A Framework for Understanding When Simple Rules Make Sense and When They Don't: A Comment on "Against Efforts to Simplify Antitrust"

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I.   INTRODUCTION

Sean Sullivan's paper *Against Efforts to Simplify Antitrust*[1] rightly argues that antitrust is complex and efforts to simplify it will either fail or reduce accuracy or both. My agreement with Sullivan is not surprising since I wrote an article with a very similar title several years ago, *Against Simplicity in Antitrust*.[2] Sullivan's arguments, while sharing some similarities with mine, provide additional analysis and examples for why simplicity is misguided in antitrust. Because I have no quarrel with any of Sullivan's claims, in this comment I will try to add some structure to how one should think about simple rules versus complex standards to illustrate why the former are particularly ill-suited to antitrust (and explain more generally where simple rules might be appropriate and where they aren't).[3]

I start with the claim that the goal of any law should be to deter harmful behavior without chilling desirable behavior. In the context of antitrust, that means that we want to deter firms from engaging in anticompetitive behavior without chilling pro-competitive activity. Another area of law that provides a useful contrast when thinking about the virtues and costs of simple rules is traffic enforcement. So, I note that in the context of traffic laws, our goal is to design and enforce laws to obtain as much safety as possible while delaying people as little as possible. Of course, there are tradeoffs. We could probably virtually eliminate car accident deaths if we could successfully enforce a maximum speed limit of 5 miles per hour. But, the cost in terms of delay would be far too great. The challenge is to design laws that optimize this tradeoff.

In the context of antitrust law, one extreme approach to this tradeoff would be to eliminate antitrust laws entirely. Then, we could avoid ever chilling pro-competitive activity, but that would come at the cost of too much anti-competitive activity. On the other hand, we could eliminate any risk of an anti-competitive merger by just prohibiting all mergers (although, it is worth noting that this would still raise some categorization

 1.   *See generally* Sean P. Sullivan, *Against Efforts to Simplify* Antitrust, 49 J. CORP. L. 419 (2024) (discussing antitrust complexities).

2. *See generally* Abraham L. Wickelgren, *Against Simplicity in Antitrust*, 14 I/S: J.L. POL'Y FOR INFO. SOC'Y 353 (2018) (providing additional insights into antitrust law).

 3.   Some of this analysis will draw on Louis Kaplow's path-breaking article. *See generally* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (discussing antitrust rules).

questions about what constitutes a merger). But, this would surely eliminate far too many pro-competitive mergers.[4]

The only reason these tradeoffs exist is because it is generally impossible for the people creating the law, enforcing the law, or the people subject to the law to perfectly distinguish between desirable and harmful conduct. If that weren't the case, we could achieve the ideal outcome either through precise ex-ante rules or vague standards that would be interpreted ex-post. Omniscient lawmakers could create ex-ante rules that precisely describe all possible conduct and correctly classify it as legal or illegal, and our omniscient populace would perfectly (and costlessly) understand those rules and act on them. Alternatively, vague ex-post standards could simply prohibit harmful conduct and rely on the people subject to the law to perfectly determine what is harmful and what is not—knowing they would act on that knowledge because the enforcers would also be able to perfectly identify which conduct was harmful and which was benign.

Of course, cognitive limitations at all three levels make either solution unrealistic. Thus, we have to think about the second-best solution. It is this fact that attracts people to simple rules. And, in some situations, they work reasonably well. Consider speed limits. These are the prototypical, and relatively accurate, examples of a simple rule. They are simple because everyone understands a 55-mile-per-hour speed limit the same way—it has a very precise and easily understandable definition. Furthermore, and just as importantly, compliance is relatively easy for both an enforcer and the individual to determine. Radar guns make measuring a driver's speed easy and accurate. Speedometers make determining whether one complies also relatively easy.

