTC. v. Whole Foods Market, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008).

⁹⁹ *See id.* at 1051-52 (Kavanaugh, J., dissenting).

¹⁰⁰ *Id.* at 1037-1041 (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, Remarks for “Merger Control in

sequential narrowing trend, moving from (i) a product market for “the combined glass and metal container industries and all end uses for which they compete” in the 1960s to (ii) separate product markets for particular uses of glass containers (for foodservice, brewery, and distillery use) in 2002 and 2013¹⁰¹ and (iii) specific sizes and shapes of metal containers in 2016.¹⁰²

Other markets narrowed quickly and then stayed narrow, such as coal mining. In the early 1970s case *United States v. General Dynamics Corp.*,¹⁰³ the district court concluded that the relevant market for assessing the competitive effects of a merger of two coal miners was “interfuel” competition among different energy sources – including coal, natural gas, and uranium – used to generate electricity.¹⁰⁴ The Supreme Court affirmed without reaching the relevant product market.¹⁰⁵ The dissenters, however, argued that there may be both a relevant market for energy and a relevant submarket for coal.¹⁰⁶ 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”¹⁰⁷ in Wyoming and the district court found a market for all Southern

USA” Panel at GCR Interactive: Merger Control, at 11, Oct. 21, 2020, available at https://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 Compl. ¶ 9, *In re Wal-Mart Stores*, No. C-4066 (F.T.C. 2002) (including “supercenters” and “club stores” in the “supermarket” market in Puerto Rico only); Compl. ¶¶ 11-12, *Koniklijke Ahold, N.V.*, No. C-4588 (F.T.C. 2016) (excluding club stores and other retailers from the “supermarket” market).

¹⁰¹ See *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 45 (D.D.C. 2002) (parties stipulated the relevant product market was “foodservice 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”).

¹⁰² Complaint ¶¶ 5, 9, *In re Ball Corp.*, No. 151-0088 (F.T.C. 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).

¹⁰³ 341 F. Supp. 534 (N.D. Ill. 1972), *aff’d*, 415 U.S. 486 (1974).

¹⁰⁴ *Id.* at 545-46.

¹⁰⁵ *General Dynamics*, 415 U.S. at 510-11.

¹⁰⁶ *Id.* at 517-22 (Douglas, J., dissenting).

¹⁰⁷ *FTC v. Arch Coal, Inc.*, 328 F. Supp. 2d 109, 121 (D.D.C. 2004) (recounting plaintiff’s argument before the court).

Powder River Basin (SPRB) coal.¹⁰⁸ 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.¹⁰⁹ In this last case, the court emphasized that its finding was dictated primarily by “the ‘narrowest market principle’” in *Brown Shoe*.¹¹⁰

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.¹¹¹ The Department’s approach has been consistent for many years, aided by the 1995 Bank Merger Guidelines, which the DOJ may soon revise.¹¹²

A few markets initially stayed constant and then narrowed, such as food products. In *FTC v. Consolidated Foods Corp.*,¹¹³ the Supreme Court defined separate markets for dehydrated onions and dehydrated garlic.¹¹⁴ The FTC was still applying these market definitions

¹⁰⁸ *Id.* at 119-123.

¹⁰⁹ *FTC v. Peabody Energy Co.*, No. 4:20-cv-00317 (E.D. Mo. Sept. 28, 2020).

¹¹⁰ *Id.* at *22. 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 21, at 196 (“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*, No. 4:20-cv-00317, at *23 (quoting *Times Picayune*, 345 U.S. 594, 612 n.31); *see also supra* notes 59-62 and accompanying text.

¹¹¹ *See, e.g.*, U.S. DEP’T OF JUSTICE, BANK MERGER GUIDELINES § 2 (using separate HHI calculations for two different sizes of “commercial and industrial loans”); U.S. Dep’t of Justice, Antitrust Div., Antitrust Division Banking Guidelines Review: Public Comments Topics & Issues Guide, <https://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.”)

¹¹² *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, <https://www.justice.gov/opa/pr/antitrust-division-seeks-public-comments-updating-bank-merger-review-analysis>.

¹¹³ 380 U.S. 592 (1965).

