PROTECTING THE COMPETITIVE PROCESS IN VERTICAL MERGER

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I. INTRODUCTION

"Antitrust is sexy again."[1]

With the rise of tech giants, public discourse over their concentrated economic power is more vibrant than ever. Many have claimed that America has a competition problem.[2] However, the evidence of rising industrial concentration and whether economic concentration in fact indicates a decline in competition is still inconclusive.[3] Nonetheless, antitrust enforcers, commentators, and politicians alike are taking a closer look at antitrust enforcement, particularly in the context of mergers. Reformers of antitrust law have argued that merger enforcement has been "overly lax" and needs to be invigorated.[4]

The contests over merger enforcement are attributable to the antitrust statutes' open-ended articulation of competition and the predictive nature of merger enforcement. While § 7 of the Clayton Act expressly condemns mergers that may substantially lessen competition,[5] none of the statutes define what "competition" means.[6] Thus, since the enactment of the Sherman Act in 1890,[7] misplaced debates over the proper goal of antitrust—rather than

1. Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714, 714 (2018).

2. *See, e.g.*, John Mauldin, *American Has a Monopoly Problem*, FORBES (Apr. 11, 2019), https://www.forbes.com/sites/johnmauldin/2019/04/11/america-has-a-monopoly-problem/?sh=4b9877e42972; Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131 (2018); Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. ECON. PERSPECTIVES No. 3, 2019, at 69.

3. *Compare Does America Have a Monopoly Problem?: Examining Concentration and Competition in the US Economy: Hearing Before the S. Comm. on Antitrust, Competition Pol'y, & Consumer Rts.*, 116th Cong. (2019) (statement of Robert B. Reich, Carmel P. Friesen Professor of Public Policy, University of California, Berkeley), https://www.judiciary.senate.gov/imo/media/doc/Reich%20Testimony.pdf (arguing that the consolidation in American economy is contributing to problems beyond the narrow concepts of consumer welfare), *with Does America Have a Monopoly Problem?: Examining Concentration and Competition in the US Economy: Hearing Before the Subcomm. on Antitrust, Competition Pol'y, & Consumer Rts.*, 116th Cong. (2019) (statement of A. Douglas Melamed, Professor, Stanford Law School), https://www.judiciary.senate.gov/imo/media/doc/Melamed%20Testimony.pdf (arguing that there is no concrete evidence that America has a market power issue).

4. *See, e.g.*, Shapiro, *supra* note 2, at 70 ("The clearest area where antitrust enforcement has been overly lax is the treatment of mergers."); TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 127 ("The priority for Neo-Brandeisian antitrust is the reform of merger review.").

5. 15 U.S.C. § 18.

6. Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996, 2030 (2018).

7. 15 U.S.C. §§ 1–38.

healthy conversations about how to achieve the goal—have dominated the public discourse. While economists and legal scholars have clustered into different ideologies, with each claiming a different goal for antitrust law, these debates are simply a red herring.[8] The statutory mandate of antitrust law is clear: the goal is to preserve and promote competition. A misplaced focus on the goal of antitrust consequently results in commentators relying on distorted legislative history, limited economic theory, and various political agendas to purport their self-reinforcing interpretations. But perhaps most dangerously, it prevents a discussion of the deeper normative values underpinning antitrust law that balance the "need for protecting individualism and community . . . in the private economic sphere."[9]

The language of the Sherman Act and Clayton Act is intentionally broad to assert competition as the "preferred governor of markets"[10] while allowing for debates as to the means to measure and achieve the goal. The legislative history of the Sherman Act reveals various concerns regarding the statute, some economic while others social and political.[11] But the goal of antitrust laws is neither to promote market efficiencies, nor to promote wealth equality, nor to tackle private political power. Instead, antitrust law reflects a careful balancing between competing concerns through "the preservation of free and fair competition or trade."[12] Granted, this framing does not answer the precise questions of what conduct constitutes competition on the merits. But defining "competition" is difficult precisely because "competition" refers to a process rather than a result.[13] The goal of antitrust is to safeguard the dynamic, robust

8. *See, e.g.*, Barak Orbach, *Antitrust's Pursuit of Purpose, Foreword to Symposium: The Goals of Antitrust*, 81 FORDHAM L. REV. 2151, 2153 (2013) (introducing the debate on the goals of antitrust and noting the "unproductive nature of the debate"); Eleanor M. Fox, *Against Goals*, 81 FORDHAM L. REV. 2157, 2159 ("The typical framing of the debate on the goals of U.S. antitrust law is misleading.").

9. John J. Flynn, *Antitrust Policy and the Concept of a Competitive Process*, 35 N.Y. L. SCH. L. REV. 893, 898 (1990) ("Antitrust policy plays a fundamental part in defining the scope of property rights in our society by balancing the rights of individuals and communities in the private economic sphere.").

10. Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1153 (1981).

11. *See generally* Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-examination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359 (1993) (rejecting a consumer welfare goal of antitrust).

12. *Id.* at 363.

13. Fox, *supra* note 10, at 1154 (arguing that the competition process is the "preferred governor of markets," and that competition as a process has unified three major concerns in antitrust law, them being distrust of power, concern for consumers, and commitment to opportunity of entrepreneurs); *see also* Flynn, *supra* note 9, at 896 (noting the importance of

competitive process itself, as opposed to ordaining certain market results.[14] This is far from a novel idea. Indeed, most contemporary antitrust scholars can agree that the principal function of antitrust enforcement is to preserve the competitive process.[15] Where they differ are the correct policies and standards to achieve that goal.

This Note begins by clarifying and reasserting that the sole goal of antitrust, as mandated by statute and interpreted by the Supreme Court, is to regulate between business decisions that are part of competition and those that "suppress or even destroy competition."[16] If antitrust reform is to proceed, the question should be framed as: what is the best method to identify conduct that does not compete on the merits and thereby harms the competitive process. This framing is necessary because competition is not static. The role of the "market" and regulations in our political economy are reflections of our deep, complex societal values and should be informed by progress in economics, social sciences, and technologies.[17] There is no short shrift to these substantive and normative questions. This Note does not aim to resolve the underlying normative debates. Rather, it evaluates different approaches to antitrust enforcement as different proxies to competition. The best approach to

understanding the concept of competition as "competition as a process," and deriving a multi-disciplinary meaning of it).

14. Fox, *supra* note 8, at 2160.

15. *See, e.g.*, Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, 35 ANTITRUST, no. 3, 2021, at 33, 33 ("Part of my thesis today is that the goal of antitrust law should be to *protect and promote competition*. Period."); A. Douglas Melamed & Nicholas Petit, *Before "After Consumer Welfare" – A Response to Professor Wu*, COMPETITION POL'Y INT'L (July 1, 2018), https://www.pymnts.com/cpi_posts/before-after-consumer-welfare-a-response-to-professor-wu/ ("As will be seen, both elements of the antitrust offense in the [consumer welfare] paradigm are about 'protecting a process.'"); A. Douglas Melamed, *Antitrust Law Is Not That Complicated*, 130 HARV. L. REV. F. 163, 166 (2016) ("With a couple of refinements, U.S. antitrust law makes it illegal to cause an increase in market power by conduct that is not competition on the merits."); Herbert Hovenkamp, *The Slogans and Goals of Antitrust Law*, 25 N.Y.U. J. LEGIS. & PUB. POL'Y, at 89 (forthcoming 2023), https://ssrn.com/abstract=4121866 ("Antitrust is properly focused on competition."); Frank H. Easterbrook, *Limits of Antitrust*, 63 TEX. L. REV. 1, 1 (1984) ("The goal of antitrust is to perfect the operation of competitive markets."); Einer Elhauge, *Should the Competitive Process Test Replace the Consumer Welfare Standard?*, PROMARKET (May 24, 2022), https://www.promarket.org/2022/05/24/should-the-competitive-process-test-replace-the-consumer-welfare-standard/ ("Kanter is right that antitrust law protects 'competition and the competitive process.'"); Fox, *supra* note 8 (explaining the substantial consensus of the goal of antitrust to be a robust market).

16. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

17. *See* Flynn, *supra* note 9, at 898 (noting that antitrust law requires "a deeper, more sophisticated understanding of the normative values underlying antitrust policy, contract law, property law, and various schools of economic and political thought.").

antitrust enforcement should balance the administrability concerns against the need for normative discussions.

This Note focuses the debates of antitrust enforcement on vertical mergers. Vertical mergers, those "that combine firms or assets at different stages of the same supply chain,"[18] do not directly eliminate competitors and, therefore, present unique and hotly contested considerations in analyzing their competitive effects. Part II of this Note examines the unique role of agencies in merger enforcement in the United States, and then the unique considerations for vertical merger analysis. Part III traces back the history of vertical merger enforcement, and then outlines the drastic changes in merger policy—with their implications for contemporary ideologies—and offers critiques to the *status quo*. Part IV analyzes potential approaches to process-based antitrust reform. It first rejects a return to the structuralist approach, and then discusses the differences between two purported standards that each claim to protect the competitive process. The final Part, Part V, asserts that antitrust law must protect competition as a process to align the law and regulations with antitrust's goal of promoting robust competition.

