ARTICLE

CONTEMPORARY MERGER REVIEW UNDER THE RULE OF LAW: TRANSLATING OLD LAW INTO MODERN ECONOMICS

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I. INTRODUCTION

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Before I begin, a necessary disclaimer. The remarks I express today are my own and do not necessarily reflect those of the Antitrust Division or the Department of Justice (DOJ).

Thank you again to the organizers for the invitation to speak on a subject that is near and dear to my heart as a law enforcer at the Justice Department. The integrity of a prosecutor's work depends on their fidelity to the law, so we think a lot about how to faithfully apply precedent to modern market realities.

And many thanks to my friend Andrew Finch for a rousing start to the morning; I agree with a great deal of what Andrew said. That's not particularly surprising. I learned much of what I know of merger law from our work together in the Front Office in the last administration. Let me share a bit of insider information with the audience—Andrew was one of the most thoughtful, careful, and zealous public servants ever to serve as Acting Assistant Attorney General or Principal Deputy of the DOJ's Antitrust Division. We all remain in debt for his service, so thank you, Andrew.

My favorite time capsule is a small aluminum canister currently about 240,000 miles from here. Neil Armstrong and Buzz Aldrin left that capsule behind after Apollo 11 landed along the Sea of Tranquility. It contains only a small silicon disk with printed messages of goodwill from the leaders of 73 countries.[1] I love that. The United States invited leaders all around the world to write messages of hope and human kindness to leave behind on the lunar surface for whomever might find them.[2]

When you fly a time capsule to the moon, storage space is tight. But one country allowed itself to include multiple messages. The United States opened with statements from four Presidents who had helped oversee the project—Dwight

[1] NASA, *Apollo 11 Goodwill Messages*, Release No.: 69-83F, at 1 (July 13, 1969), https://www.nasa.gov/wp-content/uploads/2024/05/apollo-11-goodwill-messages.pdf [https://perma.cc/4KGY-JR7D].

[2] *Id.* at 3.

Eisenhower, John F. Kennedy, Lyndon Johnson, and Richard Nixon.

When you build the rocket, I guess you get those privileges.

I urge you to give the messages a read sometime. They are individually inspiring. But even more striking is the fact that four Presidents from two political parties brought the Apollo project to fruition and have their efforts recorded there. In a democracy that necessarily undergoes regular leadership changes, it is a reminder that our greatest public accomplishments can, and often must, depend on years of bipartisan effort.

Competition law is no moon landing, but we see a similar thread of bipartisanship in the antitrust revival now underway. For example, the DOJ investigated and filed the Google Search monopolization case in 2020, and it succeeded at trial in 2024.[3] I had the privilege to support that matter in two Administrations, and as the remedies phase began in January 2025, a third Administration now oversees the matter.

The recent history of enforcement against mergers involving products and services on which rivals rely to compete, sometimes called vertical mergers, is another example of a multi-administration antitrust accomplishment.

The challenges we faced litigating *AT&T/Time Warner* perfectly tees up the topic of this lecture. To cut to the chase, my thesis is this: the holdings from the 1960s merger cases remain vibrant parts of the modern antitrust landscape and would therefore be affirmed today, even if some of their outdated economic analyses do not form a question presented for Supreme Court review.

In *AT&T/Time Warner*, we faced the challenge of determining how older legal analysis in 1960s and 1970s merger cases fit into the tapestry of modern antitrust law. The last merger case decided by the Supreme Court that didn't

[3] *See* United States v. Google LLC, No. 20-CV-3010 (APM), 2024 WL 3647498 (D.D.C. Aug. 5, 2024).

involve head-to-head competitors was *Ford Autolite* in 1972.[4] If you haven't read it lately, the economic analysis reads like it was written in a different language than we use today.

The court was dealing with this challenge too. At one point, the judge asked the parties to submit their views as to the applicable legal framework in a standalone pre-trial submission.[5]

Andrew had the wisdom not to rely on me to answer this question alone. He assigned our moderator, Taylor Owings, to help me draft our trial statement on the burden of proof. And so, we undertook a project much like we are undertaking this morning. We pored through both the older precedents and the modern cases to find a way to give voice to binding case law in a way that rhymed with modern principles.

Ultimately, we found a reasonable way to fold together still-binding concepts from *Procter & Gamble*[6] and *Philadelphia National Bank*[7] with the modern burden-shifting framework created in *General Dynamics*.[8] We

[4] Ford Motor Co. v. United States, 405 U.S. 562, 568 (1972).

[5] *See generally* United States v. AT & T Inc., 310 F. Supp. 3d 161 (D.D.C. 2018) (Joint Statement on the Burden of Proof at Trial), *aff'd sub nom*. United States v. AT&T, Inc., 916 F.3d 1029 (D.C. Cir. 2019), https://www.justice.gov/atr/case-document/file/1043756/dl?inline [https://perma.cc/Q3T8-FDNY].

[6] Fed. Trade Comm'n v. Procter & Gamble Co., 386 U.S. 568 (1967).

