



Response by the Open Markets Institute to the Request by the  
Federal Trade Commission and the Antitrust Division of the  
Department of Justice for Information on Merger Enforcement

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Table of Contents

Executive Summary ..... 3

Key Recommendations ..... 4

I. Facts and Principles of America’s Antimonopoly Tradition ..... 6

II. Establishing New Guidelines to Achieve the Aims of Section 7 of the Clayton Act..... 8

III. The New Merger Guidelines Must Incorporate Bright-Line Rules ..... 11

IV. The DOJ’s 1968 Guidelines Are a Template Upon Which the DOJ and FTC Should Build  
New Merger Guidelines ..... 11

V. The New Guidelines Should Close the Gap in Regulation on Conglomerate Mergers ..... 13

VI. The New Guidelines Should Incorporate a Qualitative Approach to Market Definition .. 13

VII. Consistent With Controlling Precedent, the New Guidelines Should Not Include a  
Defense for Efficiencies Gained Through Mergers ..... 16

VIII. Conclusion..... 17

Appendix ..... 18

    Mergers Harm the Public and Lead to Price Increases..... 18

    Mergers Do Not Improve Efficiency..... 18

    Mergers Harm Workers ..... 19

    Mergers Constitute a Waste of Resources ..... 19

## *Executive Summary*

The Open Markets Institute<sup>1</sup> offers this comment in response to a request by the Antitrust Division of the Department of Justice and the Federal Trade Commission for ideas on how to strengthen and improve merger enforcement and update it to address new challenges created by the shift of commerce and communications to digital platforms.<sup>2</sup>

We argue that the merger guidelines used by regulators since the early 1980s depart from the core principles that have historically governed America's political economy and that were essential to preserving American liberty and prosperity. We further argue that the lax merger guidelines used over the past 40 years have contributed to unprecedented concentrations of economic and political power that threaten both America's economy and its democratic institutions.

To remedy these ill effects, we recommend that regulators reestablish traditional bright-line merger rules based on market share, similar to those detailed by the Justice Department in its 1968 guidelines. We further recommend that regulators develop and adhere to guidelines that explicitly align with the clear intention of Congress in passing the Clayton Act of 1914 and its 1950 amendment.

Such legislation, upheld by ample Supreme Court precedence, calls for the prosecution of even incipient monopolies and the use of bright-line rules instead of the so-called rule of reason. We also call for new, clearer rules for defining the scope of markets and acceptable behaviors by the corporations that control essential networks and services. Finally, we call for an immediate, bright-line prohibition on all acquisitions by Google, Facebook, and Amazon, until Congress and regulators have implemented a coherent system for regulating the power and business models of these providers of essential communications and commercial services.

Adopting these and other recommended changes to the merger guidelines will not, in and of itself, solve America's monopoly crisis. But by crafting guidelines that align with the main thrust of an American antimonopoly tradition that traces to our nation's founding, and by bringing cases based on these guidelines, the DOJ and FTC can help clarify 1) the nature of America's present monopoly crisis, 2) the source of the problem in an ideology that promoted purported efficiency over any other political, social, or economic goal; and 3) how law enforcers, the judiciary, Congress, the business community, and the public can all contribute to rebuilding a robust political economy that once again supports democracy, equality of opportunity, national and economic security, and that serves the public interest.

## ***Key Recommendations***

Merger guidelines should:

- Reflect the overarching philosophy that has historically informed our nation’s controlling antimonopoly laws, including Congress’s clear intention that regulators use these laws to foster the principles of liberty and equality of opportunity embedded in our Constitution.
- Reestablish bright-line rules based on the Department of Justice’s 1968 Merger Guidelines. In most sectors of the economy, these should 1) limit the size of any one producer to 25% of the market, 2) outlaw horizontal mergers that would reduce the number of producers in any market to fewer than five, and 3) limit vertical mergers involving suppliers that control 10% of supply of a particular good or service.<sup>3</sup>
- Develop clear market definitions and reestablish other bright-line rules to govern the behavior of all corporations that provide essential network, platform, and utility services, including an absolute ban on all discrimination in the pricing and delivery of such services.
- Develop clear market definitions and reestablish other bright-line rules for the many sectors in which there are limited economies of scale and strong social benefits through competition policies that advance local and smaller-scale ownership, including retail, farming, services, and light manufacturing, as Congress intended in 1950 when it demanded such protections for “any line of commerce in any section of the country.”
- Ensure that reviews consider the effects of a proposed merger on the resiliency and stability of industrial and financial systems, labor markets, supplier markets, data markets, and the privacy of individuals, while radically reducing the focus on pricing.
- Define labor markets by three factors: 6-digit Standard Occupational Classification (SOC) code, commuting zone, and quarter.<sup>4</sup>
- Use practical facts and marketplace realities to define relevant markets, as set forth in *Brown Shoe*.<sup>5</sup>
- Challenge *any* acquisition by a dominant firm, based on the Clayton Act’s incipency standard, which prohibits mergers and acquisitions that “tend to create a monopoly.”<sup>6</sup> Define a dominant firm as one having a market share of more than 25% in any relevant market.<sup>7</sup> Also allow dominance to be proven using direct evidence.
- Encourage regulators to challenge any acquisition in which direct evidence shows competitive harm.
- Establish a rule that no illegal merger may be cured with merger conditions, whether behavioral or structural.
- Restore the clear ban on the efficiency defense for mergers, and carefully restrict the failing firm defense.
- Prohibit acquisitions by firms that have violated antitrust laws or merger conditions within the past 10 years.<sup>8</sup>
- Establish a temporary bright-line prohibition on all acquisitions by Google, Facebook, and Amazon, until Congress and regulators have implemented a coherent system for

regulating the power and business models of these providers of essential communications and commercial services.

## ***I. Facts and Principles of America's Antimonopoly Tradition***

For the first 200 years of our nation, the American people viewed antimonopoly law and policy as a foundation for democracy — a way to protect the basic liberties of the individual and to ensure a wide and safe distribution of power, control, wealth, and opportunity. Specifically, antimonopoly law and regulation extended the constitutional system of checks and balances into the political economy, thereby becoming a primary means for achieving democratically determined political, social, and economic goals.<sup>9</sup>

Until the 1880s, antimonopoly law and regulation were enforced mainly by state and local governments. This centered on robust regulation of local markets, and extremely close control of corporate behavior through direct chartering. American law treated corporations as political institutions, not as properties. They were licensed under state charters to exercise certain forms of control over property, people, and sometimes markets, and to always be answerable to the people.<sup>10</sup> Federal antimonopoly law, including but not limited to the use of antitrust statutes, became necessary only when the new technologies of the railroad and telegraph empowered corporations to operate effectively across state borders.

A central goal of this antimonopoly tradition was the preservation of individual liberty. As Senator John Sherman expressed the idea in his main speech defending the landmark 1890 federal antitrust legislation that bears his name, “It is the right of every man to work, labor, and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances. This is *industrial liberty*, and lies at the foundation of the equality of all rights and privileges.”<sup>11</sup>

In the 20<sup>th</sup> century, these core values found further expression in other landmark legislation that remains controlling law, including the Federal Trade Commission Act and Clayton Act with its 1950 amendments. Though sometimes ignored or misinterpreted by a reactionary judiciary, these statutes continue to provide federal regulators broad powers to police dangerous concentrations of power and control and to structure markets in ways that promote the preservation of our constitutional system of checks and balances and the public interest.

During this era, the American people updated the legal and analytical tools they use to distinguish clearly between 1) corporations that control networks, platforms, and utilities essential to normal communications and commerce, 2) corporations engaged in the development and provision of hardware and software and where vertical integration and mass production often provide public benefit, and 3) enterprises that can be organized along local and regional lines and can be owned and operated by individual families.

In the first half of the 20<sup>th</sup> century, Americans also refined and formalized the bright-line rules they have used since the founding to help guide antimonopoly thinking and enforcement, and to protect antimonopoly enforcement against arbitrary politicization, by establishing clear rules for achieving the original political intent of the laws. During this era, freedom of expression and of

the press were especially high priorities for enforcement. As Robert Pitofsky, the late chairman of the FTC, once said, “If you have issues in the newspaper business, in book publishing, news generally, entertainment... you want to be more careful and thorough in your investigation than if the very same problems arose in cosmetics, or lumber.”<sup>12</sup>

But starting about 40 years ago, under the influence of Robert Bork and other market libertarians, the guidelines published by federal antitrust agencies were redrawn in ways that grossly disregard both the clear intention of Congress and the American people and much of the controlling law of the nation. They did so by applying a deeply antidemocratic pro-merger ideology designed to maximize “productive efficiency” foremost, theoretically in the name of the “welfare” of the “consumer.” They then buttressed this ideology with a claim that antitrust law is a form of “science” and that it is the job of “economic analysis” to “test the propositions of the law.”<sup>13</sup>

This ideologically driven change in prosecutorial guidelines has led to unprecedented numbers of mergers and exceptionally high levels of corporate concentration in nearly every sector of the economy. Though the advocates for these changes promised that they would bring increased efficiency, lower prices, and improved “consumer welfare,” we now have 40 years of accumulated evidence showing the opposite. Study after study shows that mergers and other forms of concentration routinely lead to price increases, including for such basics as food and shelter. Nor do mergers improve efficiency; on the contrary, they routinely waste resources. (see Appendix).