So, speed limits are probably as close to as simple as they sound. But, more importantly, they also track our actual goal in designing traffic laws pretty well, albeit imperfectly. How fast one can drive is a very important factor in people's ability to get where they want quickly. Similarly, while speed isn't the only factor influencing safety, it is one of the most important. It is almost always the case that driving faster increases the danger to others, although the magnitude will vary according to other conditions. Thus, while imposing an optimal, fixed speed limit will sometimes allow people to drive faster than is warranted and other times lead people to drive more slowly than optimal given the conditions, the total social loss from these errors is probably not too great.

Notice, however, that even in this case, the actual rule as applied is not as fixed and clear as it appears. There is a great deal of enforcement discretion that makes even a simple speed limit look more like a vague standard. In fact, in most places (at least in the United States), enforcers rarely stop motorists going just barely over the speed limit.[5] In using their discretion, they almost certainly consider factors other than a motorist's speed. Someone driving 40 in a 30 zone might not get a ticket in the early morning weekend hours of a clear day when the road is nearly empty and there are no pedestrians. But, they are probably more likely to get one in the heavy rain with a lot of traffic and many pedestrians

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4. It's worth noting that of the 3,152 mergers reported under the Hart Scott Rodino Act in 2022, the agencies issued second requests for more information (a necessary pre-requisite for any enforcement action) in only 47 of them, or less than 2%. This is consistent with prior years. LINA KHAN & JONATHAN KANTER, HART-SCOTT- RODINO ANNUAL REPORT FISCAL YEAR 2022 6 (2023).

5. Sullivan and Gilbert are partially right when they argue that difficulties in proof constrain police from strictly enforcing speed limits, surely discretion to take into account other factors also plays a role. *Cf.* Sean P. Sullivan & Michael D. Gilbert, *Insincere Evidence*, 105 VA. L. REV. 1115 (2019).

around. Thus, even when the case for a simple, ex-ante rule is fairly strong, our law still incorporates some elements of ex-post standards.

Given that, why have precise speed limits at all? Why not just have a standard that says drive in a way that optimally balances safety and convenience? This would make it much harder to enforce. Conditions that would be hard to verify in court would be relevant in almost every case. Given the relatively low stakes involved in most cases, it would not be worth it to pursue such cases when a driver contested a ticket. Instead, it makes more sense to rely on easier-to-enforce speed limits, but to set the limits lower than optimal and then rely on widely-known enforcement discretion to enable drivers to exceed the limit in cases in which there is little safety cost to do so. Of course, this isn't perfect. This discretion only considers the cost of speeding under conditions observable to the enforcer. It cannot account for situations in which the benefits of speed may be particularly high.

How does this situation compare to antitrust? Many of the factors that make speed limits a reasonable second-best solution are absent in antitrust. First, consider whether we can craft rules that are close to as simple as a speed limit in that they are precisely defined in a way in which compliance with them is easy for both the enforcers and individuals to determine. As mentioned briefly above, if we are willing to be coarse enough, the answer is often yes. For example, we could probably craft a rule that prohibits any firm from purchasing another firm, although we would have to carefully define what we mean by a firm. We could even tailor it somewhat in a way that wouldn't undermine the simplicity. For example, one could prohibit any firm listed in the Standard and Poor's 500 from purchasing any other publicly traded firm with a market capitalization of at least $1 billion.

While there would be very little ambiguity about what was allowed and what was prohibited under such a rule, it would not be very well tailored to our goal of enhancing competition to promote consumer welfare. Such a rule would make no distinction, for example, between a merger of complementary products, which often enhances competition and reduces prices[6], and a merger of substitutes, which often does the opposite.[7] Similarly, it would prohibit mergers designed to enable firms to enter a new market by combining technology or reaching economies of scale to better compete with dominant firms.