[7] United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

[8] United States v. Gen. Dynamics Corp., 476 U.S. 1181 (1986).

borrowed the concept of burden-shifting from *Baker Hughes*[9] and other structural presumption cases, but explained how it should also apply when a plaintiff makes a "fact-specific" showing that the merger's effect may be to substantially lessen competition.[10]

Of course we lost that case on the facts, but the courts agreed with our approach to apply burden shifting for the burden of proof, even in a merger case with no structural presumption. The 2019 D.C. Circuit opinion quotes that pretrial statement alongside *Brown Shoe* in setting forth what is now widely accepted as the appropriate doctrinal path to evaluating a non-horizontal merger.[11] First, the court should examine plaintiff's fact-specific evidence that the merger may substantially lessen competition. Then it turns to examining other facts produced by defendants suggesting otherwise.[12]

That opinion was then relied on to develop the 2020 Vertical Guidelines and 2023 Merger Guidelines.[13] A reminder to never cut corners on a pretrial filing.

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[9] United States v. Baker Hughes Inc., 908 F.2d 981 (D.C. Cir. 1990).

[10] United States v. AT & T Inc., 310 F. Supp. 3d 161, 164 (D.D.C. 2018) (Joint Statement on the Burden of Proof at Trial), *aff'd sub nom.* United States v. AT&T, Inc., 916 F.3d 1029 (D.C. Cir. 2019), https://www.justice.gov/atr/case-document/file/1043756/dl?inline [https://perma.cc/Q3T8-FDNY].

[11] United States v. AT&T, Inc., 916 F.3d 1029, 1032 (D.C. Cir. 2019).

[12] *Id.*

[13] *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES 11–12 (2020), https://www.justice.gov/atr/page/file/1290686/dl [https://perma.cc/6493-7EEE] (noting it is "incumbent upon the merging firms to provide substantiation for

Both the Trump Administration and Biden Administration filed friend of the court briefs as Steves and Sons pushed for the divestiture that was finally ordered by a court earlier this week in the Jeld-Wen matter.

The Biden Administration saw the project through to a safe landing.

Most importantly, last year the *Illumina* court upheld the FTC's bipartisan challenge to the *Illumina/Grail* merger. December 15, 2023 will not be remembered like the moon landing, but it was a historic day for antitrust law. It was the first time *in my lifetime* that a federal court agreed with the government as to the anticompetitive risk of a merger involving rivals' complements. The Fifth Circuit did so by incorporating a sophisticated modern analysis of how the merger would risk foreclosing potential rivals within the framework established by longstanding precedent.[14] It won't surprise you that the court used the burden-shifting language from the AT&T D.C. Circuit opinion that I just mentioned.

The *Illumina* opinion now serves a similar role to my second favorite time capsule, which was actually accidental.

Probably the most important time capsule in history was never meant to be one. It traveled through time in the walls of Fort Julien in Rashid Egypt. The architects were not thinking about posterity when they built that fort; they were just looking for solid pieces of rock. But the Rosetta Stone—carved in three languages in 200 BC to set forth a Ptolemaic

claims that they will benefit from the elimination of double marginalization"); U.S. DEP'T OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES 2 (2023), https://www.justice.gov/atr/merger-guidelines [https://perma.cc/YRZ6-VVHK] [hereinafter 2023 Merger Guidelines].

[14] Illumina, Inc. v. Fed. Trade Comm'n, 88 F.4th 1036, 1048 (5th Cir. 2023).

decree—came to serve as a time capsule from Ancient Egypt to the 19th century.

We all know why the Rosetta Stone was so important. Because it translated that decree into three languages, it contained the keys to translating long-lost ancient Egyptian writings into Greek and, in turn, the other world languages.

The *Illumina* opinion did much the same. Future litigants can now turn to that opinion to understand how *Ford Autolite*, *Brown Shoe*, and an economic incentive and ability analysis should apply together within the modern burden-shifting framework of *General Dynamics* and *Baker Hughes*.

They don't fit perfectly, and it can require some translation, but the opinion underscores that we still have one tapestry of merger law that respects both past and present. And in so doing, it helps us undertake merger enforcement that better respects our obligations to the rule of law.

That is how I understand the exercise in which Andrew and I are engaged. We are not pretending that old cases are irrelevant or somehow expired. And we are not pretending that modern market realities and economic understanding can be discarded either. We are engaged in an exercise of translation and synthesis between old language and new.

II. FIVE KEY TRANSLATIONS FOR MODERN MERGER REVIEW

In that spirit, I would like to focus on five critical translations between old holdings and new understandings in merger analysis: (1) translating the word "competition" in the Clayton Act; (2) translating the words "may be" in the Clayton Act; (3) translating the structural presumption into an analysis of anticompetitive effect; (4) evaluating procompetitive efficiencies as a rebuttal, and (5) translating *Procter and Gamble*'s prohibition on mergers that entrench power into a definition of competition that distinguishes exclusion form efficiency.

These translations reflect the result of bipartisan work across many administrations to ensure the Division faithfully applies longstanding law to modern market realities in a way that enables vigorous and effective enforcement. I will aim to give my best four-minute Rosetta Stone on each.

A. Translating "Competition"

My first translation is of the word competition. The Clayton Act does not define the term competition, and many of the older Supreme Court merger cases vary in their expressions of what they think it means. Andrew documented some of this well.

In the years since, however, the Supreme Court has settled on a conception of competition: the dynamic process of rivalry that drives firms to lower prices, improve quality, raise wages, and increase innovation, among other benefits.

