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First Principles for Review of Long-Consummated Mergers

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Antitrust populists increasingly call on the government to "break up big tech."[1] Reflecting the times, antitrust authorities announced in 2019 that they have begun investigating consummated tech mergers and may challenge any that they conclude have contributed to any company's market dominance. "The new [Federal Trade Commission (FTC)] scrutiny will be broad, officials said, and will include re-examining mergers that already have been approved by the government. That re-examination could eventually lead the FTC to try to unwind deals that it finds to be having anti-competitive effects now[.]"[2]

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1 *See, e.g.*, Robert Reich, *Break Up Facebook (and While We're at It, Google, Apple and Amazon)*, GUARDIAN, Nov. 20, 2018, https://www.theguardian.com/commentisfree/2018/nov/20/facebook-google-antitrust-laws-gilded-age; TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 132–33 (Columbia Global Reports 2018) (advocating tech breakups); *see also* John Micklethwait, Margaret Talev & Jennifer Jacobs, *Trump Says Google, Facebook, Amazon May Be 'Antitrust Situation,'* BLOOMBERG, Aug. 30, 2018, https://www.bloomberg.com/news/articles/2018-08-30/google-under-fire-again-on-search-as-hatch-calls-for-ftc-probe; Tony Romm, *Trump Signals U.S. Government 'Should Be Suing Google and Facebook,'* WASH. POST, June 26, 2019, https://www.washingtonpost.com/technology/2019/06/26/trump-signals-us-government-should-be-suing-google-facebook/; Daniel Kishi, *Time for a Conservative Anti-Monopoly Movement*, AM. CONSERVATIVE, Sept. 19, 2017, https://www.theamericanconservative.com/articles/amazon-facebook-google-conservative-anti-monopoly-movement/. *See generally* Matthew Yglesias, *The Push to Break Up Big Tech, Explained*, VOX: RECODE, May 3, 2019, https://www.vox.com/recode/2019/5/3/18520703/big-tech-break-up-explained.

2 John D. McKinnon, *FTC Aims New Task Force at Big Tech*, WALL ST. J., Feb. 26, 2019, https://www.wsj.com/articles/ftc-aims-new-task-force-at-big-tech-11551209556; *see also* Press Release, U.S. Dep't of Justice, Justice Department Reviewing the Practices of Market-Leading Online Platforms (July 23, 2019), https://www.justice.gov/opa/pr/justice-department-reviewing-practices-market-leading-online-platforms.

It is appropriate for the antitrust agencies—the FTC and the Department of Justice (DOJ)—to take a fresh look at the U.S. tech sector. But they would face unusually heavy burdens if they sought to break companies up on the premise that long-consummated mergers were unlawful and should have been blocked years ago. It is one thing to hold a merged company liable for engaging in anticompetitive conduct today using assets it acquired in a merger. It is quite another to hold a company liable on the theory that its long-past merger *itself* suppressed competition in ways that eluded merger enforcement at the time of consummation.

As discussed below, the government would face three distinct and formidable evidentiary burdens if it sought to unwind a merger on the latter theory. *First*, the government would have to prove that the but-for world—that is, the world that would exist today had the government blocked the merger before consummation—would likely be more competitive than the actual world in which the merger has occurred. To see this principle in operation, suppose that, five years ago, dominant firm *X* acquired startup firm *Y*, which at the time operated only in a distinct market but now operates successfully in *X*'s own market as a subsidiary of *X*. To unwind such a merger, the government must prove, among other things, that *Y* would likely now be successfully competing against *X* if *X* had *not* purchased *Y* and infused it with capital and expertise. Otherwise, there would have been no basis for challenging the merger at the time of consummation, and because the parties acted without fault, there is no basis for challenging it now.

No one could seriously dispute that, in any case brought under section 7 of the Clayton Act, the government must bear the burden of proving that the but-for world would likely be more competitive than the actual world. Senior FTC and DOJ officials have argued, however, that they can avoid that burden if they invoke section 2 of the Sherman Act to challenge a consummated merger on monopoly-maintenance grounds. Citing the "causation" holding of *United States v. Microsoft*, the officials argue that, in the above example, the government need show only that the five-year-old merger between *X* and *Y* was "reasonably capable" at the time of preserving *X*'s monopoly, not that it was likely to have done so in the real world.[3] As discussed below, however, that position contradicts the historical relationship between the Sherman and Clayton Acts; misreads *Microsoft*, which cuts *against* a lower burden of

[3] D. Bruce Hoffman, Dir., Bureau of Competition, U.S. Fed. Trade Comm'n, Remarks at GCR Live Antitrust in the Digital Economy—Antitrust in the Digital Economy: A Snapshot of FTC Issues 9–11 (May 22, 2019) [hereinafter Hoffman, Antitrust in the Digital Economy: A Snapshot of FTC Issues] (citing United States v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam)), https://www.ftc.gov/public-statements/2019/05/antitrust-digital-economy-snapshot-ftc-issues; Jeffrey M. Wilder, Acting Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Remarks as Prepared for the Hal White Antitrust Conference—Potential Competition in Platform Markets 5–6 (June 10, 2019) [hereinafter Wilder, Potential Competition in Platform Markets] (citing *Microsoft*, 253 F.3d at 79), https://www.justice.gov/opa/speech/file/1176236/download.

causation proof in this context; and would create perverse incentives for the government to sandbag the merging parties in a variety of transactions.

Second, the government would also have to prove that its basis for unwinding a merger was sufficiently *foreseeable* at the time of consummation that the merger could have been challenged at that point. In various circumstances, a merger that appears procompetitive *ex ante* might turn out to be competitively problematic when viewed *ex post*. For example, third-party competitors might unexpectedly exit the market and leave it substantially more concentrated than it was just after the merger was consummated. Here, too, the government cannot force the unwinding of such mergers without creating a regime—alien to U.S. law—of no-fault antitrust liability.

Third, apart from these retrospective showings, the government would also have to prove, as a remedial matter, that the *prospective* benefits of unwinding the consummated transaction outweigh the *prospective* harms, including the costs and inefficiencies that often arise from such de-integration. In some cases, that comparison will counsel against unwinding a merger even if it was foreseeably anticompetitive when it was consummated. This third inquiry is simply a reflection of every tribunal's obligation to exercise its equitable discretion in the public interest.

