The DOJ and FTC's Misguided Attack on Mergers

Richard A. Epstein*

This Article reviews two recent joint statements by the DOJ and FTC. The first was their request for information on their proposals to "strengthen" the antitrust laws on mergers. The second was the July 2023 release of new draft guidelines which were subject to many comments, often critical of the new regime. The difficulties with both documents start with the initial premise of their inquiries, which falsely posit that any "improvement" of the antitrust laws requires imposing new sanctions on private activities—when in many cases a relaxation of current restrictions may be best. But both agencies write as if the efficiencies inherent in many mergers are largely illusory. Consequently, they understate the social losses that come from blocking or modifying mergers under the Clayton Act. In addition, they underestimate the efficiencies of vertical mergers and overstate the risks of downstream foreclosure, as exemplified by the FTC's unwise attack on the Ilumina-Grail merger. Both documents also overstate the risk of monopoly power in labor markets, which bear little to no relationship to product markets. In light of their recent judicial defeats, both agencies should rethink their premature departure from traditional antitrust policies and redraft the proposed 2023 Guidelines from scratch.

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* The Laurence A. Tisch Professor of Law, the Director of the Classical Liberal Institute, the Peter and Kirsten Bedford Senior Fellow, The Hoover Institution, The James Parker Hall Distinguished Professor of Law, Emeritus, and Senior Lecturer, the University of Chicago. This Article is a revised version of a paper for a conference organized by the Classical Liberal Institute on *The New Age of Antitrust,* held via Zoom on Friday, November 4, and Saturday, November 5, 2022. This Article is an extensive revision and expansion of a statement that I wrote on behalf of a number of academic lawyers and economists in response to a request for information issued by the DOJ and FTC on the need to modernize the antitrust law. Richard A. Epstein, Comments on the FTC and DOJ Request for Information with Proposals to Strengthen Enforcement Against Illegal Mergers (Apr. 21, 2022), https://www.regulations.gov/comment/FTC-2022-0003-0828 [https://perma.cc/UJ8X-UFJ9]. Given the passage of time, this Article has been updated to reflect the latest major development in the field, the issuances by the DOJ and FTC of their revised merger guidelines on July 19, 2023. *See* ANTITRUST DIV., U.S. DEP'T OF JUST. & FED. TRADE COMM'N., 2023 DRAFT MERGER GUIDELINES (2023), https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf [https://perma.cc/X5KH-BRQQ]. My thanks to Joseph Kieron, Matt Philipps, Matt Rittman, and Elle Rogers of the University of Chicago, for the initial round of research assistance, and to Ben Chesler, Will Danielson-Lanier, David Leynov, and Cade Mallett of NYU Law School for the second round of revisions.

BACKGROUND

The FTC and the Department of Justice under the Biden administration have sought to make the most radical changes to the antitrust laws in many decades.[1] Before the current initiatives, there had been broad agreement that the general purpose of the antitrust laws was to advance consumer welfare by allowing transactions that increased overall value, and by blocking only those transactions that diminished that welfare.[2] The law of mergers and acquisitions was largely informed by that principle and emerged to identify the various indicia that some mergers—usually a very small fraction of the total—warranted further examination. That decision was never taken, lightly because any such intervention comes at considerable cost. Under such policies, merging firms must hold off on integrating their two businesses on matters of operations, sales, trade secrets, personnel, and much more. It is fair to say that, as a first approximation, the proposed 2023 Guidelines hope to reverse the long-held initial presumption in favor of allowing mergers, by writing as if their restrictive effects come first, thereby relegating efficiency considerations to an afterthought. There are numerous prominent antitrust schools—all except neo-Brandeisians—that share their uneasiness with the new Guidelines: Dan Crane, Doug Melamed, Carl Shapiro, Dennis Carlton, Herbert Hovenkamp[3]—even if they disagree amongst themselves as to the preferred approaches. This observation from Luke Froeb, Danny Sokol, and Liad Wagman captures the mood:

> [T]he 2023 Draft Merger Guidelines move law and policy backwards. They begin with the premise that the bipartisan consensus of the past forty years has led to a gross under-enforcement of the law, resulting in undue concentration and bad outcomes, measured not by whether consumers were harmed, but rather by whether competitors or others were.[4]

There is, in effect, a reversion to the bad, old days of antitrust enforcement, as exemplified by the excessive reliance that the Guidelines place on *Brown Shoe Co. v. United States*, once largely discredited, but now the government's favorite case.[5]

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1. For the global position, see Promoting Competition in the American Economy, Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021). Executive Order No. 14036 takes a decidedly glum view of the current landscape and sets the stage for the DOJ's and FTC's positions. It is widely known though that Tim Wu was its principal draftsman. John Cassidy, *The Biden Antitrust Revolution*, NEW YORKER (July 12, 2021), https://www.newyorker.com/news/our-columnists/the-biden-antitrust-revolution [https://perma.cc/T8MH-V53Y].

2. Daniel Gilman, *Antitrust at the Agencies: Back to the Past Edition*, TRUTH ON THE MKT. (Sept. 1, 2023), https://truthonthemarket.com/2023/09/01/antitrust-at-the-agencies-roundup-back-to-the-past-edition/ [https://perma.cc/G99D-BA38].

3. For the full list of authors with varying schools of thought, see *id.* To see a wider range of views on the 2023 Guidelines, see *PreMarket Merger Guidelines Symposium*, CHI. BOOTH STIGLER CTR.: PROMARKET, https://www.promarket.org/tag/promarket-merger-guidelines-symposium [https://perma.cc/SFG6-F97F] (collecting various articles and viewpoints from varied authors).

4. Luke M. Froeb, D. Daniel Sokol & Liad Wagman, *Cost-Benefit Analysis Without the Benefits or the Analysis: How Not to Draft Merger Guidelines,* S. CAL. L. REV. (forthcoming 2024) (manuscript at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4537425 [https://perma.cc/T6GE-QAMQ].

5. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), which as Geoffrey Manne has noted, was cited some 15 times in the Guidelines, as part of the effort to remove matters back to the aggressive antitrust enforcement days of the 1960s and early 1970s. Gilman, *supra* note 2. Manne's full table, detailing each occurrence *Brown Shoe* was cited, can be found in an online compiled file. RICHARD EPSTEIN, 2023 DRAFT

It is painfully clear that this new attack is borne of a deep sentiment inside both the DOJ and the FTC that the relevant law has become a conceptual muddle that unwisely protects dominant firms against competition. The attitudes were obvious from the statements that both Jonathan Kanter, on behalf of the DOJ,[6] and Lina Khan, on behalf of the FTC,[7] gave before a most sympathetic Senate Judiciary Committee Hearing on Competition Policy, Antitrust, and Consumer Rights on September 20, 2022. In dealing with merger policy, Jonathan Kanter stated that the best measure of social progress in this area was the high level of new DOJ lawsuits, extraction of settlements, and sending out of ominous warnings.[8] He took great pride that a Second Request for further information—documents of mind-numbing length and complexity[9]—caused several parties to abandon various transactions.[10] He then praised seven pending civil antitrust lawsuits, the some 3000 notified transactions, and the increase in antitrust activity in labor markets.[11] He also noted that more legislation and resources were needed to run this operation and cited, with approval, legislation sponsored chiefly by Senator Amy Klobuchar, the "Competition and Antitrust Law Enforcement Act of 2021."[12]

A similar burst of renewed vigor was apparent in the views of Chairwoman Khan, who, like Kanter, noted the burdens placed on the FTC by stating that "in 2021, global deal-making soared to $5.8 trillion, the highest level ever recorded" and that "[a] record 3,644 transactions were reported to the FTC and DOJ in FY 2021, which is 87% more than the average number of transactions reported over the past five years."[13] She then drew the further inference that

> In practice, this [spate of activity] means reorienting our enforcement efforts to better capture harm from mergers involving firms at different levels of the supply chain (i.e., non-horizontal mergers) and to better anticipate future competition concerns before markets are dominated by only a few firms, as contemplated by the Clayton Act's call to arrest monopolies 'in their incipiency.' It also requires a focus not only on the output side of markets, such as the goods and services

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MERGER GUIDELINES CASE CITATIONS (2023), https://share.cleanshot.com/Q6nWcYjd92vb68kLyvtC [https://perma.cc/VNX2-FDPB].

6. *Assistant Attorney General Jonathan Kanter of the Antitrust Division Testifies: Hearing Before the Subcomm. on Competition Policy, Antitrust, and Consumer Rights of the S. Comm. on the Judiciary*, 117th Cong. (2022) [hereinafter *Hearing on Competition Policy*] (testimony of Jonathan Kanter, Assistant Att'y Gen.).