¹¹⁴ *Id.* at 595 (reporting the merging parties’ shares of the market for the “manufacture of dehydrated onion and garlic”).

in 1993, when it resolved allegations that an acquisition by McCormick & Co. would harm competition in the “U.S. dehydrated onions business.”¹¹⁵ Although market definitions involving onions and garlic have not been assessed since then, the FTC has taken a narrower tack 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.¹¹⁶

II. POTENTIAL CAUSES

At a high level, much of this narrowing may be attributable to four factors: (i) the growing use of economic tools, particularly as the primary focus of merger analysis shifted from coordinated to unilateral effects and from homogenous to differentiated products,¹¹⁷ (ii) a concomitant increase in reliance on demand substitution metrics, culminating in the exclusion of supply substitution from market definition almost entirely, (iii) additional limitations introduced in successive Guidelines, and (iv) changes in the underlying economy itself.

¹¹⁵ See Press Release, Fed. Trade Comm’n, Announced Actions for March 1, 1996, Mar. 1, 1996, <https://www.ftc.gov/news-events/press-releases/1996/03/announced-actions-march-1-1996> (reporting the agency had granted McCormick’s petition “to modify a 1993 consent order” that had resolved allegations an acquisition “would substantially reduce competition in the U.S. dehydrated onion business”).

¹¹⁶ Compl. ¶ 8, *In re McCormick & Co., Inc.*, No. 0810045 (F.T.C. 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”).

¹¹⁷ See, e.g., Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 701, 706 (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, at 49, 50 (Spring 2003) (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.”).

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.¹¹⁸ 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.¹¹⁹ Whether to use the HMT or *Brown Shoe* indicia may sound academic, but it can affect how the courts and the Agencies apply the “narrowest market” principle. Whereas under *Brown Shoe* the analysis begins with the set of all products deemed similar to either product of the merging parties,¹²⁰ under the HMT the analysis begins with a narrower set of products – just those sold by the merging parties.¹²¹ After several refinements, particularly as analysis shifted from coordinated to unilateral effects and from homogenous to differentiated products,¹²² today the hypothetical monopolist test is the leading econometric tool the courts and the Agencies use to define markets.¹²³

¹¹⁸ For a summary, see Werden, *supra* note 21.

¹¹⁹ FED. TRADE COMM’N, STATEMENT OF THE FEDERAL TRADE COMMISSION 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)).

¹²⁰ *See Brown Shoe*, 370 U.S. at 325 (“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 substitute for it. However, within this broad market, well-defined submarkets may exist . . . [the boundaries of which] may be determined by examining [the *Brown Shoe* indicia].”).

¹²¹ *See, e.g.*, FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 5 (2006), available at <https://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.”).

¹²² 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 CHICAGO OVERSHOT THE MARK 235, 238 (Robert Pitofsky ed., 2008) (arguing *Baker Hughes* substantially “eroded” the structural presumption, thereby prompting the Agencies to issue the 1992 Horizontal Merger Guidelines and advance unilateral effects analysis).

¹²³ *See, e.g.*, David Scheffman, Malcolm Coate, & Louis Silvia, *20 Years of Merger Enforcement at the FTC: An Economic Perspective*, 71 ANTITRUST L.J. 277 (2003-04) (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 were before. For example, critical loss analysis proponents argue it may be used—particularly with additional refinements—“to support a finding of narrower markets” when profit margins are high.¹²⁴ Likewise, former FTC Chairman Joseph Simons once argued that the 2010 Guidelines’ use of the Lerner Index in the market definition exercise “produces extremely narrow markets.”¹²⁵

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.¹²⁶ Perhaps recognizing this weakness, the 2010 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.”¹²⁷ Even if they need not in theory, they often do in practice, including the model the DOJ offered in *AT&T*.¹²⁸

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

¹²⁴ Katz & Shapiro, *supra* note 117, 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* Scheffman et al., *supra* note 123, at 214-15 (describing the possibility that some models may “overestimate” demand elasticities and “result[] in overly narrow markets”).

¹²⁵ 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, at 9, *available at* https://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 117 (endorsing, with adjustments, the use of critical loss analysis to define “narrower markets”); O’Brien & Wickelgren, *supra* note 117 (same).

¹²⁶ *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 market share.’” (quoting from the transcript of Professor Shapiro’s trial testimony)).

¹²⁷ 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 628, § 6.1.