The combination of these three burdens would be difficult for enforcement authorities to meet, and for good reason. It *should* be hard for the government to unwind any merger that it reviewed before consummation (or shortly thereafter) and elected not to challenge then. Mergers—including those undertaken by dominant firms—present a complex mix of potential costs and benefits. The antitrust laws empower enforcement authorities to review those costs and benefits promptly and give them appropriate incentives to bring any enforcement action without delay, usually before consummation. Those incentives would be weakened if antitrust enforcers could lie in wait while mergers are consummated in hopes of securing more favorable litigation burdens years later.

More broadly, any legal regime that accommodates such tactics would create economy-wide business uncertainty. Dominant firms would err on the side of avoiding even highly procompetitive mergers because, on the margin, they would not wish to close a transaction amid unresolved questions about whether they will be forced to divest the acquired assets years later, potentially at fire-sale prices. And even firms that do close such transactions in the face of such uncertainty would confront continuing disincentives to invest in the companies they acquire—both because such investments might be stranded in the event of a compelled divestiture and because the more successful the acquired company becomes, the more likely it would be to attract the belated attention of antitrust authorities. Antitrust law appropriately prevents these perverse consequences by making it very difficult for the government to challenge consummated mergers that, by statutory design, it could and should have challenged years earlier.

I. Statutory Background

Over the past 130 years, American merger enforcement has evolved against the backdrop of three distinct statutes: the Sherman Antitrust Act of 1890,[4] the Clayton Antitrust Act of 1914 (as amended in 1950),[5] and the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR).[6] Understanding the interplay among these three statutory schemes is essential to analyzing the scope of permissible challenges to long-consummated mergers.

Broadly speaking, the Sherman Act prohibits unreasonable restraints of trade by multiple firms acting in concert (section 1) and anticompetitive acquisition or maintenance of monopoly power by a single firm (section 2).[7] For the first quarter century after its enactment, these Sherman Act prohibitions were the federal government's only tools for challenging anticompetitive mergers.[8] But the government's track record in challenging mergers under the Sherman Act was disappointingly poor. The federal courts repeatedly adopted narrowing constructions of the Act that permitted many types of mergers that would rarely even be proposed today, such as several that effectively conferred monopoly power on the merged firm.[9]

Against this backdrop, Congress enacted the Clayton Act in 1914, which it substantially amended in 1950 to close various loopholes.[10] In its ultimate form, section 7 of the Act generally prohibits corporate acquisitions whose "effect . . . may be substantially to lessen competition, or to tend to create a monopoly."[11] As the Supreme Court explained in *Brown Shoe*, this provision "was intended to reach incipient monopolies and trade restraints outside the scope of the Sherman Act," and thus "the tests for measuring the legality of any particular economic arrangement under the Clayton Act are to be less stringent than those used in applying the Sherman Act."[12] Nearly all mergers

4 26 Stat. 209 (codified at 15 U.S.C. §§ 1–7).

5 Pub. L. No. 63-212, 38 Stat. 730 (as amended by the Celler-Kefauver Act, Pub. L. No. 81-899, 64 Stat. 1125 (1950), codified at 15 U.S.C. §§ 12–27).

6 Pub. L. No. 94-435, 90 Stat. 1383 (codified at 15 U.S.C. § 18(a)).

7 *See generally* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 767–68 (1984); United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

8 4 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 902(a), at 22–26 (Wolters Kluwer 4th ed. 2016).

9 *Id.*

10 For example, the language of the original Clayton Act (1) banned only combinations accomplished through acquisition of stock rather than assets and (2) raised questions about whether the Act applied only to horizontal mergers and not vertical or conglomerate ones. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 316–17 (1962).

11 15 U.S.C. § 18.

12 *Brown Shoe*, 370 U.S. at 318 n.32, 328–29.

today (apart from those in exempt industries) are reviewed entirely under the Clayton Act. A separate Sherman Act inquiry would be redundant and unnecessary because, as the *Brown Shoe* quote suggests, mergers violating that Act are a wholly included subset of mergers violating the Clayton Act.[13]

The final statute relevant to consummated-merger challenges is HSR. Until its enactment in 1976, merging companies were not generally required to give advance notice of their plans to the antitrust agencies. As a result, "there were strong incentives for speedily and surreptitiously consummating suspect mergers and then protracting the ensuing litigation, thus creating the 'strong probability that the government will ultimately win only a partial or "token" divestiture order,'" given the difficulty of unscrambling the eggs.[14] And "even where full divestiture was successfully achieved, 'the "victory" [was] likely to be so costly that it [was] pyrrhic. . . . [T]he costs—to the firms, the courts, and the marketplace—were immense.'"[15]

HSR addressed this problem for transactions exceeding specified dollar thresholds by requiring the parties to give advance notice of their plans to the antitrust agencies and by imposing waiting periods enabling the agencies to analyze the transactions and, if necessary, seek emergency injunctive relief before consummation. "The vast majority of the mergers the agencies investigate are now reported and examined at the premerger stage, and the vast majority of merger challenges are initiated at the premerger stage."[16] With few exceptions, most commentators view that result as beneficial for all parties concerned: "Consumers benefit because anticompetitive transactions are challenged sooner rather than later. The merging parties and taxpayers benefit because investigations are conducted more efficiently."[17]

Of course, despite HSR, the agencies do occasionally seek to unwind consummated mergers, but they nearly always do so promptly after consummation rather than years later—and with good cause for failing to bring a pre-consummation challenge. These cases fall into a few distinct categories. First, the agencies sometimes challenge mergers that came to their attention only after consummation because the dollar amounts fell below the HSR

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[13] *See also* Part II.A.2, *infra*.

[14] William J. Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 Antitrust L.J. 825, 828 (1997) (quoting H.R. Rep. No. 94-1373, at 10 (1976)).

[15] *Id.* (alterations in original) (quoting H.R. Rep. No. 94-1373, *supra* note 14, at 10). In 1969, Kenneth Elzinga supplied a strong empirical basis for the HSR legislation by studying a set of 39 merger challenges (most of them post-consummation) and concluding that, in the overwhelming majority, the remedies were unsuccessful or deficient. *See* Kenneth G. Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J.L. & Econ. 43 (1969).

[16] Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, *supra* note 14, at 832.