II. VERTICAL MERGERS ENFORCEMENT IN THE UNITED STATES

Mergers can be divided into horizontal mergers and non-horizontal mergers.[19] Horizontal mergers involve mergers between actual or potential direct competitors.[20] Therefore, the potential anticompetitive harm of horizontal mergers arises from the direct elimination of competitors because an increase in market share post-merger can directly influence firms' competitive incentives.[21] In contrast, non-horizontal mergers, which include vertical, diagonal, and conglomerate mergers, have indirect impacts on competition.[22]

Vertical mergers are particularly tricky due to their efficiency-enhancing nature. On one hand, vertical mergers can have inherent efficiency gains from

18. *Id.*

19. *2010 Horizontal Merger Guidelines*, U.S. DEP'T JUSTICE & FED. TRADE COMM'N, https://www.justice.gov/atr/horizontal-merger-guidelines-08192010 (Aug. 19, 2010) [hereinafter 2010 Horizontal Merger Guidelines]; *2020 Vertical Merger Guidelines*, U.S. DEP'T JUSTICE & FED. TRADE COMM'N, https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf (2020) [hereinafter 2020 Vertical Merger Guidelines].

20. 2010 Horizontal Merger Guidelines, *supra* note 19, § 1.

21. *Id.* § 5.

22. 2020 Vertical Merger Guidelines, *supra* note 19, § 1.

the elimination of double marginalization (EDM).[23] EDM occurs when the upstream firm transfers input at marginal cost instead of a marked-up price premerger.[24] Therefore, when the input supplier and the output producer are merged, the integrated firm can efficiently supply input to itself and thereby eliminate one of two markups.[25] On the other hand, vertically integrated downstream firms also have "an inherent exclusionary incentive" against unintegrated downstream competitors to preclude supplies.[26] Thus, despite the inherent efficiencies gained from vertical mergers, not all approaches consider them as part of the competitiveness analysis. Even for those who agree on efficiency as a competitive benefit, there is no clear consensus as to how to factor for these potential efficiencies in merger analysis.

Merger analysis considers efficiency claims in two ways.[27] First, efficiencies may be considered in the prima facie case. That is, efficiencies may be part of the inquiry of whether a given merger would have an anticompetitive effect in a given market.[28] Second, it has been argued that out-of-market efficiencies should be credited as merger benefits even after the plaintiff has established their prima facie case.[29] That is, efficiencies can be viewed as an affirmative defense to anticompetitive harm if the efficiencies are substantial enough.[30] At the heart of these debates are three fundamental questions: First, how would a vertical merger harm the competitive process? Second, how would a vertical merger benefit or strengthen the competitive process? And third, how should the agencies and courts balance the potential harms and benefits of the merger, if both exist? The courts have yet to give satisfying answers to these questions, partially due to their lack of expertise and the piecemeal nature of common law merger jurisprudence.[31] While the Supreme Court has rejected efficiencies

23. Steven C. Salop, *Invigorating Merger Enforcement*, 127 YALE L.J. 1962, 1970 (2018).

24. *Id.*

25. Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Merger: A Post-Chicago Approach*, 63 ANTITRUST L.J. 513, 526 (1995).

26. Jonathan B. Baker, Nancy L. Rose, Steven C. Salop & Fiona Scott Morton, *Five Principles for Vertical Merger Enforcement Policy*, 33 ANTITRUST, no. 3, 2019, at 12–13.

27. *See* Robert D. Willig, Steven C. Salop & F.M. Scherer, *Merger Analysis, Industrial Organization Theory, and Merger Guidelines*, 1991 BROOKINGS PAPERS ON ECON. ACTIVITY MICROECON. 281, 290 (1991), for a different framing of the two ways efficiencies enter into the analytic process.

28. Herbert Hovenkamp, *Appraising Merger Efficiencies*, 24 GEO. MASON L. REV. 703, 706 (2017).

29. PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1040d (5th ed., 2022 Cum. Supp. 2015–2021).

30. *Id.*

31. *See* Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 775 (2006) (noting that the common law piecemeal

as an affirmative defense,[32] merger enforcement has deviated from the early courts' skeptical views on efficiencies claims.[33]

The antitrust enforcement agencies play a crucial role in shaping the standard for antitrust enforcement. In the United States, § 7 of the Clayton Act expands on the Sherman Act of 1890[34] and prohibits mergers whose effect "may be substantially to lessen competition, or tend to create a monopoly."[35] With the addition of the Federal Trade Commission Act of 1914,[36] the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have joint authority to arrest anticompetitive mergers in their incipiency.[37] If the agency decides that the merger raises competition concerns, it may work with the parties to resolve the issues by entering into a negotiated consent agreement with provisions that will cure the competition concerns.[38] Alternatively, the agency may seek to stop the transaction by filing for a preliminary injunction in federal court pending a full examination of the proposed deal in an administrative proceeding.[39] Most mergers and acquisitions are able to proceed without much intervention from the agencies, and only a few mergers are litigated in court.[40]

Since 1968, the DOJ, later joined by the FTC, began to issue "Merger Guidelines" that outlined the agencies' analytical techniques and enforcement policies to determine whether to challenge a merger.[41] Though not binding,

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nature of the antitrust jurisprudence and reliance on agencies' action have resulted in increasing reliance on agency guidelines).

32. F.T.C. v. Procter & Gamble Co., 386 U.S. 568, 580 (1967) (stating that possible economies cannot defend against illegality, and that Congress struck the balance in favor of protecting competition over some competition-harming mergers creating economies).

33. Hovenkamp, *supra* note 28, at 706.

34. 15 U.S.C. §§ 1–38.

35. 15 U.S.C. § 18.

36. 15 U.S.C. §§ 41–58.

37. Hovenkamp, *supra* note 28, at 703 ("While private plaintiffs are also empowered to enforce Section 7 through both damages and equity actions, their impact on merger law has been relatively small.").

38. *Premerger Notification and the Merger Review Process*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review-process (last visited Apr. 17, 2023).

39. *Id.*

40. In the fiscal year of 2020, 1,637 transactions were reported under the HSR Act but only 43 of them were challenged in court. FED. TRADE COMM'N & U.S. DEP'T. JUST. ANTITRUST DIV., HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2020, at 1, https://www.ftc.gov/system/files/documents/reports/hart-scott-rodino-annual-report-fiscal-year-2020/fy2020_-_hsr_annual_report_-_final.pdf.

41. *1968 Merger Guidelines* § 1, U.S. DEP'T OF JUSTICE, https://www.justice.gov/archives/atr/1968-merger-guidelines (last visited July 31, 2023) [hereinafter 1968 Merger Guidelines].

courts have generally referred to the Guidelines as a persuasive framework for merger analysis.[42] The Merger Guidelines, therefore, create a critical channel in framing the legal debates.[43] Recently, new leadership at the executive branch has reinvigorated this debate by urging the agencies to strengthen vertical merger enforcement. On June 15, 2021, Lina Khan, a key scholar of the New Brandeis movement, was sworn in as the Chair of the FTC.[44] Shortly after, the FTC majority voted 3-2 to rescind its approval of the Vertical Merger Guidelines (VMG) issued in 2020.[45] Less than a month later, President Biden issued an Executive Order, encouraging the Attorney General and the FTC Chair to review and consider whether to revise the horizontal and vertical Merger Guidelines.[46] More recently, on July 19, 2023, the FTC and DOJ issued a draft update of the Merger Guidelines and requested public comments.[47] The next Part evaluates the unsatisfying historical approaches of vertical merger enforcement as reflected in the various revisions of the Merger Guidelines.

III. THE UNSATISFYING HISTORICAL APPROACHES TO VERTICAL MERGER ENFORCEMENT

Two approaches emerged throughout the evolution of merger enforcement—a structuralist approach and a welfare-based approach. The structuralist approach was manifested in the 1968 Merger Guidelines, and the welfare-based approach appeared in the 1984 Merger Guidelines as well as the newly rescinded 2020 Vertical Merger Guidelines. This Part examines the structuralist and welfare-based approaches to separate anticompetitive and procompetitive vertical mergers. First, this Part discusses the structuralist approach's populist roots as evident in the 1968 Merger Guidelines. Second, this Part examines the Chicago School's welfare-based consumer welfare standard and its lasting impact on antitrust enforcement and jurisprudence. Lastly, this Part elaborates on the issues behind the current application of the

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42. Greene, *supra* note 31, at 817.

43. *Id.* at 821.

44. *Lina M. Khan Sworn in as Chair of the FTC*, FED. TRADE COMM'N (June 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/06/lina-m-khan-sworn-chair-ftc.