Moreover, the concentration of power and control over the past 40 years threatens far more harms. These include:

- Disruption of the free exchange of news and information.<sup>14</sup>
- Surveillance of citizens, and the use of their personal data to manipulate them for profit.<sup>15</sup>
- Manipulation of elections and political institutions by foreign states.<sup>16</sup>
- Structural reduction of the wages and benefits of working Americans.<sup>17</sup>
- Rampant health care inflation and inequities.<sup>18</sup>
- Destruction of industrial and transportation capacities in ways that create systemic shortages of vital goods and services.<sup>19</sup>
- The stunting of entrepreneurship, and the taxation, extortion, and theft of individual business, farms, and homes.<sup>20</sup>

Today’s guidelines have also led to widespread confusion and bafflement by courts, regulators, and affected businesses. Judges, influenced by inappropriate guidelines, routinely contradict controlling case law. Regulators, operating under guidelines that embed a “consumer welfare” standard, too often feel unable to prosecute cases that involve other forms of harm even though decades of Supreme Court precedents and statutory law say they should. Businesses large and small meanwhile face a regulatory environment in which there are no longer bright-line rules for when mergers are permissible or not.

Adoption of the consumer welfare ideology has, in fact, made a mockery of large portions of the justice system of the United States. In place of bright-line rules designed to provide clear guidance to law enforcers, the judiciary, entrepreneurs, executives, investors, and the public, the agencies have substituted a system that depends on arcane, esoteric, unwritten, and ever-changing “economic” models that open the law itself to arbitrary and even absurd interpretation. In place of justice achieved through the application of democratically established law and reason, we have swapped in an ideology that holds that the law itself is “shaped by economic forces,” and that “the logic of the law” is “economics.”

Over the past five years or so, there has been a growing bipartisan realization that America faces a monopoly crisis, and the lax enforcement standards in place over the past 40 years are a major cause. This awakening includes President Joe Biden, who, in a speech on America’s monopoly crisis, condemned in the strongest of terms the “consumer welfare” ideology, with its focus on efficiency foremost. “Forty years ago, we chose the wrong path... following the misguided philosophy of people like Robert Bork, and pulled back on enforcing laws to promote competition,” the president said. “We’re now 40 years into the experiment of letting giant corporations accumulate more and more power. And... what have we gotten from it? Less growth, weakened investment, fewer small businesses. Too many Americans who feel left behind. Too many people who are poorer than their parents.”

The political and economic results of this experiment are unacceptable, the president said. “Capitalism without competition isn’t capitalism; it’s exploitation. Without healthy competition, big players can... charge whatever they want and treat you however they want.”

Then President Biden made his strategic goal clear. “I believe the experiment failed. We have to get back to an economy that grows from the bottom up and the middle out.”<sup>21</sup>

The Open Markets Institute is under no illusion that the action of adopting these and other recommended changes to the merger guidelines can, in and of itself, solve America’s monopoly crisis. But by crafting guidelines that align with the main thrust of an American antimonopoly tradition that traces to our nation’s founding, and by bringing cases based on these guidelines, the DOJ and FTC can help clarify 1) the nature of America’s present monopoly crisis, 2) the source of the problem in an ideology that promoted purported efficiency over any other political, social, or economic goal; and 3) how law enforcers, the judiciary, Congress, the business community, and the public can all contribute to rebuilding a robust political economy that once again supports democracy, equality of opportunity, national and economic security, and that serves the public interest.

## ***II. Establishing New Guidelines to Achieve the Aims of Section 7 of the Clayton Act***

With these fundamental principles in mind, the Open Markets Institute believes the immediate practical mission of the Department of Justice and Federal Trade Commission in establishing new Merger Guidelines is to detail how they intend to enforce Section 7 of the Clayton Act, in ways that are faithful to the original intent of Congress.<sup>22</sup>

As amended in 1950, Section 7 calls on enforcers to block any effort to “acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of



commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”

It is important to note that Congress passed the Clayton Act itself in response to the Supreme Court’s 1911 ruling in *Standard Oil*.<sup>23</sup> In *Standard Oil*, the Supreme Court stated that only restraints it deemed “unreasonable” would violate of the Sherman Act and that the “criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason[.]”<sup>24</sup> In other words, the Supreme Court ruled that it would decide what conduct violates the Sherman Act on a case-by-case evaluation of “reasonableness.” Viewing this as a usurpation of its prerogatives to structure the economy,<sup>25</sup> Congress enacted the Clayton Act in 1914, which remedied the court-created deficiencies by identifying restricted business practices, such as exclusive dealing, tying, and mergers, and established the incipient monopoly standard in merger cases.

In 1950, Congress again lowered the statutory threshold of the Clayton Act for mergers and acquisitions. The 1950 amendments were in part a response to the Supreme Court’s 1930 revision of the standard of illegality in the original Clayton Act. In *International Shoe Co. v. FTC*, the Court held that only mergers that “probably will result in lessening competition...to such a degree as will *injuriously affect the public*” were prohibited by Section 7.<sup>26</sup> Thus, the Supreme Court in *International Shoe* effectively converted the original Clayton Act’s incipency standard back into the Sherman Act’s rule of reason. The Supreme Court’s holding resulted in almost no merger cases being brought under the original 1914 Clayton Act between 1930 and 1950.<sup>27</sup>

When Congress amended the Clayton Act in 1950, it sought to implement a robust anti-merger measure capable of preventing mergers that concentrated markets, destroyed communities, and threatened democratic institutions. What this meant in practice is that the act should be interpreted broadly and should not be enforced under a rule of reason framework.<sup>28</sup>

A rule of reason framework creates several problems that Congress specifically sought to avoid. First, it puts judges in the position of trying to distinguish between good monopolies and bad monopolies, based on the claims of contending hired “experts” about essentially unknowable price effects, when their charge should simply be whether a combination will result in a company having a market share that goes beyond a specified threshold. As the Supreme Court aptly stated in *Philadelphia National Bank*, engaging in such an extensive analysis would “subvert[] congressional intent by permitting a too-broad economic investigation.”<sup>29</sup>

Indeed, a rule of reason approach puts extraordinary responsibilities and demands on the judiciary. Federal judges are generalists who typically do not have experience or specialized knowledge in antitrust or economics, much less the specific features of different industries. Under the current merger guidelines, the judiciary must set “sail on a sea of doubt”<sup>30</sup> and “ramble through wilds of economic theory.”<sup>31</sup> Both plaintiffs and defendants devote significant financial resources — assigning or hiring large teams of lawyers and economists — to review all relevant facts and build cases on whether a merger likely will, or will not, hurt competition. This type of cost-benefit analysis is more akin to legislative or regulatory deliberation than litigation in court.<sup>32</sup> Ultimately, a judge, or a panel of judges, must decide whether the plaintiff’s or the

merging parties' story of the effects of the merger is more credible. In interpreting the Sherman Act in 1972, in *Topco Associates*, a Supreme Court that was deferential to congressional intention warned against an open-ended rule of reason in interpreting the Sherman Act, stating, "If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision that must be made by Congress and not by private forces or by the courts. . . ."<sup>33</sup>

Under the rule of reason, enforcers and judges enjoy almost unlimited discretion to decide what conduct is illegal.<sup>34</sup> However, courts must adhere to the legislative intent and recognize that it is Congress, not the courts, that is ultimately tasked with setting rules to govern the economy. Once again, the *Topco* court was correct: "[C]ourts are ill-equipped and ill-situated for such decision-making. To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required."<sup>35</sup>

During the legislative debates for the 1950 amendments, Representative Bennett stated that "[The] greatest value [of Section 7] lies in protecting our citizenry from domination by business interests so large and monopolistic that the voices of average people cannot be heard in their thunder[.]"<sup>36</sup> Senator Kefauver stated, "The increased concentration of economic power is dooming free enterprise. The present trend of great corporations to increase their economic power is the antithesis of meritorious competitive development."<sup>37</sup> The job of law enforcement officers and of the courts is to achieve these aims by enforcing these laws.