[17] *Id. But see* Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 Antitrust L.J. 865 (1997) (arguing that HSR confers unfair advantages on the antitrust agencies and has transformed them from law enforcement authorities into regulators).

thresholds for pre-merger notification.[18] Second, the agencies may investigate a merger during the HSR period yet find themselves challenging it after consummation because they fail to obtain a judicial injunction before the end of the waiting period.[19] Third, and very occasionally, the agencies challenge mergers that they investigated and cleared under the HSR process if they are alerted just after consummation to previously overlooked competitive concerns or if they conclude that the parties unlawfully withheld material evidence during that process.[20]

The agencies rarely, if ever, clear a merger under the HSR process and then sue to unwind it long after consummation on the ground that they themselves committed a basic error of judgment when allowing it to close. Yet that is precisely the course that the agencies appear to be contemplating now as they "re-examin[e] mergers that already have been approved by the government" and consider "try[ing] to unwind" them on the basis of a new competitive analysis.[21] As discussed below, that course would be as ill-considered and legally unpromising as it is unprecedented.[22]

II. Appropriate Legal Analysis for Challenging Long-Consummated Mergers

One should distinguish at the outset between two superficially similar bases for seeking to break up a large and diversified company. Suppose that the government sues a company because of anticompetitive conduct by operating units the company acquired through merger but does not claim that the merger itself was unlawful. On rare occasions, the government might seek

18 *E.g.*, St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775 (9th Cir. 2015); United States v. Bazaarvoice, Inc., No. 13-cv-00133-WHO, 2014 WL 203966 (N.D. Cal. Jan. 8, 2014).

19 *E.g.*, FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028 (D.C. Cir. 2008); *see also* Chicago Bridge & Iron Co. v. FTC, 534 F.3d 410, 435 (5th Cir. 2008).

20 *E.g.*, Press Release, Fed. Trade Comm'n, Hearst Corp. to Disgorge $19 Million and Divest Business to Facts and Comparisons to Settle FTC Complaint (Dec. 14, 2001), https://www.ftc.gov/news-events/press-releases/2001/12/hearst-corp-disgorge-19-million-and-divest-business-facts-and.

21 McKinnon, *FTC Aims New Task Force at Big Tech*, *supra* note 2.

22 Notwithstanding claims to the contrary, the FTC's hospital-merger retrospective initiated in 2002—supervised by one of us as FTC Chairman—offers no precedent for unwinding consummated tech mergers today. In the first years of this century, the FTC conducted a wide-ranging retrospective investigation into the consumer effects of several consummated hospital mergers that the government had tried and failed to block in the late 20th century. The investigation confirmed that the economic theories used to defend those mergers were flawed, as the agencies had contended, and that the mergers had indeed harmed consumer welfare. *See* Jonathan E. Nuechterlein, Gen. Counsel, Fed. Trade Comm'n, Remarks at the Administrative Law Review Annual Symposium—How the FTC Works: Lessons from the Commission's Supreme Court Trifecta 4–5 (Mar. 20, 2015), https://www.ftc.gov/system/files/documents/public_statements/632081/150320adminlawreview.pdf. The purpose of that initiative, however, was not to unwind long-consummated hospital mergers, but to improve the FTC's broader economic strategies for challenging new hospital mergers. The initiative was a success, as confirmed by the FTC's extended winning streak in hospital-merger challenges today. *See id.* But the initiative was forward-looking, not backward-looking—and thus provides no template for attacking mergers today that, during the HSR process, the FTC itself previously concluded were benign or procompetitive.

divestitures of the operating units acquired through merger, but its legal basis for divestiture does not depend on whether the company acquired those units through merger or organic growth.[23] Such claims are properly conceptualized as challenges to current conduct rather than to consummated mergers—and we ignore them here.

Instead, this article addresses only claims that a given merger should be unwound years after the fact on the theory that *the merger itself* was anticompetitive and thus never should have been allowed to proceed in the first place. To justify unwinding a merger on those grounds, the government would have to make three distinct showings, which we will call "but-for-world competitive superiority," "foreseeability," and "prospective net benefits." As discussed below, those showings are, and should be, exceedingly difficult in the aggregate for the government to make.

A. *The Government Must Show That the But-For World Would Likely Be More Competitive Than the Actual World*

1. *Proof of But-For-World Competitive Superiority Is a Necessary Element of Any Merger Challenge*

To challenge any consummated merger, the government must first prove that the but-for world absent the merger would likely be more competitive than the actual world with the merger. To take a concrete and much-discussed example, assume for the sake of argument that Instagram, launched as a specialized photo-sharing platform, would likely not have become the successful social network it is today if Facebook had not acquired it, infused it with capital and know-how, and integrated it into Facebook's existing social network. If that assumption is correct, Facebook's acquisition of Instagram did not make any market less competitive than it otherwise would be, and it thus did not violate the antitrust laws.

The rationale for this first required showing is straightforward: antitrust prohibits only activity that makes the world less competitive than it would otherwise be, all else held constant. Courts and litigants are most likely to focus explicitly on this "but-for-world" construct when they must quantify the harm attributable to anticompetitive conduct, as in dueling damages testimony in private litigation.[24] But the same construct is equally integral to

[23] For example, the 1984 AT&T divestiture split the Bell System up into many separate operating units, portions of which had been acquired by AT&T many decades before, but the divestiture arose from claims of contemporaneous anticompetitive conduct, not from claims that AT&T's underlying mergers were unlawful. *See* United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[24] *See, e.g.*, Justine S. Hastings & Michael A. Williams, *What Is a "But-For World?*,*"* 31 Antitrust Mag., Fall 2016, at 102.

every underlying determination of antitrust liability. Whether explicitly or implicitly, the question in any antitrust case is whether the challenged action made (or will make) the world less competitive than it would otherwise be; if not, there can be no liability.[25]