45. *Fed. Trade Commission Withdraws Vertical Merger Guidelines and Commentary*, FED. TRADE COMM'N (Sept. 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary.

46. Exec. Order No. 14036 on Promoting Competition in the American Economy, 86 Fed. Reg. 36,987, § 5(c) (July 9, 2021).

47. *FTC and DOJ Seek Comment on Draft Merger Guidelines*, FED. TRADE COMM'N (July 19, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines.

consumer welfare standard that has caused gradually diminished vertical merger enforcement.

A. THE STRUCTURALIST APPROACH

The 1968 Merger Guidelines took the structuralist position that mergers are anticompetitive if they result in a highly concentrated market structure.[48] This position is hardly surprising, considering the political economy at the time. From the 1940s to 1960s, the prevailing industrial organization economics doctrine was dominated by the "Structure-Conduct-Performance" framework purported by Harvard economists such as Donald Turner, Edward Chamberlain, and Joe Bain.[49] In their view, high market concentration tends to result in anticompetitive behavior.[50] Accordingly, although the 1968 Guidelines addressed horizontal and vertical mergers separately and identified different theories of anticompetitive harm, the enforcement policies for each were almost exclusively based on market share.[51] Especially for vertical mergers, the DOJ identified foreclosure and barriers to entry as potential anticompetitive effects, but noted that vertical merger enforcement "can be satisfactorily stated by . . . [framing] primarily in terms of the market shares of the merging firms and the conditions of entry which already exist in the relevant markets."[52] The 1968 Guidelines also expressly rejected efficiencies as justification for all mergers except under exceptional circumstances.[53]

In addition to the prevailing economic theory at the time, the 1968 Guidelines' embracement of a structuralist approach was motivated by socio-political considerations. Beginning in the 1940s, commentators and legislators became increasingly concerned over the "rising tide of economic concentration in the American economy."[54] In *Alcoa*, Judge Learned Hand famously rejected pure economic considerations and enunciated the socio-

48. 1968 Mergers Guidelines, § 2.

49. Thomas A. Piraino, *Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century*, 82 IND. L.J. 346, 348 (2007); *see also* Herbert Hovenkamp, *Robert Bork and Vertical Integration: Leverage, Foreclosure, and Efficiency*, 79 ANTITRUST L.J. 983, 990 (2014) ("Although [the Harvard economists] did not recommend a per se rule, they did find a strong link between integration and monopoly control. These views were reflected in the 1968 Merger Guidelines[.]").

50. Hovenkamp, *supra* note 49, at 990.

51. 1968 Mergers Guidelines, § 4 (addressing horizonal mergers), § 11 (addressing vertical mergers).

52. *Id.* § 11.

53. *Id.* § 16.

54. Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962).

political goals of antitrust law.[55] He argued that Congress had intended to preserve "an organization of industry in small units" in spite of the possible cost.[56] Consistent with the 1968 Guidelines, the Supreme Court famously came very close to entirely ruling out efficiencies as a consideration from the merger analysis in *Brown Shoe Co. v. United States*.[57] Indeed, the Supreme Court treated protection of competition and the pursuit of efficiencies as directly conflicting objectives.[58] When balancing between competing considerations of integrated efficiencies and market concentration, the Court concluded that Congress resolved them in favor of decentralization.[59] The Court's analysis reflected the prevailing mid-century idea that achieving efficiencies through merger is not a part of the competitive process, and merger that would result in a concentrated market structure is anticompetitive.

B. THE CHICAGO SCHOOL'S WELFARE-BASED APPROACH

Beginning in the late 1960s, a group of legal scholars and economists associated with the University of Chicago began to challenge this interventionalist approach underlying the 1968 Guidelines.[60] The Chicago School aimed to provide a scientific tool for antitrust analysis, which lead to a focus on the outcome of the mergers. While not the first to introduce economic analysis in antitrust, the Chicago School explicitly recognized economics in judicial and administrative literature.[61] Indeed, the Chicago School's widely influential consumer welfare standard dominates the mainstream antitrust analysis to this day. Yet, it is a diverse school of thought and has progressed drastically over the years. This Section first discusses the early Chicago School's laissez-faire approach to vertical mergers, the establishment of the consumer welfare standard, and the standard's impact on vertical merger enforcement. This Section then examines both the so-called

55. United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945) (noting that Congress forbade all trusts, regardless of good or bad, not only because of economic motives, but also because of the indirect social or moral effect to prefer a system of small producers).

56. *Id.* at 429.

57. 370 U.S. 294, 294 (condemning mergers between two firms with small market shares, in part because the integrated firms can achieve cost-savings).

58. William J. Kolasky & Andrew R. Dick, *Merger Guidelines and the Integration of Efficiencies in Antitrust Review of Horizontal Mergers*, 71 ANTITRUST L.J. 207, 209 (2003).

59. *Brown Shoe*, 370 U.S. at 344 (signaling adherence to Congress's decision to favor decentralization, in the face of competing concerns that maintaining fragmented industries and markets might occasionally create higher costs and prices).

60. Scholars in the early Chicago School that purported this view include but are not limited to: Robert Bork, John McGee, Lester Telser, Richard Posner, and Ward Bowman.

61. Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 265 (2001).

Post-Chicago School's critics of the Chicago School and the welfare-based analytical framework for vertical merger under the more complex and sophisticated Post-Chicago School.

1. *The Early Chicago School, Efficiencies, and the 1982 and 1984 Merger Guidelines*

Relying on the belief that in the long run markets tend to self-correct, the early Chicago School rejected the structuralist approach of the 1960s and advocated for a laissez-faire approach to antitrust enforcement.[62] Overenforcement was considered an evil and agencies were directed to intervene only when it was clear that certain anticompetitive conduct was threatening consumer welfare.[63]

The Chicago School offered three insights into the definition of the competitive process. First, it offered a "coherent and elegant ideology" that shifts the focus of antitrust from market structure to a purely economic calculation.[64] In that sense, the use of economic models in administrative and judicial decision-making promised a rigorous, value-neutral approach to market regulation.[65] Second, and relatedly, the Chicago School prescribed welfare as the sole determination of whether conduct is procompetitive or anticompetitive.[66] Jurist and scholar Robert Bork coined the term "consumer welfare standard" as the *only* value to be considered by a court.[67] Yet, Bork, a lawyer by training, departed from the traditional economic textbook definition and interpreted consumer welfare as the "the maximization of wealth" increased through market efficiency.[68] In classic economics, what Bork referred to is the total welfare in the market, irrespective of the distribution of surplus between consumers and producers.[69] The biggest difference between total welfare and a true consumer welfare approach is that under a true consumer welfare approach, only welfare gained by the consumer would be

62. Piraino, *supra* note 49, at 350.

63. *Id.*

64. Hovenkamp, *supra* note 61, at 258, 265.

65. *Id.* at 265.

66. *See* A. Douglas Melamed & Nicholas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 REV. INDUS. ORG. 741, 746 (2019) ("[T]he CW paradigm makes clear that antitrust laws are about conduct that reduces or is likely to reduce economic welfare and is not intended to prevent noneconomic harms such as harm to the pollical process or to serve other social objectives.").

67. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 10–11 (1966) (emphasis added).

68. *Id.* at 7.

69. Barak Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 162 (2010).

credited as competitively beneficial. But under the Borkean view, mergers that increase efficiencies are procompetitive, regardless of their harm to competitors and even consumers. As a result, efficiency is not only an affirmative defense, but also the benchmark for competitiveness.

This embrace of total welfare naturally led to the Chicago School's third influence—a view that vertical mergers are generally competitively neutral or procompetitive, and therefore should be presumed to be procompetitive to avoid false positive errors and overdeterrence.[70] Although the Chicago School did identify some competitive concerns, its early proponents "placed little credence in the harm from foreclosure" and collusion.[71] First, the Chicago School rejected the theory of foreclosure, on the ground that the unintegrated rival may gain access to input elsewhere by realigning purchasing patterns.[72] Second, it rejected the theory of leverage, based on an oversimplified "single monopoly profit" model that claimed that the integrated firm cannot enjoy more than one monopoly profit.[73] Lastly, the Chicago School viewed vertical mergers as "invariably highly efficient," in large part because of the elimination of double marginalization.[74]

Bork pushes the presumption of procompetitive effect further by famously rejecting calculation for individual efficiencies.[75] Bork relied on a "beguilingly simple" theory: to the extent that vertical integration creates efficiencies, it may deter entry, but only as a result of increased competition through cost-savings; to the extent that a vertical merger is not efficient, it would not impede entry.[76] Unlike Oliver Williamson's welfare tradeoff model, which would balance the productive efficiencies gain against consumer welfare loss to determine the total welfare impact of a merger, Bork argued that an individualized calculation of net welfare gain is neither necessary nor possible.[77] Instead, Bork believed that efficiencies would be presumed to exist in all vertical mergers.[78] Although Bork's extreme views on vertical integration have subsequently been doubted by other Chicago scholars, they have important and lasting impacts in courts'

70. Salop, *supra* note 23, at 1972; *see also* Orbach, *supra* note 69, at 162 n.38 (explaining false positive and false negative errors in antitrust enforcement).