An advocate of simple rules might argue this is a straw man, we can easily tailor our rule to capture these obvious distinctions. But, in so attempting, we will inevitably no longer meet the key properties of a simple rule. This is the key point that Sullivan makes in his article. For example, imagine that we change the above rule to only prohibit mergers of between any firm listed in the Standard and Poor's 500 from purchasing any other publicly traded firm with a market capitalization of at least $1 billion that are substitutes. While substitutes have a precise economic definition, the products sold have a positive cross-elasticity, it is not easy to measure. This is one issue that economic experts in antitrust cases often spend a great deal of time and money estimating and arguing over the proper method of estimation.

Thus, just adding this one small change to try to improve the relationship of the rule to what we care about will change the rule from one that is relatively easy to follow and

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6. SIMON P. ANDERSON, SIMON LOERTSCHER, & YVES SCHNEIDER, THE ABC OF COMPLEMENTARY PRODUCTS MERGERS 6 (2008).

7. Craig Minerva, Loren K. Smith, & Peter Herrick, *The Other Side of the Coin: Complementarity in Mergers of Multiproduct Firms*, ANTITRUST MAGAZINE ONLINE, October 2021 at 1, 3.

enforce to one in which there is a great deal of uncertainty and cost associated with enforcement. Moreover, while this new version of the rule is closer to tracking the goals of antitrust law, it still isn't all that close. Many firms produce multiple products, thus some of the merging firm's products could be substitutes while others are complements. Economies of scale or other synergies could overwhelm the upward pricing pressure created by the merger of relatively weak substitutes in many cases.

In other words, with this "simple" rule we are not avoiding imperfect predictions about what is allowed or costly, and hard to adjudicate disputes about legality. But, instead of arguing about whether the action enhances or lessens what we care about—competition and consumer welfare—we are arguing about a very imperfect proxy for what we care about—are the products substitutes or not. This is the essence of Sullivan's critique of simplicity in antitrust, and it is exactly right.

II.   A FRAMEWORK FOR THINKING ABOUT SIMPLICITY

Before getting into some of the actual attempts to simplify antitrust that Sullivan discusses, I will develop a general framework for how to think about the costs and benefits of "simple" rules. The basic idea is that any law has a goal it is trying to achieve. We can try to directly enforce that goal by making actions that further the goal legal and those that don't illegal. But, sometimes that goal is hard to define precisely or to measure. This leads people to search for proxies that we can base enforcement on instead. This framework analyzes the factors that will affect whether we are better off enforcing a law based on its goals or some "simpler" proxy. This will help us understand why Sullivan's critiques of simplicity apply in antitrust but do not apply nearly as much in traffic law and what this says about when the law should try to develop "simple" proxies instead of full-fledged rule of reason analysis about whether the action in question furthers or detracts from the goal of the law.

Let G represent the effect of the activity on the goal of the law—for simplicity assume this takes only two values, either positive or negative. If this is negative, then the law would ideally like to prohibit the activity; if it is positive, the activity should be allowed. Let P represent a potential proxy that the court could use to assess compliance with the law. For simplicity, assume it is measured on the same scale as G. Let $a = \Pr(P = G)$ represent the accuracy of the proxy. For simplicity, I'm assuming this is the same whether G is positive or negative.

Because we want the law to influence behavior we also should consider how accurately the potential actor and the court/enforcer can observe G and P. Let b_i^j represent the accuracy of i's estimate of parameter j, where i stands for either the actor or the court and j stands for either G or P. Notice that if $b_i^j = 1/2$ then i can do no better than chance at predicting whether j is positive or negative. We will assume that $b_i^j \geq 1/2$—values less than one half would mean that i could more accurately predict j by doing the opposite of its estimate, so we could just relabel the opposite as the actual estimate.

This means that if an actor thinks that G is positive, then G is in fact positive with probability b_{actor}^G. So, the court will believe that G is in fact positive with probability:

$$b_{actor}^G b_{court}^G + (1 - b_{actor}^G)(1 - b_{court}^G)$$

This follows from the fact that both the actor and the court could both correctly that G is positive, or they could both incorrectly believe that G is positive. Because the accuracy rates are equal whether the truth is positive or negative, this is also the probability that the court will agree with the actor that G is negative. Because all these accuracy parameters are at least ½, the probability that the court and the actor agree on G is greater the more accurate each one is.