One illustrative case is *Rambus Inc. v. FTC*,[26] in which the D.C. Circuit reversed an FTC liability finding precisely because the Commission had not borne its burden of proving the competitive superiority of the but-for world. The Commission had found that Rambus, a tech company, violated section 2 of the Sherman Act when it failed to inform a standards-setting organization that it held patent interests essential to a standard it helped persuade the organization to adopt. But the Commission had declined to speculate whether, "in the world that would have existed but for Rambus's deception," the standard-setting organization would have chosen a different standard or, instead, "would have standardized the very same technologies" after requiring Rambus to submit to reasonable royalty terms.[27] If the latter scenario described the true but-for world, Rambus's deception could not have had an anticompetitive effect: "an otherwise lawful monopolist's use of deception simply to obtain higher prices normally has no particular tendency to exclude rivals and thus to diminish competition."[28] The court thus concluded that, because "the Commission did not reject this as being a possible—perhaps even the more probable—effect of Rambus's conduct," it had "failed to demonstrate"—as was its burden—"that Rambus's conduct was exclusionary, and thus to establish its claim that Rambus unlawfully monopolized the relevant markets."[29]

A similar but-for-world analysis is integral to merger challenges, where the government must prove that a "challenged acquisition [is] likely substantially to lessen competition"[30]—that is, "lessen" as compared to a hypothetical world absent the merger.[31] For example, the main issue in the AT&T-Time Warner

[25] Of course, this comparison of the but-for world to the actual world takes both merger harms and merger benefits into account because a merger is not unlawful if "cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market." U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines § 10 (2010) [hereinafter Horizontal Merger Guidelines], https://www.justice.gov/atr/horizontal-merger-guidelines-08192010; *see also* Part II.B.2, *infra* (discussing reasons for crediting post-consummation evidence that merger efficiencies have been achieved).

[26] 522 F.3d 456 (D.C. Cir. 2008).

[27] *Id.* at 466.

[28] *Id.* at 464 (citing NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998)).

[29] *Id.* at 467; *see also id.* at 463 ("[I]t is the antitrust plaintiff—including the Government as plaintiff—that bears the burden of proving the anticompetitive effect of the monopolist's conduct.").

[30] FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 115 (D.D.C. 2004).

[31] *E.g.*, FTC v. Sysco Corp., 113 F. Supp. 3d 1, 62 (D.D.C. 2015) (by eliminating competition, a horizontal merger "'can significantly enhance the ability and incentive of the merged entity to obtain a result more favorable to it, and less favorable to the buyer, than the merging firms would have offered separately absent the merger'") (quoting Horizontal Merger Guidelines, *supra* note 25, § 6.2); FTC v. Staples, Inc., 970 F. Supp. 1066, 1082 (D.D.C. 1997) ("[A]llowing the defendants to merge would eliminate significant future competition. Absent the merger, the firms are likely, and in fact have planned, to enter more of each other's

merger trial was whether post-merger retail rates for pay-TV subscriptions would increase compared to those in a hypothetical post-merger world absent the merger, not compared to those in the pre-merger world.[32] Both sides agreed that, as the plaintiff, the government bore the burden of showing that the merger was "likely to be anticompetitive" in this sense—that is, that the rates would be higher in the years following the merger than they otherwise would be.[33] And the government's merger challenge failed because its proof was insufficient to carry that burden.

The government confronts the same type of burden, and must employ the same but-for-world construct, when it challenges a merger between two currently non-competing companies on a theory of "actual potential competition"—that is, on the premise that one of the companies would likely bring substantial competition to the other's market but for the merger. In such cases, the government must prove, among other things, that "absent [the merger, one of the parties] would likely have entered the [other's] market in the near future" and "that such entry . . . carried a substantial likelihood of ultimately producing . . . significant procompetitive effects."[34]

The same burdens and the same but-for-world construct are no less central to the analysis when a merger challenge is brought after consummation rather than before. "[*A*]*ll* merger analysis involves the use of hypothetical markets that postulate alternatives in which the merger did or did not occur," and "the fact finder must consider movement from the situation that currently exists to a hypothetical one that would otherwise exist."[35] There is also nothing unusually onerous about expecting the government to show the likely competitive superiority of the but-for world when it challenges mergers after consummation rather than before. In particular, it is not inherently more speculative for the government to describe the likely state

markets, leading to a deconcentration of the market and, therefore, increased competition between the superstores."); *see also* Horizontal Merger Guidelines, *supra* note 25, § 2.1.4 ("The Agencies consider whether the merging firms have been, or likely will become absent the merger, substantial head-to-head competitors."); *id.* § 6.3 ("[T]he Agencies may evaluate whether the merged firm will find it profitable unilaterally to suppress output and elevate the market price[,] . . . [in that it] may leave capacity idle, refrain from building or obtaining capacity that would have been obtained absent the merger.").

32 *See* United States v. AT&T Inc., 310 F. Supp. 3d 161, 204 (D.D.C. 2018) ("[T]he Government's increased-leverage theory posits that Turner's pre-merger bargaining leverage would materially increase as a result of its post-merger relationship with AT & T and that, as a result, distributors would cede greater affiliate fees than they would absent the merger."), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019); *id.* at 225–26 (discussing the government's projections of positive, year-by-year differential in future retail rates depending on whether the merger is approved or disapproved). It would make no sense in such cases to compare projected post-merger rates to actual *pre*-merger rates (as opposed to projected post-merger but-for rates) because many non-merger-related factors can cause rates to rise or fall over time, and the question is whether a merger causes rates to be higher than they otherwise would be.

33 *AT&T*, 916 F.3d at 1032 (internal quotation marks omitted). The authors represented AT&T in that merger litigation.

34 Tenneco, Inc. v. FTC, 689 F.2d 346, 352 (2d Cir. 1982) (rejecting the FTC's challenge to a consummated merger). *See generally* 5 Areeda & Hovenkamp, Antitrust Law, *supra* note 8, ¶ 1121.

35 4 Areeda & Hovenkamp, Antitrust Law, *supra* note 8, ¶ 913, at 110 (emphasis in original).

of competition in the *contemporaneous* but-for world if it sues two years after consummation than it would have been for the government, had it brought a pre-merger challenge, to project the same state of competition in the same but-for world *two years beforehand*.