7. *Prepared Statement of the Federal Trade Commission: Hearing on Oversight of the Enforcement of the Antitrust Laws Before the Subcomm. on Antitrust, Competition Pol'y and Consumer Rts. of the S. Comm. on the Judiciary* 117th Cong. (2022) [hereinafter *Prepared Statement*] (statement of Lina Khan, Chair, Fed. Trade. Comm'n).

8. *Hearing on Competition Policy*, *supra* note 6 (testimony of Jonathan Kanter, Assistant Att'y Gen.).

9. *See* Holly Vedova, *Making the Second Request Process Both More Streamlined and More Rigorous During This Unprecedented Merger Wave*, FTC (Sept. 28, 2021), https://www.ftc.gov/enforcement/competition-matters/2021/09/making-second-request-process-both-more-streamlined-more-rigorous-during-unprecedented-merger-wave [https://perma.cc/C4K8-XMRM] ("[S]ince the 1990's, the scope of investigation and litigation discovery has expanded exponentially, with voluminous electronic submissions demanding substantial staff resources.").

10. *Hearing on Competition Policy*, *supra* note 6 (testimony of Jonathan Kanter, Assistant Att'y Gen.).

11. *Id.*

12. *Id.* (referencing the Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. (2021)).

13. *Prepared Statement*, *supra* note 7, at 3 (statement of Lina Khan, Chair, Fed. Trade. Comm'n).

> offered to consumers, but on the input side as well. This means ensuring competitive markets for workers' labor, which help workers receive fair pay and better working conditions and benefits.[14]

What is striking about both statements is that they assume that the higher the level of government activity, the greater the social benefit—an unqualified assumption that carries through to the 2023 Guidelines.[15] At no point does either Kanter or Khan address the possibility that some of these lawsuits and government actions may well be counterproductive and that the American economy might well do better with less enforcement and more mergers.[16] Thus, Kanter and Khan gave insufficient weight to the negative social consequences of "second requests"—which can cause private parties to abandon sensible transactions when the costs of government review are greater than the potential gains from the consummation of their proposed transactions.[17] The possibility of *over*-enforcement ostensibly played little or no role when the FTC defended expanding these review procedures, as demonstrated by the following:

> [W]e are seeking to ensure our merger reviews are more comprehensive and analytically rigorous. Cognizant of how an unduly narrow approach to merger review may have created blind spots and enabled unlawful consolidation, we are examining a set of factors that may help us determine whether a proposed transaction would violate the antitrust laws.[18]

Given the FTC's audacious attitude toward enforcement, it is easy to see how the wider frame of action under the 2023 Guidelines will have the same deterrent effect on mergers. The potential social losses from derailed mergers are thus compounded by the many mergers that are never attempted because of the dreaded and justified fear of FTC or DOJ review.

In similar fashion, it is odd to insist that the increased volume of merger transactions is a sign of social distress, rather than a sign of economic vitality derived from sensible mergers. That mindset comes from the view that all mergers tend to increase concentration and, therefore, reduce levels of competition. But that conclusion depends on an inarticulate and static conception of competition that regards the amalgamation of two firms into one as the loss of a single competitor, and thus, a peril to long term competitive behavior. That simple-minded approach ignores the other possibilities that could follow from any given successful combination. The new firm could become an effective competitor, while the two separate firms could stagnate, sputter, or die. The combination of these two firms could encourage independent, small entrepreneurs to start-up businesses in the hope that some

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14. *Id.* at 2.

15. *See generally* ANTITRUST DIV., U.S. DEP'T OF JUST. & FED. TRADE COMM'N, 2023 DRAFT MERGER GUIDELINES (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf [https://perma.cc/KU4L-NMYE] (indirectly asserting that government regulation equates to social benefit).

16. *See Hearing on Competition Policy*, *supra* note 6 (testimony of Jonathan Kanter, Assistant Att'y Gen.); *see Prepared Statement*, *supra* note 7 (statement of Lina Khan, Chair, Fed. Trade. Comm'n).

17. *See* Luke McFarland & Conor Reidy, *HSR Annual Report Shows More Mergers and Fewer Second Requests, But Continued and Aggressive Challenges*, WINSTON & STRAWN LLP (Nov. 21, 2019), https://www.winston.com/en/blogs-and-podcasts/competition-corner/hsr-annual-report-shows-more-mergers-and-fewer-second-requests-but-continued-and-aggressive-challenges [https://perma.cc/TS8K-HZ27] (discussing how proposed transactions that receive a Second Request have a lower rate of success).

18. Vedova, *supra* note 9.

successful merger or joint venture could offer it another path to the realization of markets. Thus, a legal environment that permits mergers could, as an empirical matter, increase the level of market competition instead of reducing it.

In light of Kanter's and Khan's bold claims, it is instructive to look at the presuppositions that undergird the burst of activity undertaken at the DOJ and the FTC. Much of the agencies' logic is found in their joint Request for Information (RFI) of January 2022, which expands upon the perceived need to modernize antitrust law as it applies to "mergers, acquisitions, joint ventures, and other structural realignments of firms."[19] The sole explanation offered for this wholesale condemnation is that the earlier guidance documents rest on "unsound economic theories that are unsupported by the law or market realities."[20] Given the current regulatory environment, the evaluation of these proposals has an unbecoming urgency that calls for a careful and thorough examination of both the RFI and the 2023 Guidelines that implement its worst recommendations.

No one, regardless of their intellectual orientation, should care to disagree with Kanter when he says that "competitive markets . . . are essential to a vibrant and healthy democracy,"[21] or with the truism that "competition is critical to the success of the economy."[22] Statements of this sort are *de rigueur* on all sides of this multi-front intellectual battle, but such generalities do little to answer the key question of just what means are best to achieve a common end. More concretely, neither of these two glittering generalities justify the basic tenor of the 2022 RFI, which the FTC introduced with a flawed press release title: "[T]o Strengthen Enforcement Against Illegal Mergers."[23] That framing of the issue explicitly assumes, without any evidence, the sole direction of all needed changes—expanded authority. Yet, to make that joint statement credible, it must first be independently established that the current levels of antitrust enforcement are uniformly too low, which may be true in some but not in all areas. A more open-minded title would ask what reforms of antitrust law would work to promote competition, and then leave it to the evidence to decide whether relaxation or strengthening is appropriate. It is of course true that "[m]ergers *can* reduce choices for consumers, workers, and other businesses, leaving them increasingly dependent on larger and more powerful firms that have purchased greater power to dictate the terms of their deals."[24] But rephrased in a different fashion, the statement now reads: mergers *can increase* choices for consumers, workers, and other

19. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, REQUEST FOR INFORMATION ON MERGER ENFORCEMENT 1, n.1 (2022).

20. Press Release, Fed. Trade Comm'n.,40 Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary (Sept. 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary [https://perma.cc/T6J9-BLME].

21. Press Release, Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't. of Just., Modern Competition Challenges Require Modern Merger Guidelines 1 (Jan. 18, 2022), https://www.justice.gov/d9/speeches/attachments/2022/01/18/opening_remarks_joint_press_conference_with_ftc_-_aag_kanter_0.pdf [https://perma.cc/HUJ3-XAA7].

22. Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers [https://perma.cc/H6TD-NHVJ].

23. *Id.*

24. *Id.* (emphasis added).

businesses, leaving them *less dependent* on larger and more powerful firms that have purchased greater power to dictate the terms of their deals. My revision allows for the possibility that certain mergers have efficiency justifications, as when two small firms, now unable to compete with major firms, could—after a merger— acquire improved tools and resources that allow the new entity to compete in national or international markets from which the previously separate firms were foreclosed.