The Supreme Court has provided additional clear guidance that aligns with this legislative intent. The Court, for instance, has elaborated that the incipency standard is the "keystone" to effectuating the legislative purpose of the Clayton Act and adheres to Congress's intent of maintaining dispersed economic power and stopping the harms derived from mergers before they occur.<sup>38</sup> In *Procter & Gamble*, the Supreme Court stated that "there is certainly no requirement that the anticompetitive power manifest itself in anticompetitive action before [Section] 7 can be called into play. If the enforcement of [Section] 7 turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipency would be frustrated."<sup>39</sup> The federal courts of appeals have repeatedly applied the incipency standard as articulated by the Supreme Court.<sup>40</sup>

In *Procter & Gamble*, the Court interpreted the incipency standard to ensure that the Clayton Act would serve as a strong check against consolidation. The Court held that, to enjoin a merger, the government and other plaintiffs need only demonstrate public harms, whether to consumers, suppliers, or rivals, based on "probabilities, not with certainties."<sup>41</sup> The Supreme Court has stated that requiring more evidence than that would contradict "the congressional policy of thwarting [mergers] in their incipency."<sup>42</sup> The courts have consistently held that evidence that presents a "reasonable probability" of harm, as opposed to certainty of harm, is enough to establish that a merger violates the Clayton Act.<sup>43</sup>

### ***III. The New Merger Guidelines Must Incorporate Bright-Line Rules***

Open Markets believes that the DOJ and the FTC, in developing new merger guidelines, should be faithful to the statutory text, legislative intent, and case law of the Clayton Act. Toward this end, the agencies should publish guidelines that identify illegal mergers based on bright-line rules tied to market share and market concentration.

The bright-line rules apply the Clayton Act's incipiency standard and principles contained within the larger framework of America's antimonopoly regime as a whole, as we detail in the Key Recommendations section of this comment. Congress designed the Clayton Act to be a robust measure against mergers that harmed the public and codified this as a prohibition against all mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly." Bright-line rules adhere to this command by acknowledging that mergers should be prohibited if specific thresholds are exceeded. Bright-line rules prevent the use of a rule of reason framework and an overly broad legal process, which Congress sought to avoid.

We believe that such bright-line rules strongly buttress and promote transparency and the rule of law. The lack of rules concerning mergers compounds the existing opacity of the entire review process.<sup>44</sup> Under the current merger review process, whether a certain merger is legal or illegal is difficult to determine in advance — and often impossible for even an informed member of the public to predict. Under these circumstances, businesses face great challenges in planning their expansion strategies with confidence — when they should pursue mergers and acquisitions and when they should pursue internal expansion.

Bright-line rules, on the other hand, are less subjective than our current enforcement regime. To enforcers they offer the opportunity to bring cheaper, faster, and more clear-cut cases. By stating which mergers are allowed, bright-line rules clarify for businesses, and for judges, when conduct is illegal.

### ***IV. The DOJ's 1968 Guidelines Are a Template Upon Which the DOJ and FTC Should Build New Merger Guidelines***

To standardize merger enforcement and apply Supreme Court precedent,<sup>45</sup> the DOJ published the first merger guidelines in 1968.<sup>46</sup> Open Markets believes they serve as a template for merger enforcement that the DOJ and FTC should follow and build upon.<sup>47</sup>

The 1968 Guidelines announced a set of bright-line rules for when the DOJ would challenge a merger as illegal under the Clayton Act. For example, the 1968 Guidelines detailed that a horizontal merger would violate the Clayton Act and thus be challenged by the department if the top four firms in an industry had a combined market share of greater than 75% and two firms each with 4% or more of that market attempted to combine. The analysis for vertical mergers was similar. The DOJ stated a vertical merger would be challenged if a supplier with 10% or more share in one market and an actual or potential customer in another market had 6% or more market share in a downstream market.

These guidelines followed controlling Supreme Court case law and generally rejected an efficiencies defense for illegal mergers. The guidelines also provided ample flexibility for midsize and smaller firms. The DOJ, for instance, noted that two small rivals could merge and acquire scale, likely without exceeding the market share and concentration tests in the guidelines. Further, it stated that “where substantial economies are potentially available to a firm, they can normally be realized through internal expansion[.]”<sup>48</sup>

The only defense to an otherwise illegal merger should be if the acquired party is on the verge of failure in the absence of the proposed consolidation. The failing firm defense is a narrow legal justification that allows merging parties to justify an otherwise illegal transaction.<sup>49</sup> The Supreme Court has stated that allowing a firm to complete an otherwise illegal merger is the “lesser of evils” such that the potential injury to competition is outweighed by harms to society from the liquidation of one of the merging parties.<sup>50</sup>

To ensure the effective enforcement of Section 7 of the Clayton Act, the DOJ’s and FTC’s new merger guidelines should *not* incorporate a weakened competitor defense. The weakened competitor defense is asserted by defendants to justify a transaction on the basis that the firm being acquired is no longer an effective competitor in an industry. Since the defense attempts to circumvent the high barrier established by the failing firm defense, it effectively tries to sidestep the enforcement of the Clayton Act. Many appellate courts expressly disapprove of the defense. The Sixth Circuit, for instance, has deemed the defense “the Hail–Mary pass of presumptively doomed mergers[.]”<sup>51</sup> The Seventh Circuit went even further and stated that the defense is “probably the weakest ground of all for justifying a merger.”<sup>52</sup> The Ninth Circuit has also rejected the defense and noted that the Supreme Court affirmed a district court decision that rejected the defense.<sup>53</sup>

Additionally, the DOJ and FTC should adopt a policy in the new guidelines that prohibits acquisitions from firms that have engaged in repeated violations of the antitrust laws or merger conditions detailed in consent decrees and other settlements in the past 10 years. We believe this policy accords with the incipency standard and will prevent harmful mergers. A recent example illuminates this recommendation. In 2021, the FTC allowed the acquisition of Celgene by Bristol-Myers Squibb, even though the company has repeatedly violated the antitrust laws.<sup>54</sup>

Along similar lines, remedies for illegal mergers, whether structural or behavioral, should be rare and exceptional, not the normal practice. Such a practice conflicts with Congress’s legislative decision to halt consolidation in its incipency.

Bright-line rules should provide a simple and easy-to-understand mainstay for merger analysis. But the DOJ and the FTC should also provide for the use of other types of direct evidence, when available, to establish the illegality of a merger. They should use certain “hot documents” to make a case that a proposed acquisition is illegal. For example, if a company’s CEO communicates to deputies and staff by email that he intends to acquire a rival to enhance the company’s pricing power against consumers or wage-setting power against workers, these emails should constitute evidence of this acquisition’s illegality.

## ***V. The New Guidelines Should Close the Gap in Regulation on Conglomerate Mergers***

The 1968 Guidelines were not perfect. They failed to adequately address conglomerate mergers, which are neither horizontal nor vertical. Instead, the guidelines stated that the DOJ would evaluate conglomerate mergers on a case-by-case basis. As a result of this regulatory gap, conglomerate mergers were the predominant type of consolidation that took place during the merger wave of the 1960s and 1970s.<sup>55</sup>

Conglomerate mergers are especially dangerous in the context of tech platforms. When the critical resource is data, the positive feedback effects between large data sets and machine learning techniques mean that the firms with the largest and richest data sets can not only dominate their own sectors but also take over others.<sup>56</sup>

To address conglomerate mergers, the DOJ and the FTC should declare that they will challenge *any* acquisition by a dominant firm. The agencies should define a dominant firm as one having a market share of more than 25% in any relevant market.<sup>57</sup> They should seek to stop dominant firms from acquiring rivals, suppliers, distributors, and any other firms, including those that are not connected to any market in which the dominant firm participates. Through such acquisitions, dominant firms can neutralize a firm that is poised to compete directly with them or extend their dominance into new markets. This targeting of dominant firm acquisitions would be faithful to the Clayton Act's prohibition on mergers and acquisitions that "tend to create a monopoly."<sup>58</sup> The new guidelines should use the 1968 Guidelines' market share numbers to apply to both the seller-side and buyer-side markets affecting labor.