This was actually documented very nicely by then-FTC Commissioner and now-FTC Chairman Andrew Ferguson in his dissent from a recent Robinson-Patman Act case. I don't take any position on the case itself or the application of the analysis to Robinson Patman. But one should take a look at the doctrinal discussion around competition. It is the same kind of analysis we are undertaking today. He explains that modern precedents focus on "protecting the economic force" that drives productive firm behavior and maximizes consumer welfare—i.e., the "competitive process."[15] He notes the holding of the Supreme Court in *Nynex v. Discon* that "plaintiff must allege and prove harm, not just to a single competitor, but to the competitive process, i.e., to competition itself,"[16] and he

[15] Dissenting Statement of Comm'r Andrew N. Ferguson, S. Glazer's Wine and Spirits, LLC, FTC Matter No. 211-0155, at 14 (Dec. 12, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-southernglazers-statement.pdf [https://perma.cc/2G3F-ESJ7].

[16] NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135 (1998).

also points out the language of then-Judge Gorsuch in *Novell* that "the proper focus of section 2 isn't on protecting competitors but on protecting the process of competition" to the benefit of its participants.[17] And both of those cases of course leverage the frequently cited line from *Brown Shoe* that the antitrust laws protect "competition, not competitors."[18]

The roots of this economically coherent definition of competition are found in *Northern Pacific*,[19] where the Supreme Court acknowledged that the Sherman Act was aimed at preserving the "unrestrained interaction of competitive forces" that drives prices down and promotes increased quality and innovation, yielding the best allocation of our nation's resources while simultaneously preserving an environment conducive to our democracy. That language is quoted in *Board of Regents,*[20] which was in turn is referenced in the opening passage of *NCAA v. Alston*.[21]

Although the Sherman and Clayton Acts are different statutes, the Sherman Act approach to understanding

[17] Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1072 (10th Cir. 2013).

[18] Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).

[19] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

[20] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104 n.27 (1984).

[21] Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 73 (2021) ("In the Sherman Act, Congress tasked courts with enforcing an antitrust policy of competition on the theory that market forces 'yield the best allocation' of the Nation's resources.") (citing Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104 n.27 (1984)).

competition as an economic process was replicated into Clayton Act jurisprudence in *Brunswick*[22] and *Cargill*.[23]

Thinking about the economic forces involved in the competitive process helps clarify what we are protecting when we protect competition. Would a merger make the merged firm a more forceful competitor by enabling it to offer better products and services? If so, that merger drives the competitive process.

On the other hand, what if the merger could sap the strength from opposing forces by raising the costs they must incur to compete? Or what if it results in a cozy oligopoly where rivals pull punches and attack each other less forcefully? Those are harms to the competitive process as we have defined it.

We also have to remember it is the dynamic nature of competitive forces that creates particularly significant benefits for society. As Joseph Schumpeter highlighted, competition is a "process of creative destruction."[24] This is always worth remembering. Static pricing incentives are one measure of competitive force, but if we narrow our focus to them, we lose sight of important longer-term effects. We need to preserve the incentives to invest and innovate that help firms gain strength and become more forceful competitors over time.

So that's our first translation. And it is critical to applying the earlier Clayton Act precedents.

[22] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977).

[23] Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 114-118 (1986).

[24] JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 81–84 (1942); *see also* Michael L. Katz & Howard A. Shelanski, *Schumpeterian" Competition and Antitrust Policy in High-Tech Markets*, 14 COMPETITION 47, 51 (2005).

B. Translating The Burden of Proof — Maybe it's "May Be"?

For my second translation, we cannot simply borrow from Sherman Act jurisprudence because it is itself a difference in the statutory text of the Sherman and Clayton Acts that needs to be reconciled. While the Sherman Act prohibits contracts that are in restraint of trade, the Clayton Act prohibits mergers whose effect "may be" to substantially lessen competition. Unless we are willing to read the word "may" out of the statute and to look for what the effect of the merger "is," we cannot simply import the Sherman Act rule of reason into the Clayton Act.

The legislative history clarifies that Congress chose this more risk-averse language intentionally. In one iteration of the bill before enactment, it would have applied only "where the effect *is* substantially to lessen competition."[25] But through a compromise between the House and Senate, the final bill replaced "is" with "may be."[26] When adopting this final language, Senator Chilton explained that this standard meant "where it is possible for the effect to be."[27]

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[25] *See* Steven C. Salop, *The Appropriate Decision Standard for Section 7 Cases*, 53 U. BALT. L. REV. 449, 460 n. 52 (emphasis added) ("The language in the House bill was 'where the effect is to eliminate or substantially reduce competition.'") (citing EARL W. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAW AND RELATED STATUTES 2515 (Jeanette Morrison et al. eds., 1978).

[26] See *id.* (citing EARL W. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAW AND RELATED STATUTES 2629 (Jeanette Morrison et al. eds., 1978).