Unfortunately, the word "efficiency" appears only once in the 2022 RFI and is used not in reference to the efficiency of markets, but to the efficiency of the government's enforcement efforts.[25] The 2023 Guidelines also speak of "procompetitive efficiencies," but then minimize their role. [26] The Guidelines' opening gambit is to state that "[t]he Supreme Court has held that 'possible economies [from a merger] cannot be used as a defense to illegality.'"[27]

The same hostility to mergers was also reflected by FTC Chair Lina Kahn when she wrote: "[i]llegal mergers can inflict a host of harms, from higher prices and lower wages to diminished opportunity, reduced innovation, and less resiliency."[28] That statement is true under the preexisting law.[29] But the problem is determining which transactions should be illegal because the reverse proposition is also true: blocking *legal* mergers can inflict a host of harms, from higher prices and lower wages to diminished opportunity, reduced innovation, and less resiliency. The challenge for both the DOJ and FTC is not to repeat a truism about illegality. Rather, the DOJ and FTC should develop a set of normative standards explaining why the traditional approach to this subject is inferior to the proposed new approach—which the DOJ and FTC 2023 Guidelines do not even attempt to justify.[30]

Nonetheless, throughout this inquiry, it is easy to put a finger on the pervasive error that dooms the joint DOJ and FTC proposal: If mergers have few or no efficiency gains, then why allow them at any level? Yet that invitation to stagnation is wholly compatible with antitrust law. Therefore, if some mergers have obvious efficiency advantages, it must also be true that at least larger transactions by two or more firms could have exactly that desirable result. It also follows that the welfare trade-offs that Oliver Williamson outlined in his famous 1968 merger article remain relevant today.[31] Do the efficiency gains lose out to losses from excessive concentration? In this regard at least, the 2023 Guidelines read less militantly than the RFI. Notwithstanding, their overall tilt is apparent.

The following examples show the danger of looking, as the DOJ and FTC too often do, at only one kind of error—underenforcement. One of the key changes in communication markets is that all information is now summarized as a set of zeros and ones. In other words, competition across different modes of communication is increasingly

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25. U.S. DEP'T. OF JUST. & FED. TRADE COMM'N, *supra* note 19, at 9.

26. *See* ANTITRUST DIV., U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 15, at 33–34 (claiming that evidence of precompetitive efficiencies is too vague and speculative).

27. *Id.* at 33 (alteration in original) (quoting United States v. Phila. Nat'l Bank, 374 U.S. 321, 371 (1963)).

28. Press Release, Fed. Trade Comm'n, *supra* note 22.

29. *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 2 (2010), https://www.ftc.gov/system/files/documents/public_statements/804291/100819hmg.pdf [https://perma.cc/CT2S-DXS2] (collecting and discussing relevant, binding law).

30. *See* ANTITRUST DIV., U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 15 (lacking any explanation as to why the traditional approach is inferior to the new approach).

31. *See* Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 19–20 (1968) (explaining antitrust actions result in losses as a result of trade-offs).

more common, which leads to a larger market in which worries of concentration are necessarily diminished.[32] The earlier example of this situation was the elimination of serious distinctions between the telegraph and the telephone. Just that situation is taking place today as differences between broadcast television, cable TV, and streaming services of various kinds become less salient in the modern communications area. At this point, the appropriate result might well be to relax antitrust scrutiny to allow for a greater range of innovation.

I. Scope of Merger Review

The basic text of the Clayton Antitrust Act declares unlawful those mergers that "may . . . substantially . . . lessen competition."[33] The standard is flexible, and there is no doubt that it can and will be applied in different ways by different government administrations. But it hardly follows from that inevitable variation that the current threshold for review is systematically too high. An alternative verbal threshold could read, for example, "to create an appreciable risk of materially lessening," as is found in the proposed Competition and Antitrust Law Enforcement Reform Act of 2021.[34] At the very least, terms of this sort require a new round of administrative and judicial determinations before some semblance of a settled meaning can emerge out of the government's spurt of new initiatives. But wholly apart from the new uncertainty and the costs that it will create, the proposed language in the Competition and Antitrust Law Enforcement Reform Act of 2021 invites a more aggressive merger review that, while capable of blocking undesirable mergers, can be used to slow down or block procompetitive mergers.[35] The DOJ and FTC offer no reliable information on this relative risk, writ large, as to justify the decision to go slow in making statutory changes in a dynamic marketplace. Continuity and consistency matter in the enforcement of antitrust law. Thus, the burden should be on those who wish to push the needle in either direction to explain why a particular systematic move is warranted. To the end that additional systemic regulation is warranted, it is not sufficient to show that previous merger guidelines were applied improperly in any given case because such errors are always possible irrespective of the merger threshold. Rather, strong, systematic evidence is needed to justify a shift—of which none has been offered.

This basic approach also applies to the distinction between vertical and horizontal mergers. In principle, the distinction between vertical and horizontal mergers makes a good deal of sense because horizontal mergers are less likely to produce efficiency advantages than vertical ones.[36] Whether one speaks of their territorial or product line effects, some restraint of trade seems much more likely than some efficiency advantage. The opposite is surely true with respect to vertical mergers that merge separate firms that perform complementary steps in the production process. Courts generally do not enjoin vertical

32. *See* Alan B. Albarran & John Dimmick, *Concentration and Economics of Multiformity in the Communication Industries*, 9 J. MEDIA ECON. 41, 48–49 (1996) (explaining that concentration in the communication industry is based on a numerical index and should lead to more competition based on the index).

33. 15 U.S.C. § 13.

34. Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. § 4 (2021).

35. *Id.*

36. Richard A. Epstein, *Monopolization Folies,* 76 ANTITRUST L.J. 205, 221 (2009) ("Horizontal mergers may encourage collusion. But vertical ones overcome serious coordination problems and, thus, have a demonstrable efficiency going forward. Any antitrust law blind to this difference is not worth its salt.").

mergers unless there is some clear and compelling evidence of substantial harm to competition. That position was also taken in the 1992 Merger Guidelines,[37] and the same basic conclusions were stated in a joint DOJ-FTC 2015 Report.[38] These vertical arrangements deal generally with complements and not substitutes, so they have a built-in efficiency justification that comes from the elimination of holdouts along the entire production paths. These mergers are also consumer-friendly, insofar as they identify a single firm that is responsible for any product flaws or defects, which obviates the need for consumers to sue multiple companies in order to remedy some particular flawed transaction. The ability to identify a clearly responsible party also enhances reputational sanctions, which are exceedingly powerful because of their instantaneous response. It is worth remembering that the architect of the famous United Shoe Merger was none other than Louis Brandeis—before he went on the Supreme Court—in a transaction that received its original blessing from Justice Oliver Wendell Holmes in *United States v. Winslow*.[39]

Nonetheless, the DOJ and FTC have consistently taken the opposite position. They started in September 2021 with the risky approach of withdrawing on a 3-2 party line vote on the 2020 vertical merger guidelines and commentary.[40] Those 2020 guidelines were not an apologia for industry because they expanded oversight on key issues, including the key issues of foreclosure and double marginalization, which the 2020 guidelines were prepared to examine more closely.[41] Nonetheless, to the current FTC and DOJ, those earlier guidelines adopted "a particularly flawed economic theory regarding purported pro-competitive benefits of mergers, despite having no basis of support in the law or market reality."[42] Again the stage for the 2023 Guidelines was set in the statement issued by the three commissioners—Lina Khan, Rohit Copra, and Rebecca Kelly Slaughter—who are suspicious of vertical transactions: "the FTC will analyze mergers in accordance with its statutory mandate, which does not presume efficiencies for any category of mergers."[43] In any merger, the FTC will consider "all relevant facts, including but not limited to market structure, to determine whether a merger may lessen competition or tend to create a monopoly," which then raises the question of foreclosure discussed in detail later.[44]

What the Guidelines fail to do is state why foreclosure is a dominant strategy for upstream firms that have 100% of the relevant market. In this situation, it is hard to see why two firms would want the merger if there were no efficiency gains to the operation.

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37. ANTITRUST DIV., DEP'T OF JUST., 1992 MERGER GUIDELINES 10 (1992), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11250.pdf [https://perma.cc/5KRM-JRMD].

38. FED. TRADE COMM'N, HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2015, 2, 4 (2015), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/160801hsrreport.pdf [https://perma.cc/AZ34-WMVD].

39. United States v. Winslow, 227 U.S. 202, 216–17 (1913).

40. Press Release, *supra* note 20.

41. Press Release, Fed. Trade Comm'n, FTC and DOJ Issue Antitrust Guidelines for Evaluating Vertical Mergers (June 30, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/06/ftc-doj-issue-antitrust-guidelines-evaluating-vertical-mergers [https://perma.cc/QBS7-BMNW].

42. Press Release, *supra* note 20.

43. FED. TRADE COMM'N, STATEMENT OF CHAIR LINA M. KHAN, COMMISSIONER ROHIT CHOPRA, AND COMMISSIONER REBECCA KELLY SLAUGHTER ON THE WITHDRAWAL OF THE VERTICAL MERGER GUIDELINES 2 (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf [https://perma.cc/84TZ-DF4X].