## ***VI. The New Guidelines Should Incorporate a Qualitative Approach to Market Definition***

Defining the relevant market is arguably the most crucial step in antitrust litigation.<sup>59</sup> Most antitrust violations require a defined relevant market to determine the existence of market power or monopoly power.<sup>60</sup>

For the first 200 years of our nation's history, American law and regulation have generally done an excellent job of clearly distinguishing between three fundamentally distinct market structures: 1) when a corporation or corporations control networks essential to normal communications and commerce; 2) when corporations are engaged in the development and provision of hardware and software and where some degree of vertical integration and mass production may provide some public benefit; and 3) enterprises that can be organized along local and regional lines and can be owned and operated by individual families and small proprietors.

To regulate corporations that control essential facilities, such as railroads or telegraph and telephone networks, the American people repeatedly established clear laws that banned personalized forms of discrimination in pricing and terms of service, and that also prevented such utilities from engaging in adjacent lines of business. Railroads could not also be shippers, for example, and telephone companies were not allowed to become news organizations. If the same standard were applied today, it would mean for example that Facebook could not simultaneously be a communications utility, an advertising firm, and a publisher.

To avoid monopolization of markets for manufactured goods, such as steel or automobiles, the American people repeatedly established laws that clearly limited consolidation even in cases where mass production and some degree of vertical integration provided economies of scale and other efficiencies. A clear example is the 1968 Merger Guidelines, which limited the size of any one producer to 25% of the market, outlawed horizontal mergers that would reduce the number of producers in any market to fewer than five, and limited vertical mergers involving suppliers that controlled 10% of the supply of a particular good or service.

For enterprises that don't have large economies of scale and that serve important social values — such as locally owned stores or light manufacturing firms — the American people repeatedly established laws and policies that established much lower thresholds of concentration. One example is the Supreme Court's *Von's* decision in 1966, which found that a merger of two grocery store chains in Los Angeles was prohibited by the Clayton Act because it would have resulted in a single firm controlling a mere 7% of the regional market.<sup>61</sup>

Under the current merger guidelines, by contrast, enforcers typically use what is known as the “hypothetical monopolist test.”<sup>62</sup> The test is used to show whether a “product market contain[s] enough substitute products so that it could be subject to a post-merger exercise of market power significantly exceeding that existing absent the merger.”<sup>63</sup> Specifically, the test requires that a “hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products (‘hypothetical monopolist’) likely would impose at least a small but significant and non-transitory increase in price (‘SSNIP’) on at least one product in the market, including at least one product sold by one of the merging firms.”<sup>64</sup> Other economic tests as well have become the predominant methods that plaintiffs and defendants use to define the relevant market.<sup>65</sup>

Most of these tests, including the hypothetical monopolist test, have never been explicitly required by the Supreme Court.<sup>66</sup> And rather than providing clarity for the courts and enforcers to define the relevant market, the entire process is opaque and complicated and sometimes bears little relation to the way market participants understand their markets and identify their rivals. Reviews of the hypothetical monopolist test show that it can overstate or understate the boundaries of the relevant market. One economist even found that the test can produce “purely arbitrary results.”<sup>67</sup> Some proponents of the current economic tests admit that the current econometric tests used to define the relevant market can be “misused” to produce overly broad markets.<sup>68</sup>

Open Markets believes that the Supreme Court's *Brown Shoe* holding and its progeny provide a superior framework for defining relevant markets for product and non-labor input markets. With respect to labor markets, we suggest the definition proposed by Azar, Marinescu, Steinbaum, and Taska, in which a labor market is defined as consisting of 6-digit Standard Occupational Classification (SOC) code, commuting zone, and quarter. Strong empirical support is provided therein.<sup>69</sup>

In merger cases from the 1960s, the Supreme Court relied on qualitative data to construct a relevant market and determine whether a violation occurred.<sup>70</sup> The Supreme Court in *Brown*

*Shoe* gave clear instructions on how litigants can proceed with defining the relevant market. The Court stated, “The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.” Additionally, the Supreme Court allowed other evidence that includes “practical indicia as industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.”<sup>71</sup> Although one factor could sufficiently form a relevant market, none of the factors would be dispositive.<sup>72</sup>

The Court’s qualitative approach takes a holistic view of market realities. What the Supreme Court has stated merely makes courts carefully analyze evidence presented to them. Based on the assumption that the litigants have “accurate perceptions of economic realities,”<sup>73</sup> courts should, based on “careful consideration...[of] the entire record,” the “nature of the commercial entities involved and by the nature of the competition [firms] face...[and] [trade realit[ies]]” of the marketplace to identify the relevant product and geographic markets.<sup>74</sup>

In accepting a qualitative approach to defining relevant markets, the Supreme Court adhered to the legislative history of the 1950 amendments. The Supreme Court in *Brown Shoe* elaborated on this point by stating, “Congress neither adopted nor rejected specifically any particular tests for measuring the relevant markets, either as defined in terms of product or in terms of geographic locus of competition, within which the anti-competitive effects of a merger were to be judged.” Although the Supreme Court stated in *Brown Shoe* that considering “reasonable interchangeability” and the “cross-elasticity of demand” are necessary to define the relevant market, the Court in the same decision was clear that these did not have to be determined using quantitative analyses.

The Supreme Court’s flexible approach to market definition was not designed to necessarily entail complete precision. In *Brown Shoe*, the Supreme Court acknowledged that, rather than precision, what mattered was “the accuracy of the broad picture presented.”<sup>75</sup>

Under this framework, litigants can introduce any relevant data and information, allowing the approach to be both flexible and adaptable to any market. Accordingly, courts have accepted consumer surveys, historical data, government analysis, interviews of experts in the industry, affidavits, and internal business documents.<sup>76</sup> The flexible analysis provided by *Brown Shoe* would also allow litigants and courts to be able to use the scholarship of experts to describe relevant markets.<sup>77</sup>

This same approach should be applied to labor markets, where employer power is increasingly ubiquitous. As the Department of Treasury’s March 7 report on “The State of Labor Market Competition” pointed out, monopsony, defined as deviation from textbook neoclassical economic models of perfect competition, “may be *inherent* to the firm-worker relationship.”<sup>78</sup> The eroding strength of the laws and institutions that structure and regulate fair labor markets, such as minimum wage, health and safety, and collective bargaining protections, have meant that workers are increasingly exposed to this baseline level of employer power.<sup>79</sup> Moreover, labor market concentration has increased employer power and contributed to wage suppression. Accordingly, merger policy has a role in policing consolidation for negative effects on workers.<sup>80</sup>

## ***VII. Consistent With Controlling Precedent, the New Guidelines Should Not Include a Defense for Efficiencies Gained Through Mergers***

On three separate occasions, the Supreme Court has rejected an efficiencies defense for presumptively illegal mergers. The Supreme Court has not revisited, let alone overruled, the three decisions. They remain controlling law.

In *Brown Shoe*, the Supreme Court recognized that, despite potential economic efficiencies gained through consolidation from mergers, Congress chose to protect competition even if “occasional higher costs and prices might result from the maintenance of fragmented industries and markets” and that “competing considerations” must be resolved “in favor of decentralization.”<sup>81</sup> Later, the Supreme Court stated in *Procter & Gamble* that “possible economies cannot be used as a defense to illegality.”

The Court also rejected weighing harms in one market from a merger against its proffered benefits in a separate market. In *Philadelphia National Bank*,<sup>82</sup> the Supreme Court stated that illegal mergers were never to be allowed based “on some ultimate reckoning of social or economic debits and credits.”<sup>83</sup> The Court continued to say that:

A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already by Congress when it enacted the amended [Section] 7. Congress determined to preserve our traditionally competitive economy. It has therefore prescribed anticompetitive mergers, the benign and the malignant alike, fully away, we must assume, that some price might have to be paid.<sup>84</sup>

On the contrary, the Supreme Court itself made clear in *Philadelphia National Bank* that such mergers were themselves likely harmful to the overall public interest. “[S]urely one premise of an antimerger statute such as § 7 [of the Clayton Act] is that corporate growth by internal expansion is socially preferable to growth by acquisition.”<sup>85</sup>

Accordingly, a merger that will unduly concentrate a labor market and likely harm workers cannot be redeemed because it could generate benefits for consumers.