[27] *Id.*; *see also* Michael Kades, Deputy Att'y Gen., U.S. Dep't of Just., Deputy Assistant Attorney General

That leads to one of *Brown Shoe*'s most important holdings. *Brown Shoe* explained that the Clayton Act standard is "concern[ed] with probabilities, not certainties" and it held that it therefore prohibits mergers with a "reasonable probability" of anticompetitive effect.[28]

This holding has hardly been stowed away, forgotten in a time capsule. It has routinely been relied on by the federal courts, including in 1990 when the Supreme Court reminded us in *California v. American Stores* that the *Brown Shoe* holding establishes a "relatively expansive definition of antitrust liability."[29] Although occasionally district courts are unsure of whether to apply a "more likely than not" type preponderance standard, the lion's share of courts interpret the words "may be" consistent with their original meaning—the possibility of an anticompetitive effect.

Meanwhile, the Supreme Court has continued to opine on what "reasonable probability" means in other contexts, underscoring that it does not require a probability that is more likely than not, such that it collapses with a preponderance standard. For example, ineffective assistance of counsel claims also turn on whether there is a "reasonable probability" that attorney incompetence changed the result of the trial. In 1999's *Strickler v. Greene* the Supreme Court explicitly cautioned that when applying a reasonable probability standard, "the adjective is important," so "[t]he question is not whether the [outcome] would [be] more likely than not.").[30]

Michael Kades Delivers Remarks at GCR Live: Law Leaders Global 2024 (Feb. 1, 2024), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-michael-kades-delivers-remarks-gcr-live-law-leaders#_edn5 [https://perma.cc/9K2X-EYSB].

[28] Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

[29] California v. Am. Stores Co., 495 U.S. 271, 284 (1990).

[30] Strickler v. Greene, 527 U.S. 263, 264 (1999).

The question is whether the probability of the outcome is reasonable.

Our application of this standard has also evolved since *Brown Shoe*. Early cases stopped the analysis after identifying a reasonable probability of anticompetitive effect, such as through a structural presumption. But *General Dynamics* underscored that we must also consider whether "other pertinent factors . . . mandate a conclusion that no substantial lessening of competition is threatened by the acquisition."[31] This leads us to the modern burden-shifting analysis for mergers.

I sometimes hear it suggested that the Clayton Act should employ a symmetrical weighing of harms and benefits similar to the Sherman Act rule of reason. But this ignores how the Supreme Court's seminal cases set up the incipiency standard at both steps of the analysis. *Brown Shoe* asks us to look for a "reasonable probability"—evidence that the merger's effect "may be" to substantially lessen competition. Then, *General Dynamics* asks us to consider whether rebuttal evidence demonstrates no substantial lessening is "threatened."[32]

Both of these standards use probabilistic language. Ultimately, taking all the evidence into account, we ask if there is a threat to competition, and whether there is a reasonable probability of that threat being realized. Applying the Clayton Act requires assessing risk, not merely balancing expected effects.[33]

C. Translating the Philadelphia National Bank Focus on Undue Concentration Into an

[31] United States v. Gen. Dynamics Corp., 415 U.S. 486, 498 (1974).

[32] *Id.*; *see also* United States v. Baker Hughes, 908 F.2d 981, 990 (D.C. Cir. 1990) (quoting *Gen. Dynamics Corp.*, 415 U.S. at 498).

[33] *See Gen. Dynamics Corp.*, 415 U.S. at 497.

Economically Sound Structural Presumption of Harm to Competition.

Those first two translations are critical to a modern reading of the other Clayton Act cases from the 1960s, since they help clarify the statutory standard. Today, we assess the risk that the merger will materially harm the economic process of competition that drives businesses to better serve the public. My next three translations apply this lens to important early holdings.

Any litigator engaged in competition law disputes knows that most merger litigation in the modern federal courts turns on *Philadelphia National Bank*'s structural presumption. Those attending the Taft Antitrust Lecture would recall the Supreme Court's holding: "[A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market[,] is so inherently likely to lessen competition substantially that it must be enjoined in the absence of [rebuttal] evidence."[34]

In just the last decade, this structural presumption has been affirmed by the Third, Sixth, Eighth, and Ninth Circuits, along with a slew of district courts.[35] And in the decades since,

[34] United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963).

[35] *See* Fed. Trade Comm'n v. Hackensack Meridian Health, Inc., 30 F.4th 160, 173 (3d Cir. 2022) ("The District Court correctly concluded that these numbers [showing that the market was highly concentrated and the merger would result in a significant increase in concentration] demonstrate the merger is presumptively anticompetitive."); Fed. Trade Comm'n v. Sanford Health, 926 F.3d 959, 963–64 (8th Cir. 2019); Fed. Trade Comm'n v. Penn State Hershey Med. Ctr., 838 F.3d 327, 347 (3d. Cir. 2016) ("The Government can establish a prima facie case simply by showing a high

we continue to see reliance on share-based presumptions of market and monopoly power in Sherman Act cases.

To briefly answer the question that headlined the Lecture, I do not think the Supreme Court would even get the chance to affirm the structural presumption. There is no circuit split of which to speak, so it is not clear how a litigant wishing to challenge it would even structure a certiorari petition. If *PNB* has been in a time capsule, it's a time capsule that has regularly been opened and reviewed favorably by the circuit courts throughout the last sixty years.

That is not to say our understanding of the structural presumption has not evolved. We now recognize that it is fully consonant with an economic definition of competition because merger-induced increases in concentration can indicate a risk of both coordinated and unilateral effects.