71. Riordan & Salop, *supra* note 25, at 518.

72. *Id.* at 516.

73. *Id.* at 517.

74. Salop, *supra* note 23, at 1970.

75. Hovenkamp, *supra* note 49, at 983.

76. *Id.* at 994.

77. Nancy L. Rose & Jonathan Sallet, *The Dichotomous Treatment of Efficiencies in Horizontal Mergers: Too Much? Too Little? Getting it Right*, 168 U. PA. L. REV. 1941, 1952 (2021).

78. *Id.*

considerations of efficiencies benefits in vertical mergers, particularly with regard to the gradually pro-defendant burden of proof in proving efficiencies.

In response to the adoption of the consumer welfare standard and the Chicago School's economics-centered analysis, efficiencies analysis began to enter the merger review framework in the 1982 Merger Guidelines.[79] Unsurprisingly, the Guidelines marked a radical change from a market-structure-based approach to a market-power-based approach for both horizontal and vertical mergers.[80] For vertical mergers, the DOJ would no longer rely on a structure-based presumption of anticompetitive harm. Instead, the agency would evaluate the competitive effects of a merger based on specific theories of harm. The 1982 Guidelines emphasized that vertical mergers lack direct impact on market concentration.[81] Moreover, just two years later, the 1984 Guidelines marked a "more dramatic departure from earlier positions."[82] Influenced by the Chicago School's endorsement of market efficiency, the 1984 Guidelines began by expressly claiming that "[t]he primary benefits of mergers to the economy is their efficiency-enhancing potential."[83] Most notably, the Guidelines noted that "the Department will give relatively more weight to expected efficiencies" for vertical mergers than horizontal mergers.[84] Under the 1984 Guidelines, the DOJ would allow mergers that it otherwise would challenge if the parties could establish by clear and convincing evidence that the merger will achieve net efficiencies.[85]

However, despite Bork's misnomer, the agencies and courts mostly interpreted consumer welfare as consumer surplus, not total surplus, and, accordingly, rejected efficiencies as an affirmative defense. The 1984 Guidelines took this view by presenting efficiencies as a factor to consider, not as a defense.[86] The then-Assistant Attorney General Paul McGrath clarified that under this approach the DOJ "would not balance expected efficiencies against expected anticompetitive consequences."[87] In doing so, the agencies

79. *1982 Merger Guidelines*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/archives/atr/1982-merger-guidelines (last visited July 31, 2023).

80. *Id.* § 1.0.

81. *Id.* § 4.1A.

82. Rose & Sallet, *supra* note 77, at 1953.

83. *1984 Merger Guidelines* § 3.5, U.S. DEP'T OF JUSTICE, https://www.justice.gov/archives/atr/1984-merger-guidelines (last visited July 31, 2023).

84. *Id.*

85. *Id.*

86. *Id.* §§ 3.5, 4.135.

87. Richard A. Pogue, Harry M. Reasoner, John H. Shenefield & Richard A. Whiting, *60 Minutes with J. Paul McGrath*, 54 ANTITRUST L.J. 131, 134–35, 141 (1985).

reaffirmed that an efficiencies gain must result in an increase in consumer surplus to be credited as procompetitive.

2. *The Post-Chicago School, Consumer Welfare Standard and the 2020 Vertical Merger Guidelines*

Beginning in the 1990s, armed with a more sophisticated understanding of microeconomics, commentators concluded that the Chicago School's economic models were overly simplistic.[88] The Post-Chicago School debunked the "single monopoly profit theories" and the assumption of a perfectly competitive market with unhindered free flow of information and low entry barriers.[89] Rather, the Post-Chicago School observed that in imperfectly competitive markets, evaluating the net competitive effect of a merger is a question of fact, not theory, which often requires sophisticated econometric modeling.[90] Informed by game theory and industrial organization economics, the Post-Chicago School offered a newer, more realistic methodology to market structure in which vertical mergers can have anticompetitive effects.[91]

The Post-Chicago School made three major contributions to the vertical merger evaluation. First, it incorporated market imperfection into economic analysis and offered tools for analyzing both unilateral and coordinated harms in vertical mergers.[92] In terms of unilateral harms, the Post-Chicago School provided "a metered alternative" to the largely binary concept of foreclosure.[93] The idea is that an integrated firm may reduce sales or increase prices to downstream unintegrated rivals and thereby make it more costly for downstream rivals to do business.[94] The Post-Chicago School measured harms under foreclosure not by a competitor's exit, but instead by the increase in equilibrium prices.[95] Additionally, the Post-Chicago School argued that vertical mergers can facilitate exclusionary conduct based on competitively sensitive information obtained through the mergers.[96] The agencies adopted the Post-Chicago School's view on competitive harms and incorporated the theories of raising rivals' costs and access to competitively sensitive information in the 2020 Vertical Merger Guidelines—the first revision of vertical merger review

88. Piraino, *supra* note 49, at 364.

89. *See generally* Salop, *supra* note 23 (rejecting the Chicago School's assumption and providing analytical framework for foreclosure and leverage theories).

90. *Id.* at 1974.

91. *Id.*

92. Hovenkamp, *supra* note 61, at 324.

93. Herbert Hovenkamp, *Competitive Harm from Vertical Merger*, 59 REV. INDUS. ORG. 139, 144 (2021).

94. *Id.*

95. *Id.*

96. Riordan & Salop, *supra* note 25, at 520.

since 1984.[97] Under the 2020 VMG, the agencies consider the ability and incentive for the merged firm to raise rivals' costs (RRC) or foreclose sale(s).[98] The central question for a firm's ability is "whether the downstream rivals have good substitutes for the input in question."[99] If the downstream firms have no good substitute, their ability to compete is weakened if the merged firm denies access to or charges higher prices for the input. In that case, the merged firm has the ability to RRC or foreclose inputs. The key question for determining incentive is whether weakening "downstream rivals would enhance profit of the merged firm due to diverted downstream sales."[100] If a merged firm has both the ability and the incentive to RRC or foreclose input, the merger harms the downstream competitors. But a final balancing of the RRC and efficiencies claims is still required.[101] Generally, this last step requires complex econometrics modeling and simulation.

Second, the Post-Chicago School reaffirmed the welfare-based consumer welfare standard but clarified that consumer welfare, rather than total welfare, should be the benchmark to determine whether business conduct is procompetitive or anticompetitive. While the Post-Chicago School has acknowledged market imperfection and the likelihood of foreclosure in vertical mergers, it has shifted the focus of competitive injury away from the destruction of rivals purported by the 1960s structuralists.[102] For the Post-Chicago School, harm to rivals was simply part of the competitive process if and only if the merger would not make consumers worse off.[103] While the Post-Chicago School acknowledged the intrinsic EDM effect for most vertical mergers in imperfectly competitive markets,[104] it asserted that EDM and other efficiencies gains do not always pass down to consumers.[105] Accordingly, under a consumer welfare standard, any efficiency gains that do not pass on to consumers theoretically should not be credited.

The agencies adopted this approach in the 2020 VMG, under which efficiency claims must be merger-specific, cognizable, and verifiable to be

97. 2020 Vertical Merger Guidelines, *supra* note 19.

98. *Id.* § 4(a).

99. Carl Shapiro, *Vertical Mergers and Input Foreclosure: Lessons from the AT&T/Time Warner Case*, 59 REV. INDUS. ORG. 303, 306 (2021).

100. *Id.*

101. *Id.*

102. Hovenkamp, *supra* note 61, at 318.

103. Hovenkamp, *supra* note 93, at 174.

104. Salop, *supra* note 23, at 1972.

105. *See id.* at 1974 ("[E]ven if EDM or other efficiencies do create downward pricing pressure, that downward pressure does not necessarily dominate the upward pricing pressure from the incentive of the upstream merging firm to raise its input price to rivals.").

credited as competitive benefits.[106] Efficiencies are merger-specific when they are likely to be achieved through the merger and unlikely to be accomplished through any *practical alternatives*.[107] For example, in assessing the merger-specificity of EDM, the agencies "examine whether it would likely be less costly for the merged firm to self-supply inputs [post-merger] . . . than for the downstream firm to purchase them from one or more independent firms absent the merger."[108] Efficiency claims are cognizable if they do not arise from anticompetitive reduction in output or service.[109] Efficiency claims are verifiable if the merging parties are able to meet the burden to substantiate their claims by showing that they are not merely speculative.[110] However, while the Post-Chicago School explicitly rejected a total welfare standard, the 2020 VMG retained a footnote indicating that agencies may consider out-of-market efficiencies.[111]

Additionally, the 2020 VMG provided that harms to downstream unintegrated rivals are not sufficient to constitute harm to competition. Rather, consistent with most of the Post-Chicago commentators,[112] the 2020 VMG required evaluating the competitive effect of a merger on the actual or potential buyers of the downstream firms.[113] The VMG expressly acknowledged that while the merged firm may have the ability and incentive to foreclose its rival or raise their costs, the merger can also create procompetitive effects that offset or even outweigh the incentive to harm customers.[114] A merger that harms downstream unintegrated competitors may nonetheless be benign if it does not harm downstream consumers. Under the Guidelines, the agencies would take an additional step to evaluate "the likely net effect on the competition."[115]

Third, to balance the potential efficiency benefits from the merger against the potential foreclosure or coordinated effect of a vertical merger, the Post-

106. 2020 Vertical Merger Guidelines, *supra* note 19, § 6.