The lower courts have faithfully applied this reading of the precedent.<sup>86</sup> For example, the Third Circuit stated, “We note at the outset that we have never formally adopted the efficiencies defense. Neither has the Supreme Court. Contrary to endorsing such a defense, the Supreme Court has instead, on three occasions, cast doubt on its availability.”<sup>87</sup> The Ninth Circuit expressed similar reservations: “We remain skeptical about the efficiencies in general and about its scope in particular.”<sup>88</sup>

The rejection of an efficiencies defense by the Supreme Court is rooted in a congressional policy choice. In restricting mergers and acquisitions, Congress sought to promote a socially beneficial form of business growth (internal expansion) over mergers and acquisitions.<sup>89</sup> During the legislative debates for the 1950 amendments, Representative Yates stated the realities of business



operations such that mergers were not the only way a corporation could grow and succeed in the marketplace. He stated that a firm could “use the profits to expand its operations [or] float new security issues in the market and expand with the proceeds.”<sup>90</sup> Other members of Congress echoed Representative Yates’ statement. Representative Carrol stated that “Free competition safe-guards not only the consuming public; it also encourages small business and the development of new types of business and industry.”<sup>91</sup>

Any effort by the enforcement agencies to include an efficiencies defense in the guidelines would also undercut this clear intent of Congress.

### ***VIII. Conclusion***

Mergers, especially in concentrated markets, threaten the public, consumers, workers, suppliers, and rivals. The current merger guidelines used by the Department of Justice and the Federal Trade Commission are not adequate to this threat and do not adhere to the statutory text and legislative intent of Section 7 of the Clayton Act. The current guidelines also add significant and unnecessary ambiguity and uncertainty into merger enforcement. In developing new merger guidelines, the FTC and the DOJ should adhere to congressional intent. To this end, we recommend a return to the clear, bright-line principles embedded in DOJ’s 1968 Merger Guidelines.

## *Appendix*

### **Bright-Line Anti-Merger Rules Are Consistent With the Empirical Research on the Adverse Effects of Consolidation and Mergers**

Significant evidence shows that on balance mergers are harmful to consumers, workers, suppliers, rivals, and democratic institutions. Mergers also rarely produce the efficiencies asserted by the merging parties. This evidence further supports Congress's policy choice to substantially curb mergers and acquisitions.

#### *Mergers Harm the Public and Lead to Price Increases*

In the most comprehensive retrospective study of horizontal mergers to date, economist John Kwoka found that even when the success of mergers is evaluated by the narrow "consumer welfare" framework of lower prices and increased output, most mergers fail to provide their asserted benefits.<sup>92</sup> Kwoka's study found that most transactions led to a price increase, with a mean price increase of 4.31% across all mergers.<sup>93</sup> In one case, prices increased over 50% after a merger.<sup>94</sup> Kwoka's research has also found that when a merger reduced the number of firms from seven to six, 80% of those mergers resulted in a price increase.<sup>95</sup> Another retrospective study of hospital mergers found that price increases ranged from 10% to 40%.<sup>96</sup> Other studies also find price increases tend to follow mergers.<sup>97</sup>

Since the substantial reduction in antitrust enforcement in the 1980s,<sup>98</sup> mergers have also become a quintessential means for corporations to consolidate their economic power and control over industries. In the technology sector alone, for example, between 1987 to 2018, Google, Apple, Facebook, Amazon, and Microsoft collectively acquired over 700 companies.<sup>99</sup> As such, mergers have become a business practice that exacerbates economic and political inequality in the United States.<sup>100</sup>

#### *Mergers Do Not Improve Efficiency*

While price increases have often followed mergers, significant efficiency improvements have been extremely rare. For example, the Whirlpool-Maytag merger led to non-trivial price increases, but no appreciable efficiency gains.<sup>101</sup> A 2016 study examining the price markup and productivity effects of mergers in the manufacturing sector, using a comprehensive data set on manufacturing plant acquisitions found that mergers, particularly horizontal mergers, create higher price-cost markups and generally do not improve plant- or firm-level productivity.<sup>102</sup> This lack of merger-related productivity improvements is in line with another comprehensive study in 1987 that found that mergers, in general, failed to yield economic efficiencies and indeed, more often than not, resulted in a loss of efficiency.<sup>103</sup> Business scholar Melissa Schilling, in a 2018 study reviewing empirical evidence on the outcomes of mergers, summarized most of the studies detailing mergers by aptly stating that "[M]ost mergers do not create value for anyone, except perhaps the investment bankers that negotiated the deal."<sup>104</sup>

### *Mergers Harm Workers*

Research has found that mergers create other harmful effects, including lower wages for workers,<sup>105</sup> lost jobs, and decreased worker mobility to find alternative employment.<sup>106</sup> The anti-worker effects of mergers exacerbate the already great disparities of wealth and power in American society.<sup>107</sup>

### *Mergers Constitute a Waste of Resources*

Decades of lax merger policy have led firms to treat expansion through mergers and acquisitions as substitutes for expansion through real investments in new plant and equipment, research and development, and employees. For example, a merger between two firms, both investing to introduce competing products, is likely to slow innovation.<sup>108</sup> This has had opportunity costs. Two scholars aptly described the current pro-merger environment by stating the system is based on “managerial energies [being] devoted to sterile paper entrepreneurialism and the quick growth-through-merger game” and “diverted from the critical task of investing in new plants, new products, and state of the art manufacturing techniques.”<sup>109</sup> The authors continued by stating that “Billions of dollars spent on shuffling ownership shares are, at the same time, billions of dollars not spent on productivity-enhancing plants, equipment, and research and development. The millions of dollars absorbed in legal fees and investment banking commissions are, at the same time, millions of dollars not plowed directly into the nation’s industrial base.”<sup>110</sup>

Rather than invest in their operations, our current unclear merger enforcement protocols make mergers, contrary to Congress’s intentions, an attractive business strategy to kill off competition. One business executive stated that “Most mergers were to kill competitors, because it’s cheaper to buy them than to compete with them.”<sup>111</sup>

So-called “superstar” firms, especially in the tech sector, enjoy entrenched competitive advantages over rivals and potential entrants.<sup>112</sup> Even assuming they initially reached their market-leading positions through superior innovation and productive efficiency, these are precisely the firms that merger policy should discourage from growth through acquisition.<sup>113</sup> In a well-functioning marketplace, the most productive and innovative firms will indeed capture greater market share, but through reinvesting high profits in organic growth, research and development, and innovative processes — not buying out rivals or potential competitors.<sup>114</sup> Merger controls and enforcement preserve precisely that competitive dynamic.<sup>115</sup>

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<sup>1</sup> The Open Markets Institute is a nonprofit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine fair competition and threaten liberty, democracy, and prosperity. Open Markets uses research and journalism to expose the dangers of monopolization, identifies changes in policy and law to address them, and educates policymakers, academics, movement groups, and other influential stakeholders to establish open, competitive markets that support a strong, just, and inclusive democracy.

Our comment specifically addresses the following questions from the Request for Information: 1a, 1f, 5a, 5e, 6b,6c, 7a, 9b, 9c, 9h,12f, 14a, and 14b.

<sup>2</sup> *Submit a Comment on the Joint FTC-DOJ Merger Enforcement Request for Information*, FED. TRADE COMM’N (Jan. 18, 2022), <https://www.ftc.gov/policy/studies/submit-comment-merger-enforcement-request-information>.

<sup>3</sup> Open Markets Institute, *Restoring Antimonopoly Through Bright-Line Rules*, PROMARKET (Apr. 26, 2019) <https://www.promarket.org/2019/04/26/restoring-antimonopoly-through-bright-line-rules/>.

<sup>4</sup> José Azar et al., *Concentration in U.S. Labor Markets: Evidence from Online Vacancy Data* 66 (IZA Discussion Paper, No. 11379, 2018), <https://www.econstor.eu/bitstream/10419/177183/1/dp11379.pdf>.

<sup>5</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 325-28 (1962).

<sup>6</sup> 15 U.S.C. § 18.

<sup>7</sup> In a case applying Section 1 of the Sherman Act, the Second Circuit found that Visa and MasterCard each had market power with shares in the relevant market of 47% and 26%, respectively. *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 240 (2d Cir. 2003).

In a similar spirit, the Department of Justice, in the 1982 Merger Guidelines, included a “leading firm proviso” under which it stated, “Notwithstanding those standards, the Department is likely to challenge the merger of any firm with a market share of at least 1 percent with the leading firm in the market, provided that the leading firm has a market share that is at least 35 percent and is approximately twice as large as that of the second largest firm in the market.” See *1982 Merger Guidelines*, U.S. DEP’T JUST. (1982), <https://www.justice.gov/archives/atr/1982-merger-guidelines> (last visited Feb. 18, 2022) [hereinafter 1982 Merger Guidelines].