¹²⁸ *See AT&T*, 310 F. Supp. 3d at 235 (using market shares as a proxy for diversion ratios).

correct.¹²⁹ These tools typically suggest narrow markets, particularly for differentiated goods.¹³⁰ For example, in the 2010 Guidelines the Agencies declared that “[d]efining a market broadly . . . can lead to misleading market shares” and “[m]arket shares of different products in narrowly defined markets . . . often more accurately reflect competition between close substitutes.”¹³¹ 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.”¹³² 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.’”¹³³

In short, new(er) 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.¹³⁴ In the aggregate, these changes discount competition from most distant but previously in-market alternatives, supporting the definition of narrower markets.¹³⁵

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

¹²⁹ See Baker & Blumenthal, *supra* note 19, 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.”).

¹³⁰ See, e.g., Katz & Shapiro, *supra* note 117, at 50 (endorsing these “narrower markets”).

¹³¹ 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 628, § 4.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See, e.g., Carl Shapiro, *Mergers with Differentiated Products*, ANTITRUST, Spring 1996, at 23, 24 (“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.”).

¹³⁵ See, e.g., Katz & Shapiro, *supra* note 117, at 50 (endorsing techniques that confirm “narrower markets”).

supply responses of other firms.”¹³⁶ This passage was deleted from the 1992 Guidelines, which instead declared that “[m]arket definition focuses solely on demand substitution factors”¹³⁷ and supply substitution is relevant only as a mitigating factor in subsequent steps in the analysis.¹³⁸ The 2010 Horizontal Merger Guidelines retained the 1992 formulation,¹³⁹ which the courts routinely follow today.¹⁴⁰ For example, in *FTC v. Rag-Stiftung*,¹⁴¹ the FTC argued that supply substitution supported a broader product market that included several complementary grades of hydrogen peroxide.¹⁴² Citing the 2010 Horizontal 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.¹⁴³

The present approach has both detractors and defenders. Some critics charge a demand-only approach lacks “intuitive economic logic” and generates “peculiar if not anomalous”

¹³⁶ U.S. DEP’T OF JUSTICE, MERGER GUIDELINES § 2 (1984), available at <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11249.pdf>.

¹³⁷ U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, MERGER GUIDELINES § 1.0 (issued Apr. 2, 1992), available at <https://www.ftc.gov/sites/default/files/attachments/merger-review/hmg.pdf>.

¹³⁸ *Id.* (“Supply substitution factors—i.e., possible production responses—are considered elsewhere in the Guidelines.”).

¹³⁹ See 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 628, § 4.

¹⁴⁰ 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 Horizontal Merger Guidelines); *FTC v. Whole Foods Market*, 548 F.3d 1028, 1039 (D.C. Cir. 2008) (Brown, J.) (assessing only demand-side substitution); *id.* at 1043-44 (Tatel, J., concurring) (same).

¹⁴¹ 436 F. Supp. 3d 278 (D.D.C. 2020).

¹⁴² *Id.* at 292.

¹⁴³ See *id.* at 293-94 (defining the three conditions as showing supply substitution is “(1) nearly universal among firms selling one or more of a group of products, (2) easy, and (3) profitable” (quoting 2010 Horizontal Merger Guidelines § 5.1 & n.8) (cleaned up)); *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”).

markets.¹⁴⁴ Defenders argue “it can be both difficult and confusing” to consider supply alongside demand,¹⁴⁵ explicitly favoring narrower markets to ensure simplicity and clarity.¹⁴⁶

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.”¹⁴⁷ 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 Oats¹⁴⁸ – that is, they were repositioning,¹⁴⁹ a traditional supply-side factor.¹⁵⁰ On appeal, the D.C. Circuit did not credit evidence of supply-side substitution,¹⁵¹ while in dissent Judge Kavanaugh emphasized that the repositioning of both (i) premium, natural, and organic supermarkets and (ii) conventional supermarkets made it “an industry in transition.”¹⁵² Thus, both the district court and Judge

¹⁴⁴ Kenneth G. Elzinga & Vandy M. Howell, *Geographic Market Definition in the Merger Guidelines: A Retrospective Analysis*, 53 REV. INDUS. ORG. 453, 465-66 (2018).

¹⁴⁵ Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129, 134 (2007).

¹⁴⁶ *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. (Alcoa)*, 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”).