107. *Id.* (emphasis added).

108. *Id.*

109. *Id.*

110. *Id.*

111. *See* 2020 Vertical Merger Guidelines, *supra* note 19, § 6 n.6 ("The Agencies in their prosecutorial discretion may also consider efficiencies not strictly in the relevant market[.]").

112. *See* Shapiro, *supra* note 99, at 320 (following the 2020 Vertical Merger Guidelines' approach of evaluating input foreclosure concerns based on their impact on downstream customers); Riordan & Salop, *supra* note 25, at 561 ("In evaluating input foreclosure, we concluded that proof that input prices would rise is insufficient. It also is necessary to show injury to consumers.").

113. 2020 Vertical Merger Guidelines, *supra* note 19, § 1.

114. *Id.*

115. *Id.* § 4(a).

Chicago School proposed a welfare tradeoff model to evaluate the net competitive effect of the merger.[116] Where vertical mergers create significant efficiency benefits and raise significant competitive concerns, "those conflicting effects must be weighed and balanced."[117] The Post-Chicago School's sophisticated welfare-balancing approach dominates the contemporary antitrust analysis. But the increasing reliance on econometrics and expert testimony imposes a great challenge for lawyers and judges to evaluate the accuracy and presumptions behind these complex economic models. The next section addresses the shortcomings of the modern Post-Chicago approach.

C. CRITIQUE OF CURRENT VERTICAL MERGER ENFORCEMENT

Commentators who are discontent over the *status quo* of vertical merger enforcement have argued for a reform in merger enforcement and offered three main critiques. First, the misleading phrasing of "consumer" welfare has led to neglect in identifying merger harms to input markets such as the labor market.[118] Second, although the merger guidelines acknowledge non-price harms, the consumer welfare standard, as currently applied, focuses almost exclusively on economic factors such as price, output, or efficiencies, and rarely considered less-quantifiable theories based on reduced product quality, variety, and diminished innovation.[119]

Third and relatedly, under the Chicago School's continuing influence within the agencies and the judiciary, merger enforcement has been indoctrinated with pro-defendant assumptions that vertical mergers are mostly procompetitive. Therefore, in practice, contrary to the incipiency standard mandated by the Clayton Act, a plaintiff challenging a vertical merger faces a heavy burden to show competitive harm under the three-step burden-shifting framework outlined in *United States v. AT&T, Inc.*[120] For example, under a

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116. Hovenkamp, *supra* note 28, at 715.

117. Riordan & Salop, *supra* note 25, at 523.

118. *See, e.g.*, 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, at 7–8 (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 (advocating for new vertical merger guidelines that include framework for evaluating non-price harms); Hiba Hafiz, *Labor Antitrust Paradox*, 86 CHI. L. REV. 381 (2020) (arguing that the consumer welfare standard is ill-equipped to address the labor market); Eric A. Posner, Glen Weyl & Suresh Naidu, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2018) (noting the neglect of labor market harm in merger review and developing a variety of analytic tools to evaluate labor markets).

119. Lina Khan, Note, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 721–22 (2017).

120. 916 F.3d 1029, 1032 (D.C. Cir. 2019).

bargaining theory based on pricing pressure, a plaintiff must quantify the net effect on competition and persuade the skeptical generalist judge, who is often ill-equipped to evaluate complex economic models and tends to err on the side of the defendant.[121]

The burden on plaintiffs seems to be even heavier for those who allege prima facie theories of harms other than price and output. Even after the revision of the 2020 VMG and the 2010 HMG, which explicitly outline various non-price theories of harms, courts are reluctant to embrace theories of harms other than price and output.[122] Plaintiffs are frequently required to show econometric proof that relies on data access.[123] In addition, it is not sufficient for a plaintiff to merely show that the merged firm has the ability and incentive to harm competition as a profit maximizing entity. The plaintiff must also consider any historical business practices that would prevent the merged firm from behaving anticompetitively *and* show that the merged firm would harm downstream consumers.

For example, in a recent vertical merger case, Judge Carl Nichols of the District Court of Columbia rejected the government's vertical data misuse theory for a merger between UnitedHealth Group and Change Healthcare, a health care technology company that operated the largest electronic data interchange (EDI)[124] clearinghouse in the United States.[125] Under the vertical data misuse theory, the government claimed that UnitedHealthcare, the nation's biggest commercial health insurer, would have access and use rights to the claims data of its rivals and would thereby deter its rivals from innovating out of the fear that UnitedHealthcare will free ride off their innovation.[126] Judge Nichols found that the government failed to establish fact-specific showings that United would "uproot its entire business strategy and corporate culture," intentionally violate firewall policies and existing contractual commitments, and sacrifice significant financial reputational interests.[127] And, perhaps most alarmingly, Judge Nichols further reasoned that even if the government had shown that the merged firm has an incentive

121. *See* Shapiro, *supra* note 99, for a detailed account of the heavy evidentiary burden to show harms in *United States v. AT&T, Inc.*

122. *See* 2010 Horizontal Merger Guidelines, *supra* note 19, § 6.4; 2020 Vertical Merger Guidelines, *supra* note 19, § 4.b.

123. Elhauge, *supra* note 15.

124. IBM, *What is electronic data interchange (EDI)?*, https://www.ibm.com/topics/edi-electronic-data-interchange (last visited Feb. 3, 2024).

125. United States v. UnitedHealth Grp., Inc., 1:22-CV-0481, 2022 WL 4365867, at *15–*26 (D.D.C. Sept. 21, 2022).

126. *Id.* at *15.

127. *Id.* at *16.

to misuse claims data obtained through Change's EDI clearing house, the government failed to demonstrate that rival payers would innovate less post-merger.[128] And, even if rival payers would scale back on innovation, the government must also have proved that the reduction in innovation would *substantially* lessen competition.[129] As this example shows, the immense burden on plaintiffs to establish prima facie harms has a serious chilling effect on potential private plaintiffs and agencies who have limited resources. The result is that, for the past forty years, only a handful of cases were litigated where the focus was mainly on the vertical aspects of the merger—and the agencies lost each of them.[130]

IV. VERTICAL MERGER REFORM

Reformers wishing to reinvigorate vertical merger enforcement generally fall under one of the three camps: (1) a return to the structuralist approach; (2) a trading partner welfare approach (rebranded as "protecting competition"); or (3) a protection of competitive process standard. Reformers under the second and third camps share the same explicit acknowledgement of antitrust's competition goal and urge focus on the merger's impact on the competitive process. Yet, the two groups differ as to how to evaluate the competitive impact. The trading partner welfare standard expands the consumer welfare standard's narrow focus of a merger's impact on direct consumers onto trading partners on the other side of the market. Meanwhile, the protection of competitive process standard rejects the use of welfare as a proxy and argues that antitrust law should directly separate "fair and foul."[131]

This Part asserts that a protection of competitive process standard—the third approach—is needed to truly capture the concept of competition and safeguard the long-term interests of consumers, producers, and workers. The first Section, IV.A, argues that a return to the first, structuralist approach is undesirable. The second Section, IV.B, comparatively analyzes the frameworks under the trading partner welfare standard and the protection of competition approach. The last Section, IV.C, asserts that the rebranded trading partner welfare standard is inadequate to safeguard competition, and analyzes

128. *Id.* at *24–*25.

129. *Id.* at *25.

130. *See* United States v. AT&T, Inc., 916 F.3d 1029 (D.C. Cir. 2019); Fed. Trade Comm'n v. Illumina, Inc., No. CV 21-873, 2021 WL 1546542 (D.D.C. Apr. 20, 2021); *UnitedHealth*, 2022 WL 4365867.

131. Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice* 8, SSRN (Apr. 5, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249173.

application of each the second and third approaches in vertical merger enforcement.