As to coordinated effects, when a merger further concentrates a concentrated market, it raises the risk of oligopoly behavior. The change in market structure can suggest a danger that competitors will pull their punches in the hopes that all participants will compete less forcefully and share in the higher prices that result. Indeed, this specific concern was repeated in *Brooke Group* in 1993. The Supreme Court explained that "it has long been settled" that excessive concentration portends oligopolistic price coordination.[36]

market concentration based on HHI numbers."); Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 788 (9th Cir. 2015) ("The extremely high HHI on its own establishes the prima facie case."); ProMedica Health Sys. Inc. v. Fed. Trade Comm'n, 749 F.3d 559, 570 (6th Cir. 2014) (applying the structural presumption based on "the strong correlation between market share and price, and the degree to which this merger would further concentrate markets that are already highly concentrated").

[36] Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 229–30 (1993).

As to the elimination of head-to-head competition, when shares are high, diversion ratios and margins often are too, suggesting a risk that the merger will eliminate substantial head-to-head competition and result in unilateral effects. The structural presumption can therefore serve as a coarse proxy for the more in-depth merger simulations that use demand estimation and margin data to attempt to quantify unilateral effects.

For those who hoped for a bruising battle with Andrew and are disappointed by how much we agree, you will find controversy here on one point. I noticed that he made a point to the effect that reliance on the structural presumption in merger review is an example of the structure-conduct-performance (SCP) error that was rebutted by Demsetz.

It is important to contrast which variables the SCP paradigm and the structural paradigm correlate. The SCP debate was about whether there was a correlation between market structure and market performance generally. Demsetz argued that competition can lead to concentration as scale economies organically drive firms to win share.[37] Since competition can drive concentration, he said, we can't assume that more concentration usually means less competition.[38]

But that doesn't give us a reason to ignore the implications of changes in market structure caused not by an efficient firm winning customers, but by a horizontal merger combining competitors. That's correlating a different variable. And the variable we are testing here—merger-induced increases in concentration—correlates with modern competitive effects theories.

In fact, two dozen economists who have served as senior economists in both Republican and Democratic administrations recently wrote a paper in the Journal of

[37] *See generally* Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1 (1973).

[38] *Id.* at 1.

Antitrust Enforcement that demonstrates this distinction.[39] The main focus of their paper is a concern about the misuse of concentration measures as a basis for assessing market competitiveness. They worried that Demsetz's point was ignored by papers correlating concentration generally with competition generally as the SCP paradigm once did. They reiterated that it is wrong to assess the state of competition in our economy solely based on the level of concentration. But they distinguished relying on *merger-induced concentration changes* for a structural presumption. They explained that as to that separate question, "economic theory is consistent with the legal presumption that a merger is likely to have adverse competitive effects if it occurs in a concentrated market and makes that market more concentrated."[40]

Those 26 economists from multiple parties apply basic statistical principles distinguishing between the variables being analyzed. I think it is the more persuasive account.

And it's not just that the structural presumption remains strong as a theoretical economic principle. The empirical economic support has hardly been in a time capsule either. Many recent merger retrospectives link merger-induced concentration increases to observed post-merger anticompetitive effects, such as increased prices and decreased product availability. Works by Bhattacharya et al., Hosken et al., Koch et al., Dafny et al., and many others suggests a strong empirical relationship between merger-induced changes in concentration and higher prices.[41] Those

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[39] *See* Nathan Miller et al., *On the Misuse of Regressions of Price on the HHI in Merger Review*, 10 J. ANTITRUST ENF'T 248 (2022).

[40] *Id.* at 249.

[41] *See, e.g.*, Vivek Bhattacharya, Gaston Illanes & David Stillerman, *Merger Effects and Antitrust Enforcement: Evidence from US Consumer Packaged Goods* (Nat'l Bureau of Econ. Rsch., Working Paper No. 31123, 2023), https://www.nber.org/papers/w31123

studies cover a wide range of markets including consumer packaged goods,[42] grocery stores,[43] hospitals and health care

[https://perma.cc/UQH9-5LBZ]; Daniel Hosken, Luke Olson, & Loren Smith, *Do Retail Mergers Affect Competition? Evidence from Grocery Retailing*, 27 J. ECON. & MGMT. STRATEGY 3 (2018); Thomas Koch & Shawn W. Ulrick, *Price Effects of a Merger: Evidence from a Physicians' Market*, 59 ECON. INQUIRY 567 (2021); Leemore Dafny, Mark Duggan & Subramaniam Ramanarayanan, *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry*, 102 AM. ECON. REV. 1161 (2012).

[42] Bhattacharya et al., *supra* note 41 (studying 50 mergers in the consumer packaged goods industry and finding that these mergers raised prices by 1.5 percent and decreased quantities sold by 2.3 percent, on average).

[43] Hosken et al., *supra* note 41 (finding that the majority of grocery mergers in highly concentrated markets resulting in price increases of more than 2 percent).

providers,[44] health insurers,[45] and other mergers in oligopoly markets.[46]

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[44] Koch & Ulrick, *supra* note 41 (concluding that a merger of orthopedic physicians' practices increased prices to some payors by 10 to 20 percent while prices in nearby areas not affected by the merger remained unchanged); Zack Cooper et al., *The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured*, 134 Q.J. ECON. 51 (2019) (examining 366 hospital mergers and finding that prices increased by over 6 percent when merging hospitals were geographically close); Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 AM. ECON. REV. 397 (2021) (examining hospital mergers and finding reduced wage growth when merger significantly increases concentration).