¹⁴⁷ *Whole Foods*, 502 F. Supp. 2d at 34.

¹⁴⁸ *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.”).

¹⁴⁹ *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.”).

¹⁵⁰ 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 628, § 6.1 (“Repositioning is a supply-side response that is evaluated much like entry, with consideration given to timeliness, likelihood, and sufficiency.”).

¹⁵¹ *See Whole Foods*, 548 F.3d at 1044 (Tatel, J., concurring in the judgment). Judge Brown’s opinion does not mention it.

¹⁵² *Id.* at 1054-55 (Kavanaugh, J., dissenting).

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.¹⁵³

Third, successive *Guidelines* have introduced additional restrictions that do not appear in the Supreme Court cases. For example, Donald Baker and Bill 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.¹⁵⁴ 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.”¹⁵⁵ The 1982 Guidelines likewise provided for “additional, narrower . . . markets” defined around buyers subject to price discrimination.¹⁵⁶

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 may in turn reduce demand substitution for at least some customers.¹⁵⁷ Yet changes in the underlying industries is unlikely to fully explain the rise of multi-adjective product markets. For example, commodities like coal and salt have

¹⁵³ *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”).

¹⁵⁴ Baker & Blumenthal, *supra* note 19, at 324.

¹⁵⁵ *Id.* at 324-25.

¹⁵⁶ U.S. DEP’T OF JUSTICE, MERGER GUIDELINES § II.A (1982), available at <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11248.pdf>; see Baker & Blumenthal, *supra* note 19, at 326.

¹⁵⁷ 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, Nat’l Bureau of Econ. Res. Working Paper No. 25968 (June 2019), available at <https://www.nber.org/papers/w25968> (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 et al., Diverging Trends in National and Local Concentration, Federal Reserve Bank of Richmond Working Paper 18-15R, https://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?*, TRUTHONTHEMARKET.COM, Dec. 14, 2019, <https://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).

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: (i) the exclusion of out-of-market efficiencies; (ii) the structural presumption; and (iii) the traditional emphasis upon mergers involving “overlapping” horizontal competitors.¹⁵⁸ As described further below, narrowing product markets tend to alter the operation of these rules in ways that, *ceteris paribus*, favor plaintiffs.

A. Efficiencies

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

¹⁵⁸ 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, AAI White Paper, Apr. 2020, available at <https://www.antitrustinstitute.org/wp-content/uploads/2020/04/Amex-Commentary-4.21.20-Final.pdf> (arguing (i) that the district court opinion in *Sabre* was “clearly incorrect” because it ignored competition between the firms, and (ii) that the district court should have used the narrowest market principle to define several “overlapping or nested markets”).

1. Out-of-Market Efficiencies

First, as former FTC Commissioner Josh Wright and his co-authors recognized a few years ago,¹⁵⁹ narrower markets push some otherwise cognizable 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,”¹⁶⁰ 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.¹⁶¹ 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.’”¹⁶² Likewise, the relevant geographic market was the four-county Philadelphia area,¹⁶³ which the Court defined for the express purpose of avoiding “the indefensible extremes of drawing the market either so expansively . . . or so narrowly.”¹⁶⁴

The rule against out-of-market 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

¹⁵⁹ See Rybnicek & Wright, *supra* note 20; at [*12-13] (“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 20, at [*16] (“*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.”). See

¹⁶⁰ United States v. Philadelphia Nat’l Bank, 374 U.S. 321, 370 (1963)

¹⁶¹ See, e.g., Daniel A. Crane, *Balancing Effects Across Markets*, 80 ANTITRUST L.J. 397, 397 (2015) (coining the former term).

¹⁶² *Id. Phila. Nat’l 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.”).

¹⁶³ *Id.* at 359 (finding “the four-county area in which appellees’ offices are located would seem to be the relevant geographical market”).

¹⁶⁴ *Id.* at 361.

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 those in *Philadelphia National Bank* and assess the net effect within these broader markets.¹⁶⁵ Indeed, the Court's recent decision in *American Express* suggests the Court may already be moving in this direction.¹⁶⁶

2. Magnitude of Offsetting Efficiencies

Since *FTC v. H.J. Heinz Co.*,¹⁶⁷ narrower markets have also changed the magnitude of offsetting efficiencies a defendant must prove. Two dimensions of that case are relevant here.

