Measuring the Impact of Mergers on Labor Markets

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While the Department of Justice (DOJ) traditionally reviews mergers solely in terms of their impacts of prices for consumers, the antitrust laws were enacted to deal with broader socio-political problems like industrial concentration as well as prices. A new line of research on labor market concentration suggests an additional area of concern for antitrust law, noting that even as mergers decrease prices, they can increase labor market concentration, keeping wages low for employees of merging companies.

This Note analyzes a merger through the lens of its predicted impact on wages, rather than prices. Part II lays out the evolution of antitrust law and merger review from its early multifaceted socio-political focus to its current narrow economic angle. Part III then questions whether the price-focused consumer welfare standard is as complete as it appears to be. Next, Part IV reviews the literature on labor market concentration and demonstrates how the tools that measure concentration in the product market can easily do the same in the labor market. Part V conducts a retrospective empirical analysis of a past merger, assessing whether it would have passed DOJ muster had the agency considered its effect on wages. Finally, Part VI suggests possible changes to the merger review process in light of the research and case study.

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I. INTRODUCTION

In the years following the Great Recession, the economy has steadily strengthened, with productivity growth high and unemployment low.[1] Yet even as these global indicators have improved, most workers have not seen an accompanying increase in their wages.[2] This discrepancy has led commentators to suggest a range of possible explanations.[3] Antitrust scholars have posited one novel reason: even as the economy has improved, a large number of mergers has reduced the number of potential employers competing for employees. In a strong labor market, employers would typically compete for employees by offering higher wages.[4] Yet instead of competing, employers have consolidated, thereby restricting competition for employees by giving them little choice in whom to work for and therefore not needing to raise wages. This line of thinking is relatively new in antitrust law, which is typically concerned with the impact of mergers (and other antitrust activities) on prices rather than wages.

This lacuna in the antitrust laws should be explored further. The Department of Justice (DOJ) reviews mergers to determine whether they will substantially harm competition under Section 7 of the Clayton Act.[5] Today, effects on competition are primarily assessed using the consumer welfare standard, which is only concerned with the increased prices of products, despite a long history of antitrust laws being used to remedy labor market concentration as an evil in itself.

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1. *See, e.g.*, Sam Fleming et al., *U.S. Economy: Statistics at a Glance*, FIN. TIMES, https://ig.ft.com/sites/numbers/economies/us [https://perma.cc/F936-PVAK] (last visited Sept. 7, 2019).
2. *See, e.g.*, Don Schlagenhauf & Ryan Mather, *Job and Wage Growth Since the Great Recession*, FED. RES. BANK ST. LOUIS: ON THE ECON. BLOG (Oct. 1, 2018), https://www.stlouisfed.org/on-the-economy/2018/october/job-wage-growth-great-recession [https://perma.cc/5838-UB9B] ("Wage growth since the beginning of the Great Recession has been slow.").
3. *See, e.g.*, Drew DeSilver, *For Most U.S. Workers, Real Wages Have Barely Budged in Decades*, PEW RES. CTR. (Aug. 7, 2018), http://www.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barely-budged-for-decades [https://perma.cc/T5B2-DQGW] (suggesting that increased employer-sponsored health care costs or the decline of labor unions could be to blame).
4. *See generally* Randy M. Stutz, *The Evolving Antitrust Treatment of Labor-Market Restraints: From Theory to Practice*, AM. ANTITRUST INST. (July 31, 2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/09/AAI-Labor-Antitrust-White-Paper_0-1.pdf [https://perma.cc/8UN7-54H9].
5. *See infra* note 9.

Although barely relevant in current DOJ analysis, concentration in labor markets arising from mergers can have multiple harmful effects. Even under the consumer welfare standard, extensive labor market concentration can cause suppression of wages, which is an effective price increase for those whose wages are artificially pushed below market value, especially when jobs in many markets are concentrated. Moving beyond the traditional theory of harm, the DOJ should begin to see labor market concentration as a harm in itself. This theory is supported by existing case law and doctrine, as well as the legislative history and intent behind the major antitrust laws, yet it is rarely invoked explicitly today.[6]

This Note pulls together several strands of existing research to show that there is a lengthy history of using antitrust laws to attack industrial concentration, that labor market concentration is measurably high, and that many labor markets are highly concentrated.[7] This Note builds on this work and presents a case study that illustrates how to measure labor market concentration by using the inverse of the DOJ's existing methods to measure product market concentration. The case study finds that concentration in the labor market can decrease wages, with comparisons in similar cities to control for exogenous economic factors. As the theories on labor market concentration continue to develop, it is critical to provide real-life examples of their potential harms in order to build momentum in addressing the problem.

Incorporating concerns about the labor market in the DOJ's merger review will lead to a more holistic, comprehensive, and accurate review process. This more robust review will ensure that employees maintain a more expansive set of options when applying for jobs and will prevent merging companies from forming the types of oligopolies that are anathema to antitrust law. A new generation of antitrust scholars demonstrate that antitrust law, developed in the 1890s and solidified in the 1970s, could not have foreseen novel distortions in our modern and rapidly changing economy.[8] Demonstration of concentrated labor markets' potential harm is another aspect of that vision.

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6. *See infra* Part II.
7. *See infra* Part IV.
8. *See, e.g.*, Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2016).

Part II of this Note lays out some of the intellectual foundations of antitrust law and merger review that incorporate a broad array of social and political concerns, in addition to economic ones. It then explains how antitrust law narrowed to consider only the effect on prices when determining whether a given action is anticompetitive. Part III complicates that notion by highlighting several areas where courts have found antitrust violations when higher prices were not the primary issue, despite the nominal dominance of the consumer welfare standard. Part IV describes more fully why the impact of the labor market should be a factor in the DOJ merger review. In making that case, this Note demonstrates how the essential elements of the labor market are very similar to those of the product market, and how the same tools currently used to analyze the latter can be applied to the former. Part IV also outlines the extent to which the labor market is concentrated. Finally, Part V provides a case study of a real-life merger and demonstrates its effects on wages. This Note then concludes by proposing to the DOJ methods for incorporating labor market considerations into their broader merger review.

II. HISTORICAL PROGRESSION OF ANTITRUST LAW

The Sherman Antitrust Act's (Sherman Act) brevity belies its complexity.[9] While the text of the law is brief,[10] judges and legal scholars have spilled much ink attempting to determine its precise bounds and limits. Although today the law is enforced primarily to ensure that prices are not artificially increased, this Part outlines the initial, multifaceted goal of antitrust law and merger review: limiting economic concentration and the colossal power of the "trusts," i.e., the business combinations that domi-

9. The Sherman Antitrust Act, passed in 1890, was the first antitrust law in the country. 15 U.S.C. §§ 1–7 (2012). In broad strokes, it forbade unreasonable restraints of trade and maintenance of monopolization and implicitly gave the courts the role of defining those terms. It was followed in 1914 by the passage of both the Clayton Act, 15 U.S.C. §§ 12–27 (2012), which gave the Sherman Act more teeth by prohibiting particular types of conduct and the Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2012), which created the Federal Trade Commission (FTC) and empowered the Commission to prosecute unfair methods of competition. Section 7 of the Clayton Act was amended in 1950 to more explicitly discourage anticompetitive mergers. 15 U.S.C. § 18 (2012).

10. The substantive part of the section on monopolization simply reads: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty of a felony." 15 U.S.C. § 2 (2012).

nate their industry. Antitrust advocates have historically believed that reducing the trusts' strength would minimize the power of individual businesses and bolster democracy, which would then protect certain vulnerable actors in the economy all while keeping prices in check. Congress strengthened Section 7 of the Clayton Act[11] in 1950 to address these same concerns and ensure that companies could not agglomerate into trusts that were powerful enough to bend the government to their will. However, Parts II.C–D of this Note describe how in the 1980s these varied goals were reduced to a focus solely on whether alleged antitrust violations or mergers increased prices, thereby shedding the broader socio-political goals of the antitrust laws.

A. INITIAL GOALS OF ANTITRUST LAW GENERALLY

In the wake of the Industrial Revolution, businesses in the U.S. began rapidly consolidating under the leadership of wealthy entrepreneurs. By the end of this period of mergers, just under half of all major industries had a single entity that controlled over seventy percent of the market share.[12] These industries were monopolized such that John Rockefeller's oil trust, J.P. Morgan's banking trust, and Andrew Carnegie's steel trust, for example, each became the sole entities with market power in their respective industries.[13] The same type of consolidation also occurred in dozens of other industries.[14]

The trusts often exploited their massive market power to drive out competitors using an interlocking set of predatory political and economic tactics. For instance, to maintain its monopoly in oil pipelines, Standard Oil bought up land on which alternative pipelines were to run and used its political clout to prevent Congress from exercising its eminent domain power for pipeline construction.[15] In some localities, Standard Oil even engaged in predatory bidding, forcing competitors to pay inflated prices for

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11. Also known as the Anti-Merger Act. *See* Celler-Kefauver Anti-Merger Act, Pub. L. No. 81-899, 64 Stat. 1125 (1950).

12. *See* NAOMI LAMOREAUX, THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS 1895–1904 (1985).

13. *See* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 25 (2018).

14. *Id.*

15. *See* ELLIOTT JONES, THE TRUST PROBLEM IN THE UNITED STATES 66–67 (1921) (explaining the tactics that several trusts used to consolidate power and exclude competitors from the industry).

oil.[16] The company then used price discrimination tactics to cut rates low enough to drive out competition, instead of reflecting the actual costs of supplying oil.[17] When pipelines were deemed common carriers, Standard Oil was known to place additional obstacles, such as simply refusing to transport oil belonging to other companies or imposing onerous regulations like requiring a minimum shipment of 300,000 barrels of oil.[18]

While relevant, high prices per se were not the principal impetus for the Sherman Act; rather, the oppressive dominance of the trusts pushed Congress to act.[19] Ironically, when considered in light of current antitrust law, prices were relatively low in 1890.[20] Overcharging consumers was simply one of many ways that the trusts could use their power to the detriment of the public. In his remarks defending the bill, Congressman John Sherman railed against the trusts for usurping Congress' role, warning the public that "[i]f the concentrated powers of this combination are intrusted [sic] to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the State and national authorities."[21] Congressman Sherman was not only speaking for himself, but rather, he was also channeling "the deep seated public aversion toward trusts."[22]

The power of the trusts was broad and multifaceted, spanning politics, business, and even the labor markets. As expressed by the well-known octopus political cartoons of the day, political observers feared that the trusts could eventually control every aspect of life.[23] While not a primary issue at the time, many were

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16. *Id.* at 67.

17. *Id.* at 77.

18. *Id.* at 68–69.

19. *See* John B. Kirkwood, *The Essence of Antitrust: Protecting Consumer and Small Suppliers from Anticompetitive Conduct*, 81 FORDHAM L. REV. 2425, 2433–34 (2013) (showing how Congress wisely recognized that even if monopolists did not have high prices now, they easily could later, meaning that high prices were only a symptom of the problem of concentrated power).

20. *See* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 97 (1982).

21. 21 CONG. REC. 2457 (1890).

22. Barak Orbach & Grace E. Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. CAL. L. REV. 605, 618 (2012); *see also* William Letwin, *Congress and the Sherman Antitrust Law: 1887–1890*, 23 U. CHI. L. REV. 221, 222–35 (1956) (tracing the long history of American public opposition to monopolies and how it drove the passage of the Sherman Act); David K. Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219 (1988) (claiming that the Sherman Act was a culmination of a long history of American antipathy towards monopolies).