2. *The Sherman Act Offers No Basis for Shifting the Burden of Proof in Consummated Merger Cases*

Antitrust officials at DOJ and the FTC have recently suggested that, under the "causation" holding of *Microsoft*, the government may avoid the burden of proving the competitive superiority of the but-for world when challenging consummated mergers involving a monopolist under section 2 of the Sherman Act.[36] *Microsoft*, of course, was not a merger case; it involved allegations that Microsoft had undertaken exclusionary conduct with no efficiency justification to suppress nascent technological threats to Microsoft's operating system monopoly. The D.C. Circuit relieved the government from the need to prove, for liability purposes, that the potentially competing technologies likely would have threatened Microsoft's operating-system monopoly in the but-for world absent the exclusionary conduct. Instead, again for liability purposes, the government was required to prove only that those technologies "reasonably constituted nascent threats at the time Microsoft engaged in the anticompetitive conduct at issue" and that suppressing them thus "reasonably appear[ed] capable of making a significant contribution" to the maintenance of Microsoft's monopoly power.[37] Citing this passage, current antitrust officials argue that, compared to Clayton Act section 7, Sherman Act "Section 2 imposes a somewhat relaxed test for the causal relationship" the government must prove in challenging a merger involving a dominant firm.[38]

That conclusion is incorrect. As a threshold matter, any suggestion that Sherman Act causation standards are easier to meet than Clayton Act

[36] Hoffman, Antitrust in the Digital Economy: A Snapshot of FTC Issues, *supra* note 3, at 9–11; Wilder, Potential Competition in Platform Markets, *supra* note 3, at 5–6.

[37] United States v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam) (quoting 3 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 651(c), at 78 (Little, Brown & Co. 1996)). As its source for the "reasonably capable" standard, the *Microsoft* court relied principally on a passage in Areeda & Hovenkamp whose meaning and proper application have been the subject of spirited academic debate. *See, e.g.*, Timothy J. Muris, *The FTC and the Law of Monopolization*, 67 Antitrust L.J. 693, 696–98 (2000) (criticizing FTC officials for proposing to apply this passage so broadly as to eliminate the government's burden of proving anticompetitive effects); David A. Balto & Ernest A. Nagata, *Proof of Competitive Effects in Monopolization Cases: A Response to Professor Muris*, 68 Antitrust L.J. 309 (2001) (critiquing Muris); Timothy J. Muris, *Anticompetitive Effects in Monopolization Cases: Reply*, 68 Antitrust L.J. 325 (2001) (critiquing Balto and Nagata).

[38] Hoffman, Antitrust in the Digital Economy: A Snapshot of FTC Issues, *supra* note 3, at 10; *see also* Wilder, Potential Competition in Platform Markets, *supra* note 3, at 5 (asking the question "whether the acquisition of a potential competitor 'is reasonably capable of contributing significantly to a defendant's continued monopoly power'") (quoting *Microsoft*, 253 F.3d at 79).

standards in merger cases ignores the historical relationship between these two statutes. As discussed in Part I above, Congress enacted the Clayton Act in 1914 and substantially amended it in 1950 because it concluded that the Sherman Act imposed *excessive* burdens on the government in merger challenges.[39] The Clayton Act thus *lowered* the burdens in merger cases in order "to reach incipient monopolies and trade restraints outside the scope of the Sherman Act."[40] In particular, a Clayton Act plaintiff need prove only that a merger's effect "*may be* substantially to lessen competition, or to tend to create a monopoly."[41] Because the Clayton Act "involves *probabilities*, not certainties or possibilities,"[42] this statutory language requires the government as plaintiff to prove that "the challenged acquisition [is] likely" to have one of the specified effects—either substantially lessened competition or a tendency towards monopoly.[43] Whatever the Sherman Act standard may be for reviewing mergers raising "monopoly" concerns, it cannot be more pro-government than the applicable Clayton Act standard because, in the Supreme Court's words, "the tests for measuring the legality of any particular economic arrangement under the Clayton Act are to be *less stringent* than those used in applying the Sherman Act."[44]

Microsoft is entirely consistent with that conclusion. Suggestions to the contrary misread the D.C. Circuit's decision in two fundamental respects.

First, the more lenient "reasonably capable" standard the *Microsoft* court adopted for causation purposes applies by its terms only to exclusionary conduct lacking any procompetitive justification—and thus *not* to typical mergers, particularly those that were reviewed by the government itself before consummation. The *Microsoft* court upheld findings (1) that Microsoft

39 *See* 4 Areeda & Hovenkamp, Antitrust Law, *supra* note 8, ¶ 902(a), at 22–26 (discussing, *inter alia*, United States v. U.S. Steel Corp., 251 U.S. 417 (1920) and United States v. United Shoe Mach. Co., 247 U.S. 32 (1918)); *see also* United States v. Columbia Steel Co., 334 U.S. 495, 507–08 & n.9, 522 n.19 (1948) (analyzing, and upholding, asset acquisition under the Sherman Act because the pre-1950 Clayton Act was inapplicable).

40 Brown Shoe Co. v. United States, 370 U.S. 294, 318 n.32 (1962).

41 15 U.S.C. § 18 (emphasis added).

42 United States v. Baker Hughes Inc., 908 F.2d 981, 984 (D.C. Cir. 1990) (emphasis in original).

43 FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 115 (D.D.C. 2004).

44 *Brown Shoe*, 370 U.S. at 328–29 (emphasis added); *see also id.* at 328 ("If the share of the market foreclosed is so large that it approaches monopoly proportions, the Clayton Act will, of course, have been violated; but the arrangement will also have run afoul of the Sherman Act."). Areeda and Hovenkamp suggest that section 2 of the Sherman Act could usefully plug a gap that courts might read into section 7 of the Clayton Act for mergers between monopolists and potential rivals, but no such gap is likely to appear. The gap could arise only if a court mistakenly concludes that mergers between merely potential rivals can never "'lessen' competition" under section 7 because, in a temporal sense, such mergers "neither reduce the number of rivals in the market nor increase the market share of any firm." 4 Areeda & Hovenkamp, Antitrust Law, *supra* note 8, ¶ 912(b), at 92 (quoting 15 U.S.C. § 18). Yet the relevant comparison under the "lessen competition" standard is not temporal (whether the post-merger world is substantially less competitive than the *pre-merger* world), but conceptual—whether the post-merger world is substantially less competitive than the *but-for* world. *See id.* ¶ 907, at 52–53, ¶ 1124, at 63–64. The Clayton Act is suitable for blocking mergers between potential competitors that fail the latter comparison, and there is thus no gap that the Sherman Act needs to fill.