[45] Dafny et al., *supra* note 41 (examining healthcare mergers and finding the mean increase in local market HHI during the studied period raised premiums by roughly 7 percent).

[46] *See, e.g.*, JOHN E. KWOKA, JR., MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 110–11 (2015) (providing a meta-analysis of retrospective literature, finding that more than 80 percent of mergers resulted in price increases and the mean price increase was 5.88 percent across all studied transactions); Orley C. Ashenfelter, Daniel Hosken & Matthew C. Weinberg, *Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers*, 57 J.L. & ECON. S67 (2014) (reviewing prior retrospectives and concluding that mergers in oligopolistic markets can result in economically meaningful price increases, as 36 of the 49 studies found evidence of merger induced price

This modern economic work shows us that merger-induced changes in market structure are a reasonably reliable indicator that a merger will harm Americans' pocketbooks. The empirical record in support of the structural presumption is stronger today than it has ever been.[47] Its continued

increases); 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) (examining a set of mergers that were unchallenged by the government finding that the majority resulted in a significant increase in consumer prices in the short run).

[47] *See* Jonathan B. Baker & Joseph Farrell, *Oligopoly Coordination, Economic Analysis, and the Prophylactic Role of Horizontal Merger Enforcement*, 168 U. PA. L. REV. 1985, 1991 (2020) ("[O]ne important conclusion is straightforward . . . greater concentration can be expected to make coordination more likely, stronger, or more effective. Accordingly, our analysis supports a structural merger policy, by which mergers between rivals that increase concentration significantly in a concentrated market are presumed to harm competition."); Volker Nocke & Michael D. Whinston, *Concentration Thresholds for Horizontal Mergers*, 112 AM. ECON. REV. 1915, 1946 (2022) (concluding that the 2010 Horizontal Merger Guidelines' structural presumption thresholds were likely too lax to prevent consumer harm from unilateral price effects); Simon Loertscher & Leslie M. Marx, *Coordinated Effects in Merger Review*, 64 J.L. & ECON. 705 (2021); *see also* Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 ANTITRUST L.J. 269, 276–78 (2015) (proposing that there is a "moderate rebuttable presumption that a

economic support is recognized by a wide range of serious academics and drove the Canadian Parliament just last year to codify a structural presumption into their merger review regime.[48]

So, we translate the structural presumption in *Philadelphia National Bank* into modern antitrust analysis by recognizing it is a sufficiently reliable indicator to demonstrate a prima facie case that a merger's effect "may be" to substantially lessen competition in the elimination of head-to-head competition and the enablement of oligopoly coordination. The structural presumption demonstrates a reasonable probability of higher prices, lower quality, or diminished innovation.

All of these presumptions are rebuttable, of course. That's the second critical element of translating the structural presumption today. Under the *General Dynamics* framework for applying the incipiency standard that I mentioned a few minutes ago,[49] the presumption of harm to competition we draw from an increase in concentration can be rebutted with further analysis of the impacts on competition.

merger uniting firms with high combined shares in a highly concentrated market is likely anticompetitive").

[48] *See* Competition Bureau Canada, *Reviewing the Merger Enforcement Guidelines*, GOV'T OF CAN. (Nov. 7, 2024), https://competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/reviewing-merger-enforcement-guidelines [https://perma.cc/L2G3-37AB]; Competition Bureau Canada, *Changes to the Provisions on Mergers and Restrictive Trade Practices in the Competition Act*, GOV'T OF CAN. (Nov. 7, 2024), https://competition-bureau.canada.ca/en/mergers-and-acquisitions/changes-provisions-mergers-and-restrictive-trade-practices-competition-act [https://perma.cc/T649-P4EJ].

[49] *See supra* note 31 and accompanying text.

D. Translating Procter & Gamble's Prohibition on Consideration of Possible Economies as a Defense to Illegality Into a Modern Burden-Shifting Framework that Considers Efficiencies as a Rebuttal

My last two translations focus on one of the more controversial of the 1960s cases: *Procter & Gamble*.[50] The puzzle of translating *Procter & Gamble* is a fascinating one. For those unfamiliar with the facts, Clorox, the largest manufacturer of household bleach, was bought by Procter & Gamble, which among other products was a leader in detergent sales.[51]

In the Supreme Court's equivalent of ancient Egyptian phrasing, this was a "product-extension" merger because it extended a product line that included other household cleaning products to also include bleach.[52] The Supreme Court noted that this would give the merged firm an advantage over rivals that don't sell the full range of products in things which can be done together, like marketing and distribution.[53]

What's so fascinating about translating that case is that the economics have evolved so much since then. We now use the word "complements" broadly for products and services with positive impacts on one another's demand. And we would now say the efficiencies of joint marketing and distribution for detergent and bleach are "production complements."

Our understanding of the economics of mergers of complements has greatly expanded in the last fifty years. We now better understand both the benefits, and the potential competitive risks, of mergers of complements. Those are the two translations I would like to unpack.

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[50] Fed. Trade Comm'n v. Procter & Gamble Co., 386 U.S. 568 (1967).

[51] *Id.* at 570–73.

[52] *Id.* at 577.