44. *Id.*

After all, in place of the merger, those parties might well substitute a long-term alternative requirements contract, which may or may not be as efficient as the merger arrangement, but could increase the risk of breach.[45] Therefore, it seems most likely that mergers will take place only when they are superior to the alternatives, at which point the efficiency argument for allowing those mergers to go forward while at the same time blocking any cooperative agreements between direct competitors still holds.

United Shoe Machinery is a classic case which illustrates those gains. The *United Shoe Machinery* case[46] involved the 1899 merger (organized by Louis Brandeis) of seven different firms, each of which held strong patents.[47] In *United States v. Winslow*, Holmes, J. explained why the transaction passed antitrust scrutiny:

> On the face of it the combination was simply an effort after greater efficiency. The business of the several groups that combined, as it existed before the combination, is assumed to have been legal. The machines are patented, making them is a monopoly in any case, the exclusion of competitors from the use of them is of the very essence of the right conferred by the patents and it may be assumed that the success of the several groups was due to their patents having been the best . . . . [T]hey did not compete with one another, it is hard to see why the collective business should be any worse than its component parts . . . . [W]e can see no greater objection to one corporation manufacturing 70 per cent of three noncompeting groups of patented machines collectively used for making a single product than to three corporations making the same proportion of one group each.[48]

In addition, it is also important to note the other efficiencies involved in the case, none of which turned on the presence or absence of monopoly power. The integrated firm could deal more easily with the outside world by eliminating the need for aggrieved customers to find where in the production chain some defect occurred.[49] It also allowed for the consolidation of all the activities at the single Beverly factory and allowed the coordination of patent improvements on existing technologies.[50] It would also be instructive to look for these localized improvements at other firms. It is therefore overhasty to dismiss the historical evidence, or to disregard the current differences in approach for vertical and horizontal mergers, even though the categorical distinction between vertical and horizontal transactions does not hold for some complex transactions that have features of both.

At this point, it is hard to be dogmatic, for what is needed is a detailed examination of the relative strength of the efficiency and restrictive elements of each deal. That inquiry is common today, with reviews of proposed mergers under the Hart-Scott-Rodino Antitrust

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45. *See, e.g.*, Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961) (upholding a 20-year requirements contract against an antitrust challenge); *see also* Derek C. Bok, *The Tampa Electric Case and the Problem of Exclusive Arrangements Under the Clayton Act*, 1961 SUP. CT. REV. 267, 281–85 (1961) (elaborating on the effects of the *Tampa Electric* case).

46. United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 299–300 (D. Mass. 1953).

47. For an account of the complex litigation, see RICHARD A. EPSTEIN, ANTITRUST CONSENT DECREES IN THEORY AND PRACTICE: WHY LESS IS MORE 40–51 (2007).

48. United States v. Winslow, 227 U.S. 202, 217–18 (1913) (citations omitted).

49. *United Shoe Machinery*, 110 F. Supp. at 340.

50. *Id.* at 300, 337.

Improvements Act of 1976.[51] Under the Act, the correct approach is often to condition the merger on the divestment of certain units, or on the acceptance of business practice restrictions—which is of ever greater importance today—as a precondition for the merger to be approved. These inquiries should be made routinely no matter what the overall standard, so that, at least for the present, there is no reason to reject this well-established distinction.

II. ANTICOMPETITIVE PRESUMPTIONS

The same basic objection applies to the DOJ's and FTC's repeated suggestion that new rules should render certain mergers presumptively anticompetitive.[52] One problem with this section is that it does not specify the strength of the desired new presumption; nor does it discuss any of the relevant conditions that might rebut the presumption in any particular setting. To the extent that the Herfindahl-Hirschman Index[53] is relevant to merger cases, there is no reason to think that the test overrates the importance of actual rates of competition when new entrants (and exits) make all predictions precarious, especially in an expanding industry when new entrants are likely to outnumber new exits. Nor is there any reason to think that the usual rules that treat mergers of three firms into two firms, or even four firms into three firms, should be extended so that mergers five into four firms, or even six into five, becomes presumptively illegal. There is the additional difficulty with using the HHI index at all in rapidly evolving markets. New firms start up very quickly and older firms can easily be displaced by generational shifts in technology. The HHI works best in relatively stable markets, such as public utilities. Indeed, owing to the dynamic nature of most new markets, the index is likely to systematically overstate the level of industry concentration because it is unable, by definition, to measure the impact of the many potential entrants in most markets who are waiting in the wings.

Yet the Guidelines move strongly in the opposite direction by insisting that "[m]arkets with post-merger HHI greater than 1,800 are highly concentrated,"[54] which means that six to five mergers, (where the concentration levels are 20^2 x 5 = 2000) would require special scrutiny when these firms have very limited power to raise prices over the competitive level, so long as they do not collude. Nor does this provision represent the extent of the government's move here. Given the risk of foreclosure, the Guidelines post this warning: "That trend [toward concentration] can be established by market structure, for example as a steadily increasing HHI exceeds 1,000 and rises toward 1,800."[55] There are similar difficulties in the effort to create artificial presumptions in Senate File 225.[56] Thus, section 4(b) of the act creates a presumption against mergers in which the acquiring person has a market share of over "50 percent or otherwise has significant market power" to

51. 15 U.S.C. § 18a.

52. *See* sources cited *supra* note 5 (containing statements before Congressional hearings).

53. *See* *Herfindahl–Hirschman Index*, ANTITRUST DIV., U.S. DEP'T OF JUST., https://www.justice.gov/atr/herfindahl-hirschman-index [https://perma.cc/47MZ-7GMZ] (explaining the index and its application).

54. ANTITRUST DIV., U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 15, at 6.

55. *Id.* at 22.

56. Competition and Antitrust Law Enforcement Reform Act § 4.

acquire control over assets or entities, for example, that "compete or have a reasonable probability of competing with the acquiring person in the same relevant market."[57]

Both provisions are sufficiently expansive that they could lead to a de facto prohibition of any acquisition by a dominant firm, which in turn could cripple its efforts to keep up with smaller firms that face (at least for the moment) no limitation on the firms they may acquire. In addition, the prohibition could reduce the number of start-ups because major firms that might be in the acquisition market are excluded from acquiring companies in their initial stages of business. The anticipated effect of these restrictions will be to reduce the probability of an acquisition, the price that can be obtained from smaller firms, or both. What makes the matter more uncertain is that there is no time window to determine whether new firms should or should not be able to compete. The process could take months, even years, to clarify itself. Thus, it is possible that the worst of both worlds will occur: no acquisition of the new firm because of the failure to satisfy the want of capital infusion that a larger firm could supply. There is no reason to throw this kind of a monkey wrench into acquisition markets. What may be needed are reforms outside the antitrust laws, including modifications of the securities laws that allow new corporations to go public, thereby bypassing the acquisition markets altogether.

III. MARKET DEFINITION

Both the RFI[58] and the Guidelines[59] speak of the need to make some modifications to the current accounts of market definition in both its product and geographical dimensions to take into account nonprice forms of competition. But the motivation here is hazy at best. Nonprice competition can take place, creating the risk that stopping mergers under these new guidelines will also stop forms of nonprice competition that could allow newly merged firms to compete more effectively against larger incumbents. The effort to use these metrics to deal with a broad class of mergers will surely complicate the administrative process without any clear improvement in substantive outcomes. The 2023 Guidelines endorse the test of the "hypothetical monopolist" or the firm that "likely would undertake at least a small but significant and non-transitory increase in price ("SSNIP")),"[60] which asks about price, but says nothing about potential product improvements. The Guidelines also adopt a 5% increase, which could be hard to apply in light of the general uncertainties over inflation.[61] The Guideline provisions are not all that unconventional. But, what is worrisome is its citation to *Brown Shoe*, which involved concentration levels so low that they would be laughable today.[62] At the time of the 1956 Brown Shoe merger, Brown Shoe was the fourth largest company in the market with a share of about 4%.[63] It sought to acquire Kinney, which clocked in about 0.5% of production and about 1.2% of sales.[64] Does this citation mean that concentration levels are fair game given that Warren, C.J.