<sup>8</sup> For example, the FTC allowed BMS to acquire Celgene in a mega-merger in 2020, even though BMS is a serial violator of the antitrust laws. See, e.g., *Bristol-Myers Squibb Co.*, 135 F.T.C. 444 (2003); *Bristol-Myers Squibb to Pay \$2.1 Million Penalty for Failure to Disclose Agreement Involving Substantial Payments to Delay Entry of a Generic Version of the Drug Plavix*, FED. TRADE COMM’N (Mar. 31, 2009), <https://www.ftc.gov/news-events/news/press-releases/2009/03/bristol-myers-squibb-pay-21-million-penalty-failure-disclose-agreement-involving-substantial>. See also Alison Kodjak, *How a Drugmaker Gamed The System To Keep Generic Competition Away*, NPR (May 17, 2018), <https://www.npr.org/sections/health-shots/2018/05/17/571986468/how-a-drugmaker-gamed-the-system-to-keep-generic-competition-away> (noting Celgene was one of the top companies receiving complaints from the FDA for restricting access to drug samples, which enables the creation of cheaper generic drugs).

<sup>9</sup> American antimonopoly law traces to the Revolution. See BARRY C. LYNN, *LIBERTY FROM ALL MASTERS: THE NEW AMERICAN AUTOCRACY VS. THE WILL OF THE PEOPLE* 87-107 (2020) (describing the Declaration of Independence, Northwest Ordinance, and the Constitution as antimonopoly documents).

<sup>10</sup> See generally WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

<sup>11</sup> 21 CONG. REC. 2457 (1890) (statement of Senator Sherman).

<sup>12</sup> Alec Klein, *A Hard Look at Media Mergers*, WASH. POST (Nov. 29, 2000), <https://www.washingtonpost.com/archive/business/2000/11/29/a-hard-look-at-media-mergers/d8380c2d-92ee-4b1b-8ffd-f43893ab0055/>.

<sup>13</sup> *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?: Hearing Before the S. Subcomm. on Antitrust, Competition, & Consumer Rts. of the S. Comm. on the Judiciary*, 114th Cong. (2017) (statement of Barry C. Lynn, Executive Director, Open Markets Institute), <https://www.judiciary.senate.gov/imo/media/doc/12-13-17%20Lynn%20Testimony.pdf>.

<sup>14</sup> Letter from the Open Markets Institute et al., to Maken Delrahim, Assistant Attorney General, Dep’t of Justice (Mar. 6, 2019) (discussing why the agency should block the merger between Quad/Graphics and LSC Communications),

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<https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5ebed00768f0572400ae16ef/1589563401476/3.6.2019-DOJ-Printers-Letter-FINAL.pdf>; Letter from the Open Markets Institute et al., to Richard Powers, Acting Assistant Attorney Gen., Dep't of Justice (Jan. 29, 2021) (discussing why the agency should block the merger between Bertelsmann and Simon & Schuster), <https://www.openmarketsinstitute.org/publications/letter-to-justice-department-urging-immediate-block-of-private-conglomerate-bertelsmann-from-buying-the-book-publisher-simon-schuster>.

<sup>15</sup> Daniel A. Hanley, *Eyes Everywhere: Amazon's Surveillance Infrastructure and Revitalizing a Fair Marketplace*, OPEN MARKETS INST. (July 2021), <https://www.openmarketsinstitute.org/publications/eyes-everywhere-part-2-amazons-surveillance-of-consumers-and-competitors>; Daniel A. Hanley, *The FTC Created Facebook—It Has the Power to Take it Down*, COMMON DREAMS (Nov. 8, 2021), <https://www.commondreams.org/views/2021/11/08/ftc-created-facebook-it-has-power-take-it-down>; Sandeep Vaheesan, *How Biden's FTC Can Go After Google and Facebook*, DEMOCRACY J. (May 25, 2021), <https://democracyjournal.org/arguments/how-bidens-ftc-can-go-after-google-and-facebook/>.

<sup>16</sup> Letter from the Open Markets Institute, to David Cicilline, Chair of the Subcomm. on Antitrust, Commercial and Administrative Law of the U.S. H.R. and James Sensenbrenner, Ranking Member of the Subcomm. on Antitrust, Commercial and Administrative Law of the U.S. H.R. (Apr. 17, 2020), <https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5ebde3dd0a67ce269cbc7b04/1589502948280/O MI-House-Letter-4.17.20.pdf>.

<sup>17</sup> Sandeep Vaheesan & Matthew Buck, *Antitrust's Monopsony Problem*, PROMARKET (Feb. 3, 2020) <https://www.promarket.org/2020/02/03/antitrusts-monopsony-problem/>.

<sup>18</sup> Zack Cooper et al, *Do Higher-Priced Hospitals Deliver Higher-Quality Care?* (Nat'l Bureau of Econ. Research, Working Paper No. 2908, 2022) [https://www.nber.org/system/files/working\\_papers/w29809/w29809.pdf](https://www.nber.org/system/files/working_papers/w29809/w29809.pdf).

<sup>19</sup> Phillip Longman, *Amtrak Joe vs. the Modern Robber Barons*, WASH. MONTHLY (Nov. 7, 2021), <https://washingtonmonthly.com/2021/11/07/amtrak-joe-vs-the-modern-robber-barons/>.

<sup>20</sup> See, e.g., Daniel A. Hanley et al., *Fixing America: Breaking Manufacturers' Aftermarket Monopoly and Restoring Consumers' Right to Repair*, OPEN MARKETS INST. (April 2020), [https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5ea8a6d93b485d0feb9b5d6b/1588111098207/R eport\\_RightToRepair\\_HanleyKellowayVaheesan-1.pdf](https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5ea8a6d93b485d0feb9b5d6b/1588111098207/R eport_RightToRepair_HanleyKellowayVaheesan-1.pdf); *Building Food System Resiliency Through Different Business Scales and Forms*, OPEN MARKETS INST. (June 2021), [https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/60df0e09cc8302417c732010/1625230859521/U SDA\\_SupplyChainsComment\\_LR\\_CK\\_JF.pdf](https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/60df0e09cc8302417c732010/1625230859521/U SDA_SupplyChainsComment_LR_CK_JF.pdf).

<sup>21</sup> *Remarks by President Biden At Signing of An Executive Order Promoting Competition in the American Economy*, WHITE HOUSE (July 9, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/>.

<sup>22</sup> See, e.g., U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 10 (2010) (“[A] primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm’s ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products.”) [hereinafter 2010 MERGER GUIDELINES].

<sup>23</sup> *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

<sup>24</sup> *Id.* at 62.

<sup>25</sup> Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 13-15 (2003).

<sup>26</sup> *Int'l Shoe Co. v. FTC*, 280 U.S. 291, 298 (1930) (emphasis added).

The Sherman Act’s language of prohibiting “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade” was interpreted as prohibiting only unreasonable mergers. See *Northern Securities Co. v. United States*, 193 U.S. 197 (1904).

The original Clayton Act stated that mergers and acquisitions (based on stock as opposed to asset) were prohibited if their effect “may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.” Clayton Act, § 7, 38 Stat. 730 (1914).

<sup>27</sup> Louis B. Schwartz, *Potential Impairment of Competition – The Impact of Standard Oil Company of California v. United States on the Standard of Legality Under the Clayton Act*, 98 U. OF PA. L. REV. 10, 33 (1949); DAVID DALE MARTIN, *MERGERS AND THE CLAYTON ACT 1-2*, 242-53 (1959); *Int'l Shoe*, 280 U.S. at 298 (the court stated that a merger is only illegal when it “injuriously affect[ed] the public”); Samuel R. Reid, *Antitrust and the Merger-Wave Phenomenon: A Failure of Public Policy*, 3 ANTITRUST L. & ECON. REV. 25 (1969-1970).

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After 1930, a small amount of merger litigation continued under the Sherman Act until the 1950 Celler-Kefauver Amendments. *See* Anthony D. Schlesinger, *Merger Litigation under the Sherman Act - Choice or Echo*, 18 SW L.J. 712 (1964).

<sup>28</sup> Louis B. Schwartz, *The New Merger Guidelines: Guide to Governmental Discretion and Private Counseling or Propaganda for Revision of the Antitrust Laws?*, 71 CAL. L. REV. 575, 595 (1983).

<sup>29</sup> *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362 (1963).

<sup>30</sup> *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283 (6th Cir.1898) (Taft, J.), *aff'd*, 175 U.S. 211 (1899).

<sup>31</sup> *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609 (1972).

<sup>32</sup> *Id.* at 611-12 (“If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision that must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are illequipped and ill-situated for such decisionmaking. To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required.”).

<sup>33</sup> *Topco*, 405 U.S. at 611.