Say the actor's benefit from the action is B and the fine for breaking the law is F.[8] If the court will enforce the law based on G, then the actor will do the act if and only if they believe G is positive if:

$$\{1 - [b_{actor}^G b_{court}^G - (1 - b_{actor}^G)(1 - b_{court}^G)]\}F < B < [b_{actor}^G b_{court}^G \\ + (1 - b_{actor}^G)(1 - b_{court}^G)]F$$

The first inequality ensures the benefit from the act exceeds the expected punishment when the actor believes G is positive. The second ensures the benefit is less than the expected punishment whenever the actor believes G is negative. Because all the b's, representing the accuracy of the parties' estimates are greater than ½, for any fixed B, there will exist an F that satisfies this inequality—the probability the court will punish the actor is greater when the actor thinks the action is harmful than when they think it is not.

But, if B is not fixed and the same for all actors, then any given fine might not deter some actors from harmful conduct and could chill others from desirable conduct. This undesirable outcome will happen less the greater the difference in the expected punishment when the actor thinks the act is harmful than when they think it is desirable. That is, the ability to achieve this goal of efficient deterrence of harmful activity without chilling desirable activity will be greater the larger is $b_{actor}^G b_{court}^G - (1 - b_{actor}^G)(1 - b_{court}^G)$. This will be larger, the closer each of b_{actor}^G and b_{court}^G are to one—that is, the more accurately both the actor and court can estimate G. Both accuracy parameters are important for maximizing compliance with the law.

If, instead, the court enforces the law based on P, the proxy for G, then the analysis of the behavior of the actor is the same except for replacing b_{actor}^G and b_{court}^G with b_{actor}^P and b_{court}^P. Because the actor cares about avoiding the fine, they base their decision on their prediction of the proxy, not the actual goal. Thus, when court enforcement is based on the proxy, the analysis so far only tells us how easy it is to get the actor to engage in the activity if and only if their estimate of the proxy is positive. We still need to further adjust our analysis based on the accuracy of the proxy itself.

If the actor thinks P is positive, then the probability that G is positive is given by $ab_{actor}^P + (1 - a)(1 - b_{actor}^P)$. Again, G can be positive because the proxy is accurate and the actor correctly assesses the proxy or because the proxy is inaccurate and the actor incorrectly assesses the proxy. Notice that because $a < 1$ and $b_{actor}^P \geq 1/2$, we know

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8. This analysis is more directly applicable to antitrust cases brought after firms have engaged in conduct, which is essentially all antitrust cases other than mergers. It is somewhat less applicable to mergers where the objective is less about deterrence versus chilling, and more about allowing or prohibiting behavior going forward. Even in this case, however, a firm's ability to predict what the agency or court will do is important. Firms often have to choose which targets to merge with, a decision that depends on the probability that the agencies or a court will block the merger. Moreover, blocked or abandoned mergers are both costly and very disruptive for firms, making accurate prediction quite valuable. I thank Louis Kaplow for raising this distinction.

that $ab_{actor}^P + (1-a)(1-b_{actor}^P) \leq b_{actor}^P$. This is intuitive, if the actor is trying to estimate the proxy, they will be more accurate in so doing than they will be at using the proxy to estimate the goal. So, the proxy is only a more accurate guide for the actor if $ab_{actor}^P + (1-a)(1-b_{actor}^P) > b_{actor}^G$. This requires not only that the actor can estimate the proxy more accurately than the actual goal, but that it can do so sufficiently better to also make up for the imperfect ability of the proxy to track the goal.