First, the D.C. Circuit adopted a sliding scale for assessing 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."¹⁶⁸ But when the market is highly concentrated, the court said – following the approach first set out in the 1997 Guidelines¹⁶⁹ – the defendants must prove not just efficiencies,

¹⁶⁵ 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 62, § 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).").

¹⁶⁶ See *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2285-87 (2018) (defining 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).

¹⁶⁷ 246 F.3d 708 (D.C. Cir. 2001).

¹⁶⁸ See *id.* at 719-20; see also 15 U.S.C. § 18; see U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 4 (Apr. 2, 1992, rev. Apr. 8, 1997) [hereinafter 1997 GUIDELINES], available at <https://www.ftc.gov/sites/default/files/attachments/merger-review/hmg.pdf>.

¹⁶⁹ 1997 GUIDELINES, *supra* note 168, § 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.").

but “extraordinary efficiencies.”¹⁷⁰ This appears to mean the magnitude of those efficiencies that remain in the relevant market must substantially exceed the magnitude of harms.¹⁷¹ Although this rule started in the D.C. Circuit,¹⁷² it is now also binding circuit precedent in the Third and Ninth Circuits,¹⁷³ and has been followed by trial courts in the Sixth and Seventh Circuits.¹⁷⁴

Second, merging parties in highly concentrated markets face a heightened evidentiary burden when seeking, almost always in vain,¹⁷⁵ 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.”¹⁷⁶ Although

¹⁷⁰ *Heinz*, 246 F.3d at 720.

¹⁷¹ *See id.*; *see also* 1997 GUIDELINES, *supra* note 168, § 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 id.* at 721-22.

¹⁷² *See id.* 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.”).

¹⁷³ *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)).

¹⁷⁴ *See FTC v. Advocate Health Care*, No. 15-cv-11473, 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-cv-00047, 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)).

¹⁷⁵ 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 “the efficiencies are sufficiently verifiable and merger-specific to merit consideration as evidence that decreases the persuasiveness of the *prima facie* case”).

¹⁷⁶ *H.J. Heinz*, 246 F.3d at 721.

one hopes that the court conducts a rigorous analysis in every case,¹⁷⁷ 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, a defendant that previously could have carried its 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.¹⁷⁸

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

¹⁷⁷ Furthermore, some believe the 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 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.”).

¹⁷⁸ Of course, demonstrating cognizable efficiencies remains an uphill battle for merging parties. *See, e.g.*, Christine S. Wilson, *Breaking the Vicious Cycle: Establishing a Gold Standard for Efficiencies*, Address at the Bates White Antitrust Webinar, June 24, 2020, *available at* https://www.ftc.gov/system/files/documents/public_statements/1577315/wilson_-_bates_white_presentation_06-24-20-final.pdf.

place appellees in different markets.”¹⁷⁹ It likewise declined to consider only the banking patterns of the largest customers, many of whom used banks based in New York City.¹⁸⁰

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 features to their own products. Therefore, in some cases narrower markets may result in relatively *less* aggressive antitrust enforcement, at least in theory.¹⁸¹

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 antitrust enforcement.”¹⁸²

Embodied in both the caselaw and the Horizontal Merger Guidelines,¹⁸³ when the presumption is

¹⁷⁹ *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 361 (1963).

¹⁸⁰ *See id.*

¹⁸¹ 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.

¹⁸² Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 *Yale L.J.* 1996, 1997 (2018).

¹⁸³ *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 & Southern Nat’l Bank*, 422 U.S. 86, 120-22 (1975); *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 363 (1963))); 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 628, §§ 2.1.3, 5.3 (explaining

triggered, it shifts the burden from the plaintiff and requires the defendant to prove that the transaction is lawful.¹⁸⁴ 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.¹⁸⁵ 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 generally,¹⁸⁶ and of a case in which the courts defined a broader market than either party sought.¹⁸⁷

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

“mergers 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).

¹⁸⁴ See, e.g., Douglas H. Ginsburg & Joshua D. Wright, *Philadelphia National Bank: Bad Economics, Bad Law, Good Riddance*, 80 ANTITRUST L.J. 377 (2015).

¹⁸⁵ See *Phila. Nat'l 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”).

¹⁸⁶ See, e.g., Hovenkamp & Shapiro, *supra* note 182, 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.”).