<sup>34</sup> The Supreme Court has lamented the costliness and protracted nature of antitrust litigation (and, on these grounds, restricted enforcement of the antitrust laws). *See, e.g.*, *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264, 281-82 (2007); *Verizon Communs. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004). The Court, however, created this problem in the first place by adopting the rule of reason as the primary analytical framework in antitrust cases. *See, e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Continental TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

<sup>35</sup> *See, e.g., Topco*, 405 U.S. at 611.

<sup>36</sup> 95 CONG. REC. 11506 (1949) (remarks of Representative Bennett).

<sup>37</sup> 96 CONG. REC. 16452 (1950) (remarks of Senator Kefauver).

<sup>38</sup> *Brown Shoe*, 370 U.S. at 347 (“apparent that a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency.”); *United States v. Pabst Brewing Co.*, 384 U.S. 546, 552 (1966) (Congress “was concerned with arresting concentration in the American economy, whatever its cause, in its incipiency.”).

<sup>39</sup> *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967); *see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977) (Section 7 of the Clayton Act is “a prophylactic measure, intended ‘primarily to arrest apprehended consequences of inter-corporate relationships before those relationships could work their evil.’”).

<sup>40</sup> *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986) (Posner, J.), *cert. denied*, 481 U.S. 1038 (1987) (“Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable ... is called for.”).

<sup>41</sup> *Procter & Gamble*, 386 U.S. at 577.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* (“The section can deal only with probabilities, not with certainties.”); *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 594 (1965) (“Section 7 ... is concerned ‘with probabilities, not certainties.’ ”); *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 191 (1964) (“reasonable likelihood of substantial lessening of competition is all that is required”); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 658 (1964) (The Clayton Act is concerned “with probabilities, not certainties”); *Brown Shoe*, 370 U.S. at 323 (1962) (“Congress used the words ‘may be substantially to lessen competition’ to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act.”); *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 597-98 (1957) (“‘Incipiency’ in this context denotes not the time the stock was acquired, but any time when the acquisition threatens to ripen into a prohibited effect. To accomplish the congressional aim, the Government may proceed at any time that an acquisition may be said with *reasonable probability to contain a threat* that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce. Even when the purchase is solely for investment, the plain language of [Section] 7 contemplates an action at any time the stock is used to bring about, or in attempting to bring about, the substantial lessening of competition.”) (emphasis added) (internal citations omitted); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2011); *United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850, 858 (6th Cir. 2005).

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Note that the Supreme Court requires more than a mere possibility of the anticompetitive conduct. *United States v. Citizens & So. Nat'l Bank*, 422 U.S. 86 (1975) (the Clayton Act concerned with “probable effects” on competition, not “ephemeral possibilities”); *Consolidated Foods*, 380 U.S. at 598 (“The ‘mere possibility’ of the prohibited restraint is not enough. . . . Probability of the proscribed evil is required, as we have noted.”).

<sup>44</sup> See Jesse Eisinger & Justin Elliott, *These Professors Make More Than a Thousand Bucks an Hour Peddling Mega-Mergers*, PROPUBLICA (Nov. 16, 2016), <https://www.propublica.org/article/these-professors-make-more-than-a-thousand-bucks-hour-peddling-mega-mergers> (“There are few government functions outside the CIA that are so secretive as the merger review process,” said Seth Bloom, the former general counsel of the Senate Antitrust Subcommittee.”).

<sup>45</sup> Hillary Greene, *Guidelines Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 782 (2008).

<sup>46</sup> See *1968 Merger Guidelines*, U.S. DEP’T JUST. (1968), <https://www.justice.gov/archives/atr/1968-merger-guidelines> [hereinafter 1968 Merger Guidelines].

<sup>47</sup> *Alternatives to the Consumer Welfare Standard” Competition and Consumer Protection in the 21st Century-Hearing 5: Before the Fed. Trade Comm’n* (2018) (statement of Barry C. Lynn, Executive Director, Open Markets Institute), <https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5ebee691e15d431344924377/1589569176266/FTC-Day-5-2.pdf>.

<sup>48</sup> 1968 Merger Guidelines § 10.

<sup>49</sup> *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 506 (1974) (quoting *Int’l Shoe*, 280 U.S. at 302 (1930)).

<sup>50</sup> *Id.* at 507.

<sup>51</sup> *ProMedica Health System, Inc. v. FTC*, 749 F.3d 559, 572 (6th Cir. 2014).

<sup>52</sup> *Kaiser Aluminum Chemical Corp. v. FTC*, 652 F.2d 1324, 1339 (7th Cir. 1981).

<sup>53</sup> *FTC v. Warner Communications Inc.*, 742 F.2d 1156, 1164-65 (9th Cir. 1984); *id.* at 1164 (citing *United States v. Phillips Petroleum Co.*, 367 F. Supp. 1226 (C.D.Cal.1973), *aff’d mem.*, 418 U.S. 906, 94 S.Ct. 3199 (1974) (stating “Section 7 is concerned only with the effect upon competition of an acquisition, and the statutory language was carefully drafted to refer only to an acquisition’s effect. If the acquisition has a substantial anticompetitive effect, it is illegal under § 7.... The issue in an antitrust case is not a determination of the reasons for selling, but only the anticompetitive effect of the sale.”)).

<sup>54</sup> See citations *supra* note 8.

<sup>55</sup> JAMES R. WILLIAMSON, *FEDERAL ANTITRUST POLICY DURING THE KENNEDY-JOHNSON YEARS* 35 (1995) (detailing how conglomerate mergers constituted of 88.5% of all mergers in 1968).

<sup>56</sup> See generally ARIEL EZRACHI & MAURICE E. STUCKE, *VIRTUAL COMPETITION: THE PROMISE AND PERILS OF THE ALGORITHM-DRIVEN ECONOMY* (2017).

<sup>57</sup> In a case applying Section 1 of the Sherman Act, the Second Circuit found that Visa and MasterCard each had market power with shares in the relevant market of 47% and 26%, respectively. *Visa*, 344 F.3d at 240.

In a similar spirit, the Department of Justice, in the 1982 Merger Guidelines, included a “leading firm proviso” under which it stated, “Notwithstanding those standards, the Department is likely to challenge the merger of any firm with a market share of at least 1 percent with the leading firm in the market, provided that the leading firm has a market share that is at least 35 percent and is approximately twice as large as that of the second largest firm in the market.” See 1982 Merger Guidelines, *supra* note 7.

<sup>58</sup> 15 U.S.C. § 18.

<sup>59</sup> Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129 (2007) (“Throughout the history of U.S. antitrust litigation, the outcome of more cases has surely turned on market definition than on any other substantive issue.”).

<sup>60</sup> *United States v. Grinnell Corp.*, 384 U.S. 563, 573 (1966) (applying same relevant market analysis under Section 7 of the Clayton Act and Section 2 of the Sherman Act).

<sup>61</sup> *United States v. Von’s Grocery Co.*, 384 U.S. 270 (1966).

<sup>62</sup> See 1982 Merger Guidelines, *supra* note 7; Greene, *supra* note 45, at 811.

<sup>63</sup> 2010 MERGER GUIDELINES § 4.1.1 (2010).

<sup>64</sup> *Id.*

<sup>65</sup> Benjamin M. Gerber, *Enabling Interlock Benefits While Preventing Anticompetitive Harm: Toward an Optimal Definition of Competitors Under Section 8 of the Clayton Act*, 24 YALE J. ON REG. 107, 119 (2007) (“Quantitative measures such as cross-elasticity of demand, SSNIP analysis, and simulation models have become the bedrock of Section 7 market definition analysis.”).