23. *See* Orbach & Rebling, *supra* note 22, at 618.

concerned about trusts harming workers by tinkering with labor markets. Congressman Sherman presciently argued that a monopoly could "command the price of labor without fear of strikes, for in its field it allows no competitors."[24] Stated in modern terms, Congressman Sherman expressed the same concerns about monopsony that contemporary scholars are only now addressing: dominant trusts can suppress wages if no other firms compete for employees.[25] This concern was a natural outgrowth of the fear associated with the all-encompassing trust. Congressman Sherman and his allies were principally worried about the trusts controlling both Congress and less dominant companies, but the labor market was surely a concern, even if less urgent than the others.

President Theodore Roosevelt concurred with Congressman Sherman's sentiments and ushered in a more vigorous era of antitrust enforcement, departing from the lax standard that had prevailed until his presidency.[26] Like Congressman Sherman, President Roosevelt believed it was dangerous for democracy to allow the trusts disproportionate influence over economic policy, which he believed should be reserved for the political branches.[27] In 1904, the U.S. government filed suit against the Northern Securities company, securing the first breakup of a private company under the antitrust laws with Justice Harlan writing the opinion.[28] This mode of enforcement continued when the Supreme Court broke up the Standard Oil Company using a similar rationale, with Justice Harlan decrying again the potential of the trusts to create a kind of "slavery that would result from aggregations of capital in the hands of a few individuals and corporations."[29] Per Justice Harlan's antitrust opinions, the Sherman

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24. 21 CONG. REC. 2457 (1890).

25. A monopsony is a buyers' monopoly. Whereas in monopolies a single seller has multiple potential buyers, a monopsony has one buyer with multiple potential sellers. In the labor market context, a monopsony means that only one company is offering to hire employees of a certain type, i.e., those who are selling their labor. *See* Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 297–98 (1991).

26. *See* Wu, *supra* note 13, at 46 ("McKinley's *laissez-faire* views had left the Sherman Act, then a newly enacted antitrust law, in a stillbirth from which it was not clear it would ever emerge.").

27. *Id.* at 49.

28. *Id.* at 49–50. *See also* N. Sec. Co. v. United States, 193 U.S. 197 (1904) (ordering the breakup, in part, because Northern Securities had eliminated competition by combining competitors).

29. Standard Oil Co. v. United States, 221 U.S. 1, 83 (1911).

Act was meant to directly counteract the immense private and unaccountable power accumulated by the trusts.

The 1912 presidential election, which followed Justice Harlan's influential antitrust decisions, prominently featured questions about antitrust law. In a four-man race, primary competitors Woodrow Wilson and William Howard Taft both campaigned on a competitive — but regulated — economy position along the lines of the Sherman Act (with Louis Brandeis serving as an economic advisor to Wilson, before eventually becoming a Supreme Court Justice). The two less popular candidates, President Roosevelt and Eugene V. Debs, called for nationalizing the trusts.[30] Combined, the candidates favoring traditional antitrust legislation earned over sixty percent of the popular vote.[31] With the subsequent passage of the Clayton Act and FTC Act, which both codified and strengthened antitrust law, the anti-consolidation version of the antitrust laws attained further democratic legitimacy (and arguably even constitutional legitimacy) given the nature of the national debate and the decisive electoral and legislative victories.[32]

Along with the political considerations, research has shown that the law was intended to protect smaller companies from the trusts, preferring the economic landscape to be populated with many small companies rather than a few large ones, even at the cost of economic efficiencies.[33] Justice Brandeis supported this

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30. *See* Wu, *supra* note 13, at 75–76. In a departure from his previous policies, Roosevelt proposed that the trusts be allowed to remain but completely controlled and supervised by the federal government. *See id.* Debs, the Socialist candidate, called for collective ownership of the trusts by the people. *See id.*

31. *See United States Presidential Election of 1912*, ENCYC. BRITANNICA (Oct. 29, 2018), https://www.britannica.com/event/United-States-presidential-election-of-1912 [https://perma.cc/9LHR-AVBW].

32. *See* Wu, *supra* note 13, at 77 (citing 1 BRUCE A. ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) (theorizing that there are certain moments in history where public opinion is focused and decisive enough to create a constitutional change even if the formal amendment process has not been used)). Wu argues that antitrust law underwent such a moment in the 1912 election and its consummation in the subsequent passage of additional antitrust laws. *See id.*

33. *See* George J. Stigler, *The Origin of the Sherman Act*, 14 J. LEGAL STUD. 1 (1985) (finding some empirical backing for the contention that states populated by small producers drove support for the Sherman Act); *see also* Werner Troesken, *The Letters of John Sherman and the Origins of Antitrust*, 15 REV. AUSTRIAN ECON. 275 (2002) (arguing that Congressman Sherman intended the act to protect small producers from their larger competitors); Kirkwood, *supra* note 19, at 2438 (declaring "the predominant goal" of the antitrust laws as "protecting of consumers and small suppliers from anticompetitive conduct"); Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 24, 44 (1989)

view, critiquing the predatory nature of trusts for driving small companies out of business using exclusionary conduct.[34]

As late as 1945, the socio-political elements of the antitrust laws were still in full force. In the landmark *Alcoa* decision, Judge Learned Hand tied together several of these non-economic ideas to render a verdict against Alcoa, an aluminum company with ninety percent market share whose profits were moderate, not extortionate.[35] Judge Hand noted that case law since the passage of the Sherman Act had demonstrated that the law was meant to bolster small producers and disrupt industrial concentration. Judge Hand also provided broader economic justifications for antitrust law, viewing monopoly as an economic "narcotic," and competition as a "stimulant."[36]

Alcoa marked a clear and forceful enunciation of the multifaceted goals of antitrust policy. Shortly thereafter, Congress passed the Anti-Merger Act, which sought to attack industrial consolidation by applying the antitrust laws, including the varied

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(providing evidence from the Congressional Record that the drafters of the Sherman Act "were at least as concerned with various kinds of injury to competitors").

34. *See* Kenneth G. Elzinga & Micah Webber, *Louis Brandeis and Contemporary Antitrust Enforcement*, 33 TOURO L. REV. 277, 282 (2017). *See also* Orbach & Rebling, *supra* note 22, at 629. For an illustrative example of Justice Brandeis' views, *see* Louis K. Liggett v. Lee, 288 U.S. 517, 565 (1933) (Brandeis, J., dissenting) ("[T]hrough size, corporations . . . have become an institution — an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the state.").

35. United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945) [hereinafter *Alcoa*]. Despite its citation as a Second Circuit case, *Alcoa* is considered a Supreme Court case, though a Second Circuit panel heard it due to unique procedural complications. Four Supreme Court Justices had recused themselves from the case because they had previously held top positions at the DOJ and had investigated Alcoa in that capacity. Lacking a quorum on the high court, Congress passed special legislation enabling the most senior appellate judges in the relevant district to hear the case instead. *See* Marc Winerman & William E. Kovacic, *Learned Hand,* Alcoa*, and the Reluctant Application of the Sherman Act*, 79 ANTITRUST L.J. 295, 299 (2013).

36. Alcoa, 148 F.2d at 427 ("Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. . . . We have been speaking only of the economic reasons which forbid monopoly; but, as we have already implied, there are others, based upon the belief that *great industrial consolidations are inherently undesirable, regardless of their economic results*. . . . [A]mong the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them. . . . Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." (emphasis added)).

goals invoked in *Alcoa*, more directly to mergers.[37] Like the Sherman Act, this law sought to prevent monopolies from accruing excessive economic or political power.

B. INITIAL GOALS OF MERGER REVIEW

The same socio-political concerns that engendered the Sherman Act arose again during the proposal of the amendments to Section 7 of the Clayton Act in 1950. Like its precursor, the amendment is brief, stating most substantively that mergers are illegal if they "substantially lessen competition or tend to create a monopoly."[38] Proponents of the amendments to Section 7 likewise feared that increasing industrial concentration placed too much power in the hands of big companies, depriving citizens of control of their local communities.[39]

This fear was compounded by recent historical experience. One of the bill's cosponsors, Congressman Emmanuel Celler, warned that industrial monopolies in Germany paved the way for the rise of Hitler and encouraged Nazi Germany to quickly mobilize for war.[40] The concern that industrial concentration would lead to totalitarianism augmented the longstanding anxiety that economic concentration would give trusts a disproportionate voice in policymaking. This view was shared among supporters of the amendment.[41]

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37. *See* 15 U.S.C. § 18 (2012). Also known as Section 7 of the Clayton Act or the Celler-Kefauver amendments.

38. *See id.*

39. *See* Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1062–63 (1979) ("The present trend of great corporations to increase their economic power is the antithesis of meritorious competitive development. . . . Local economic independence cannot be preserved in the face of consolidations such as we have had during the past few years. The control of American business is steadily being transferred . . . from local communities to a few large cities. . . . Millions of people depend helplessly on their judgment. Through monopolistic mergers the people are losing power to direct their own economic welfare. When they lose the power to direct their economic welfare they also lose the means to direct their political future." (quoting 96 CONG. REC. 16, 452 (1950)).

40. *Id.* at 1062. For further discussion of how "a highly concentrated industrial sector facilitated Hitler's rapid consolidation of political control," *see* Daniel Crane, *Antitrust and Democracy: A Case Study from German Fascism* 15 (U. Mich. Law Sch., Law & Econ. Working Papers, Art. 155, 2018).

41. *See* Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 235 (1960) ("In the minds of the Congressmen, the growth of these large economic groups could lead only to increasing government control; freedom would corrode and the nation would drift into some form of totalitarianism.").

These broader concerns were considered by the Supreme Court in the landmark cases of *Brown Shoe* and *Philadelphia National Bank*, decided in 1962 and 1963, respectively, which established the basic process of merger review.[42] The Court determined that the process entailed first defining the market by identifying a specific "line of commerce" and "section of the country" and delving into the specifics of that market in order to determine whether a merger would unduly increase market share in that relevant market.[43] Once the market was defined, a court should employ a burden-shifting framework to assess the potential harm caused by the merger. If a merger resulted in coverage of a certain percentage of the market,[44] it was presumptively unlawful. After that, the burden shifted to the merging companies, in which they could present procompetitive justifications in order to override this presumption and articulate why the merger would not cause economic harm.[45] The market definition and burden-shifting frameworks have been adjusted over the years but remain structurally in place.[46]

Yet, while explicating the economic analysis required to assess a merger, the Court did not shy away from also acknowledging non-economic rationales for blocking mergers. Indeed, Chief Justice Warren's unanimous[47] majority opinion in *Brown Shoe* recognized "Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and market. It resolved these competing considerations in favor of decentraliza-

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42. *See generally* United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963); Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

43. *See Phila. Nat'l Bank*, 374 U.S. at 355–56; *Brown Shoe*, 370 U.S. at 324.