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57. *Id*.
58. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 19.
59. ANTITRUST DIV., U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 15, at 6, 20.
60. *Id.* at 8.
61. *Id.* at 9.
62. Brown Shoe Co. v. United States, 370 U.S. 294, 303 (1962).
63. *Id.*
64. *Id.*

sought to nip the problem in the bud by "arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency."[65]

IV. NASCENT COMPETITION

The same arguments apply to the effort to have merger law take into account the impacts on nascent competition, as suggested by Professors Scott Hemphill and Tim Wu,[66] and picked up without any explanation in the 2023 Guidelines, which adds for emphasis that there may be a "nascent threat" even if the impending threat is uncertain and may take several years to materialize.[67] The FTC's sole reference here is to *United States v. Microsoft Corp.*,[68] where the sole question was whether both Java and Navigator, hardly small fish in a large pond, were impermissibly restricted from the personal computer market.[69] The court's analysis, in turn, led to the general announcement that "suffice it to say that it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will—particularly in industries marked by rapid technological advance and frequent paradigm shifts."[70]

The citation marks an unannounced extension of the basic doctrine to companies that are far smaller and, in doing so, leads to an unprincipled expansion. It is not a wise use of resources to try to guess which of many different startups will become the superstar of the next generation.[71] In some cases, the purchase by a large firm may preclude one new competitor. But on the other side of the coin, the increased likelihood of acquisition could induce new start-ups to enter the market, some of which may be acquired, ironically by smaller companies, or go public on their own. What cannot be assumed is that successful acquisitions of smaller companies by larger ones necessarily, or even probably, reduce competition. In many of these cases, it is difficult (if not impossible) to ascertain whether the acquired corporation could have survived if it were not assisted by infusions of capital and knowledge from the acquiring firm. Take, for example, the acquisition of Instagram by Facebook in 2012 for the sum of $1 billion, consummated when Instagram had just 13 employees.[72] At the time, it was thought that Facebook was taken to the cleaners when it overpaid for a company that had yet to go public.[73] Ex post, it turned out to be a huge success.[74] Is there any reason to think that the success of the merger came at the expense of the public at large? Or that the two companies would have had the same level of success if Instagram was left to its own devices, without the cash and technical support from

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65. *Id.* at 317.

66. C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. 1879, 1889 (2020).

67. ANTITRUST DIV., U.S. DEP'T OF JUST. & FED TRADE COMM'N, *supra* note 15, at 20–21.

68. *Id.* at 21 n.64.

69. United States v. Microsoft Corp., 253 F.3d 34, 53–54 (D.C. Cir. 2001).

70. *Id.* at 79.

71. *See* Richard A. Epstein, *Is There an Antitrust Crisis in Big Tech?*, HOOVER INST. (Oct. 12, 2020), https://www.hoover.org/research/there-antitrust-crisis-big-tech [https://perma.cc/77RP-GKNX] (discussing the difficulty of predicting startup success).

72. *See* Kurt Wagner, *Here's Why Facebook's $1 Billion Instagram Acquisition Was Such a Great Deal*, VOX (Apr. 9, 2017), https://www.vox.com/2017/4/9/15235940/facebook-instagram-acquisition-anniversary [https://perma.cc/D6ZZ-MTK3] (reporting on Facebook's acquisition of Instagram).

73. Francis Robinson, *Wikipedia's Jimmy Wales Says Facebook Overpaid for Instagram*, WALL ST. J. (May 9, 2012), https://www.wsj.com/articles/BL-TEB-4234 (on file with the *Journal of Corporation Law*).

74. Wagner, *supra* note 72.

Facebook? Or would a different merger strategy have been more effective and ultimately better than the one actually used? The risks of industrial policy should never be forgotten. We do not want government to use its own cash to decide winners or losers. Thus, we should take the same cautious approach with antitrust policy, which has far more capacity to upset sensible transactions than to block dangerous ones.

Behind this hostility to nascent mergers is the undefended claim that "[c]ompetition usually spurs firms to achieve efficiencies internally, and Congress and the courts have indicated their preference for internal efficiencies and organic growth."[75] Guided by this belief, regulators tighten the noose further by looking with skepticism on any efficiencies so claimed: "the Agencies will not credit vague or speculative claims, nor will they credit benefits outside the relevant market."[76] Instead, they will require detailed proof that the merger will generate "verifiable" benefits that will, within "a short period of time[,]" be passed through to consumers.[77] Note that there is a complete reversal of the burden of proof: general theory is allowed to state the wrong initial position, but detailed concrete evidence on the other side is needed to overcome it. This, of course, is hard to obtain before mergers are completed. It is, for example, hard to be sure whether the suggestion of some specific benefit will suffice. But the final Guidelines make no use of the simple point that the parties to a transaction will, in virtually every case, seek those operational efficiencies, which will be hard to overcome under the current Guidelines.

V. FORECLOSURE

The RFI did not examine the question of foreclosure in connection with vertical mergers. However, the foreclosure question took center stage in Guideline 6 of the 2023 Guidelines, which states that "vertical mergers should not create market structures that foreclose competition."[78] Guideline 6 further states that "[a]t or near a 50% share, market structure alone indicates the merger may substantially lessen competition. Below that level, the Agencies examine whether the merger would create a 'clog on competition . . . which deprives rivals of a fair opportunity to compete.'"[79] These Guidelines then complete the analysis by looking at four very wooly "plus factors": (1) the "trend toward vertical integration," (2) the "nature and the purpose of the merger," (3) whether "the relevant market is already concentrated," and (4) whether "the merger increases barriers to entry."[80] What is needed here is an explanation of why it makes sense for any firm to practice this form of foreclosure. The first point is that it is critical to disentangle two senses of the term foreclosure. In its most common meaning, foreclosure is a process whereby a lender wipes out the interest of the debtor in some real estate when the debtor fails to pay the underlying loan.[81] The foreclosure works all for the advantage of the lender, who gets to collect his

75. ANTITRUST DIV., U.S. DEP'T OF JUST. & FED TRADE COMM'N, *supra* note 15, at 33.

76. *Id.*

77. *Id.* at 34.

78. *Id.* at 3 (quoted words capitalized in original).

79. *Id.* (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962) (omission in Merger Guidelines)).

80. ANTITRUST DIV., U.S. DEP'T OF JUST. & FED TRADE COMM'N, *supra* note 15, at 17–18 (quoted words in last quotation capitalized in original). The "definite trend" language used by the drafters of the Guidelines comes from *Brown Shoe Co. v United States*, 370 U.S. 294, 301 (1962).

81. *Foreclosure*, BLACK'S LAW DICTIONARY (11th ed. 2019).

principal, interest, and costs, before returning, as often happens, the residual value to the borrower.

Foreclosure in antitrust law does not involve that kind of wipeout. The only way that one firm can foreclose on another is to refuse to do business with it. Once it does so, that firm loses the profits that it could have made from entering that deal, just as anyone who wants to boycott another firm has to pay a collateral cost in terms of its own lost profits. In this context, why should any firm favor its wholly-owned subsidiary by refusing to deal with its downstream competitors, when the royalty stream it could obtain from licensing its technology is larger than that which it obtains from exclusively conducting its own business activities? The point here is just another variation of the Coase theorem; if the parties can bargain, they will choose the high-yield solution here.[82]

It is for this reason that smart antitrust lawyers are prepared to commit themselves to not foreclosing their competitors to satisfy the antitrust authorities. If they foreclose, they harm themselves. Hence they give up no economic advantage by committing themselves not to foreclose in order to help secure antitrust approval that would allow the win/win transaction to go through. Unsurprisingly, the 2023 Guidelines provide no answer to this analysis. Instead, they treat foreclosure as *per se* illegal when it should be per se legal. The following cases—that deal with different industries and one common antitrust challenge—confirm this analysis.

In the 2019 AT&T and Time Warner case involving the merger of AT&T's satellite and cable-television divisions with Time Warner's television networks, the parties announced in advance that they would never cut off customers from various programs, but would always resort to some form of arbitration in the event of differences on rates.[83] This precommitment strategy was one reason why the D.C. Circuit affirmed the AT&T/Time-Warner merger.[84] That agreement contained an irrevocable commitment to arbitrate differences with customers for a seven-year window following the merger.[85] The effect of this institutional commitment was a conscious effort to nip in the bud a common set of holdout practices that *might* give rise to antitrust concerns. It is possible to claim that, somehow, these contractual restraints could fail. However, it is hard to see how these public commitments can be blithely ignored given the combined risks of contractual and reputational exposures.[86]

The same issue arose in a more complex form in the Illumina-GRAIL merger that was first approved on September 9, 2022.[87] The FTC's Chief Administrative Law Judge, D. Michael Chappell, issued a stunning rebuke to the FTC in its effort to block the merger of Illumina and Grail, two companies that work to advance medical technology in complementary fashion.[88] The FTC immediately issued a statement that the FTC

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82. ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 81–85 (6th ed. 2016).