Thus, the tradeoffs are now apparent. The proxy can induce better compliance with the law (although, not necessarily the actual goal of the law) if and only if $b_{actor}^P b_{court}^P > b_{actor}^G b_{court}^G$ because that will expand the difference in expected punishment between acting when one's assessment of positive versus negative. Attempted compliance with the proxy will serve the goals of the law better than attempted compliance with the goal itself if and only if $ab_{actor}^P + (1-a)(1-b_{actor}^P) > b_{actor}^G$.

Thus, if $b_{actor}^P b_{court}^P > b_{actor}^G b_{court}^G$ and $ab_{actor}^P + (1-a)(1-b_{actor}^P) > b_{actor}^G$, then using the proxy will both improve compliance and compliance will be more valuable. On the other hand, if $b_{actor}^P b_{court}^P < b_{actor}^G b_{court}^G$ and $ab_{actor}^P < b_{actor}^G$ then using the goal itself generates both superior compliance and makes compliance more valuable. When the inequalities do not both go in the same direction, then using the proxy might generate more compliance but the compliance could be less valuable or vice versa. Which of these is more important will depend on how hard it is to induce compliance and how much less valuable compliance with the proxy is than compliance with the goal. If the private benefits, B, from the action, are fairly predictable and similar across actors, then compliance should be fairly easy to generate, so we should be more concerned about making that compliance more valuable. If private benefits are more difficult to predict, then generating a wider band of compliance will become relatively more important.

So far, we have not discussed the costs of each entity, the actor and court, estimating the proxy or the goal itself. It is important to note that if the law is good at inducing compliance, the costs for the actor should loom much larger than the costs for the court or enforcer. The actor must bear these costs whenever it is attempting to comply because that is when it must estimate the parameter the law is based on. (If it will not comply—so act all the time or never, then it does not need to estimate the relevant parameter.). The court (or enforcer), on the other hand, only bears the costs when there is an action. Even then, these costs might be significantly reduced if there is a settlement before complete adjudication.

III.   APPLYING THE FRAMEWORK

With this framework in mind, we can now see why using speed limits as a proxy makes sense for traffic enforcement but proxies are unlikely to be a good fit for antitrust enforcement. Every car has a speedometer, and these are very accurate. Thus, it is relatively cheap and accurate for a driver to determine if they are complying with the speed limit, b_{actor}^P is likely close to 1. On the other hand, determining whether one is driving optimally safely is quite hard to do. Most individuals know very little about how the risks of driving faster affect the probability or severity of an accident under a variety of road conditions. It is also well-documented that people tend to overestimate the safety of their driving. In other words, b_{actor}^G is likely pretty far below 1. Thus, as long as the speed limit is a reasonable approximation of the optimal speed in most situations (*a* is not too far below one), asking

drivers to comply with the speed limit proxy will do a better job of making that compliance track the goal of optimal safety than if we ask drivers to comply with the standard of optimal safety directly.

Furthermore, because it is much easier for both courts and enforcers to accurately determine compliance with speed limits (even if they can do a somewhat better job of determining what constitutes optimally safe driving than drivers can), we should expect that $b_{actor}^P b_{court}^P - (1 - b_{actor}^P)(1 - b_{court}^P)$ is much larger than $b_{actor}^G b_{court}^G - (1 - b_{actor}^G)(1 - b_{court}^G)$ because both $b_{actor}^P \gg b_{actor}^G$ and $b_{court}^P \gg b_{court}^G$. This means that the range of possible private benefits for which we can induce compliance is much larger using the proxy than using the goal itself.[9]

For antitrust, however, the framework suggests something very different. Consider, for example, proxies based on market share thresholds, some of which Sullivan's article discusses when he talks about the structural presumption in merger law or the new proposals to make mergers or other conduct presumptively illegal once certain market share thresholds have been met. As Sullivan notes, the problem is that market shares are even less like speed limits than substitutability. Our framework can shed some additional light on Sullivan's arguments for why market share thresholds are misguided.