44. It was thirty percent at the time. *See Phila. Nat'l Bank*, 374 U.S. at 364. Today, courts use a looser sliding-scale approach whereby a stronger prima facie case requires stronger evidence to rebut it. *See* Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 ANTITRUST L.J. 269, 275 (2015). While courts no longer require a specific percentage of the market to be covered by a merger, the FTC has challenged seventy-five percent of mergers with market shares over sixty percent, sixty-three percent of mergers with market shares between forty-five and sixty percent, and just thirty-two percent of mergers with market share below forty-five percent. *Id.* at 278–79. The existence of entry barriers also plays a role in determining whether the FTC will challenge a given merger. *Id.* at 279.

45. *See Phila. Nat'l Bank*, 374 U.S. at 371–72.

46. *See infra* Part V on merger review. *See also* Salop, *supra* note 44, at 306.

47. Though only seven justices participated in the case. *See Brown Shoe*, 370 U.S. at 346. Further, Justice Harlan dissented in part, mostly based on jurisdictional grounds, but concurred with the judgment. *Id.* at 357.

tion."[48] Echoing discussions around the passage and enforcement of the Sherman Act, the majority in *Brown Shoe* noted Congress' desire to avoid mergers' potentially "adverse effects upon local control of industry and upon small business."[49]

Similarly, the majority in *Philadelphia National Bank* acknowledged that Congress had not intended for merger review to be a wholly economic question. Justice Brennan noted that "Congress [was] determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware . . . that some price might have to be paid," implying that even some economically efficient price-decreasing mergers might be blocked for socio-political reasons.[50]

In theory and practice, antitrust law and merger review specifically took account of a host of socio-political goals when considering whether competition would be unreasonably or substantially impaired. Yet a new model would upend this holistic conception of antitrust in favor of a regime focused only on narrow economic impact.

C. THE RISE OF THE CONSUMER WELFARE STANDARD

The vigorous debates around the application of the broader socio-political concerns of antitrust laws gradually, and then suddenly, gave way to a solely economic framework. The "Chicago School," spearheaded by Robert Bork, who would go on to become the U.S. Solicitor General and a U.S. Court of Appeals Judge, proposed that antitrust law was not intended to address social concerns, and instead should focus solely on the economic question of whether an action increases consumer prices. The Supreme Court was amenable to this view (and Congress showed no inclination to overturn it), and eventually wrung all socio-political goals out of antitrust law and merger review, leaving only Bork's price-focused consumer welfare standard. This Part of the Note discusses the consumer welfare standard and its adoption by the Court, as well as its adoption of similar economic, price-focused principles for merger review.

48. *Id.* at 344.
49. *Id.* at 320.
50. *Phila. Nat'l Bank*, 374 U.S. at 371 (1963).

In the 1960s and 70s, Bork led the Chicago School in critiquing the multifaceted theory of antitrust law, arguing instead for the "consumer welfare standard."[51] Put simply, this standard stood for the proposition that antitrust law should disregard any socio-political concerns and consider only whether the conduct in question would increase prices for consumers. Bork began writing his antitrust articles in the 1960s, and the Supreme Court adopted his simpler rule by the end of the 1970s.[52]

Bork focused his critique of the broader antitrust standard on its legislative history as well as its present unworkability and potential for abuse. After surveying the legislative history, Bork concluded that statements of the senators supporting the Sherman Act and their intended competition policies demonstrated that they had only intended antitrust law to consider consumer welfare.[53] Bork's assessment directly contradicts the history laid out above,[54] which he justified by making two logical leaps.

First, Bork explicitly stated that the prospect of divining legislative history is inherently uncertain since it requires parsing statements and intentions of many different people.[55] Notwithstanding this difficulty, he construed ambiguous statements in the legislative history to support his position and easily reinterpreted any that contradicted his consumer welfare focus.[56] Further, Bork's definition dispensed with decades of judicial precedent following the passage of the Sherman Act as well as debates around the passage of the Clayton Act, FTC Act, and the Anti-Merger Act. He denigrated judges who attempted to use extra-economic values in the formation of antitrust law, with particular criticism reserved for Judge Hand. Bork believed that the values which had been part of the law for decades should be eliminated if they were not proper in the first place.[57]

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51. *See generally* ROBERT H. BORK, THE ANTITRUST PARADOX (1978).

52. *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).

53. *See* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

54. *See supra* Part II.

55. *See* Bork, *supra* note 53, at 7 n.2. Nevertheless, Bork believed that the legislative history was clear in this case. *Id.* at 7 n.1.

56. *Id.* at 26 (citing a lengthy quote from Sherman, Bork states in a conclusory fashion that the passage emphasizes consumer harm and claims that Sherman's mention of a fear of a trust prohibiting strikes is "clearly an additional evil and not a test for illegality to be applied independently of consumer welfare").

57. *Id.* at 8.

Second, Bork correctly noted that legislators in the 1890s did not have access to the same level of economic rigor that existed by the mid-twentieth century.[58] While undoubtedly true, this rhetoric allowed Bork to translate the legislators' views into economic terms that were more amenable to his interpretation.[59] Both of these contentions have merit, but Bork massages them to make it appear that the legislators' intent matched his own exactly.[60]

Bork's reading of the legislative history was useful in providing a basis for his theory, but more importantly it provided him with a platform to make the substantive arguments for adopting the consumer welfare standard. Bork argued that judicial precedent provided no clear guidelines for weighing the extra-economic values that were at play, which meant that judges could use them to achieve their preferred outcomes. In critiquing *Alcoa*, Bork complained that Judge Hand had provided no guidance on how to value non-economic goals or when those goals could supersede consumer welfare questions, leaving it to future judges to decide in an ad hoc fashion.[61] Stemming from a later Judge Hand opinion, Bork imputed to Judge Hand the belief that "the Fifty-First Congress had given the federal courts virtual carte blanche to choose the values they would implement through the Sherman Act."[62] Agreeing with Bork, Judge Douglas Ginsburg later wrote that "[non-economic values] can be invoked (or not) to justify almost any result in any situation."[63] Bork argued, and Ginsburg concurred, that granting the immense power of breaking up companies to the courts was dangerous for democracy, as it allowed them to circumvent Congress in making policy and raised the

58. *See* Barak Orbach, *How Antitrust Lost its Goal*, 81 FORDHAM L. REV. 2253, 2263 (2013).

59. *Id.* at 2262–64. *See also* Lande, *supra* note 20 at 87 ("Indeed, it is unlikely that in 1890 many economists, much less legislators, understood the impact of monopoly power on allocative efficiency.").

60. Herbert Hovenkamp, an author of an antitrust treatise, calls Bork's reading "strained," and declares that "not a single statement in the legislative history came close to stating the conclusions that Bork drew." Hovenkamp, *supra* note 33, at 22. Tim Wu concludes that "the weight of scholarship regards [Bork's presentation of the consumer welfare standard] as both an implausible reading of the legislative history, and a suspicious echo of Bork's own theories." Tim Wu, *After Consumer Welfare, Now What? The 'Protection of Competition' Standard in Practice*, COMPETITION POL'Y INT'L ANTITRUST CHRON. 3–4 (Apr. 2018).

61. *See* Bork, *supra* note 53, at 9.

62. *Id.*

63. Douglas H. Ginsburg, *Bork's Legislative Intent and the Courts*, 79 ANTITRUST L.J. 941, 942 (2014).

possibility of arbitrary or politically-motivated enforcement.[64] Instead of holding the traditional concerns about consolidated power among businesses as a threat to democracy, Bork viewed excessive power in the judiciary as a threat to the will of the people.

Eliminating judicial consideration of the Sherman Act's socio-political goals certainly streamlined the analysis by creating a clear rule. In place of weighing abstract and non-economic goals, Bork's proposition of simply measuring consumer welfare was much easier for courts to apply. Indeed, not only did courts avoid the tradeoff between economic and socio-political ends, but since the standard only measured consumer welfare, the costs and benefits to other parties (e.g., producers, employees, and the political system as a whole) were also not calculated.[65]

Although controversial at first, Bork's ideas were extraordinarily successful. In 1979, the Supreme Court appeared to adopt his language and consumer welfare standard when it stated that "the [floor debates surrounding the Sherman Act] suggest that Congress designed the Sherman Act as a 'consumer welfare prescription,'" citing Bork's *The Antitrust Paradox* as the basis for that conclusion.[66] The Supreme Court repeatedly affirmed this notion in numerous cases, both in formulation and content,[67] becoming the standard in antitrust law today.[68] With the adoption

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64. *See* Robert H. Bork & Ward S. Bowman Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 375–76 (1965).

65. Herbert Hovenkamp, *Whatever* Did *Happen to the Antitrust Movement?*, 94 NOTRE DAME L. REV. 583, 589 (2019).

66. Reiter v. Sonotone Corp, 442 U.S. 330, 343 (1979).

67. *See, e.g.*, Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 367 (1982) (Powell, J., dissenting) ("As we have noted, the antitrust laws are a consumer welfare prescription."); Nat'l Collegiate Athletic Ass'n v. Oklahoma, 468 U.S. 85, 107 (1984) ("'Congress designed the Sherman Act as a consumer welfare prescription.' A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of anti-trust law." (quoting Reither v. Sonotone Corp., 442 U.S. 330, 343 (1979)); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986) ("[C]utting prices in order to increase business is often the very essence of competition."); State Oil Co. v. Khan, 522 U.S. 3, 15 (1997) ("Antitrust laws' primary purpose is to protect interbrand competition, and that condemnation of practices resulting in lower consumer prices is disfavored[.]") (citation omitted); Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 906 (2007) ("The rationales for [protectionist] provisions are foreign to the Sherman Act. Divorced from competition and consumer welfare, they were designed to save inefficient small retailers from their inability to compete.").

68. *See, e.g.*, HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 2.3c (4th ed. 2011) ("[A]ntitrust policy adopts the 'consumer welfare' . . . prescription.").

of Bork's views and a tighter focus on consumer welfare and prices, antitrust law became less concerned with concentration as an evil in itself.

D. THE CONSUMER WELFARE STANDARD AND MERGER REVIEW

Just as the consumer welfare standard was quickly adopted as the standard for antitrust law as a whole, so too did it penetrate the assessment of mergers. While the 1968 Horizontal Merger Guidelines [hereinafter, the 1968 Guidelines] reflected the varied tactics used to decrease industrial concentration, the next edition of the Guidelines published in 1982 evinced a wholesale adoption of Bork's consumer welfare ideas. The 1968 Guidelines — drafted under the fear of trusts consolidating and amassing power — focused on challenging mergers when they caused even moderate concentration by today's standards.[69] Industrial concentration was treated as an evil to be avoided with economic goals as one consideration among many. Based on the 1968 Guidelines, concentration was harmful even if it did not increase consumer prices. However, Bork's consumer welfare ideas turned the tide against the socio-political goals in merger review and toward a model of consumer welfare alone. This trend began with the *General Dynamics*[70] decision, which at the time signaled the strongest rejection yet of the socio-political goals in merger review. There, the Supreme Court rejected the populist sentiments expressed in *Brown Shoe* to uphold a merger that increased concentration but was not determined to harm consumer welfare.[71] This decision was later solidified by the executive branch in later versions of the guidelines.

The version of the Horizontal Merger Guidelines promulgated in 1982 [hereinafter, the 1982 Guidelines] stripped all of the socio-political content from merger review, focusing strictly on economic effects.[72] This satisfied one of Bork's critiques of antitrust

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69. For example, the 1968 Guidelines called for challenging mergers in a market where the acquiring firm's share is at least fifteen percent, the acquired firm's share is at least one percent, and the four largest firms have a share of seventy-five percent. *See* Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in 40 Years*, 77 ANTITRUST L.J. 701, 703 (2010).