83. United States v. AT&T, 916 F.3d 1029, 1035, 1041 (D.C. Cir. 2019).

84. *See id.* at 1041 (explaining negative externalities that stem from the irrevocable' offers of no-blackout arbitration agreements).

85. *Id.* at 1035.

86. *Id.* at 1040–41 (discussing the risks Time Warner was taking).

87. Initial Decision, *In re* Illumina, Inc. & Grail, Inc., No. 174 F.T.C. 9401 (FTC Sept. 9, 2022).

88. *Id.*

commissioners would review the case on appeal.[89] They did so in an internal proceeding that reversed that administrative decision unanimously, with three of the FTC commissioners taking a hard line, and the fourth (Christine Wilson) concurring on more limited grounds.[90]

In its complaint of March 30, 2021, the FTC alleged that their proposed merger between the two companies violated section 7 of the Clayton Act.[91] Both companies are working on developing early tests for cancer.[92] Illumina, the acquiring corporation, at one point owned all the shares of Grail, but subsequently sold off most of those shares, retaining a 20% interest of the company.[93] Illumina is the dominant provider of a DNA sequencing tool which operates as a next-generation sequencing (NGS) device, essential for developing and commercializing multicancer early detection (MCED) tests, which have a huge advantage of allowing doctors to use blood tests to search for multiple conditions at once.[94] Grail is in the business of commercializing its own MCED test, Galleri, as the first commercial entrant into the market.[95] The gist of the FTC complaint was that the combination of the two companies will allow Illumina to foreclose the Grail's rivals and thereby allow itself to reap inordinate profits in the market.[96] Thus, in paragraph 11 of its complaint, the FTC writes that "[a]s the only supplier of a critical input, Illumina already possesses the ability to foreclose or disadvantage Grail's MCED rivals[,]" none of whom are named.[97] The complaint then asserts that "[*i*]*f* Illumina determined it [could] maximize its profits by limiting [Grail's rivals]", it could so achieve that end by (1) raising its prices for various NGS instruments and consumables, (2) delaying cooperation with those parties, or (3) slowing down the licensing process in question for these parties.[98]

The FTC's March 31, 2023 decision endorsed the FTC's complaint.[99] Yet in line with the general theory, the supposed test is wholly inadequate to make out a sound claim of foreclosure. That defense, in vertical merger cases, says that the upstream provider will favor its own downstream party in ways that will exclude competition at a level that is detrimental to consumers who are denied vital goods. The claim is in tension with the

89. Press Release, Fed. Trade. Comm'n., Administrative Law Judge Dismisses FTC's Challenge of Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail (Sept. 12, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/09/administrative-law-judge-dismisses-ftcs-challenge-illuminas-proposed-acquisition-cancer-detection [https://perma.cc/C8XF-D56V]; *see also* Leah Nylen, *FTC to Appeal Illumina-Grail Merger Loss, Extending Litigation*, BLOOMBERG (Sept. 2, 2022), https://www.bloomberglaw.com/bloomberglawnews/health-law-and-business/XC147QKS000000?bna_news_f-ilter=health-law-and-business#jcite (on file with the *Journal of Corporation Law*) (elaborating on the FTC's September 12 press release). Note the simmering due process issue that arises when the agency acts as both the prosecutor and judge in the same case, which has yet to receive an authoritative Supreme Court decision.

90. Opinion of the Commission, *In re* Illumina, Inc. & Grail, Inc., No. 174 F.T.C. 9401 (FTC Mar. 31, 2023); Concurring Opinion of Commissioner Christine S. Wilson, *In re* Illumina Inc. & Grail, Inc., No. 174 F.T.C. 9401 (FTC Mar. 31, 2023).

91. Complaint, *In re* Illumina, Inc. & Grail, Inc., No. 171 F.T.C. 9401, at 1 (FTC Mar. 30, 2021).

92. *Id.* at 2–3.

93. *Id.* at 8–9.

94. *Id.* at 2.

95. *Id.* at 3.

96. Complaint, *supra* note 91, at 23–24.

97. *Id.* at 5.

98. *Id.* (emphasis added).

99. Opinion of the Commission, *supra* note 90.

common justification for these vertical mergers, which tend to eliminate double marginalization and coordination problems within the chain of production. Yet nothing in the FTC complaint explains why its negative foreclosure account of vertical mergers should dominate the common efficiency explanation.

The first point to note is that the three negative possibilities mentioned by the FTC are present in all merger cases. Thus, the remorseless application of this rule could foreclose all vertical mergers on the strength of a single "if."

The only way to avoid spreading the net far too widely is to earnestly address the question of whether Illumina will find it in its interest to foreclose the operation from all downstream companies. The FTC thinks foreclosure is an inevitable outcome, but in fact, the presumption surely runs in the opposite direction. For starters, it seems highly unlikely that Grail's activities cover the entire waterfront in dealing with MCED tests. Other companies may well be aiming at different portions of the larger market or may use the Illumina technology for some unknown alternative purpose, which may well be kept for commercial reasons as a trade secret. The potential downstream entrants should increase in number. Thus, it can be inferred that Illumina today wants them to come into tomorrow. It is not credible to think that Illumina would be prepared to sacrifice downstream income from a company that is not in the same market niche as Grail, as that transaction would be all loss and no gain.[100] In addition, as was clear in this case, the rival producers had yet to reach the stage in which they could commercialize any downstream product today, which meant that foreclosure was impossible in the short run.[101] There is no reason why Illumina would want to cut off a market that is not in any competition with Grail's projects. And it has little reason to seek to cut off companies that are moving largely in a different direction. The cutoffs would result in a loss of revenue from Illumina that would not result in additional revenue for Grail.

There are, of course, other cases that could arise sometime in the future in which the competition with Grail might be is direct. But even if those circumstances should arise, there is no evidence in the record that indicates that Illumina could profit by cutting off these future competitors. To impose foreclosure here means that Illumina had to forgo all the revenues that it gains from dealing with those competitors. It will also have to reckon with the reluctance of other downstream players who will now look elsewhere in the upstream market, as it cannot be assumed that over a five or ten year window Illumina will not have any competition for all or some of its applications. Each of the three strategies that the FTC mentions is likely to prove a potential loser. By raising its prices for various NGS instruments and consumables, the company could reduce its own revenues. By delaying competition with downstream parties, it cuts itself off from valuable information and develops a bad reputation that will lead others to either cut down or eliminate doing business with Grail. By slowing down the licensing process, it also reduces its own gains and gets a poor reputation that could deter future customers from making deals. Combining three losing approaches only increases the losses. There was evidence in the record, as noted, that any supposed foreclosure could only take place in the future, only when the new

100. *See* Initial Decision, *supra* note 87, at 121, 172–74 (explaining Illumina's business motivations).

101. *See id.* at 98, 176 ("Galleri is the only NGS-based MCED test that is commercially available . . . . current diversion between Galleri and other test is impossible.").

entrant begins to sell.[102] Why should Illumina take huge short-term hits, when it is unlikely to lose long-term revenue loss by keeping these technologies widely available?

At this point, it becomes critical to note that Illumina is likely anxious not to lose its existing customers as it forms a closer relationship with Grail. The same tactics of long-term contractual commitments that were at use in the AT&T-Time Warner case[103] were carried to a whole new level of thoroughness and sophistication both for present and future entrants,[104] which the Administrative Opinion notes that,[105] that post-acquisition new customers could get the same goods on "substantially similar" terms taking into account all relevant factors such as "region, customer type, volume, and mix of business";[106] and that Illumina will continue to make its sequencing platforms, product services and support, "consistent with Illumina's customary practices."[107] Illumina further announced that any trade secrets it received from its customers would be kept from Grail, which is commonly done with trade secrets.[108] And these terms induced some major players in the field "including, among others, Guardant, Freenome, FMI, Natera, Thrive, and Exact" to enter into long term negotiations with Illumina.[109]

Similar provisions were made relevant to the service components of the deal,[110] as well as to supply arrangements.[111] Thus, once Illumina binds itself to avoid foreclosure, its ability to engage in restrictive practices is taken off the table. Consequently, the evident efficiencies of sharing information between Illumina and Grail are no longer offset by any restrictive practices. And why does Illumina do this? Because it has already gone through the same basic analysis to conclude that foreclosure of downstream rivals is a losing business strategy. Hence, once this position is taken, it makes the organization of the Illumina-Grail relationship all the easier.