Businesses don't think of markets the same way that antitrust agencies and courts do. Furthermore, there are many different ways that businesses calculate market share when they bother to do so at all. This may or may not correspond with how the courts or agencies might do so in any particular setting.[10] So, without discussing the matter with their antitrust counsel, businesses will not be able to accurately estimate either who are the relevant competitors in their antitrust market or the antitrust market shares. While antitrust counsel can help, given how contested market definition is any most antitrust cases, even after consulting with counsel, the firm's estimate of this proxy will probably be subject to a fair amount of error. Thus, if a firm's antitrust risk from some particular action is heavily dependent on a market share cutoff, as in some recent proposals, it will be in a very poor position to predict whether a court will find it violating or complying with the law.

On the other hand, businesses think about the competitive effects of their conduct all the time. It is critical to their decisions. To maximize profits and shareholder returns, a business needs to know if an action will enable it to increase prices, lower costs, increase quality, or reduce the ability of a competitor to make sales. These are exactly the factors that determine whether an action is pro-competitive or anti-competitive. The only difference between the profit effects and the competitive effects is the sign of the weights attached to each. All of the above effects increase profits, but only cost reduction or greater quality are pro-competitive effects. Increasing profits by taking actions that reduce

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9. One might wonder what compliance means in the traffic context. In our simple binary setting, we can think of compliance with the proxy as meaning driving fast when the speed limit allows it and driving slow when the that is what the speed limit requires. Compliance with the goal would mean driving fast when it is optimally safe and driving slow when it is optimally safe (where optimality means balancing the benefits of greater speed with the risks in the particular situation).

10. Bill Gates was once asked by a journalist, "What Microsoft competitor worries your most?" to which his response was "Goldman Sachs." Rich Karlgaard, *Talent Wars*, FORBES (Oct. 31, 2005), https://www.forbes.com/forbes/2005/1031/045.html?sh=1022123675dd [https://perma.cc/FL5F-L5EB]. Obviously, Goldman Sachs was not considered a competitor in the Microsoft antitrust case. *See generally* U.S. v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

competition or enable profitable price increases (absent improved quality) is anti-competitive. Thus, it stands to reason that businesses would be much better able to predict whether their actions are anti-competitive than what their market share is in a properly defined antitrust market—especially considering that, as Louis Kaplow has pointed out, market definition is not a well-defined concept.[11] That is, b_{actor}^{G} should be quite close to one, while b_{actor}^{P} should be much smaller. Because $a<1$, compliance can't be as socially valuable when it is compliance with a market definition proxy rather than the goal of promoting competition.

Thus, the only hope for the market definition proxy is that it is much easier (or cheaper) for courts to estimate so that it could be better at inducing compliance. Recall, however, that the ability to induce compliance for measure j is based on how close $b_{actor}^{j}b_{court}^{j} - (1 - b_{actor}^{j})(1 - b_{court}^{j})$ is to one, so it depends on the size of both b_{actor}^{j} and b_{court}^{j}. Since we've already established that $b_{actor}^{G} >> b_{actor}^{P}$ in this context, for the proxy to be better at inducing (socially inferior) compliance, the court would have to be much better able to estimate the proxy, here market definition and market shares, than the goal, competitive effects. Given that almost all the evidence that courts and enforcers use to define markets is the same as the evidence they use to assess competitive effects, the only way assessing this proxy could be easier would be if it were easier to aggregate into an assessment.

Given that market definition lacks any solid analytical foundation, that seems very unlikely. Market definition is often not a well-defined concept; even when it is well-defined, it is incredibly difficult to measure (and this measurement is heavily contested); once we've defined a market, measuring market shares can also be difficult and contested; and market shares are not particularly well-correlated to what we care about (the effect of the merger or other conduct on competition or consumer welfare).