70. *See* United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974).

71. *See* Robert A. Skitol & Kenneth M. Vorrasi, *The Remarkable 50-Year Legacy of* Brown Shoe Co. v. United States, 26 ANTITRUST 47, 49 (2012).

72. *See* Donald I. Baker & William Blumenthal, *The 1982 Guidelines and Preexisting Law*, 71 CAL. L. REV. 311, 320 (1983) ("[P]opulist concerns have become largely vestigial.

law by replacing ostensibly mushy philosophical values with a clear economic test. The 1982 Guidelines further solidified Bork's vision by removing socio-political considerations such as "viewing mergers as a threat to the societal fabric."[73] Such concerns, which had "once received more or less equal billing [with economic considerations] as the basis for merger policy," were removed in favor of economic considerations alone.[74]

The Supreme Court's adoption of the consumer welfare standard along with the DOJ's publication of economically-focused guidelines completed the transformation, especially as publishers of the guidelines made future editions increasingly more technical and economic after 1982.[75] In antitrust law and merger review, all branches of government had dispensed with the broader socio-political goals of antitrust law in favor of a narrow focus on consumer welfare. Mergers would no longer be scrutinized for whether industry consolidation could have deleterious effects on democracy or small businesses, but rather only for whether they would increase prices for consumers.

III. Gaps in the Consumer Welfare Standard

The consumer welfare standard gradually consumed antitrust law, and the leading scholars and practitioners have since considered its dominance to be a *fait accompli*.[76] Despite this apparent consensus, courts have not applied the consumer welfare standard unstintingly. Especially in labor markets, anticompetitive conduct, such as no-hire agreements and monopsony, has been deemed unlawful by courts even if it does not result in increased prices.[77]

They may still linger in the body of antitrust law, but as a practical matter they serve little function. . . . [E]ven those scholars who would base antitrust policy in part on social and political considerations have been forced to admit the minority status of their views.").

73. *Id.* at 317.

74. *Id.*

75. *See* Shapiro, *supra* note 69, at 705.

76. *See, e.g.*, Hovenkamp, *supra* note 68, at § 2.3c ("[A]ntitrust policy adopts the 'consumer welfare' . . . prescription.").

77. Though in some cases there is a consumer welfare angle, even if it is not addressed by the court. *See* Ioana Elena Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1038 (2019) (explaining that based on economic theory, companies with labor monopsonies will tend to produce lower output, since they will use their market power to hire fewer workers at lower wages).

There are several instances in product markets where increased prices are not required to make out a violation.[78] The same is often true for labor markets, where antitrust standing is granted when employers improperly interfere with the fair functioning of the labor markets, even if those changes do not result in increased consumer prices. According to an influential antitrust treatise:

> Antitrust law addresses employer conspiracies controlling employment terms precisely because they tamper with the employment market and thereby impair the opportunities of those who sell their services there. Just as antitrust law seeks to preserve the free market opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of employment services. It would be perverse indeed to hold that the very object of the law's solicitude and the persons most directly concerned — perhaps the only persons concerned — could not challenge the restraint. . . . An employee overcomes the primary hurdle to standing when he or she shows that the alleged violation restrains competition in the labor market.[79]

Companies engage in no-hire agreements when they conspire not to hire employees from one another.[80] Justifications for these agreements exist in highly-skilled, specialized fields; companies do not want to invest in identifying and training their chosen employees only to have them abscond to a competitor once they are trained.[81] Recently, even companies hiring for low-skill jobs

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78. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (making price fixing per se illegal even if the price fixer does not have market power or the price fixed is relatively low); Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977) (holding that a direct purchaser can have antitrust standing against suppliers even if the price increase is not passed on to consumers); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986) (deciding that an agreement among dentists that harmed insurers violated antitrust laws, regardless of whether it resulted in higher prices).

79. PHILIP AREEDA ET AL., ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION § 352c (4th ed. 2014).

80. *See, e.g.*, *In re* High Tech Emp. Antitrust Litig., 985 F. Supp.2d 1167 (N.D. Cal. 2013) (granting class certification when several tech companies, including Apple, Google, and Intel, agreed not to recruit one another's employees). The litigants eventually settled for $435 million. *See* Settlement Agreement at 47, *In re* High Tech Emp. Antitrust Litig., 985 F. Supp.2d 1167 (N.D. Cal. 2013).

81. *See* Brian R. Henry & Joseph M. Miller, *Sorry We Can't Hire You . . . We Promised Not To: The Antitrust Implications of Entering into No-Hire Agreements*, 11 ANTITRUST 39, 39–40 (1996).

have been caught engaging in no-hire agreements, for which the justifications are less persuasive.[82] As distasteful as they may be, no-hire agreements are not commonly understood to increase prices for consumers. They can have deleterious effects on employees, such as locking them into jobs and preventing them from seeking fair market wages with a competitor, but those economic effects do not translate into consumer harm as traditionally understood. Nonetheless, even as courts have acknowledged that no consumer harm results, they have still granted victims of no-hire agreements standing to sue on the basis of an antitrust injury.[83]

An analysis of no-hire agreements concluded that antitrust challenges to these kinds of agreements would be most successful when there were only a limited number of employment opportunities available to the plaintiff, noting that this would typically take place when the plaintiff worked in a highly specialized field.[84] However, today many industries across the U.S. are highly concentrated regardless of skill level,[85] making these types of agreements ripe for challenge in any sector. The DOJ has begun to recognize this reality and recently began enforcing antitrust law against companies engaging in wage-fixing and no-hire agreements.[86] The DOJ's Antitrust Division brought the first such suit in 2018 against Knorr-Bremse AG and Westinghouse

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82. *See* Alan B. Krueger & Eric A. Posner, *A Proposal for Protecting Low-Income Workers from Monopsony and Collusion*, BROOKINGS: THE HAMILTON PROJECT (Feb. 2018), http://www.hamiltonproject.org/assets/files/protecting_low_income_workers_from_monopsony_collusion_krueger_posner_pp.pdf [https://perma.cc/VV47-79WV] (discussing how Jimmy John's, a fast food sandwich chain, required low-level workers to sign agreements preventing them from working at other fast food sandwich chains within a three-mile radius for two years).

83. *See, e.g.*, Eichorn v. AT&T Corp., 248 F.3d 131, 144 (3d Cir. 2001) ("courts have uniformly found that covenants not to compete should be examined under the rule of reason"); Roman v. Cessna Aircraft Co., 55 F.3d 542, 545 (10th Cir. 1995) ("[C]ompetition in the market for [plaintiff's] services as an employee has been directly impeded by defendant's agreement not to compete for each others' employees. . . . We believe this is sufficient to allege antitrust standing.").

84. *See* Henry & Miller, *supra* note 81, at 41. Although there are justifications for no-hire agreements in high-skilled fields, they are still more damaging when assuming that there are a relatively small number of employers in those areas. Conversely, though no-hire agreements for low-skill jobs are less defensible, they are typically less harmful (depending on the availability of jobs generally) because it is more likely that there is a larger number of low-skill jobs available.

85. *See infra* Part IV.C.

86. *See* Press Release, *Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation*, U.S. DEP'T OF JUSTICE (Oct. 20, 2016), https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals [https://perma.cc/377J-ZPJ4].

Air Brake Technologies — companies that primarily hire skilled workers — and subsequently secured a settlement meant to prevent this conduct.[87] The initial announcement was made under the Obama administration in 2016 and the litigation was brought under President Trump's antitrust division, showcasing bipartisan backing for this element of antitrust law.[88]

Monopsony is also unquestionably an antitrust violation, and one that does not require increased prices either. In *Weyerhaeuser v. Ross-Simmons*, a unanimous Supreme Court declared that monopsony was the "mirror image"[89] of monopoly and concluded that "the kinship between monopoly and monopsony suggests that similar legal standards should apply to claims of monopolization and . . . monopsonization."[90] The conduct at issue in *Weyerhaeuser* was predatory bidding — the flipside of predatory pricing. Whereas a company conducting predatory pricing cuts prices below costs and then recoups profits when its competitors are driven out of business,[91] predatory bidding occurs when a company inflates the prices it is willing to pay for inputs, thereby driving competitors out of the market by rendering them unable to match the predatory bidder's prices for inputs while still making a profit.[92] Once a company holds a monopsony in the market for inputs, the predatory bidder will then drastically reduce its preferred price, forcing the input manufacturer to go along since there are no other bidders remaining to compete in the market.

The *Weyerhaeuser* Court implicitly acknowledged that predatory bidding constitutes an antitrust violation even if it does not result in harm to consumers. A firm that bids up prices to drive competitors out of the market, and then reduces the bid prices below their prior market value once they are a monopsony, can be held liable for predatory bidding even if its output prices to con-

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87. *See No More No-Poach: The Antitrust Division Continues to Investigate and Prosecute "No-Poach" and Wage-Fixing Agreements*, U.S. DEP'T OF JUSTICE: ANTITRUST DIVISION (Spring 2018), https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements [https://perma.cc/PZZ9-GMWB].

88. *See id.*; *see also supra* note 85.

89. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 321 (2007) (citing John B. Kirkwood, *Buyer Power and Exclusionary Conduct*, 72 ANTITRUST L.J. 625, 653 (2005)).

90. *Id.* at 322. For a definition of monopsony, *see supra* note 25.

91. *See generally* Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

92. *Weyerhaeuser*, 549 U.S. at 320.

sumers are reduced.[93] It is possible for the monopsonist to recoup profits lost in the inflated bids solely from sharply reducing bid prices without changing (or even while cutting) prices to consumers. This scenario clearly sets out another example of antitrust injury that exists independently of increased prices to consumers.

The 2010 edition of the Horizontal Merger Guidelines [hereinafter, 2010 Guidelines] cautions against allowing mergers that would create a monopsony, using the term to mean a buyer's monopoly in a market for inputs.[94] The 2010 Guidelines warn that such a merger can harm competition if it leads to a limited market for suppliers and enables buyers to take advantage of the market concentration to collaborate tacitly or expressly with their competitors to increase prices of inputs. Notably, the 2010 Guidelines state that competition can be harmed "even if the merger will not lead to any increase in the price charged by the merged firm for its output."[95] Although labor markets are also monopsonies of a kind, the 2010 Guidelines only refer to monopsony in product markets and do not express any judgment about labor markets.[96] The DOJ and FTC have not challenged any merger due to its effects on the labor market,[97] nor has any court found that a labor market was illegally concentrated, confirming the 2010 Guidelines' intent to focus only on product markets.[98]

These examples illustrate that in practice, and especially with regard to labor markets, antitrust law is not always concerned with consumer welfare as it is generally understood, but rather the competitive process. Conduct that does not increase prices

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93. *See id.* at 324 ("A predatory bidding-scheme could succeed with little or no effect on consumer prices because a predatory bidder does not necessarily rely on raising prices in the output market to recoup its losses.").

94. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 12 (2010), https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf [https://perma.cc/N2EB-S9QR].

95. *Id.*

96. *See* Adil Abdela, *Market Concentration and the Importance of Properly Defined Markets*, ROOSEVELT INST. (April 2018), http://rooseveltinstitute.org/wp-content/uploads/2018/04/LMC-issue-brief.pdf [https://perma.cc/PNU7-UWJE].