[53] *Id.*at 579.

First, the analysis of efficiencies in mergers. Economics teaches us that mergers of complements can in some situations benefit competition. But *Procter & Gamble* refused to consider efficiencies altogether, holding that "possible economies cannot be used as a defense to illegality."[54]

Based on that quote, many advocates of stronger merger enforcement pushed the Division and FTC to remove the efficiencies rebuttal from the merger guidelines.

But remember my first two points earlier about having an economic conception of the dynamic competitive process and employing a burden-shifting framework to evaluate rebuttal evidence. *Procter & Gamble* says efficiencies cannot be a *defense* to illegality.[55] But it does *not* say that procompetitive benefits are irrelevant rebuttal evidence in determining whether the merger is unlawful in the first place because of procompetitive effects of the transaction.

So efficiencies are *rebuttal* even if not a *defense*. They don't excuse a lessening of competition; they prevent it from happening in the first place.

Now, we must remember what we are rebutting for this to work. Efficiencies must benefit competition in the relevant market to rebut a lessening of competition. If our prima facie concern is that the merger will lead market participants to compete less forcefully, the cognizable efficiencies would need to show that the merger makes them a more forceful competitor. And we would need to know that the same benefits could not be achieved via contract; although the Sherman Act would prohibit a contract causing the anticompetitive effects of the merger, it would generally not prohibit the parties from achieving the merger's efficiencies.

One can probably predict from this discussion how the 2023 Guidelines responded to the calls to eliminate the efficiencies defense: the antitrust agencies declined the invitation. Instead, they clarified from the outset of the document that the statutory focus on "competition" centers

[54] *Id.* at 580.
[55] *Id.* (emphasis added).

the agencies' review, and that procompetitive efficiencies can therefore be appropriately considered in rebuttal.

E. Translating Procter & Gamble's Concern With Entrenchment of Power Into a Modern Framework that Distinguishes Efficiencies from Exclusion

That brings me to my last translation of *Procter & Gamble*. Our continuing evolution on this final topic through multiple administrations is critically important to competition in big tech. In order to enable competition in markets with significant network effects, we must have a thoughtful approach to mergers by already-dominant firms that threaten to entrench their market power.

The original understanding of *Procter & Gamble*'s entrenchment holding was not particularly thoughtful. The case states that "raising entry barriers" around an already dominant position is anticompetitive for purposes of the Clayton Act.[56] This sounds a little like Sherman Act monopoly maintenance. But not all barriers to entry are anticompetitive. Being a really forceful and capable competitor can scare off other firms from even trying. Yet early applications of *Procter & Gamble* did not distinguish efficiencies from exclusionary entrenchment, and the case was relied upon for what some have called an *efficiencies offense*.[57]

[56] *Id.* at 578; *see also* United States v. Anthem, Inc., 855 F.3d 345, 354 (D.C. Cir. 2017) (confirming that *Procter & Gamble* remains good law).

[57] *See, e.g.*, Alden Abbott, *Oldie-but-Baddie: The Revival of an Antitrust 'Efficiencies Offense'?*, TRUTH ON THE MARKET (Dec. 7, 2021), https://truthonthemarket.com/2021/12/07/oldie-but-baddie-the-revival-of-an-antitrust-efficiencies-offense/?utm_campaign=Competition%20Corner%20by

That gave way to a second era of thinking about entrenchment in which the concern was rejected altogether. Beginning in the 1970s and 1980s, the U.S. agencies rejected the premise that we should be concerned with mergers that entrench power and purged any mention of the theory altogether.

But many barriers to entry are anticompetitive. Indeed, many firms lessen competition by keeping would-be entrants out of the market. For example, economics teaches us that when you control a rivals' complements, you can make it harder or less attractive for them to enter. Or when you annex a tool that enables multi-homing across platforms, you can shut down platform interoperability and stifle competition.[58] Exclusionary barriers to entry are the bane of dynamic markets. By definition, the higher the costs of entry for innovators and entrepreneurs, the lower their return on investment for innovation and ingenuity. In this way, exclusionary barriers to entry discourage innovation, reduce investment, and stifle dynamic competition.

Or to use the language of economic forces: conduct harms competition when it makes rivals or would-be rivals less forceful competitors by inhibiting their access to complements.

The second era of entrenchment overcorrected. We see that in widespread concerns about the dominance of today's big tech firms and the constraints they place on little tech's ability to invest, thrive, and grow. We now recognize that the same monopoly maintenance concerns that animate our ongoing Sherman Act cases also have relevance to a Clayton Act designed to prevent the tendency toward monopoly in its incipiency.

%20Alden%20Abbott&utm_medium=email&utm_source=Revue%20newsletter [https://perma.cc/B6DX-6NGK].

[58] Susan Athey & Fiona Scott Morton, *Platform Annexation*, 84 ANTITRUST L.J. 677 (2022).

We are now in what I think of as the third era in the history of the Antitrust Division's approach to entrenchment theories in merger review.