The FTC's response was, in essence, to claim that the enforcement of any or all of these provisions was insufficient to prevent Illumina from colluding with Grail by turning over to it confidential information obtained from other customers or to slow-walk its delivery obligations to these contracting parties.[112] Or that even if a breach were discovered, the remedial process was too balky.[113] But to these charges there are obvious answers—most notably that the sophisticated parties on the other side are prepared to accept these supposed risks to get needed services. These firms well know that Illumina would take a tremendous reputational hit if it behaved in an underhanded way. So why presume that breach is in the advantage of Illumina? And if there is any doubt about the private enforcement mechanisms, the FTC could have allowed the deal to go through on the assumption that any violation of key terms would lead to antitrust sanctions imposed by the FTC. It is the worst kind of analysis to block a sensible transaction by positing,

102. *Id.* at 97, 103.
103. United States v. AT&T, 916 F.3d 1029, 1035 (D.C. Cir. 2019).
104. Initial Decision, *supra* note 87, at 102.
105. *Id.* at 98.
106. *Id.*
107. *Id.*
108. *Id.* at 116.
109. Initial Decision, *supra* note 87, at 99.
110. *Id.* at 104–05.
111. *Id.* at 107–08.
112. *Id.* at 182–85.
113. *Id.* at 135, 182–85.

without a shred of evidence, the bad faith actions of a given firm when it is not in the firm's interest to act in bad faith. So, the bottom line is that the immediate gains (yes, there are efficiencies from sharing technologies and facilities) have to be put to one side in the hopes of stimulating a future market that was already in the process of formation. This is a classic case where the *non*enforcement of the FTC guidelines strengthens the efficiency and resilience of competitive markets.

The next stage in the case—but certainly not the final—was the review in the Fifth Circuit Court of Appeals, which held that the FTC had prevailed on its basic theory.[114] Nonetheless, the Fifth Circuit remanded the case for further analysis of the way in which the "open offer" feature of the case fit into the general antitrust analysis when it was treated as part of the FTC's prima facie case and not as a remedy.[115] "The Commission's standard stems from its mistaken belief that the Open Offer is a remedy."[116] Not so. It had to be considered earlier in the process, as will become clear.

To start from the beginning, the Fifth Circuit defined the relevant market as covering MCED products both present and future.[117] The Fifth Circuit thought that broader definition of the market necessarily worked in favor of the FTC's case because it meant that the risk of foreclosure had to be evaluated also in connection with the many future diagnostic productions sure to come on the market. But at the same time, the Fifth Circuit did not address the question of whether at some future time, a credible rival for Illumina's upstream technology could emerge whose appearance would in turn undermine the FTC's overall case.

More importantly, the Fifth Circuit erred seriously on the two key questions in the case: the foreclosure and the "open offer" provision, by undoing the good work done at the administrative level. On the first point, the Fifth Circuit hearkened back to the reasoning of the Commission:

> [T]he greater Illumina's ownership stake in Grail, the more its interest in maximizing downstream profits will outweigh its interest in preserving upstream profits, and thus the more incentive it will have to foreclose. And since the merger would increase Illumina's ownership stake in Grail from 12% to 100%, Illumina would 'now earn much more from the sale of a [Grail] test than from the sale of a rival's test' and would therefore 'have a significantly greater incentive to foreclose [Grail's] rivals rather than to keep them on a level playing field.'[118]

The difficulty with this argument, as noted earlier, is that effective foreclosure of some future efficient rival does not work even when Illumina owns (as it did at the formation of the business) all of Grail. Let us suppose that Illumina can make $1,000,000 by backing its own product but could get $1,500,000 by licensing that same technology to an outsider while letting its own revenues from its inferior product go to zero. It is still better off—by $500,000—allowing the complete substitution of the outside revenue for the internal revenue source. More likely, the optimal solution will involve some mix of internal and

114. Illumina, Inc. v. FTC, No. 23-60167 (5th Cir. filed Dec. 15, 2023).
115. *Id.*
116. *Id.* at 28.
117. *Id.* at 17–18.
118. *Id.* at 16–17.

external revenue sources, which in effect eliminates foreclosure. But at no point did the Fifth Circuit ever address the case where the outside licensees were not making competitive products for Grail, at which point foreclosure is done, given that both sources of revenue are not fully available.

It is certain, moreover, that Illumina should try to do as much as is possible to avoid the wooly speculation about the foreclosure argument if it has a way to forestall it. For just this reason, Illumina has followed the more common approach of making the "open offer," which in effect tells any future purchaser that it will obtain the most-favored nation treatment with Grail. That approach avoids any freeze-out, so long as it goes into effect. There are, as noted earlier, both legal and reputational reasons for Illumina to keep that promise, and so the probability of nonperformance is so low that it makes no sense to block a merger today when the FTC or the parties can rectify any harm down the road. The case for waiting on this point is thus overwhelming.

Yet for some inexplicable reason, the Fifth Circuit thinks that the only issue worth discussing concerns the burden of proof (both for production and persuasion) on whether the open offer means that the merger will not substantially lessen competition.[119] The remand was because the ultimate burden rested on the FTC. So, it was error to insist that the FTC had to show that the open offer would return the situation to the pre-merger situation, when all that Illumina had to show was that the open offer meant that the deal did not substantially lessen competition, which, if the above analysis is correct, it did not. But instead of reaching the obvious conclusion that the deal eliminated the risk of discrimination against outside firms, the Fifth Circuit noted that the rebuttal evidence needed to be "(1) merger specific, (2) verifiable in its existence and magnitude, and (3) likely to be passed through, at least in part, to consumers."[120] But if the nondiscrimination provision works, as it does, that ends the case—which is what should have happened here. One hopes that the intellectual mishmash at this stage prompts the Supreme Court to grant certiorari. In the meantime, a sensible merger is left in limbo.

VI. LABOR MONOPSONY

The RFI says little about the application of the antitrust law to labor transactions. But the issue has been a hot one in both government and academic circles.[121] Thus, Senate Bill 225 contains language whereby the stringent antitrust guidelines will cover not just antitrust activities in product markets, but also in labor markets.[122] Accordingly, the law replaces the word "monopoly" with the phrase "monopoly or a monopsony."[123] In several places, the bill equates the risks of monopsony with those of monopoly in their ability to disrupt a competitive economy. It makes this key finding:

> monopsony power or seller market power allows a firm to force suppliers of goods or services to accept below market prices or to force workers to accept below market wages, resulting in lower quality products and services, reduced

119. *Id.* at 26–29.

120. *Id.* at 29–30.

121. *See, e.g.*, Richard A. Epstein, *The Application of Antitrust Law to Labor Markets—Then and Now*, 15 N.Y.U. J.L. & LIBERTY 327 (2022).

122. Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. § 4(b) (2021).

123. *Id.*

> opportunities for suppliers and workers, reduced availability of products and services for consumers, reduced innovation, foreclosure of competitors, and increased entry barriers.[124]

The same approach is followed in the brief treatment of labor markets in the 2023 Guidelines, which see the prospect that "[a] merger of competing buyers can substantially lessen competition by eliminating the competition between the merging buyers or by increasing coordination among the remaining buyers[,]"[125] which are then said to invite a litany of antitrust wrongs. This new approach represents a sharp and unwise break from what has hitherto been the well-nigh uniform practice for the DOJ and the FTC to avoid getting into protracted battles over labor market definition in merger reviews. That traditional hands-off attitude is correct on both theoretical and practical grounds, for which I have now argued on three separate occasions (in opposition to Eric Posner, who worked as an advisor to the Biden administration on labor antitrust matters).[126] The reason why the antitrust law works well in product markets is because there are a few standardized products, e.g., gasoline, that make it possible to define the relevant product market with some degree of accuracy. That is simply not possible to accomplish in most labor markets, except perhaps in a few markets that have strong barriers to entry in the form of licensing requirements. Thus, the typical employment contract has multiple independent dimensions, none of which display any high level of standardization, especially in connection with the dollars and cents value of any particular in-kind benefit or perk. The duties of workers within the same occupational category could differ widely across firms, depending in part on their internal organizations. Wages and salaries in start-ups may be higher than they are in established firms because their employees take greater risks of firm failure and job loss. Thus, in smaller firms, larger fractions of the compensation could easily take the form of warrants or stock options. Cash payments for workers are just one part of the overall compensation equation, and even these may vary within or across firms for reasons that have nothing to do with monopsony power. Pension benefits may vary from firm to firm both in type and form. Prospects for promotion may induce individuals to accept lower wages or salaries, as might the prospect of obtaining valuable skills on the job that could be marketable elsewhere. These total compensation packages will vary within departments and across separate plants, often as a function of a combination of federal, state, and local employment mandates and taxes. Unionized portions of workforces will have entirely different workplace arrangements from nonunion workers in the same plant or facility, with some workers hired as employees and others as independent contractors. Some firms may subcontract out work that other firms don't. Accordingly, there is little or no opportunity to compare compensation packages across a wide and ever-changing marketplace. In addition, most firms regard their entire personnel policies as containing multiple trade secrets, which they are reluctant to share.