A. CRITIQUES OF A RETURN TO THE STRUCTURALIST APPROACH

At the outset, this Note rejects a return to the structuralist approach. Relying on the original legislative intent and the populist root of the Sherman Act, some reformers advocate that concentrated private power is an evil in and of itself and should be prohibited or regulated.[132] Some even propose for a return to the 1968 Merger Guidelines.[133] However, a focus on market structure risks the same pitfalls as the Chicago School's consumer welfare standard, as they both focus on results rather than process. The 1960's structuralist approach emerged in an era when there were no satisfactory tools for case-by-case assessment for mergers.[134] The "Structure Conduct Performance" framework prevalent at that time was supplanted long ago within industrial organization economics.[135] Additionally, the New Brandeis' argument based on the murky legislative intent of the Sherman Act is as unpersuasive today as when it was raised by Judge Bork for his prescription of the consumer welfare standard. Although the Sherman Act was inspired by various social, political, and economic concerns of monopolies, antitrust law is not designed to solve all of these concerns.[136] What's more, regardless of Congress's intent over a hundred years ago, antitrust statutes' broad mandates have been generally viewed as a common law-like process evolving overtime.[137] A fixation over the original intent of the law is neither meaningful nor productive to the discussion.

It is not to say that antitrust law is solely for promoting economic goals. It does not. A narrow view that antitrust should only look at economic welfare of the society, however defined, is misguided.[138] Indeed, unlike many commentators who reject a return to a structuralist approach, this Note

132. *See* Khan, *supra* note 119, at 797.

133. Open Markets Institute, American Economic Liberties Project, Frank Pasquale & Maurice Stucke, Comment on Draft Vertical Merger Guidelines (Feb. 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/comment_to_ftc-doj_re_vertical_merger_guidelines.pdf.

134. Gregory J. Werden, *Back to School: What the Chicago School and New Brandeis School Get Right* 10, SSRN (Oct. 10, 2018), https://ssrn.com/abstract=3247116.

135. Shapiro, *supra* note 15, at 34.

136. *Id.* at 42.

137. State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (noting that when Congress promulgated the Sherman Act it "expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition"); Melamed & Petit, *supra* note 66, at 746 ("Antitrust has long been understood to evolve over time through a common-law like process.").

138. *See* Fox, *supra* note 10; *supra* note 13 and accompanying text.

recognizes that the New Brandeis movement and earlier progressive commentators are correct to identify that antitrust laws promote competition to serve a variety of interests.[139] The structuralist's biggest pitfall, however, is that it views socio-political benefits of a decentralized market a *prevailing and dispositive* consideration. Its favoritism of decentralized markets would bypass the process of vigorous competition and ignore the benefits of increased efficiencies.

Some New Brandeis commentators enunciate several principles of antitrust in hope to replace the Chicago School's efficiency obsession. Some of these objectives are within the purview of antitrust law, while others are not. For example, reformers aim for "the preservation of open markets, the protection of producers and consumers from monopoly abuse and the dispersion of political and economic control."[140] The first two aims fall squarely within the idea of protecting competition, while the connection between protecting competition and the "dispersion of political and economic control" is less direct. It is important to note that antitrust law is not and should not be the only body of law that addresses the political control of private entities, the inequitable distribution of wealth, and many other social issues.[141] It is antithetical to the basic idea of competition to punish firms for being big and successful if they achieve their size lawfully.[142] The line between size and power is a thin one, and commentators may disagree vigorously about what strategies are or are not lawful. But a shortcut based on the size of the firm alone contradicts the long-held distinction between the mere possession of market power and abuse of market power.[143] Perhaps more importantly, a structuralist approach, like the welfare approach, predetermines the role of antitrust law in our democratic republic and forecloses normative discussions about fairness, justice, and market competition. Therefore, a presumption or

139. Khan, *supra* note 119, at 739.

140. *Id.* at 743.

141. *See* Shapiro, *supra* note 15, at 42 (arguing that lax antitrust enforcement is not the central cause of social and economic problems in America); *see also* Herbert Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, 93 NOTRE DAME L. REV. 583, 594 (2018) (noting that antitrust is only one of many legal policies that address the concern of what citizens are entitled to expect from business and their economy).

142. *Id.*

143. *See, e.g.*, Verizon Commc'n Inc. v. L. Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (clarifying that merely possessing monopoly power and charging monopoly prices, without anticompetitive conduct, is not only not unlawful, but critical to the free market in attracting "business acumen," inducing risk-taking, and incentivizing innovation).

even per se illegality based on a firm's size and market power is not a desirable policy.[144]

B. THE TWO STANDARDS OF PROTECTING COMPETITION: TRADING PARTNER WELFARE STANDARD AND PROTECTION OF THE COMPETITIVE PROCESS

The idea of protecting competition means little without defining what types of business conduct are deemed proper and which are not. Therefore, while commentators generally agree on the goal of antitrust law as protecting competition or the competitive process, how to administer that goal is particularly divisive. This Section discusses two existing standards and their key differences.

Under the guise of various names, a number of mainstream progressives argue for a "trading partner" welfare approach to protect the competitive process.[145] In its essence, compared to the Post-Chicago School's consumer welfare standard, the trading partner welfare standard expands the recognition of harm from consumers to trading partners on the other side of the market.[146] Trading partners thus include product and labor suppliers, and welfare is defined broadly to include product variety, product quality, and innovation.[147] While commentators supporting the trading partner welfare standard acknowledge that promoting competition is the goal of antitrust, they also emphasize that economic measurements are necessary to make this goal operational.[148] The issue with underenforcement in vertical mergers, they

144. *See* Fox, *supra* note 10, at 1182 (declining to include the preservation of small size for its own sake as a possible goal of antitrust because of the potential conflict between that objective and consumers' interests); *see also* Shapiro, *supra* note 1, at 745 ("Economic growth will be undermined if firms are discouraged from competing vigorously for fear that they will be found to have violated the antitrust laws, or for fear they will be broken up if they are too successful.").

145. *See, e.g.*, Shapiro, *supra* note 15, at 38 ("A business practice is judged to be anticompetitive if it harm trading parties on the other side of the market as a result of disrupting the competitive process."); C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078, 2080 (2018) (arguing that reduced competition between buyers is unlawful even where there is no harm to downstream purchasers).

146. Shapiro, *supra* note 15, at 38; *see also The Consumer Welfare Standard in Antitrust: Outdated, or a Harbor in a Sea of Doubt: Hearing Before the Subcomm. on Antitrust, Consumer Protection and Consumer Rights of the S. Comm. on the Judiciary*, 115th Cong. (2017) (statement of Carl Shapiro, Professor of Business Strategy, University of California, Berkeley), http://faculty.haas.berkeley.edu/shapiro/consumerwelfarestandard.pdf.

147. Shapiro, *supra* note 15, at 38.

148. *The Consumer Welfare Standard in Antitrust: Outdated, or a Harbor in a Sea of Doub*t: *Hearing Before the Subcomm. on Antitrust, Consumer Protection and Consumer Rights of the S. Comm. On the Judiciary*, 115th Cong. (2017) (statement of Carl Shapiro Professor of Business Strategy,

argue, is not that the welfare approach is wrong, but that it has not been applied properly under the influence of the Chicago School.[149] Under this view, the issues of false negative errors and the plaintiff's high evidentiary burden to establish prima facie case can be fixed by establishing rebuttable presumptions.[150] Similarly, the critique over the welfare standard's price fixation is not inherent to the consumer welfare paradigm.[151] In sum, the trading partner welfare standard does not signify a fundamental change in a welfare approach.[152] Rather, it is a rebranding of the consumer welfare standard to escape the inconsistent history of the term since Bork and the Chicago School.[153] Under this approach, mergers that harm trading partners on the other side of the market are anticompetitive and should be condemned.

In contrast, some commentators associated with the New Brandeis school reject the use of welfare as a proxy and argue that antitrust law should directly separate "fair and foul" under a protection of competitive process standard.[154] In an influential paper prior to her appointment to the FTC, Chairwoman Lina Khan criticized the use of consumer welfare as "inadequate to promote real competition."[155] She identified that the issue with the welfare standard is that it focuses on an outcome, as opposed to process.[156] The right inquiry is about a business conduct's impact on the neutrality of the competitive process and the openness of the market, which must be viewed in relation to the market structure.[157] Many critics of the New Brandeis movement have characterized the school as advocating for a structuralist return under the "big is bad" motto.[158] But the New Brandeis School is much more diverse and nuanced than that. In *Amazon's Antitrust Paradox*, Khan clarified that she was not advocating for "a strict return to the structure-conduct-performance

University of California, Berkeley), http://faculty.haas.berkeley.edu/shapiro/consumerwelfarestandard.pdf.

149. Salop, *supra* note 70, at 1963.

150. Shapiro, *supra* note 15, at 39.

151. *See* Melamed & Petit, *supra* note 15, at 5 ("But that inhospitality to pricing cases can hardly be called a problem of price fixation, and its correction does not required abandonment of the [Consumer Welfare] paradigm.").