had engaged in exclusionary conduct without any procompetitive justification, (2) that the conduct had in fact suppressed the use of the Navigator browser, and (3) that Navigator "reasonably constituted [a] nascent threat[]" to the Windows operating system monopoly at the time of the conduct.[45] Microsoft argued that it could escape section 2 liability despite those facts because the government had not provided direct evidence that "Navigator would actually have developed into [a] viable platform substitute[]" for Windows but for Microsoft's exclusionary conduct.[46] The court rejected that argument and adopted the more lenient "reasonably capable" standard instead. The court reasoned that, "[t]o some degree, 'the defendant is made to suffer the uncertain consequences of its own *undesirable conduct*.'"[47]

This relaxed standard for "undesirable conduct" bereft of any procompetitive rationale has no application to mergers, which often present significant efficiency benefits alongside any competitive concerns.[48] *A fortiori*, the standard cannot be applied to a merger that the government itself reviewed pre-consummation, allowed to proceed, and thus implicitly deemed benign or procompetitive. There is no non-circular basis for deeming such a merger "undesirable" in the absence of a convincing causal showing that the merger actually made the world less competitive than it would otherwise be.[49]

Second, even where *Microsoft*'s plaintiff-friendly standard of causation is relevant at all, it is relevant *only to liability but not to remedy*. As the court held, "Microsoft's concerns over causation have more purchase in connection with the appropriate remedy issue, *i.e.*, whether the court should impose a structural remedy or merely enjoin the offensive conduct at issue. . . . Absent some measure of confidence that there has been an actual loss to competition that needs to be restored, wisdom counsels against adopting radical structural relief."[50] Indeed, the *Microsoft* court vacated the district court's divestiture order over the government's objection and further suggested that no divestiture order would be appropriate on remand unless the government offered convincing evidence "of the causal connection between Microsoft's exclusionary conduct and the company's position in the OS [operating

[45] United States v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam).

[46] *Id.*

[47] *Id.* (emphasis added) (quoting 3 Areeda & Hovenkamp, Antitrust Law, *supra* note 37, ¶ 651(c), at 78); *see also* McWane, Inc. v. FTC, 783 F.3d 814, 837 (11th Cir. 2015) (following *Microsoft*'s "causation" holding in another section 2 case also involving exclusionary conduct with no cognizable procompetitive justifications).

[48] *See, e.g.*, 4 Areeda & Hovenkamp, Antitrust Law, *supra* note 8, ¶ 901(a), at 6 ("[I]n contrast to horizontal price-fixing agreements, the mere fact that a merger eliminates competition between the firms concerned has never been a sufficient basis for illegality. The explanation lies in the lesser danger to competition and the greater potential for procompetitive benefits.") (footnote omitted).

[49] Of course, there may be outlier cases in which the only plausible explanation for an acquisition is the suppression of a significant competitive threat. Such an acquisition might well fall within the scope of the Microsoft standard for purely "undesirable" conduct. But such cases would be very rare and are unlikely to involve mergers that were subject to and survived HSR scrutiny.

[50] *Microsoft*, 253 F.3d at 80.

system] market."[51] For this reason by itself, the *Microsoft* holding cannot support any argument for easing the government's proof burdens when it seeks to break companies up.

These limitations on *Microsoft*'s causation holding are significant and justified. Subjecting mergers to the pro-plaintiff "reasonably capable" standard would invite wasteful sandbagging by the government whenever it confronts the following scenario: a firm with market power (*X*) seeks to acquire a complementary company (*Y*) that might conceivably compete with it someday in the but-for world but is unlikely to do so, and the merger will involve integrating the two firms' operations to make the acquired firm resemble the acquiring firm more closely. The government would generally forgo any pre-merger challenge to such an acquisition because it could not prove a likelihood that *Y* would enter *X*'s market absent the transaction. But years later, once *X* merges with *Y* and, as planned, converts it into a successful participant in *X*'s market, the government could sue to unwind the merger by invoking the "reasonably capable" standard, which would spare it any need to substantiate claims that the but-for world would be more competitive than the actual world. Shifting enforcement from pre-merger to post-consummation challenges in this manner would resurrect the costs and litigation uncertainties that characterized the pre-HSR merger-challenge regime.[52]

B. *The Government Must Show That Its Basis for Challenging a Consummated Merger Was Present at the Time of Consummation*

1. *A Merger's Lawfulness Must Be Judged as of the Time of Consummation, Not the Time of Suit*

A firm can be liable for anticompetitive *conduct* at any time, including through misuse of assets previously acquired through merger. But the underlying merger itself must be judged by reference to the state of affairs when it was consummated. If it is unlawful now, it must have been unlawful then; a merger cannot be lawful at the time of consummation but become unlawful on the basis of unexpected subsequent developments. While post-acquisition evidence can be relevant to proving that a transaction was unlawful at the time of consummation (see below), unlawfulness that arises only in the post-acquisition period cannot be the basis for invalidating a merger. Instead, the government must prove that its basis for alleging that the merger made

[51] *Id.* at 107.

[52] *See generally* Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, *supra* note 14, at 826–28 (discussing United States v. El Paso Nat. Gas Co., 376 U.S. 651 (1964), the "poster child" of pre-HSR dysfunction).

the world less competitive than it would otherwise be was sufficiently foreseeable at the time of consummation that the merger could have been challenged then.

This point has long enjoyed widespread support in the academic commentary, from sources as diverse as Donald Turner,[53] Robert Pitofsky,[54] and the Areeda & Hovenkamp treatise.[55] In Pitofsky's words, any contrary rule would be "anathema to American antitrust" because it would impose, in effect, a regime of no-fault liability by holding companies liable for future developments that "would have been unpredictable at the time the transaction was entered into and therefore unfair to charge against the interests of the merging parties."[56]

For example, suppose that, in year 1, antitrust authorities allow a five-to-four merger to close because they reasonably predict that the merger's benefits will outweigh its harms. But by year 10, two of the merged firm's competitors have exited the market because they relied on a technology that became infeasible for reasons no one foresaw. In this scenario, the government might be able to prove that the actual world, with only two remaining competitors, is competitively inferior to the but-for world with three. But if so, that is insufficient to justify unwinding the merger because the problem was unforeseeable, and neither section 7 nor section 2 imposes no-fault liability.[57] Moreover, even if U.S. law *did* impose a no-fault regime, there would be no reason to apply it against the merged firm rather than its remaining competitor. They both occupy the same position in a concentrated market through (by hypothesis) no fault of their own, and after many years of

[53] *See* Donald F. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1347 n.53 (1965) (noting "very strong" arguments for judging transactions as of the time of consummation except in cases involving "partial stock acquisition" and thus continuing collaboration between two economically distinct entities).