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124. *Id.* at § 2(a)(8).

125. ANTITRUST DIV., U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 15, at 25.

126. *See, e.g.*, Richard A. Epstein, *The Unwise Extension of Antitrust Law to Labor Markets*, CONCURRENTIALISTE (Feb. 8, 2022), https://leconcurrentialiste.com/epstein-antitrust-labor/?mc_cid=dc3293a7f8&mc_eid=bf49884da1 [https://perma.cc/79WC-RVZE] (arguing for the hands-off attitude and discussing Eric Posner's approach); Epstein, *supra* note 121 (arguing for the hands-off approach); Richard A. Epstein, *Antitrust Overreach In Labor Markets: A Response to Eric Posner*, N.Y.U. J.L. & LIBERTY 407 (2022) (responding to Professor Posner's take on the labor market definitions in merger review).

The defenders of the new movement toward higher merger scrutiny claim that a wealth of empirical studies support their concern that some unidentified group of employers are able to keep wages below competitive levels by making sure that supplies of excess labor are held in reserves.[127] These labor markets are divided roughly into highly skilled and less skilled professions. There is no reason to think that persons who fill janitorial, clerical, receptionist, restaurant, or hotel positions cannot move between different industry groups because it is highly unlikely that any of these industry classifications capture the dynamics of these markets. Alternatively, workers with high technical or professional skills can often move back and forth between professions because of their abstract and technical skills. The current 'so long as you can code, I can teach you the rest' mentality enables highly-technical workers to learn new occupations in new market niches. The rate of turnover in labor markets is inconsistent with the notion that employers as a group can hold down wages. Any notion of worker immobility is dispelled by so-called 2022 "great resignation," a period of time where workers quit their jobs in droves to take up new economic opportunities.[128] Once the COVID pandemic began, many individuals started their own specialized firms to take advantage of the need to have flexible hours to deal with the pressures imposed by COVID and the various restrictions that governments at all levels and private institutions of all types imposed. Remote working and telecommuting necessarily reduces the geographical constraints on job opportunities, which have led to a constant procession of "now hiring" signs that now dot the digital landscape. And yet 2023 seems to present a different picture entirely, with many firms calling workers back into the office.[129]

In the face of this obvious ferment in labor markets, some studies use clever techniques to detect the supposed exercise of monopsony power. One of the most cited articles in this area by José Azar, Ioana Marinescu and Marshall Steinbaum treats advertised wages for posted vacancies as a proxy for local demand.[130] That flawed technique gives no information about whether these positions are filled and fails to predict the terms of salaries and total compensation packages that are eventually negotiated. Nor is there any reason to think that vacancy levels track market power. A small firm on the rise could easily be more active in the hiring market than a large firm in decline. Azar's purported high estimate of a 17% decline in wages owing to exertions of monopoly power

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127. *See, e.g.*, Eric A. Posner, *Antitrust and Labor Markets: A Reply to Richard Epstein*, 15 N.Y.U. J.L. & LIBERTY 389, 392–93 (2022) ("A recent meta-analysis, published after my book, looks at 1,320 estimates of firm-level labor elasticity in 53 studies, and finds, after controlling for a range of factors including publication bias, that the literature provides strong evidence for monopsonistic competition and implies sizable markdowns in wages." (quotations omitted)).

128. *See, e.g.*, Rani Molla, *Hating Work Is Having a Moment*, VOX (Nov. 12, 2021), https://www.vox.com/recode/22776112/quit-jobs-great-resignation-workers-union [https://perma.cc/684X-WMFZ] (discussing the recent increase in resignations and changes in attitudes among workers).

129. *See, e.g.*, Lucia Mutikani, *US Labor Market Loses Steam as Job Openings, Resignations Decline*, REUTERS (Aug. 29, 2023), https://www.reuters.com/world/us/us-job-openings-july-post-third-straight-monthly-drop-2023-08-29 [https://perma.cc/C3GG-R6PH] (discussing a jobs report that found fewer people were leaving their jobs); Mark Calvey, *Return to Office, Get a Raise? Most CEOs Say Those Coming into the Office Will Get Rewarded*, AUSTIN BUS. J. (Oct. 9, 2023), https://www.bizjournals.com/austin/news/2023/10/09/kpmg-ceo-outlook-survey-hybrid-remote-work.html (on file with the *Journal of Corporation Law*) ("Way more CEOs calling for a return to office compared to last year.").

130. José Azar, Ioana Marinescu & Marshall Steinbaum, *Labor Market Concentration* 57 J. HUM. RES. (Special Issue) 167, 189 (2022).

is not credible, and the smaller estimates of 5%, if correct, raise the question of whether these gradations in multiple labor markets can be sensibly dealt with in merger review.[131]

Much more plausible seem the empirical estimates documented by Elana Prager and Matt Schmitt that are based on actual wages across all job classifications in the hospital industry.[132] Such recent estimates are in line with standard theory.[133] While there is some market power in certain niche areas like nursing, such wage depression is often partly offset by union pressures that push wages in the opposite direction.[134] Generally, little wage effect is observed across a wide range of occupations.[135] It follows, therefore, that a focus on those industries (like two local hospitals in a particular city or town) will pick up any rare merger that has possible monopsonistic effects without the incredible endless labor needed to fractionate these highly variable and constantly moving markets. Thus, this entire effort looks heavily misplaced, which, ironically, overlooks more serious problems, i.e. the ability of organized labor unions to raise wages, suppress competition, and/or shut down businesses through strikes and other work stoppages without imposing vast, negative effects on overall economic level.[136] But the DOJ and FTC do not ask about that, because they well understand that Joseph Biden, the "most pro-union president ever," would oppose any such examination.[137]

CONCLUSION

It should be evident that one of the implicit assumptions of the FTC and DOJ is that it is important to reshape the antitrust laws of mergers and acquisitions in new ways that shift the balance heavily in favor of strict enforcement in virtually every relevant area. There is a real cost to this form of antitrust adventurism, which comes out in at least two ways. First, the traditional antitrust objectives—e.g., cartels and territorial divisions—are necessarily slighted because attention is now diverted to this novel and dubious end. Second, the antitrust tool is less efficient than the traditional tools. There is only one way to avoid this risk, which is to use particular tools for limited, designated purposes, so as to avoid the need for hopeless coordination and compromise. In my view there is a sense in which antitrust law should be as simple as A, B, C. 'A' is to go after cartels and monopolies and have that be a primary, per se rule (i.e., have a strong presumption that needs a specific rebuttal). 'B' is to deal with mergers and acquisitions, where a rule of reason test seeks to trade off efficiencies on the plus side against restrictive practices on the other. 'C' deals

131. *Id.* at 167, 169.

132. *See* Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 AM. ECON. REV. 397 (2021) (testing whether wage growth declines after hospital mergers).

133. *Id.* at 416.

134. *Id.* at 419–22.

135. *Id.* at 424.

136. *See* Jeremy Hill, Natalie Ching Mun Choy & Steven Church, *Trucker Yellow Goes Bankrupt After Debt, Labor Woes Pile Up*, BLOOMBERG (Aug. 7, 2023), https://www.bloomberg.com/news/articles/2023-08-07/trucking-firm-yellow-goes-bankrupt-as-debt-labor-woes-pile-up (on file with the *Journal of Corporation Law*) (reporting how Yellow blamed its collapse on union officials "gumm[ing] up plans to reshape [Yellow's] trucking division").

137. Joseph Biden, U.S. President, Remarks by President Biden in Honor of Labor Unions (Sept. 8, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/08/remarks-by-president-biden-in-honor-of-labor-unions [https://perma.cc/5NUH-Z7EZ] ("I intend to be the most pro-union President leading the most pro-union administration in American History.").

with three various claims of predation (or foreclosure) where the odds of coming up with some serious social inefficiencies are so small that the supposed gain is not worth the hunt. But the new antitrust of the DOJ and FTC exaggerates the threats to competition from so many common practices that it loses sight of this strong hierarchy and sends the field of mergers and acquisitions off in the wrong direction.

It is far better to resist this imperialism before it takes root. If we wait, it may become too difficult to reverse course. The DOJ and the FTC should withdraw the 2023 Guidelines and start over.