As Louis Kaplow has persuasively argued, the most sensible way to choose between alternative ways of defining a market is circular.[12] We choose based on information about market power that already tells us what we want to know without defining a market. The Merger Guidelines attempt to avoid this circularity by proposing a specific method for defining a market, the Hypothetical Monopolist Test. But this test suffers from the same flaws. To determine whether a hypothetical monopolist of a group of products would want to increase price, we have to know about the substitutability or cross-elasticity of the products under the control of this hypothetical monopolist. Since these products always include the products of the merging parties, we can estimate the upward pricing pressure directly from this information, without bothering to define a market or estimate market shares.

All of these are well-trodden complaints based on Kaplow's path-breaking article. Additionally, however, notice that no method of market definition, including the Hypothetical Monopolist Test, can be read off a radar gun. Market definition is typically the most contested issue in antitrust cases. Experts spend hundreds of hours and hundreds of thousands of dollars (for bigger cases, those would be thousands and millions) on expert reports discussing market definition. If cases do not settle before summary judgment or at all, it is very often because the parties disagree about market definition. It would only

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11. *See generally* Louis Kaplow, *Why (ever) Define Markets?*, 124 HARV. L. REV. 437 (2010).

12. *Id.* at 474.

become even more contested if it were to dictate the outcome even more than it already does. Thus, making the outcome depend even more on market definition due to creating simple-sounding prohibitions for firms with large market shares will not increase simplicity, clarity, or ease of enforcement.[13]

Furthermore, the way market definition often plays out in cases and investigations, the available evidence is also used in very similar ways, just to address a slightly different question. For example, in *Federal Trade Commission v. Staples*[14] the court addressed the market definition question under the hypothetical monopolist test by comparing prices in markets with one office supply superstore to those with all three.[15] To address competitive effects using the same methodology, one would simply compare prices between markets with one superstore to those with two or those with two to those with three (because the merger would reduce the number of independent superstores by one in any given market). There is no reason to think that the accuracy of these practically identical comparison tools would differ. Agencies also often engage in merger simulation. To answer the market definition question under the hypothetical monopolist test, they simulate the merger of the products they want to test. They can just as easily and accurately (probably more accurately since it is closer to the current reality) simulate only the merger of the two firms in the market. Agencies also engage in qualitative analysis by asking major customers how they would respond if a group of products were to increase in price (to address the hypothetical monopolist test). They can just as easily (and often do) ask the same question for the products of the two merging parties. Again, because such a question is closer to what these customers experience, its answer is probably more accurate.

Moreover, to the extent that using market share rules creates precise cutoffs, then we create huge consequences for disputes that almost certainly have very little effect on the actual effect on competition. For example, consider the proposed rule discussed by Sullivan that would make some conduct presumptively illegal for a firm with greater than 50% market share. If one way of defining and market and measuring market share gave the firm a share of 49% while another gave it a share of just over 50%, then each side would have a huge stake in proving that its method was superior. But, even if we were to believe that a firm's market share was a big determinant of the competitive effects of the conduct, the difference in the competitive effects of the conduct done by a firm with 50% versus a firm with 49% market share is likely trivial. So, the entire litigation (and thus the incentives created by the likely litigation outcome) could turn on a dispute that has essentially no relevance to the ultimate goal of the legal rule.

Thus, using a market definition/market share proxy in antitrust will almost certainly induce both less compliance and make that compliance less valuable. Unlike speed limits, the proxies are much harder for the relevant actors to discern than the actual competitive effects, certainly no easier for the courts or enforcers, and are necessarily less reflective of the goals of the law than simply basing legality directly on the estimate of the goal one wants to achieve. Thus, Sullivan is exactly right when he says it is "better for antitrust law to be clearly vague than for it to be vaguely clear."[16]

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13. Kaplow also makes this point in the context of merger review. Louis Kaplow, *Replacing the Structural Presumption*, 84 ANTITRUST L.J. 565, 565–627 (2022).

14. F.T.C. v. Staples Inc., 970 F. Supp. 1066 (D.D.C. 1997).

15. *Id.* at 1076.

16. Sullivan, *supra* note 1, at 436.