In this modern era, the agencies are developing a more systematic and nuanced approach to entrenchment in the United States targeted at mergers that threaten exclusion harmful to competition. This third era began in the years following the release of the 2010 Horizontal Guidelines, which added a concern of mergers that "entrench . . . market power," without further explanation in the sentence setting forth the guidelines' unifying theme.[59]

In 2015, the Antitrust Division and Federal Communications Commission raised concerns with the merger of Comcast and Time Warner Cable. Although the companies did not overlap geographically, they owned about a combined two-thirds of the nation's broadband connections, and they had a shared incentive to discourage future innovation.[60] The merger was abandoned after both agencies expressed their concerns.[61] Assistant Attorney General Bill

[59] U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), https://www.justice.gov/atr/file/810276/dl?inline [https://perma.cc/F58E-U43V].

[60] *See* Edward Wyatt, *Senate Panel Expresses Caution on Merger of Cable Giants*, N.Y. TIMES (Apr. 9, 2014), https://www.nytimes.com/2014/04/10/business/media/senate-committee-begins-its-review-of-comcast-deal.html?_r=0 [https://perma.cc/TAX9-2Q2T].

[61] Press Release, U.S. Dep't of Just., Comcast Corporation Abandons Proposed Acquisition of Time Warner Cable After Justice Department and the Federal Communications Commission Informed Parties of Concerns (Apr. 24, 2025), https://www.justice.gov/archives/opa/pr/comcast-

Baer explained to a Chatham House conference in 2015 that the merger would further entrench these incumbents, threatening innovation.[62]

Then in the first Trump Administration, we saw the U.S. articulate an entrenchment theory in a legal pleading for the first time in decades. In challenging Visa's acquisition of payment technology provider Plaid, the Antitrust Division alleged that the merger would "raise . . . entry barriers . . . entrenching Visa's monopoly power."[63] Visa abandoned the merger shortly thereafter.[64]

The 2023 Merger Guidelines documented the U.S. agencies' evolution into this third era with the new Guidelines 6 and 9. These Guidelines use monopolization principles and cases that already distinguish exclusion and efficiency in the Sherman Act context to draw a similar line for entrenchment

corporation-abandons-proposed-acquisition-time-warner-cable-after-justice-department [https://perma.cc/K5K5-S6V7].

[62] Press Release, U.S. Dep't of Just., Assistant Attorney General Bill Baer Delivers Remarks at the Chatham House Annual Antitrust Conference (June 18, 2015), https://www.justice.gov/archives/opa/speech/assistant-attorney-general-bill-baer-delivers-remarks-chatham-house-annual-antitrust [https://perma.cc/3FJT-EJGK].

[63] Complaint ¶ 69, *United States v. Visa Inc.*, No. 3:20-cv-07810 (N.D. Cal. Nov. 5, 2020), available at https://www.justice.gov/opa/press-release/file/1334726/dl [https://perma.cc/6WNG-9NJ9].

[64] Press Release, U.S. Dep't of Justice, Visa and Plaid Abandon Merger After Antitrust Division's Suit to Block (Jan. 12, 2021), https://www.justice.gov/opa/pr/visa-and-plaid-abandon-merger-after-antitrust-division-s-suit-block. [https://perma.cc/634Y-KG62].

cases.[65] They also explain how exclusionary entrenchment can arise in platform markets.[66] As we now understand *Procter & Gamble* in light of the new Guidelines, the law distinguishes anticompetitive entrenchment from growth or development as a consequence of increased competitive capabilities or incentives.[67] The law distinguishes a merger that makes the merged firm a more forceful competitor from one that would weaken the forces of rivals.

This distinction that enables a discerning approach to entrenchment mergers is critically important as we take more seriously the need to deploy the Sherman Act in prohibiting monopoly maintenance by dominant firms in Big Tech and other industries. Imagine if instead of building and tying Internet Explorer to Windows,[68] Microsoft had just bought Netscape. What provision of the 1992 Merger Guidelines would have applied? The answer is none, because they didn't include an entrenchment section.[69] If we take monopoly maintenance seriously and do not apply similar economic theories in merger review, our monopolization program may just push dominant firms into acquisitions that enable them to exclude rivals and preserve their power.

III. CONCLUSION

Let me conclude by taking a step way back. Why bother with this exercise? Why retrofit and translate sixty-year-old cases into modern market realities?

We know why the Egyptologists celebrated the Rosetta Stone. It was not because they cared much about the details

[65] *See* 2023 Merger Guidelines, at 18–21.

[66] *Id.* at 23–26.

[67] *Id.* at 18.

[68] *See generally* United States v. Microsoft Corp., 253 F.3d 34 (2001).

[69] *Cf.* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES 2 (1992).

of the ancient decree written in three languages there. Rather, they cared about unlocking all of the history and culture that translating the decree enabled.

But we have English language video and newspapers from the 1960s. So we don't need a similar kind of translation for that.

We have a very different and more important reason: the rule of law.

I have had the great fortune to serve as an advisor to six assistant attorneys general and acting AAGs. Soon, I will serve a seventh and an eighth.

They all have differences in perspectives, personalities, and priorities. But they have all had one thing in common. Their authority to bring to bear the powers of the Justice Department against private parties flows *solely* from their fidelity to the law. They share a profound obligation to understand the law as they find it and to apply it to the facts without fear or favor.

Brown Shoe, *Philadelphia National Bank*, and *Procter & Gamble* are not the expired decrees of a forgotten government. They are the active mandates of a nation premised on the primacy of law over power and personal preference.

What a gift that is.

Thank you for joining me in this conversation.