152. Shapiro, *supra* note 15, at 38 ("I have seen no evidence whatsoever that the "consumer welfare" standard is somehow outdated, so long as one accepts that the goal of antitrust is to promote competition.").

153. *Id.*

154. Wu, *supra* note 131, at 8.

155. Khan, *supra* note 119, at 744.

156. *Id.*

157. *Id.* at 745–46.

158. *See, e.g.*, Aurelien Portuese & Joshua Wright, *Antitrust Populism: Towards a Taxonomy*, 21 STAN. J.L. BUS. FIN. 1, 18 (2020); *cf.* Khan, *supra* note 2, at *3 (distinguishing antimonopoly from "big is bad").

paradigm."[159] Instead, she argued that market structure provides insights on how power is distributed in a given market, which is crucial to determine whether a business decision would prevent competition on the merits.[160] In other words, the New Brandeis' view of antitrust does not blanketly prohibit big firms from engaging in certain business conducts just because of their size. Rather, it simply recognizes that dominant firms may be prohibited from engaging in certain conduct where their smaller rivals would not because dominant firms have the power to distort the competitive outcome.[161] Khan defined "distorting" as "a single player [having] enough control to dictate outcomes."[162] Under this definition, large firms that engage in conduct or agreements that do not give them the power to dictate a competitive result are free to do so without scrutiny. In the horizontal merger context, agencies, economists, and courts have long recognized that concentration in a given market is a good indicator of whether a horizontal merger would raise substantial competitive concerns. Under the 2010 HMG, a firm with the largest market share would not be allowed to merge with the second largest competitor in a concentrated market, while a merger between two small competitors may not raise similarly competitive concerns. Market structure has always mattered and should continue to matter in antitrust analysis.

The disconnect between these two competition-focused approaches stems from their different definitions of "competition on the merits." Whereas mainstream progressives view conduct that does not harm trading partners as competition on the merits, the protection of competitive process standard recognizes that conduct that does not harm consumers or suppliers may nonetheless harm the competitive process.[163] Thus, their key disagreement is the role of regulation in shaping the competitive process.

The proponents of the welfare approach view markets as strictly driven by economics. That is, market regulations and policies (including antitrust policy) exist to facilitate the best allocation of resources. New Brandeis proponents, on the other hand, view markets as defined by economic justice, fairness, and opportunities.[164] Therefore, while economic learnings may guide our understanding of the economic effects of certain business conduct, a determination of legality requires additional examination of the equitable

159. Khan, *supra* note 119, at 745.

160. *Id.*

161. *Id.*

162. *Id.* at 746 n.189.

163. Tim Wu, *The "Protection of the Competitive Process" Standard* (Columbia Public Law Research Paper, No. 14-612, 2018), https://scholarship.law.columbia.edu/faculty_scholarship/2290.

164. Fox, *supra* note 10, at 1178.

effects of that conduct. The New Brandeis movement presented several factors to consider in determining the neutrality of the competitive process, including entry barriers, conflict of interest, the emergence of gatekeepers or bottlenecks, the use of and control over data, and the dynamics of bargaining power.[165]

To resolve this dispute of whether the rebranded welfare standard is adequate to protect competition, we must answer the underlying question of what the competitive process seeks to protect. The trading partner welfare standard offers compelling reasons to limit actionable harms to those suffered by trading partners and to use welfare, broadly defined, as a measurement of harm. But the welfare-based approach deviates from the principle of protecting competition in significant ways when applied to vertical mergers.[166] The next Sections explain why a process-based approach is needed to effectively protect competition.

C. PROTECTION OF COMPETITIVE PROCESS

This Section begins (in Section IV.C.1) by establishing a framework for analyzing vertical mergers under the protection of competitive process standard.[167] The Section then (in Section IV.C.2) evaluates the two competition-based standards by looking at their substantive abilities to capture and protect the essence of competition, as well as their administrability. Section IV.C.2.a first argues that the trading partner welfare standard fails to recognize that "competition" is not limited to the relationships and interactions between sellers and buyers, but also includes dynamics between sellers who compete in the market. Section IV.C.2.b then notes that balancing the various harms and benefits among trading partners is no more administrable than asking courts

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165. *Id.* at 746.

166. The same is true when applied to vertical restraints cases. For criticism on the use of neoclassic efficiencies standard on vertical restraints cases, see John J. Flynn & James F. Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. REV. 1125 (1987).

167. After this note is drafted, on July 19, 2023, the Federal Trade Commission and the Department of Justice released a draft update of the Merger Guidelines for public comment. *Merger Guidelines for Public Comment*, U.S. DEP'T JUSTICE & FED. TRADE COMM'N (July 19, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf. In many ways, the proposed guidelines are consistent with the process-based approach, by directing the focus to the competition among rivals and market structure. *See id.* at 15. ("Mergers should not substantially lessen competition by creating a firm that controls products or services that its rivals may use to compete."); *see also id.* at 17, n.52 ("("In addition to this structural analysis, many vertical mergers can also be analyzed under the ability and incentive analysis in Guideline 5. Either can be a sufficient basis to warrant concern.").

to make equitable judgments of business conduct under the protection of competition standard.

1. *Framework for Assessing the Competitive Process*

A true process-based standard should look at (1) the incentives and abilities of the merged firm to prevent downstream rivals from competing on the merits, and (2) whether the entry barriers in the downstream market are sufficiently high to raise competitive concerns. Under the first prong, a focus on the competitive process standard should debunk the popular but often misquoted slogan that antitrust protects competition, not competitors.[168] Protecting competitors against conduct that impedes competing on the merits *is* protecting competition. A showing of the merged firm's incentives and abilities to foreclose or RRC through sophisticated econometric modeling is sufficient but not necessary. Downstream competitors' abilities to compete on the merits can be further defined as offering goods or services at cheaper prices, better quality, or in any other way that attracts consumers.[169]

Under the second prong, regarding entry barriers, harms to downstream rivals by themselves are not sufficient to render a merger anticompetitive. A competitive process protects the robustness of the market as a whole, not any particular unintegrated downstream rival.[170] The requirement that plaintiffs must bear the burden of proving high barriers to entry in the downstream market would safeguard this principle. If the downstream market has low entry barriers and the loss of competition from the foreclosure effect can practically be replenished, the competitive process of the downstream market would not be harmed. Conversely, if the downstream market has high entry barriers or the if vertical merger is likely to result in high entry barriers, such as by creating the need for two-tier entry, the downstream competition would be harmed and the merger is anticompetitive.

Moreover, efficiency claims should not be credited as a defense when the two prongs are met.[171] It is true that any efficiencies gained through vertical integration may give the merged firm an incentive to pass those efficiencies down for the benefit of consumers. Accordingly, some may argue that

168. Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338 (1990) (quoting Brown Shoe Co. v. United States, 82 S. Ct. 1502, 1521(1962)) ("The antitrust laws were enacted for 'the protection of competition, not competitors.'").

169. *See* Wu, *supra* note 131, at 9 (arguing that enforcers should consider whether the complained-of conduct is "competition on the merits," namely a better or cheaper product).

170. *See* United States v. Aetna Inc., 240 F. Supp. 3d 1, 18 (D.D.C. 2017) ("[T]he Clayton Act protects 'competition,' rather than any particular competitor.").

171. Of course, defendants can still rebut the prima facie harm by showing that the plaintiffs fail to meet the two prongs test.

efficiency should be credited as a part of "competition on the merits." However, conducts that harm the competitive process may increase efficiency in the short run. For example, efficiency gained from vertical integration may simultaneously create incentives to foreclose downstream unintegrated rivals.[172] For mergers that do not impede on the competitive process, which are most mergers, firms are free to achieve efficiencies through vertical integration. But for vertical mergers that generate substantial efficiency benefits, the potential harm to competition is also more likely.[173] Crediting efficiency gains based on overall consumer welfare increases[174] would put consumers' benefits before harms to a fair competitive process. In light of the incipiency standard enunciated by the Clayton Act, harms to the competitive process, once established, cannot be cured through efficiency claims.

2. The Competitive Process Standard is Better Suited to Protect Competition

This Section addresses two reasons why the protection of competitive process standard is better than the trading partners welfare standard. First, competition serves to safeguard both consumers and competitors. Thus, the trading partner welfare standard is not sufficient to capture the essence of competition when it ignores harms to competitors. Second, the trading partner welfare standard cannot capture dynamic competitive harms and thus is no more administrable than the competitive process standard.

a) The Competitive Process Serves Both Consumers and Competitors

Mainstream progressives argue that competition is fundamentally intended to serve consumers.[175] Mere harms to competitors are not actionable harms because "many forms of legitimate competition harm rivals but benefit customers."[176] Thus, the trading partners welfare standard becomes a useful tool to separate legitimate competitive conduct from illegitimate conduct. However, the trading partner welfare standard presents an interesting issue when applied to the vertical merger context. Since vertical mergers necessarily involve two stages of a supply chain, trading partners in a vertical merger can arguably include downstream unintegrated rivals who rely on the upstream

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172. *See* Yongmin Chen, *On Vertical Mergers and Their Competitive Effects*, 32 RAND J. ECON. 667, 681 (2001) ("[A] firm can raise rivals' cost through vertical integration if and only if its own cost is reduced through the integration.").