97. In an October 2018 hearing, the FTC Chairman stated that FTC staff "has been specifically instructed to look at each merger for potential anticompetitive impacts on labor," but acknowledged that his agency had never challenged a merger "specifically over concerns related to labor market competition." *Oversight of the Enforcement of the Antitrust Laws: Hearing before the Antitrust Subcomm. of the S. Comm. on the Judiciary*, 115th Cong. 31 (2018) (statement of Joseph Simons, Federal Trade Commission Chairman).

98. *See* Suresh Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 571 (2018).

can be condemned if it tampers with the mechanisms used to ensure fair competition, such as an equitable process for hiring and paying workers.[99]

None of the instances cited are labor market cases related to mergers, but merger law has run in concert with antitrust law generally. If antitrust law has acknowledged that unreasonable interference in the labor market violates the Sherman Act, so should merger law. Moreover, data on labor market concentration and the structural similarities between the labor and product markets suggest these two areas should be treated similarly when it comes to reviewing mergers for anticompetitive effects.

IV. SIMILARITIES BETWEEN LABOR AND PRODUCT MARKETS

Antitrust scholars have used the *Weyerhaeuser* Court's analogy between monopoly and monopsony to suggest that the process of reviewing mergers for undue concentration in product markets can be inverted for use in analyzing monopsony in labor markets, not just the market for input products. To see how this transformation process takes place, this Part of the Note first discusses the DOJ's process of reviewing mergers for concentration in the product market. It then explains how scholars have analogized

99. *See, e.g.*, United States v. Socony Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940) (deeming price fixing illegal because of its "threat to the central nervous system of the economy"); United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (The court deemed Microsoft guilty of unlawful monopolization in the market for Intel-compatible PC operating systems due to its high market share and exclusionary conduct toward competitors. *Id.* at 50–51. Even though Microsoft was providing Windows at relatively low prices, the court enumerated several instances of conduct by Microsoft that were designed to prevent competitors from arising and had no legitimate business justifications. *Id.* at 57, 60–78.); Renata Hesse, Acting Assistant Att'y Gen., Antitrust Div., And Never the Twain Shall Meet? Connecting Popular and Professional Visions for Antitrust Enforcement, Opening Remarks at the Department of Justice 2016 Global Antitrust Enforcement Symposium (Sept. 20, 2016), *in* U.S. DEP'T OF JUSTICE: NEWS (Oct. 3, 2016), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-renata-hesse-antitrust-division-delivers-opening [https://perma.cc/L6DM-6ZWY] (defending the decision to block a proposed merger between Comcast and Time Warner on the grounds that it would have given the merged entity too much power both in the provision of internet service and cable TV to consumers, which could have allowed it to harm competitors to its TV service that operate over the internet, like Netflix. "We best protect consumer[s] . . . by stopping anticompetitive practices, including mergers among substantial competitors, that experience and evidence — including company documents and customer testimony — suggest are likely to harm competition. If we required particularized and quantified proof of consumer harm in every case, we would simply make it more difficult to stop harmful conduct.").

those tools to assess the labor markets, and finally outlines the existing degree of labor market concentration.

A. MERGER PROCESS IN THE PRODUCT MARKET

If a merger is above a certain monetary threshold, the merging entities need to file for pre-merger clearance with the FTC and DOJ under the Hart-Scott-Rodino Act.[100] The relevant agency has thirty days to file a second request, in which case the review process begins in earnest. Once the process has commenced, agencies seek to determine whether the merging entities have market power in the relevant market. Market power can occasionally be gleaned from direct evidence, which includes pricing far above competitive levels,[101] or the defendant forcing its suppliers or competitors to engage in actions that have no business purpose other than retaining the relationship with the company possessing market power.[102] Most often, direct evidence will be unavailable,[103] and agencies will have to use indirect evidence of market power.[104] The process for gathering indirect evidence involves assessing how much of the market for a specific product is controlled by the defendant. The DOJ has developed a process for this, as expanded upon below, which involves defining the relevant product and geographic markets, assessing the market

100. *See* 15 U.S.C. § 18a (2012). The thresholds are updated regularly and have two separate requirements. For transactions valued between $84.4 million and $337.6 million, one party must have at least $16.9 million in sales or assets and the other party must have at least $168.8 million. All transactions above $337.6 million require filing regardless of the size of the other party. Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 83 Fed. Reg. 4050, 4050 (Feb. 28, 2018).

101. *See* Areeda, *supra* note 79, at 528 (7th ed. 2013) (but noting that assessing how high above competitive levels prices need to be to constitute direct evidence of market power is itself a difficult question).

102. *See* Toys "R" Us v. FTC, 221 F.3d 928 (7th Cir. 2000) (holding that the FTC was within its discretion to determine that Toys "R" Us had market power based on its ability to coerce suppliers into restricting the number of toys they sold to Toys "R" Us' competitors).

103. The methods for finding direct evidence in labor markets might differ from doing so in product markets. *See* Marinescu & Hovenkamp, *supra* note 77, at 1034–35, 1053–54 (suggesting that a no-poaching agreement constitutes direct evidence of labor market power in the relevant labor market, since the existence of the agreement implies that the companies believe themselves to be competing in the same market). *See also* Rochella T. Davis, *Talent Can't Be Allocated: A Labor Economics Justification for No-Poaching Agreement Criminality in Antitrust Regulation*, 12 BROOK. J. CORP. FIN. & COM. L. 279, 279 (2018) (arguing that no-poaching agreements are economically equivalent to market allocation schemes, which are per se illegal).

104. *See* 2010 Guidelines, *supra* note 94, § 4.

share and concentration of those markets, and considering whether there are exogenous pro or anticompetitive factors that militate for or against the merger.

1. *Product and Geographic Market Definition*

The first stage in determining indirect evidence of market power is to define the relevant product and geographic markets.[105] Defining the product market is inherently subjective and uncertain as it requires analyzing the market with reference to its possible substitutes.[106] For example, if Ferrari and Lamborghini merge, several possible product markets are imaginable. The merging companies might suggest that their share of the market should be measured in reference to all methods of private transportation, which would include all cars, as well as motorcycles, bicycles, and perhaps even idiosyncratic options like skateboards. Such a broad product market definition would mean that the two companies had a relatively small market share, enabling them to avoid antitrust scrutiny.

By contrast, the government might argue that the relevant product market should be narrower, encompassing cars, sports cars, or just Italian sports cars, thereby increasing the market share the merging companies have in that market. To determine which product market is most appropriate, the 2010 Guidelines support use of the Hypothetical Monopolist Test (HMT),[107] which involves an analysis that asks whether the merging entities could increase profits by imposing a small but significant and non-transitory increase in prices (SSNIP) of about five percent.[108] The narrowest market in which a SSNIP could be profitably imposed is generally considered to be the relevant market, though other circumstantial evidence can play a role as well.[109]

Using the sports car example above, the HMT would first look at the Italian sports car market and test whether a SSNIP could be profitably imposed or if consumers would default to substitute products. Assuming arguendo that potential buyers of Ferraris would choose to buy a BMW if faced with even a small increase in

105. *Id.*
106. *Id.*
107. *Id.* § 4.1.1–4.1.3.
108. *Id.* § 4.1.2.
109. *Id.* § 4.1.3.

the price of Ferrari's, the HMT would then be applied to the next largest market, perhaps European sports cars. The same analysis would impose a SSNIP on European sports cars, testing whether consumers would substitute to buying Cadillacs in the face of a price increase, or whether they deem American sports cars to be an insufficient substitute for European sports cars. If so, the relevant market would be European sports cars. The product market definition will often be heavily litigated, since defining the market determines how much market share the merging firms will have, which is a crucial element of merger analysis.

In addition to the product market, the merging firms will also need to determine the geographic market for their products. This element is typically easier to define than product markets, as it encompasses the geographic areas where the relevant products are sold. Geographic markets will generally be defined by the locations of suppliers, unless price discrimination is possible based on the location of customers, in which case the geographic market will be defined by the locations of all customers.[110] Nevertheless, geographic markets could be worth litigating if possible because anticompetitive impacts in even a single geographic market can invalidate the merger.[111]

2. *Market Share/HHI Analysis*

Once the relevant markets are defined, the shares of the merging firms in those relevant markets are assigned. Market share is usually defined by revenue,[112] but sometimes an alternative measure could be appropriate, such as search query volume for search engines. After the market shares have been assigned, the Herfindahl-Hirschman Index (HHI) is used to assess the impact of the merger on overall concentration of the market.[113]

HHI is calculated by taking the sum of squares of percentages of market share.[114] To illustrate this concept with the sports car example (and fictional numbers), imagine that in the European

110. *Id.* § 4.2.

111. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 337 (1962) ("[I]f anticompetitive effects of a merger are probable in 'any' significant market, the merger — at least to that extent — is proscribed."). *See also* 2010 Guidelines, *supra* note 94, § 4.2.

112. *See* 2010 Guidelines, *supra* note 94, § 5.2.

113. *Id.* § 5.3.

114. *Id.*

sports cars market, Ferrari and Lamborghini each have a market share of 30%; Porsche has a market share of 20%; BMW has a market share of 15%; and Jaguar has a market share of 5%. As it stands, this market would have a pre-merger HHI of 2450.[115] After a merger between Ferrari and Lamborghini, the market would have an HHI of 4250.[116] Per the 2010 Guidelines, a market with an HHI below 1500 is unconcentrated; an HHI between 1500–2500 is considered moderately concentrated; and an HHI above 2500 is highly concentrated and presumptively illegal.[117] Mergers that increase HHI by less than 100 points are presumptively legal. Increasing HHI by 100–200 points raises anticompetitive concerns, especially if the merger results in a highly concentrated market. Finally, increasing HHI by over 200 points raises significant anticompetitive concerns.[118]

In the example above, the pre-merger market is already nearly highly concentrated. The proposed merger would place it squarely in the highly concentrated sector and would increase HHI by 1800 points, raising serious anticompetitive concerns. Mergers are not assessed by numbers alone, however, and a persuasive pro or anticompetitive narrative can still salvage or doom a merger even when the statistics would suggest otherwise.

3. *Pro and Anticompetitive Narratives*

Even if a merger is determined to increase market concentration substantially, it may still be permitted if the defendants can present plausible procompetitive justifications for the merger despite its facial anticompetitiveness.[119] Conversely, the DOJ can present additional evidence that the merger will harm competition beyond the market share analysis.

There are several common anticompetitive narratives deployed by the government. One is that the merger will eliminate a competitor and allow the merged entity to increase prices, or the merger is even merely a pretext for a price-increasing scheme.[120] Along these lines, the government can claim that the

115. $30^2 + 30^2 + 20^2 + 15^2 + 5^2 = 2450$.
116. $60^2 + 20^2 + 15^2 + 5^2 = 4250$.
117. *See* 2010 Guidelines, *supra* note 94, § 5.3.
118. *Id.*
119. *Id.* § 10.
120. *See* FTC v. Staples, 970 F. Supp. 1066, 1082 (D.D.C. 1997) (enjoining a merger between Staples and Office Depot when "direct evidence show[ed] that by eliminating

merger will eliminate a maverick competitor that has an innovative product or offers lower prices. More speculatively, the government can argue that mergers are simply attempts by companies to defend their obsolete business model by getting rid of challengers,[121] or that merging companies are trying to eliminate future potential challengers in their incipiency.[122]

There is an equal number of procompetitive justifications used by defendants. If the increase in HHI would be relatively low, a simple explanation would be that the merger is a routine transaction that will have no effect on the market. If challenged with strong evidence of concentration, the merging firms can argue that the merger will help them improve efficiencies by cutting marketing costs, firing redundant employees, and pressuring suppliers to lower prices.[123] They can argue that the merging entities will complement each other in order to be able to create products they could not have made alone.[124] Alternatively, the firms can argue that by merging they will be able to challenge a stronger competitor,[125] or that one company is rescuing the distressed assets of another that was poorly managed.[126] Finally,

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Staples's most significant, and in many markets only, rival, this merger would allow Staples to increase prices or otherwise maintain prices at an anti-competitive level").