[54] *See* Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 Geo. L.J. 195, 223–24 (1992) (rejecting regime of "[c]onditional clearance of mergers pending postmerger developments").

[55] *See* 5 Areeda & Hovenkamp, Antitrust Law, *supra* note 8, ¶ 1205(a), at 307 ("Controlling and especially total acquisitions should be judged on the basis of evidence of the situation existing at the time of the acquisition, [except that p]ost-acquisition evidence available at the time of trial might be probative of the true situation that existed at the time of the merger."); *see also* Scott A. Sher, *Closed But Not Forgotten: Government Review of Consummated Mergers Under Section 7 of the Clayton Act*, 45 Santa Clara L. Rev. 41, 57–66, 76–77 (2004); Bruce Bromley, *Business' View of the du Pont-General Motors Decision*, 46 Geo. L.J. 646 (1958).

[56] Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, *supra* note 54, at 223–24.

[57] *See* A. Douglas Melamed & Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 Rev. Indus. Org. 741, 764–67 (2019). In the late 1970s, Congress considered and abandoned proposals to impose liability for "no-fault monopolization." *See* Harry First, *Woodstock Antitrust*, CPI Antitrust Chron., Apr. 2018, at 1, 3–4; Joe Sims, *Report of the President's Commission on Antitrust*, Regulation, Mar./Apr. 1979, at 25, 31–32.

integration, it would likely be no easier to break up the merged firm than its competitor.[58]

This logic is unassailable. The only question is whether the Supreme Court's 62-year-old *DuPont* decision requires a contrary rule.[59] It does not.

DuPont was a major supplier to General Motors (GM) and purchased a 23-percent stock interest in GM in transactions between 1917 and 1919. Over the ensuing decades, DuPont used this interest to influence GM's purchasing decisions to favor DuPont, and the government ultimately filed suit in 1949. In 1957, with three Justices recused, a 4-to-2 majority found that DuPont's decades-old stock acquisition violated section 7 of the Clayton Act. It reasoned that "there was *at the time of suit* a reasonable likelihood" that DuPont would use its GM shares to foreclose competing suppliers.[60] Justice Harold Burton, joined by Justice Felix Frankfurter, dissented on the ground that this holding was "unfair to the individuals who entered into transactions on the assumption, justified by the language of § 7, that their actions would be judged by the facts available to them at the time they made their decision."[61] In his view, "if the Government chooses to bring its action many years [after an acquisition], it must prove what § 7 plainly requires—that the acquisition threatened competition when made."[62]

Justice Burton's position is now widely regarded as an accurate statement of the law—except in the special circumstances presented in *DuPont* itself. Because DuPont and GM remained *separate* companies after the stock purchase, DuPont's use of shareholder influence on GM to exclude rival upstream suppliers could be found to constitute an ongoing antitrust violation. As Areeda and Hovenkamp explain, such "[n]oncontrolling acquisitions

[58] Donald Turner made essentially the same point in 1965 when addressing the related question of whether a merger, lawful at the time of acquisition, itself becomes unlawful if the merged company subsequently engages in (independently culpable) anticompetitive conduct:

> If a merger would have been upheld at any time up to [the anticompetitive conduct], this is the equivalent of saying, from a legal standpoint, that expansion by acquisition was no more objectionable than expansion by building. If a company expanded by building and then indulged in [anticompetitive conduct], it would not be subject to a rule of automatic divestiture. There seems little more reason to apply such a rule when growth came by an otherwise unobjectionable acquisition.

Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, *supra* note 53, at 1347.

[59] *See* United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957).

[60] *Id.* at 592 (emphasis added); *see also id.* at 589 ("[The Clayton Act] is designed to arrest in their incipiency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result from the acquisition by one corporation of all or any part of the stock of any other corporation."); *id.* at 597 ("[T]he Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce."); *id.* at 607 ("[T]he test of a violation of § 7 is whether, at the time of suit, there is a reasonable probability that the acquisition is likely to result in the condemned restraints.").

[61] *Id.* at 623 (Burton, J., dissenting).

[62] *Id.* at 624.

of stock or temporary acquisitions of assets may be appraised for legality at any time," and "[t]his is the meaning of the Supreme Court's *DuPont* (*GM*) decision."[63] But "[t]hese are the *only* situations that are always appraised . . . on the basis of the situation existing at the time of trial."[64] A full-blown merger cannot constitute an ongoing violation reviewed on a time-of-trial basis because only one economic actor remains after consummation, and *Copperweld* insulates intracorporate influence from antitrust challenge, in part because it is presumed efficient.[65] Mergers are thus "judged on the basis of evidence of the situation existing *at the time of the acquisition*," not the time of suit.[66]

Unfortunately, the *DuPont* majority did not explicitly limit its "time of suit" principle to noncontrolling stock purchases.[67] And the precise scope of that holding remains unsettled because, in the immediate aftermath of *DuPont*, the antitrust authorities themselves disavowed any intent to pursue a broad interpretation,[68] and the courts have thus had no occasion over the ensuing six decades to give *DuPont* the appropriately narrow construction urged by Areeda and Hovenkamp.[69] But there seems little doubt that courts would adopt that construction if the antitrust authorities abruptly began construing *DuPont* to hold companies retroactively liable for mergers that were lawful at the time of consummation.

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63 5 Areeda & Hovenkamp, Antitrust Law, *supra* note 8, ¶ 1205(a), at 307.

64 *Id.* (emphasis added).

65 *Id.* ¶ 1205(c)(1), at 313; *see also* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 770–73 (1984).

66 5 Areeda & Hovenkamp, Antitrust Law, *supra* note 8, ¶ 1205(a), at 307 (emphasis added); *see also id.* ¶ 1205(c)(3), at 316 (dismissing as "unconsidered dicta" the description of *DuPont* in *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 241–42 (1975)); *id.* ¶ 1205(c)(1), at 313 (noting the Second Circuit's holding in SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1206–07 (2d Cir. 1981) that "a patent acquisition that was lawful when made, because the patent was unused and the acquirer lacked significant power, could not become unlawful later on, when the patent became potent").