¹⁸⁷ See *United States v. Philadelphia 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), *aff'd*, 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.’”).

included market.”¹⁸⁸ 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 latter of which triggered a structural presumption of illegality.¹⁸⁹

Narrowing markets also increase the probability of triggering a corollary to the structural presumption. In recent years courts have repeated an emerging modern maxim: “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.”¹⁹⁰ 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.¹⁹¹

The *Whole Foods* case illustrates both of these dynamics. As discussed earlier, the FTC argued a narrow product market for premium, natural, and organic supermarkets (PNOS) and the defendant urged a broader market that included conventional supermarkets. As both the district court and the court of appeals noted, the “case hinged—almost entirely—on the proper definition of the relevant market.”¹⁹² If the market was narrow, concentration was high, the structural presumption applied, and the transaction was likely unlawful. If the market was broad, concentration was low and the structural presumption did not apply. Moreover, the FTC rested

¹⁸⁸ FTC v. Peabody Energy Co., No. 4:20-cv-00317, at *23 (E.D. Mo. Sept. 28, 2020).

¹⁸⁹ *Id.* at *55-56.

¹⁹⁰ FTC v. Whole Foods, Inc., 548 F.3d 1028, 1043 (D.C. Cir. 2008) (Tatel, J.) (quoting FTC v. Whole Foods, Inc., 502 F. Supp. 2d 1, 8 (D.D.C. 2007)); FTC v. Sysco, Inc., 113 F. Supp. 3d 1, 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 138 (quoting *Whole Foods*, 548 F.3d at 1043)); *see also* FTC v. Wilhelm 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*, 4:20-cv-00317, at *74 (likewise quoting *Whole Foods*, 548 F.3d at 1043, in a parenthetical).

¹⁹¹ This is particularly true today given the Guidelines’ focus upon close substitutes and differentiated products.

¹⁹² *Whole Foods*, 548 F.3d at 1043 (Tatel, J., concurring) (internal citations and quotation marks omitted).

its entire case on the structural presumption and its corollary,¹⁹³ and these were the controlling considerations in the final judgment of the D.C. Circuit.¹⁹⁴

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 it believed “have become, or have the potential to become, significant competitors of commercial banks.”¹⁹⁵ Also reflecting what it viewed as significant industry developments, the FRB also defined a broader geographic market encompassing nine

¹⁹³ *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.”).

¹⁹⁴ *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).

¹⁹⁵ Fed. Res. Sys., *In re First Union Corp.*, Order Approving the Merger of Bank Holding Companies at 16 n.22 (Apr. 13, 1998) [hereinafter First Union FRB Order]; *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 institutions.” (citing, *inter alia*, *Philadelphia National Bank*)); *see also* Robert Kramer, Chief, Lit. II Section, Address before the Am. Bar Ass’n: “Mega-Mergers” in the Banking Industry, at 3, Apr. 14, 1999 (describing the FRB’s approach to product and geographic market definition in CoreStates/First Union as “the broad market” approach).

counties near Philadelphia, as compared with the four-county area the Supreme Court had used in 1963.¹⁹⁶ The DOJ, in contrast, broke the “cluster” of commercial banking services into narrower single-product markets – savings accounts, checking accounts, and so forth.¹⁹⁷ 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.¹⁹⁸

Consistent with the theory described above in Part III, these different market definitions meant the DOJ and FRB applied the same substantive 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 deposits¹⁹⁹), (i) “would not be likely to result in a significantly adverse effect on competition” and (ii) would generate “public benefits” such as “increased consumer convenience and gains in efficiency.”²⁰⁰ 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),²⁰¹ or nine branches (and \$210 million more in deposits) more than the FRB. And, having drawn markets narrowly, the DOJ did not publicly mention efficiencies at all.²⁰²

¹⁹⁶ First Union FRB Order, *supra* note 195, 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).

¹⁹⁷ See Kramer, *supra* note 195, at 3-4 (explaining that, in *CoreStates-First Union*, 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 *PNB*).

¹⁹⁸ *Id.* at 4 (noting both *PNB*’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”).

¹⁹⁹ FRB Order, *supra* note 195, at 16-17.

²⁰⁰ FRB Order, *supra* note 195, at 50.

²⁰¹ 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 (describing the relevant market defined by the DOJ).