121. *See* Jill Goldsmith, *Post-Merger AT&T Unfurls New Skinny-Bundle Video Service*, FORBES (June 21, 2018), https://www.forbes.com/sites/jillgoldsmith/2018/06/21/post-merger-att-unfurls-new-skinny-bundle-video-service/#3af921ed4710 [https://perma.cc/6NDU-V3JM] (explaining AT&T's mergers with DirecTV and Time Warner as a means to offer new services like streaming and skinny bundles to compete with streaming companies).

122. *See* Tim Wu, *The Case for Breaking up Facebook and Instagram*, WASH. POST (Sept. 28, 2018), https://www.washingtonpost.com/outlook/2018/09/28/case-breaking-up-facebook-instagram [https://perma.cc/3ZZB-VDT9] (claiming that antitrust agencies erred by not considering Facebook and Instagram competitors when assessing the merger).

123. *See* Staples, 970 F. Supp. at 1089 (defendants arguing that the merger would enable them to save $1 billion annually over the ensuing five years).

124. *See* Matt Reynolds, *If You Can't Build It, Buy It: Google's Biggest Acquisitions Mapped*, WIRED (Nov. 25, 2017), https://www.wired.co.uk/article/google-acquisitions-data-visualisation-infoporn-waze-youtube-android [https://perma.cc/6NSS-3X7J] (illustrating how Google combined its superior search function with Android's superior mobile phone operating system to create a popular product).

125. *See* United States v. AT&T, Inc., 301 F. Supp. 3d 161, 164 (D.D.C. 2018) (defendants arguing that the merger was necessary to compete with powerful new players like Netflix).

126. *See* Kristen Hamill, *Comcast and GE Complete NBC Deal*, CNN MONEY (Jan. 29, 2011), https://money.cnn.com/2011/01/29/news/companies/comcast_ge_nbc/index.htm [https://perma.cc/MA6B-VNUV] (noting DOJ and FCC approving Comcast's acquisition of "ratings-challenged" NBC).

merging firms can preemptively agree to conditions or divestitures that will allay anticompetitive concerns.[127]

At the conclusion of the analysis, courts have several potential remedies. If they determine that the procompetitive justifications are strong enough to outweigh the increased concentration, they can allow the merger to go through as is. Otherwise, courts can require divestitures of certain elements of the company or extract promises not to engage in certain conduct. Courts can also block mergers outright before their consummation or break companies up retroactively.[128]

B. MERGER ANALYSIS IN THE LABOR MARKET

Assessing the impact of a merger on a labor market can be done with the same tools used to assess product markets. Since the government has never challenged a merger based on concerns about the labor market, this analysis is necessarily speculative. Nevertheless, several antitrust scholars have made inroads into using the tools created for product market mergers to consider the effects of mergers on the labor market. This Part outlines those tools, analogizing them to those used to determine and assess product markets.

1. *Relevant Labor Market*

While merger review typically focuses on the relevant product market, labor market review would focus on assessing the relevant labor market, though the fundamental tools remain the same. Defining the product market requires finding the narrowest relevant market in which a SSNIP can be profitably imposed. Similarly, determining the relevant labor market means finding the narrowest market in which a small but significant and nontransitory reduction in wages (SSNRW) can be profitably imposed.[129] The principles remain the same; when assessing labor

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127. *See* Ted Johnson, *How the Disney-Fox Deal Got DOJ's Greenlight Quicker Than Expected*, VARIETY (June 27, 2018), https://variety.com/2018/politics/news/disney-fox-merger-justice-department-1202859900/ [https://perma.cc/34LP-83ZD] (Disney preemptively agreed to divest from twenty-two regional sports networks it would have acquired from Fox, since Disney's ownership of ESPN would have meant reducing competition for sports programming in those markets).

128. *See* Wu, *supra* note 13, at 132–33 ("Breakups and the blocking of mergers . . . are at the historic core of the antitrust program.").

129. *See* Marinescu & Hovenkamp, *supra* note 77, at 1050.

markets, we are looking for a market in which the employers have sufficient market power to reduce wages without bleeding employees or substantially decreasing output.

These labor markets can be operationalized using the six-digit Standard Occupational Classification (SOC-6) as defined by the Department of Labor. This classification defines jobs to a relatively high level of detail; for example, within the two digit SOC of "Food Preparation and Serving Related Occupations," the SOC-6 differentiates among fast food cooks, restaurant cooks, and institution and cafeteria cooks, even though there is surely relatively high elasticity between these different professions.[130] Several studies have used the SOC-6 classification while acknowledging its shortcomings.[131] Some economists have argued that the SOC-6 classification is overly broad, especially given that individual firms have fairly low labor supply elasticity.[132] If individual firms are the true relevant labor market, SOC-6 is too broad of a measure and will underestimate concentration, providing a "reasonable and conservative presumptive definition of a labor market."[133] Conversely, the SOC-6 definition might be too narrow. In theory, a restaurant cook could presumably find a job as an institution or cafeteria cook without too much difficulty since many of the same skills are involved. In practice, however, a variety of complex reasons combine such that most people will not immediately leave a job even if their wages drop by, or fail to increase with inflation to a degree constituting, an SSNRW.[134] Putting these concepts together, merger review of labor markets first involves

130. *May 2018 Occupational Profiles*, BUREAU LABOR STAT., https://www.bls.gov/oes/current/oes_stru.htm [https://perma.cc/QAK5-B4F5] (last modified Mar. 29, 2019).

131. *See* Marinescu & Hovenkamp, *supra* note 77, at 1049; Jose A. Azar et al., *Concentration in U.S. Labor Markets: Evidence from Online Vacancy Data* 11 (NBER Working Paper No. 24395, 2018).

132. That is, people rarely even switch to a different firm, let alone a whole new job. *See* FED. TRADE COMM'N, HEARING ON COMPETITION AND CONSUMER PROTECTION IN THE 21ST CENTURY 44 (Oct. 16, 2018), https://www.ftc.gov/system/files/documents/public_events/1413712/ftc_hearings_session_3_transcript_day_2_10-16-18_0.pdf [https://perma.cc/2M3X-SMZV].

133. Marinescu & Hovenkamp, *supra* note 77, at 1051 (emphasis omitted).

134. *See* Ioana Marinescu & Eric A. Posner, *A Proposal to Enhance Antitrust Protections Against Labor Market Monopsony* 5 (Roosevelt Institute Working Paper, 2018), http://rooseveltinstitute.org/wp-content/uploads/2019/01/RI_ProposalToEnhanceAntitrustProtection_workingpaper_11419-1.pdf [https://perma.cc/57XV-PDUD] (providing evidence that "workers are not very sensitive to wages in choosing where to apply or whether to quit a current job").

finding an SOC-6 classification in which a hypothetical monopsonist can profitably impose an SSNRW.

2. *Geographic Market*

Calculating the geographic market differs slightly from doing so in the product context. While today many products are sold across the country and the world, employees still overwhelmingly work at jobs that are in relatively close physical proximity to them, notwithstanding the modest rise in telecommuting.[135] This raises stronger concerns about monopsony, since an employee faced with high concentration in her labor and geographic market has even fewer choices than an individual seeking to buy a product in a concentrated market that spans the nation.

Measuring geographic markets can be done by using Commuting Zones (CZ), a marker developed by the U.S. Department of Agriculture based on the 2000 census in order to delineate local economies based on evidence of where people live and work, instead of relying on more artificial boundaries based on city or county.[136] Over eighty percent of job applications are made to employers within the same CZ as the applicant, confirming the accuracy of the measure.[137] Another reasonable alternative is the Bureau of Labor Statistics (BLS) Occupational Employment Statistics (OES), which, because it provides a wealth of employment data based on metropolitan and nonmetropolitan areas, makes it a sensible substitute for CZ.[138]

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135. *See* Naidu et al., *supra* note 98, at 555 ("[L]abor markets remain extremely local. . . . Most jobs still require physical proximity to the employer, greatly narrowing the geographic scope of most labor markets[.]").

136. *See Commuting Zones and Labor Market Areas*, U.S. DEP'T OF AGRIC. ECON. RES. SERV. (2018), https://www.ers.usda.gov/data-products/commuting-zones-and-labor-market-areas [https://perma.cc/M9JA-V4HU]. *See also* Azar, *supra* note 131, at 9; Marinescu and Hovenkamp, *supra* note 77, at 1048–49.

137. Ioana Marinescu & Roland Rathelot, *Mismatch Unemployment and the Geography of Job Search*, 10 AM. ECON. J.: MACROECONOMICS 42, 47 fig.1 (2018).

138. *May 2017 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates*, BUREAU OF LABOR STAT., https://www.bls.gov/oes/current/oessrcma.htm [https://perma.cc/GN3M-FNQ8] (last modified Mar. 29, 2018).

3. *Market Share/HHI Analysis*

Just as HHI for product markets is calculated using market share, it can also be calculated for labor markets by determining each employer's share of the labor market.[139] Practically, this means taking a SOC-6 classification within a specified CZ or metropolitan area and tabulating how many employees within that SOC-6 class work for each employer. If one firm in a CZ employs fifty percent of all financial and investment analysts within that CZ, then that firm has a labor market share of fifty percent. The remaining percentages are determined and then squared and added to calculate HHI for that labor market. It is plausible that product and labor markets will not always overlap, meaning that a merger could be beneficial in the product market but harmful in the labor market, or vice versa.

The same boundaries for moderately and highly concentrated product markets have been used in recent research on labor markets.[140] However, this consistency is likely due more to inertia than a principled economic argument that HHI analysis will be precisely the same in both labor and product markets. The author of the 1982 Guidelines conceded that the thresholds he constructed were "arbitrary" and had "no magical qualities."[141] Accordingly, antitrust enforcers should welcome substantive economic arguments for adjusting the thresholds for labor market analysis.

Using the techniques described in the preceding subpart, analysts can measure the impact of a merger on labor market concentration. This analysis is particularly urgent in light of research, as discussed in the following subpart, which demonstrates that many common labor markets are highly concentrated.

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139. *See* Naidu et al., *supra* note 98, at 576.

140. *See, e.g.*, Marinescu & Hovenkamp, *supra* note 77, at 1039; Azar, *supra* note 131, at 1–2, 27–28.