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- <sup>66</sup> Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, 71 ANTITRUST L.J. 253, 263 (2003) (“Courts have noted that they are not bound by the Merger Guidelines, but in many of the same opinions they proceeded to endorse or apply the Guidelines’ hypothetical monopolist paradigm.”).
- <sup>67</sup> Andrew P. Vassallo, *Can One (Ever) Accurately Define Markets?*, 13 J. COMPETITION L. & ECON. 261 (2017).
- <sup>68</sup> Michael L. Katz & Carl Shapiro, *Critical Loss: Let’s Tell the Whole Story*, ANTITRUST, Spring 2003, at 49 (specifically referring to critical loss analysis), <https://www.law.berkeley.edu/wp-content/uploads/2015/04/Katz-Shapiro-Critical-Loss-Lets-Tell-the-Whole-Story-2003.pdf>.
- <sup>69</sup> Azar et al., *supra* note 4.
- <sup>70</sup> See, e.g., *Pabst Brewing*, 384 U.S. 546; *Von’s Grocery*, 384 U.S. 270; *United States v. Aluminum Co. of Am.*, 377 U.S. 271 (1964), *reh’g denied*, 377 U.S. 1010 (1964); *Philadelphia Nat’l Bank*, 374 U.S. 321 (1963); *Brown Shoe*, 370 U.S. 294.
- <sup>71</sup> *Brown Shoe*, 370 U.S. at 325.
- <sup>72</sup> *Gen. Foods Corp. v. FTC*, 386 F.2d 936, 941 (3d Cir. 1967), *cert denied* 391 U.S. 919 (1968) (“Our reading of *Brown Shoe* discloses no requirement that each of the seven criteria must be present in every merger case.”).
- <sup>73</sup> *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 n.4 (D.C. Cir. 1986) (quotation marks omitted).
- <sup>74</sup> *United States v. Cont’l Can Co.*, 378 U.S. 441, 449 (1964); *United States v. Phillipsburg Nat. Bank & Tr. Co.*, 399 U.S. 350, 360 (1970).
- <sup>75</sup> *Brown Shoe*, 370 U.S. at 343 n.69.
- <sup>76</sup> John D. Harkrider, *Operationalizing the Hypothetical Monopolist Test*, U.S. DEP’T OF JUSTICE (2015), <https://www.justice.gov/atr/operationalizing-hypothetical-monopolist-test>; *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 52 (D.D.C. 2011) (“When determining the relevant product market, courts often pay close attention to the defendants’ ordinary course of business documents.”) (citations omitted); *Philadelphia Nat’l Bank*, 374 U.S. at 357 n.34 (1963); *Monfort v. Cargill*, 591 F. Supp. 683, 702 (D. Colo. 1983) (defendant’s annual reports), *aff’d*, 761 F.2d 570 (10th Cir. 1985), *rev’d on other grounds*, 479 U.S. 104 (1986); *United States v. Mrs. Smith’s Pie Co.*, 440 F. Supp. 220, 227 (E.D. Pa. 1976) (expert testimony and market survey); *Crown Zellerbach Corp. v. FTC.*, 296 F.2d 800, 805 (9th Cir. 1961) (data provided by the Bureau of the Census).
- <sup>77</sup> See, e.g., José Azar et al., *Labor Market Concentration 2* (Nat’l Bureau of Econ. Research, Working Paper No. 24147, 2017), <http://www.nber.org/papers/w24147>.
- <sup>78</sup> U.S. DEP’T OF TREASURY, THE STATE OF LABOR MARKET COMPETITION 1 (2022) (emphasis in original), <https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf>.
- <sup>79</sup> Azar et al., *supra* note 4.
- <sup>80</sup> Azar et al., *supra* note 77; Efraim Benmelech et al., *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?*, J. HUM. RESOURCES (2020), <http://jhr.uwpress.org/content/early/2020/12/03/jhr.monopsony.0119-10007R1.abstract>.
- <sup>81</sup> *Brown Shoe*, 370 U.S. at 344.
- <sup>82</sup> *Philadelphia Nat’l Bank*, 374 U.S. 321.
- <sup>83</sup> *Id.* at 371.
- <sup>84</sup> *Id.*
- <sup>85</sup> *Philadelphia Nat’l Bank*, 374 U.S. at 370; see also *Brown Shoe*, 370 U.S. at 345 n. 72.
- <sup>86</sup> See, e.g., *United States v. Anthem, Inc.*, 855 F.3d 345, 353 (D.C. Cir. 2017) (“Despite, however, widespread acceptance of the potential benefit of efficiencies as an economic matter, . . . , it is not at all clear that they offer a viable legal defense to illegality under Section 7.”).
- <sup>87</sup> *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 347 (3d Cir. 2016); see also *FTC v. ProMedica Health Sys., Inc.*, 2011 WL 1219281 (N.D. Ohio 2011) (“No court in a 13(b) proceeding, or otherwise, has found efficiencies sufficient to rescue an otherwise illegal merger.”).
- <sup>88</sup> *Saint Alphonsus Medical Center-Nampa Inc. v. St. Luke’s Health System, Ltd.*, 778 F.3d 775, 790 (9th Cir. 2015).
- <sup>89</sup> 95 CONG. REC. 11495 (statement of Representative Bryson) (“under local management the legitimate profits of industry tend to remain at home and promote the well-being of the home town. In contrast, under the new outside ownership, the profits are siphoned off to distant areas. . . . Moreover, large portions of these profits which are drained off to these metropolitan centers are not put to work in the form of new capital investment but are used for such nonproductive purposes as speculation in the stock market, buying useless luxuries, gambling at the race track, paying night-club bills, and engaging in the other frivolities of the cosmopolitan idle rich.”).
- <sup>90</sup> 95 CONG. REC. 11493 (1949) (statement of Representative Yates).
- <sup>91</sup> 95 CONG. REC. 11493 (1949) (statement of Representative Carrol).



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- <sup>92</sup> JOHN KWOKA, *MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY* (2015); *see also* Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, 64 ANTITRUST BULL. 479 (2019).
- <sup>93</sup> KWOKA, *supra* note 92, at 94.
- <sup>94</sup> *Id.*
- <sup>95</sup> John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns?*, 81 ANTITRUST L.J. 837, 863 (2017).
- <sup>96</sup> David M. Cutler & Fiona Scott Morton, *Hospitals, Market Share, and Consolidation*, 310 JAMA 1964, 1965 (2013).
- <sup>97</sup> Orley Ashenfelter et al., *Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers*, 57 J.L. ECON. S67 (2014); Orley Ashenfelter & Daniel Hosken, *The Effect of Mergers on Consumer Prices: Evidence from Five Mergers on the Enforcement Margin*, 53 J.L. ECON. 417 (2010).
- <sup>98</sup> *See, e.g.*, Cutler & Morton, *supra* note 96.
- <sup>99</sup> Daniel A. Hanley, *A Topology of Multisided Digital Platforms*, 19 CONN. PUB. INT. L.J. 271, 314 (2020).
- <sup>100</sup> Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 235-45 (2017).
- <sup>101</sup> Orley C. Ashenfelter et al., *The Price Effects of a Large Merger of Manufacturers: A Case Study of Maytag-Whirlpool*, 5 AM. ECON. J: ECON. POL'Y 239 (2013).
- <sup>102</sup> Bruce A. Blonigen & Justin R. Pierce, *Evidence for the Effects of Mergers on Market Power and Efficiency 3-5* (Nat'l Bureau of Econ. Research, Working Paper No. 22750, Oct. 2016).
- <sup>103</sup> F.M. SCHERER & DAVID J. RAVENSCRAFT, *MERGERS, SELL-OFFS, AND ECONOMIC EFFICIENCY* 202-03 (1987).
- <sup>104</sup> Melissa A. Schilling, *Potential Sources of Value from Mergers and Their Indicators*, 63 ANTITRUST BULL. 183 (2018).
- <sup>105</sup> Benmelech et al., *supra* note 80; *see, e.g.*, Azar et al., *supra* note 77, at 2.
- <sup>106</sup> Azar et al., *supra* note 4, at 16-17.
- <sup>107</sup> Arthur E. Wilmarth Jr., *Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 U. CIN. L. REV. 1283, 1328, 1446 (2013).
- <sup>108</sup> Giulio Federico et al., *Antitrust and Innovation: Welcoming and Protecting Disruption*, 20 INNOVATION POL'Y & ECON. 125 (2020), <https://www.journals.uchicago.edu/doi/full/10.1086/705642?af=R>.
- <sup>109</sup> Walter Adams & James W. Brock, *The Proposed Emasculation of Section 7 of the Clayton Act*, 65 NEB. L. REV. 813, 819 (1986).
- <sup>110</sup> *Id.*
- <sup>111</sup> Mitsuru Igami & Kosuke Uetake, *Mergers, Innovation, and Entry-Exit Dynamics: Consolidation of the Hard Disk Drive Industry, 1996-2016*, YALE UNIV. (2019), [http://www.restud.com/wp-content/uploads/2019/08/MS24360manuscript\\_without\\_appendix.pdf](http://www.restud.com/wp-content/uploads/2019/08/MS24360manuscript_without_appendix.pdf).
- <sup>112</sup> David Autor et al, *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q. J. ECON., 645 (2020).
- <sup>113</sup> Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. ECON. PERSPECTIVES 69 (2019).
- <sup>114</sup> WILLIAM LAZONICK, *BUSINESS ORGANIZATION AND THE MYTH OF THE MARKET ECONOMY* (1993).
- <sup>115</sup> Tommaso Valletti & Hans Zenger, *Increasing Market Power and Merger Control*, 5 COMPETITION L. & POL'Y DEBATE 40 (2019).