²⁰² See *id.*

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 their analysis use[d] different product markets and this [difference] played a significant role in this matter.”²⁰³ He also characterized the FRB’s analysis as the “broad market” approach.²⁰⁴

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 now called Truist Financial.²⁰⁵ As with the CoreStates transaction, both the DOJ and the FRB undertook antitrust reviews, and 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.²⁰⁶

Different market definitions once again produced different results. As the DOJ put it, “[i]n 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.”²⁰⁷ Ultimately, the DOJ “negotiated the divestiture of 28 branches in 3 different states with approximately \$2.3 billion in deposits.”²⁰⁸ These divestitures included two branches in

²⁰³ Kramer, *supra* note 197, at 3; *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”).

²⁰⁴ Kramer, *supra* note 197, at 3.

²⁰⁵ Rachel Louise Ensign & Allison Prang, *BB&T to Buy SunTrust in Largest Bank Deal Since the Financial Crisis*, WALL ST. J., Feb. 7, 2019, <https://www.wsj.com/articles/suntrust-bb-t-to-combine-in-all-stock-merger-11549537817>.

²⁰⁶ *See* Fed. Reserve Sys., *In re* BB&T Corp., Order Approving the Merger of Bank Holding Companies at 8 n.24, FRB Order No. 2019-16 (Nov. 19, 2019) (defining geographic markets more broadly than MSAs and including thrift institutions at a discounted weight); *id.* Appx. II (listing each banking market).

²⁰⁷ U.S. Dep’t of Justice, Antitrust Div., Update 2020, at 19, *available at* <https://www.justice.gov/file/1280196/download>.

²⁰⁸ *Id.* at 19-20.

Franklin County, Virginia,²⁰⁹ which the DOJ apparently defined as a separate geographic market but the FRB included in a broader Roanoke-area market.²¹⁰ Ultimately the FRB found this market to be unconcentrated, with an HHI below the threshold at which the DOJ had “informed the Board” it would challenge a transaction,²¹¹ whereas the DOJ’s narrower market apparently yielded a larger HHI that exceeded its stated divestiture threshold.²¹²

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

²⁰⁹ See Press Release, U.S. Dep’t of Justice, Antitrust Div., Justice Department Requires Divestitures in Order for BB&T and SunTrust to Proceed with Merger, Nov. 8, 2019, <https://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, Virginia).

²¹⁰ See *id.* Attachment A (listing divestitures in Franklin County but none of the other jurisdictions included in the FRB’s Roanoke market); SunTrust FRB Order, *supra* note 206, at 79 Appx. II (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”).

²¹¹ SunTrust FRB Order, *supra* note 206, at 79 Appx. II (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.”).

²¹² Compare Press Release, U.S. Dep’t of Justice, Antitrust Div., Justice Department Requires Divestitures in Order for BB&T and SunTrust to Proceed with Merger, Nov. 8, 2019, <https://www.justice.gov/opa/pr/justice-department-requires-divestitures-order-bbt-and-suntrust-proceed-merger> (“Under their agreement with the Justice Department, the companies have agreed to divest SunTrust branches in . . . Franklin County, Virginia.”), with Fed. Reserve Bd., *BB&T Corp.*, FRB Order No. 2019-16, at 79 (Nov. 19, 2019) (Order Approving the Merger of Bank Holding Companies) (describing a “Roanoke, Virginia” market that includes Franklin and four other counties and has a “resulting HHI” of 1757) and *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.”).

the banking regulators, which underscored the need for a robust remedy” requiring a multi-billion dollar divestiture.²¹³ In at least one market, Franklin County, Virginia, the DOJ’s narrow market 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.²¹⁴

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 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

²¹³ U.S. Dep’t of Justice, Antitrust Div., Update 2020, at 19, *available at* <https://www.justice.gov/file/1280196/download>

²¹⁴ *See* Letter from Sen. Elizabeth Warren to Asst. Atty. Gen. Makan Delrahim, Oct. 16, 2020, *available at* <https://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 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.”).

narrow. And narrowing markets, in turn, have significantly altered the way courts apply several bedrock merger rules.

The 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.²¹⁵ 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.

²¹⁵ To be clear, we do not endorse a return to 1960s-era antitrust enforcement, let alone *Von's Grocery* and *Pabst Brewing*.