141. William F. Baxter, *A Justice Department Perspective*, 51 ANTITRUST L.J. 287, 292 (1982).

C. CURRENT LEVELS AND IMPACT OF LABOR MARKET CONCENTRATION

Mergers are primarily relevant in this analysis if they lead to high concentration in labor markets. For decades, conventional wisdom has been that anyone who conscientiously searches for a job can find one, and thus labor market concentration was assumed to be relatively low. Indeed, this may be one reason why concentration in labor markets has been overlooked.[142] However, a flurry of recent research illustrates that labor markets are highly concentrated across most geographic areas and a wide variety of common occupations.

Initial research into the extent and effects of labor market concentration has found a startlingly high concentration in labor markets with an accompanying negative correlation to wages. One study in particular found that the average HHI of CZs in the U.S. was 4378, with sixty percent of markets above the highly concentrated threshold of 2500 HHI. In practice, this means that the average number of firms recruiting at any given time is just 2.3.[143] Just eleven percent of markets were moderately concentrated and twenty-nine percent had low concentration.[144] Of the thirty most common occupations, twenty-three had an HHI above 2500.[145] These highly concentrated and popular occupations included a mix of high- and low-skill jobs, from food service managers, stock clerks and order fillers, and nursing assistants to financial managers, web developers, and computer systems analysts.[146]

Several estimates show a negative correlation between labor market concentration and wages. One regression analysis found that "an increase in HHI of 200 in a market with an HHI of 2000 . . . is associated with a decline in wages of 1.4%."[147] Depending on the specifications used, increasing HHI from the 25th percen-

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142. *See* Naidu et al., *supra* note 98, at 541–43 (providing several reasons why labor markets have not been analyzed in antitrust law until now, including: the assumptions that jobs were readily available; that labor and employment law were sufficient to protect workers; the rise of the consumer welfare standard which did not easily measure effects on employees; and the difficulty of successful class-action litigation from the employee standpoint).
143. *See* Azar, *supra* note 131, at 13.
144. *Id.*
145. *Id.* at 27.
146. *See id.*
147. *Id.* at 13.

tile to the 75th percentile could decrease wages from five to seventeen percent.[148] A study focusing on wages after mergers in the health care industry found that hospital mergers within the top quartile of concentration slowed wage growth by roughly one to two percent annually.[149]

Striking as these studies are, they likely underestimate the full extent of labor market concentration. First, because the SOC-6 classifications are arguably too broad, markets may be more highly concentrated than this measure assumes. Second, because labor markets are two-sided markets, the actual choice given to job-seekers is even more limited.[150] A two-sided market in this context means that not only do potential employees have to seek out available jobs in their geographic area that match their qualifications, but that employers also have discretion to accept or reject applicants as they see fit. This is contrasted with product markets, where even if consumers have a small number of choices, the product cannot decide if it wants to be bought by a particular person. In reality, because job seekers will be limited not only by the available jobs, but also by the whims of employers, they have even less of a choice than the raw concentration numbers suggest.

Even without numerical evidence, another theory suggests that rational companies will engage in wage suppression through mergers. Because the DOJ vigorously inspects product markets during mergers, but currently ignores effects in the labor market, businesses acting rationally will minimize price increases and instead suppress wages. The company saves money by either raising prices or reducing wages, but since the DOJ only scrutinizes the former, companies are given free rein to save money by reducing wages. Therefore, savvy companies can cut prices *and* wages, sailing through the merger review process while also counting on low labor market elasticity to keep their workers. They can even emphasize reduced wages as an efficiency that will benefit consumers.[151]

With such high concentration in labor markets, wages are likely being suppressed based on the limited evidence available

148. *Id.*

149. ELENA PRAGER & MATT SCHMITT, EMPLOYER CONSOLIDATION AND WAGES: EVIDENCE FROM HOSPITALS, Washington Center for Equitable Growth, 19–20 (2019).

150. *See* Azar, *supra* note 131, at 21.

151. *See* FED. TRADE COMM'N HEARING, *supra* note 132, at 128–130, 138.

and the analogy to product market concentration, which tends to increase prices.[152] Wage suppression has the equivalent effect of a price increase, especially when high labor market concentration (and the accompanying wage suppression) exists broadly across the U.S. and is not just restricted to small numbers of people. When a decrease in wages is shared to this extent, it should begin to implicate the consumer welfare standard because a broad decrease in wages is equivalent to an increase in prices.

To zoom in from this general overview of labor market concentration, the following Part will first conduct a case study of a labor market concentration analysis, focusing on a merger in a specific industry and geographic region, before then calculating the merger's impact on wages. It will also propose several solutions for addressing high labor market concentration and suggest how those solutions can be implemented in practice.

V. CASE STUDY AND PROPOSED SOLUTIONS TO LABOR MARKET CONCENTRATION

Part V.A will describe the facts of the case study and illustrate how the labor market merger analysis tools can be implemented in practice.[153] The following subparts will then outline multiple pathways to address labor market concentration and discuss how to implement them.

A. CASE STUDY

In 2016, Great Western Bancorp merged with HF Financial Corp. These two corporations have bank branches all across the Midwest, but the analysis in this Note focuses on its impact on loan officers in the Sioux Falls, South Dakota area. The companies meet the qualifications for Hart-Scott-Rodino filing because the acquisition of HF Financial cost $1.1 billion, well over the $337.6 million threshold.[154]

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152. *See* JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 95 (2015) (conducting a meta-analysis finding that mergers increased prices by five percent in one-third of cases, and by over ten percent in one-fifth of cases).

153. *See supra* Part IV.B for explication of the merger analysis tools.

154. *See* Great Western Bancorp Inc., Annual Report (Form 10-K), 12 (2016).

Using the BLS OES SOC-6 classifications, the relevant labor market is "loan officers."[155] That classification of the labor market is buttressed by references to the position of loan officer in SEC filings published by the companies.[156] A prior study conducted the SSNRW analysis and concluded that the SOC-6 was a sufficiently sized labor market to properly review its antitrust implications.[157] The geographic market, also delineated by the BLS OES, is the Sioux Falls metropolitan area.[158]

The employers competing for loan officers in Sioux Falls are a mix of national, regional, and local banks, including Wells Fargo, Great Western Bank (operated by Great Western Bancorp), Home Federal Bank (operated by HF Financial), First National Bank, and a number of smaller banks and credit unions.[159] Before the merger, a total of 620 loan officers were working in the region, earning an average of $66,820 annually.[160]

Of the merging companies, Great Western Bank employed ninety-two[161] (fifteen percent of the total) loan officers with Home Federal employing seventy-five[162] (twelve percent). Wells Fargo is the dominant player in the area; before the proposed merger, it

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155. *See Occupational Employment and Wages, May 2016, Classification 13-2072*, BUREAU OF LABOR STAT., https://www.bls.gov/oes/2016/may/oes132072.htm [https://perma.cc/U258-FSDZ] (last modified Mar. 31, 2017) (defining loan officers as those who "evaluate, authorize, or recommend approval of commercial, real estate, or credit loans. Advise borrowers on financial status and payment methods. Includes mortgage loan officers and agents, collection analysts, loan servicing officers, and loan underwriters.").

156. *See* Annual Report, *supra* note 154, at 12.

157. *See* Azar, *supra* note 131, at 11, 13 (acknowledging that a 6-digit SOC fits the SSNRW analysis, and if anything is broader than job titles it will underestimate labor market concentration; also finding that using two even broader classifications of labor markets still resulted in roughly equivalent estimates of labor market concentration as compared to the SOC-6 market).

158. *See May 2016 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates, Sioux Falls, SD*, BUREAU OF LABOR STAT., https://www.bls.gov/oes/2016/may/oes_43620.htm [https://perma.cc/VQ4Z-9J3D] (last modified Mar. 31, 2017).

159. Data on competitors was compiled using Google Maps, Yelp, and individual company websites.

160. *See supra* note 158. Some of the following labor market analysis requires estimation of employees performing specific jobs, reflecting the heavy emphasis on product markets and dearth of data available on labor market concerns.

161. The number of loan officers here was determined by multiplying the total number of loan officers employed by Great Western Bancorp (419) by the percentage of branches the company operated in Sioux Falls (twenty-two percent). *See Great Western Bancorp Inc., Annual Report*, *supra* note 154, at 12.

162. This total is derived from multiplying the total number of Home Federal Bank employees in Sioux Falls (299) by twenty-five percent, the proportion of loan officers used by Great Western Bancorp. *See* HF Financial Corp., Annual Report (Form 10-K), 18 (2015); Great Western Bancorp Inc., Annual Report (Form 10-K), 12 (2016).

employed an estimated 405 (sixty-five percent) loan officers in Sioux Falls.[163] Another competitor, First National, had twenty-two loan officers (four percent).[164] A handful of smaller financial institutions employed the remaining five percent of loan officers in that region.

The HHI calculations show a highly concentrated market. The total HHI of the loan officer labor market in Sioux Falls before the proposed merger was 4641.[165] After the proposed merger, the HHI of the labor market would increase to 5000.[166] To begin with, the relevant market is already well above the highly concentrated marker of 2500 HHI. After the proposed merger went through, HHI would increase by 359, also well above the threshold of a merger that raises significant anticompetitive concerns.

After the government presents the merging entities with evidence that their merger would further concentrate an already-tight labor market, the companies would be permitted to present reasons why the merger might not reduce wages. A defense might adapt some of the strategies used to make arguments for mergers in the product market to the labor market, such as the merger creating high worker mobility or economies of scale that would mitigate the alleged wage depression.[167]

In this case, the merger decreased wages for loan officers. From their average of $66,820 in 2016, they only made $62,990 in 2017.[168] This six percent decrease comes in spite of an overall 1.7% increase in wages across all occupations in the Sioux Falls

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163. This number was estimated by multiplying the number of Wells Fargo bank branches in Sioux Falls (six) by the average number of employees at each Wells Fargo location in South Dakota (270), *see* Jodi Schwan, *Wells Fargo Revamps Sioux Falls Leadership with Retirement*, SIOUX FALLS BUS. (2017), http://siouxfalls.business/wells-fargo-revamps-sioux-falls-leadership-with-retirement [https://perma.cc/W8NW-BEKW]; although the article states that Wells Fargo has ten branches in Sioux Falls, that figure also includes operations centers which do not employ loan officers. Then, the average number of employees is multiplied by the percentage of total employees that are loan officers used by Great Western Bancorp (twenty-five percent), to reach an estimated total of 405 loan officers.

164. *See generally Our Professionals*, FIRST NAT'L BANK SIOUX FALLS (2018), https://www.fnbsf.com/our-professionals [https://perma.cc/TJP3-2E6H].

165. $65.3^2 + 14.8^2 + 12.1^2 + 3.5^2 = 464$.

166. $65.3^2 + 26.9^2 + 3.5^2 = 5000$.

167. *See* Krueger & Posner, *supra* note 82, at 12.