173. *Id.*

174. *See* 2020 Vertical Merger Guidelines, *supra* note 19, § 6 (identifying efficiencies gains that lead to lower prices to consumers as potential procompetitive benefits that would counterbalance incentive to foreclose or raise rivals' costs).

175. Shapiro, *supra* note 15, at 38.

176. *Id.*

supplier. Under a consumer welfare standard, as outlined in the 2010 HMG and 2020 VMG, a "consumer" was considered to be the direct consumer of the downstream firm.[177] Therefore, harms to downstream rivals were not considered in the analysis, despite the fact that they are consumers of the upstream firm prior to the merger.

Under a trading partner welfare standard, a similar question arises: are downstream unintegrated rivals considered as trading partners whose harms are recognized under the expanded standard of trading partner welfare?[178] The mainstream progressives fail to give a consistent answer to this question. The general consensus is that harms to downstream unintegrated rivals are not by themselves sufficient to render a merger anticompetitive.[179]

But tensions arise when a vertically integrated firm has the incentive and ability to foreclose downstream rivals, yet at the same time generates cognizable, merger-specific efficiencies that benefit downstream customers.[180] Some commentators acknowledge that when the merged firm has the ability and incentive to raise costs for the unintegrated downstream rivals, the impact "could be said to disrupt competition on the merits."[181] On the other hand, the welfare-based reformers nonetheless suggest a final balancing of the welfare effect on the consumers. Some commentators proposed using a burden-shifting rule that allows a plaintiff to shift the burden to the merging parties once the plaintiff establishes harms to downstream rivals.[182] Then, the merging parties must bear the burden to produce evidence of merger-specific benefits, including accounting for the elimination of double marginalization and other efficiency claims.[183] Next, if the merging parties are able to rebut the prima facie case, the plaintiff bears the ultimate burden of persuasion to show the net effect on the downstream customers.[184]

Under a foreclosure or RRC theory, for example, prima facie harm is established if the plaintiff can show that the merged firm has the ability and

177. *See supra* notes 112–113 and accompanying text.

178. *See* Salop, *supra* note 23, at 1985 ("One key legal and policy issue raised here is whether it should be sufficient for the government just to prove likely higher prices or other injury to the customers of the upstream firms (i.e., the unintegrated downstream competitors) or whether it is also necessary to show harm to the customers of the downstream competitors.").

179. Shapiro, *supra* note 99, at 320 ("The 2020 VMGs evaluate input foreclosure concerns based on their impact on downstream customers . . . I believe there is a consensus that this is the proper way to evaluate vertical mergers.").

180. Salop, *supra* note 23, at 1985.

181. *Id.* at 1985.

182. *Id.* at 1986.

183. *Id.*

184. *Id.*

incentive to foreclose or significantly raise rivals' costs.[185] Then, the merging parties can rebut the prima facie case by proving that the efficiencies are cognizable and merger-specific.[186] Ultimately, the case comes down to modeling the welfare tradeoffs on downstream firms' consumers when both foreclosure effect and efficiencies are present.[187]

The welfare-based reformers claim that a change in the burden of proof would remove the undue burden on the plaintiff and encourage the parties to "seriously balanc[e]" the pricing effect when necessary.[188] But if the goal is to protect competition on the merits and impede harms to downstream rivals on their ability to compete with the merged firm on the merits, why engage in the final balancing at all? This gap between the harms to the process and harms to consumers demonstrate that mergers that harm the competitive process may not always result in harms to consumers. Alternatively, firms that compete vigorously can produce sub-optimal allocations of resources and may not directly benefit consumers economically. Most vertical mergers that harm downstream rivals are likely to result in harm to consumers.[189] But equating consumers' economic welfare to the vigorousness of competition is both under- and over-inclusive.

b) Welfare Cannot Capture Dynamic Harms, at Least Not Without Sacrificing Administrability

Even if the ultimate goal of competition is to serve consumers, a trading welfare standard can easily fall into the same fraught fixation over qualifiable evidence as the consumer welfare standard. To the extent that the mainstream progressives' rebranding is successful, a trading partner welfare standard is likely to be extremely hard to administer. To begin, "welfare" in a technical sense does not necessarily cover the general notion of consumer interest or supplier interest.[190] Granted, in theory, a welfare standard can be defined broadly enough to encompass a broad range of long-term interests, such as innovation, consumer satisfaction, etc. But in reality, courts often require quantifiable economic analysis as evidence, starting from market definition to the defendant's abilities and incentives to engage in anticompetitive conduct

185. Shapiro, *supra* note 99, at 332 (delineating how agencies may seek to prove a prima facie case of harm to competition).
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. Fox, *supra* note 10, at 1161.

post-merger.[191] A simple rebranding of consumer welfare would not resolve the issues of technocracy and inhospitality towards less quantifiable interests, particularly when proof of additional harm to consumers is required.

Second and relatedly, broadening the concept of welfare to encompass a broad range of interests, such as innovation and product quality, would greatly undermine the administrability of the welfare standard. To illustrate, consider a vertical merger that would allow the merged firm to gain access to competitively sensitive information about its downstream rivals. Like the government in *UnitedHealth Group*,[192] the plaintiff would allege a harm to innovation based on the theory of data misuse. Assuming the plaintiff can successfully establish a prima facie harm, the defendant would aim to rebut the case by arguing that the merger-specific efficiency benefits of the merger lower prices for consumers. How should a court balance alleged long-term consumer harm stemming from the potential loss of innovation against efficiency gains by the defendant and the alleged short-term consumer welfare gain? While the welfare approach provides a helpful model to trading off conflicting welfare effects, it gives little instruction on how to tradeoff between different types of welfare harms.

Critics of the protection of competitive process standard have frequently attacked the New Brandeis school's process-based approach for its indeterminacy, administrability, and unsophistication.[193] But it is no less indeterminant or un-administrable than the trading partner welfare standard. Protecting competition and confronting novel business practices is no easy task. It is particularly true if the goal is to avoid false negative error,[194] in light of weakened merger enforcement under the Chicago School's dooming influence. In that sense, the protection of competitive process standard offers a clean slate to define the role of markets and unfair business conduct.

As aforementioned, a process-based standard need not deviate from sound economic learning. Industrial economic theories are and will continue to be helpful in identifying changes to firms' incentives and abilities to prevent rivals from competing on the merits. The protection of competitive process standard

191. *See* United States v. AT&T, Inc., 310 F. Supp. 3d 161, 190 (D.D.C. 2018), *aff'd*, United States v. AT&T, Inc., 916 F.3d 1029 (D.C. Cir. 2019) (holding that the government must base its case on evidence and facts, instead of antitrust theory and speculation).

192. *UnitedHealth*, 2022 WL 4365867.

193. *See, e.g.*, Hovenkamp, *supra* note 15, at 89 (arguing that "protection for competitive process" operates as a slogan, not as a goal because it "lacks sufficient definition and does not create a meaningful target for measurement").

194. A false negative error in this context means finding no anticompetitive effect when the merger in fact has. *See supra* note 70 (defining false negative and false positive errors in merger analysis).

emphasizes that economic theories and models are tools that help us understand the relationships between business entities, rather than limiting principles. The protection of competition is itself a protection of economic liberty, which inevitably has the indirect effect of protecting other social and political values. It should be driven by a determination of right and wrong conduct in the market. The inquiry is purely about the economy, but not purely economic. Defining desirable market conduct thus requires deeper discussions to draw the line between fairness and efficiencies, individuals and communities.

V. CONCLUSION

Vertical merger enforcement has become the front and center of antitrust debates. It offers a great opportunity to reevaluate the role of antitrust law in our society. Despite the decades of debates over the proper goal of antitrust, antitrust law is about protecting a competitive process. Congress's decision in entrusting "competition" as the governor of the market reflects a careful balancing between the benefits of integrated efficiencies and deconcentrated economic powers; between private contractual and property rights and the broader sense of fairness embedded in our legal system.

Conversations and disagreements about the definition of competition and what role antitrust law should play in facilitating competition are encouraged. Vertical merger enforcement presents a unique opportunity for this debate: Whose harms and whose benefits should we recognize? How should we balance harms and benefits when they are borne by different groups? How should we balance long-term harms and short-term benefits? These are hard questions that require more vigorous discussions about the role of regulation in the markets and the normative values of economic liberty. Hopefully, this Note provides a forum for that.