168. *See supra* note 158; *see also May 2017 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates, Sioux Falls, SD*, BUREAU LABOR STAT., https://www.bls.gov/oes/2017/may/oes_43620.htm [https://perma.cc/BGU2-2N5G] (last modified Mar. 30, 2018).

area over this year.[169] In three cities (Fargo, North Dakota; Omaha, Nebraska; and Des Moines, Iowa) that are comparatively similar to Sioux Falls,[170] wages for loan officers increased between 2016 and 2017. Fargo, perhaps the most similar city to Sioux Falls,[171] saw wages for loan officers increase from $68,540 in 2016 to $70,020 in 2017.[172] Wages for loan officers in Omaha rose from $81,080 to $92,260,[173] and in Des Moines from $67,500 to $68,910 in that timeframe.[174] This deflation in wages for loan officers in Sioux Falls is thus largely attributable to labor market concentration rather than exogenous economic factors. This case study shows, retrospectively, that not only did the merger decrease wages for loan officers in Sioux Falls, but that by using traditional tools, the agencies reviewing the mergers could have also flagged it beforehand and stopped an anticompetitive merger in its incipiency. Using a retrospective analysis, there are several

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169. *Id.*

170. *See* Jed Kolko & Josh Katz, *What Is Your City's Twin?*, N.Y. TIMES (Apr. 3, 2018), https://www.nytimes.com/interactive/2018/04/03/upshot/what-is-your-citys-twin.html [https://perma.cc/B8K5-ES4H] (calculating similarity between cities based on the mix of jobs in each).

171. Fargo has 137,890 people employed with a mean wage of $47,170, and Sioux Falls has 151,480 people employed with a mean wage of $43,930. In the Business and Financial Operations Occupations sector, Fargo has 6980 employed at an average wage of $62,820, and Sioux Falls has 8580 employed at an average wage of $65,650. The two cities are also geographically and demographically similar. *Compare May 2017 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates, Fargo, ND*, BUREAU LABOR STAT., https://www.bls.gov/oes/2017/may/oes_22020.htm [https://perma.cc/VAD5-PJCC] (last modified Mar. 30, 2018); *with May 2017 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates, Sioux Falls, SD*, BUREAU LABOR STAT., https://www.bls.gov/oes/2017/may/oes_43620.htm [https://perma.cc/BGU2-2N5G] (last modified Mar. 30, 2018).

172. *Compare May 2016 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates, Fargo, ND*, BUREAU OF LABOR STAT., https://www.bls.gov/oes/2016/may/oes_22020.htm [https://perma.cc/W5YB-9RAZ] (last modified Mar. 31, 2017); *with May 2017 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates, Fargo, ND*, BUREAU LABOR STAT., https://www.bls.gov/oes/2017/may/oes_22020.htm [https://perma.cc/VAD5-PJCC] (last modified Mar. 30, 2018).

173. *See May 2016 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates, Omaha, NE*, BUREAU LABOR STAT., https://www.bls.gov/oes/2016/may/oes_36540.htm [https://perma.cc/7J65-6GBE] (last modified Mar. 31, 2017); *see also May 2017 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates, Omaha, NE*, BUREAU LABOR STAT., https://www.bls.gov/oes/2017/may/oes_36540.htm [https://perma.cc/2XU2-VES4] (last modified Mar. 30, 2018).

174. *See May 2016 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates, Des Moines, IA*, BUREAU LABOR STAT., https://www.bls.gov/oes/2016/may/oes_19780.htm [https://perma.cc/BU2T-UR5G]; *see also May 2017 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates, Des Moines, IA*, BUREAU LABOR STAT., https://www.bls.gov/oes/2017/may/oes_19780.htm [https://perma.cc/Q78S-YSW8] (last modified Mar. 30, 2018).

reasons to have blocked a merger that reduced wages for loan officers in Sioux Falls, effectively increasing prices for them. The following subpart discusses several pathways for existing and novel readings of antitrust law to address these problematic mergers.

B. PROPOSED SOLUTIONS

Multiple legal theories can support the review of mergers for labor market concerns, ranging from revitalizing the socio-political goals as a legitimate basis of antitrust law, to operating within the existing consumer welfare standard, and to exploiting the existing gaps in that standard.[175] The first involves reviving the socio-political goals imputed to merger review (and antitrust law) in its early stages. These goals were concerned with alleviating harm caused by powerful trusts. Although protecting employees received only modest acknowledgement in the legislative history, fear of the trusts arose from the broad and severe harm they were capable of causing. Legislators in the late 19th and early 20th centuries saw some ways that the trusts could cause harm, but did not anticipate every possible permutation. Fortunately, they were able to constrain the trusts at a relatively early phase. Had wage suppression been more prevalent and visible, early antitrust enforcers might have considered it a more important goal as well. Today, a number of scholars have proposed reintegrating some of the socio-political goals into antitrust enforcement; mergers that suppress wages can be one target of those revived goals.[176] Revitalizing the socio-political goals would mean that when the DOJ reviews mergers, it considers not only economic effects, but also an additional set of factors, including the potential for the merger to attain undue political influence and suppress wages for employees in the relevant fields.

Chicago School proponents will contend, not inaccurately, that the Supreme Court has long since wrung out the inchoate socio-political goals from antitrust law, leaving only dry economic analysis. After adopting Bork's consumer welfare standard, enforcers and judges need only ask whether a proposed merger would increase prices for consumers. Even under this standard,

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175. *See supra* Part III.

176. *See, e.g.*, Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. PRAC. 131, 131 (2018).

wage-suppressing mergers can still be deemed anticompetitive. A purely economic argument can be made that a firm with market power in the labor market will depress wages, which will in turn dampen overall employment. Lower employment ultimately leads to lower output, and a scarcer commodity means that prices need to be increased in order to make a profit.[177] In this way, even a pure consumer welfare standard should also be concerned about wage suppression, as it can eventually lead to increased prices as well.

A more novel theory of harm under the consumer welfare standard involves the impact of wage suppression on a grand scale.[178] With labor market concentration at such high levels across so many industries and localities, many workers are seeing their wages suppressed. Keeping wages below their market level while holding prices constant still means that individuals have to pay a higher percentage of their wages for goods than they would in an otherwise competitive market.[179] Any suggestion that this theory of harm should not apply since it does not affect the entire market as prices do is weak in the face of evidence suggesting such widespread labor market concentration.

Finally, even as the Supreme Court has nominally adopted the consumer welfare standard, it has decided several cases in various categories that have not required price increases to consumers to prove violations, particularly when the conduct affects the labor market.[180] Under this precedent, mergers that harm labor markets should not be required to increase consumer prices in order to provoke an antitrust challenge, and need only openly "tamper with the employment market" for such a challenge to be successful.[181]

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177. *See* Marinescu & Hovenkamp, *supra* note 77, at 1038 ("Ultimately, imperfect competition in the labor market has the same kind of depressing effect on production as imperfect competition in the product market."); *see also* C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078, 2083 (2018) (arguing that labor market monopsony can also have negative long-term effects in the labor market, such as "workers choos[ing] not to invest in skill acquisition due to the lower wage rate").

178. *See* Federal Trade Comm'n Hearings, *supra* note 132, at 149–150 (noting agreement between Renata Hesse, former Acting Assistant Attorney General for Antitrust, and Eric Posner, University of Chicago Law professor, that the consumer welfare standard is flexible enough so as to block anticompetitive harm toward employees).

179. *See* Areeda, *supra* note 79 (stating that "buyers" in the employment market should have recourse to antitrust law).

180. *See supra* Part III.

181. *See* Areeda, *supra* note 79.

C. IMPLEMENTING SOLUTIONS IN PRACTICE

Antitrust agencies will naturally be skittish about incorporating an entirely new and untested method into their review process. The labor market review process can begin with a slow learning curve to allow enforcers to utilize the product market tools in a slightly different context and identify any practical differences between the product and labor markets. One broad way to do so is to address only mergers that have an extremely high HHI in the labor market. In one study, the 75th percentile of HHI in a relevant labor market was 7279.[182] Concentration to that degree is above and beyond what is even considered highly concentrated in product markets, yet twenty-five percent of labor markets have a concentration at that level. Setting that as a rough baseline would ensure that only the most concentrated labor markets are addressed at the outset. Yet, because so many labor markets are so highly concentrated, enforcers would still have plenty of examples to confront.

To further refine their task, agencies can begin with mergers that not only produce high labor market concentration, but also high product market concentration.[183] These mergers would already be flagged by the DOJ and FTC in order to investigate their potential effects on product markets; implementing this policy would simply give both agencies an additional facet of the merger to investigate. These investigations could be triggered using a sliding scale analysis with the following guidelines:

(1) The product market concentration thresholds for triggering an investigation would remain the same.

(2) Even if the product market HHI is not worthy of concern, an investigation would be triggered if labor market HHI was above the 75th percentile threshold.[184]

(3) A company with a highly concentrated product market that might otherwise be ignored (with an HHI over 2500, or an increase in HHI of over 200) would automatically be investigated if

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182. *See* Azar, *supra* note 131, at 13.

183. Firms that have high market power in both labor and product markets are especially harmful since the concentration on each side of the market compounds the deadweight loss from the other. *See* Hemphill & Rose, *supra* note 177, at 2087.

184. *See* Prager & Schmitt, *supra* note 149, at 3 (supporting the notion that mergers in the top quartile of HHI do the most harm to wages).

the labor market was also moderately concentrated (at an HHI of at least 4378).[185]

This set of guidelines allows agencies to continue their product market work while focusing only on the most egregious and damaging set of companies concentrated in the labor market. This strategy would avoid the obstacle of creating a wholly new category of mergers to assess, while still allowing the agencies to ascertain any differences in the application of market definition tools to product and labor markets for mergers they were already reviewing. For best effect, these recommendations, along with the analytical tools, can be incorporated into future versions of the guidelines gradually as their application to labor markets is refined.

VI. Conclusion

Analyzing mergers for their effects on labor markets is a novel idea, but the intellectual and programmatic architecture for doing so is already in place. The same tools used to assess product markets can be adapted for use in labor markets, the same problem of high concentration exists in both product and labor markets, and similar effects arise as a result of concentration in both product and labor markets. Crucially, although there is no case law on mergers and the labor market yet, there have been enough legal signals from academia, courts, and agencies to suggest that such a case could be successful. Most promisingly, the FTC has recently launched a series of hearings on competition policy in the 21st century, three of which have explicitly considered monopsony, the status of the consumer welfare standard, and antitrust evaluation of labor markets.[186]

The case study presented provides just one example of mergers that contributes to highly concentrated labor markets but are approved without scrutinizing the labor impact, which ultimately end up negatively impacting wages for employees. Further case studies and a more comprehensive retrospective analysis of mergers and labor markets would help persuade policymakers that this type of enforcement is necessary. Unsurprising-

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185. *See* Azar, *supra* note 131, at 13.

186. *Hearings on Competition and Consumer Protection in the 21st Century*, FED. TRADE COMM'N, https://www.ftc.gov/policy/hearings-competition-consumer-protection [https://perma.cc/69YZ-DVTQ].

ly, there is much richer data publicly available on product markets than the trickle of information that exists relating to labor markets, reflecting the government's priorities to this point. A greater governmental focus on labor markets could lead to more available data on the impact of mergers on those markets, which would then lead to more robust studies on that question.

As antitrust issues return to the public conversation, there is an opportunity to reassess their application.[187] Using existing antitrust law and economic techniques to evaluate the impact of mergers on labor markets fits within a long history of deploying antitrust law to address socio-economic problems caused by anti-competitive actions. A more robust discussion of this issue will mean fuller deliberation on how best to benefit U.S. workers.

187. *See, e.g.*, Matthew Yglesias, *Democrats' Push for a New Era of Antitrust Enforcement, Explained*, VOX (July 31, 2017), https://www.vox.com/policy-and-politics/2017/7/31/16021844/antitrust-better-deal [https://perma.cc/JA7S-KDPB].