67 It is not even obvious why the "time of suit" principle was essential to the outcome in *DuPont* in the first place. The Court rejected DuPont's claim that it originally purchased GM stock simply as a passive investment and concluded that the company always intended to use those holdings to influence GM's purchasing decisions in DuPont's favor (which, according to the pro-plaintiff "foreclosure" principles of the time, was deemed competitively problematic). *See* United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 598–606 (1957); *see also id.* at 607 ("The fire that was kindled in 1917 continues to smolder."). It is thus difficult to see why, on the basis of the Court's own reasoning, the government could not have sued to block the stock purchases at the time they were made. Justice Burton, too, found the majority opaque on this point. According to him, the majority only "apparently concede[d]" that the purchases were "lawful when made" because GM's market share was lower in 1917 than later and because the 77% of shares *not* owned by DuPont were spread among fewer third parties in 1917 than in 1947. *Id.* at 623 n.15 (Burton, J., dissenting). But the majority did not in fact state that the purchases were lawful when made, and although it noted the market changes identified by Justice Burton, it attached no clear legal significance to them.

68 *See* John C. Stedman, *The Merger Statute: Sleeping Giant or Sleeping Beauty?*, 52 Nw. U. L. Rev. 567, 568 (1957) ("Even the Government appears to have been taken somewhat aback. The Antitrust Division's chief public response to date has been to calm the fears of business concerns understandably upset by the decision and fearful of an attempt to exploit [*DuPont*].").

69 *See* Sher, *Closed But Not Forgotten: Government Review of Consummated Mergers Under Section 7 of the Clayton Act*, *supra* note 55, at 64 ("[T]he *du Pont* decision did not open the floodgates of challenge to transactions that had closed years or decades earlier. The DOJ wisely recognized that to do so would cause chaos in the business community.") (footnote omitted).

2. *Subsequent Evidence May Be Admissible as Proof of a Merger's Lawfulness at the Time of Consummation*

This article focuses on identifying the *substantive propositions* the government must prove when it seeks to unwind consummated mergers. To this point, we have identified two: (1) that the but-for world would be more competitive than the actual world and (2) that the merger could have been challenged on that basis at the time of consummation. But our analysis does not purport to resolve all the distinct questions that can arise about *what evidence* may be used to prove or disprove those propositions. This distinction—between substantive and evidentiary issues—is significant. Even though a merger's legality must be evaluated as of the date of acquisition rather than trial, "[p]ost-acquisition evidence available at the time of trial might be probative of the true situation that existed at the time of the merger."[70] For example, "post-merger market statistics may indicate what the [actual] situation was at the time of merger," and "[p]ost-acquisition evidence might occasionally show that anticompetitive threats that seemed probable at merger time were not, in fact, probable."[71]

By the same token, post-acquisition evidence may confirm that the parties entered into a merger with the incentive and ability to derive substantial efficiencies that outweigh any anticompetitive effects. Here, too, it would be more difficult for the government to challenge the merger years after the fact than it would have been for the government to have challenged the same merger before or just after consummation. In litigated merger cases involving efficiency claims by the merging parties, the government nearly always argues—and courts nearly always agree—that those claims are too speculative to be credited.[72] But that argument would be unavailable to the government

[70] 5 Areeda & Hovenkamp, Antitrust Law, *supra* note 8, ¶ 1205(a), at 307.

[71] *Id.*; *see also* Timothy J. Muris & Bilal K. Sayyed, *Three Key Principles for Revising the Horizontal Merger Guidelines*, 9 Antitrust Source, Apr. 2010, at 1, 11 ("With consummated mergers, the Agencies may be able to use fundamentally different facts than are available in the normal HSR process: evidence of the merger's actual competitive impact."). This observation comes with a caveat: in transactions challenged *just after* consummation, defendants sometimes cite the absence of immediate competitive harms as evidence that their mergers are benign, and courts often reject such evidence as it "could arguably be subject to manipulation" by the defendants themselves, who have every incentive to remain on their best behavior while merger litigation is threatened or pending. Chicago Bridge & Iron Co. v. FTC, 534 F.3d 410, 435 (5th Cir. 2008) (emphasis omitted). That approach is sound, but it normally has little application for mergers cleared many years before suit. The longer ago a merger was consummated, and the more explicit the government's acquiescence was at the time, the less plausible it is to speculate that the merged company might have altered its conduct for litigation-related reasons.

[72] *See, e.g.*, United States v. Anthem, Inc., 855 F.3d 345 (D.C. Cir.), *cert. dismissed*, 137 S. Ct. 2250 (2017); St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 788–92 (9th Cir. 2015). In contrast, the agencies are much more likely to be receptive to efficiency claims in non-litigation contexts—in the investigatory stage of a merger proceeding and as a basis for a consent agreement with the merging parties. *See generally* William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, 71 Antitrust L.J. 207 (2003); *see also* Timothy J. Muris, *The Government and Merger Efficiencies: Still Hostile After All These Years*, 7 Geo. Mason L. Rev. 729 (1999) (discussing the government's growing but incomplete recognition of efficiency claims).

in post-acquisition cases involving demonstrable efficiencies. For example, the government could not plausibly argue that a merger should be unwound because its animating efficiencies appeared difficult to achieve *ex ante* if the merged company has already achieved them *ex post*.

What, though, if the evidence relates to merger-specific efficiencies that were *not* foreseeable at the time of consummation? In our view, although a court should not consider unforeseeable merger *harms* for the reasons discussed above, it may consider merger *benefits* that the merged company derives from integration, whether or not those benefits were foreseen or foreseeable. That approach, while obviously asymmetrical, serves valuable policy objectives because categorically excluding such evidence would reduce the incentives of post-merger companies to innovate in ways that create consumer benefits. Robert Pitofsky made a similar observation in 1992, a few years before he became FTC Chairman. Although he endorsed the consensus that the government should not "charge against the interests of the merging parties" any *harms* that were "unpredictable at the time the transaction was entered into," he added that it may be appropriate to credit "an efficiency defense . . . on the basis of postmerger developments," given that "[t]he parties have some control over the timing and magnitude of efficiencies that emerge after the merger," and "the existence of efficiencies is advantageous to a competitive system."[73]

In any event, the merits of this asymmetrical approach are largely academic because, irrespective of the liability issues discussed to this point, equitable principles provide an adequate and independent basis for rejecting efforts to unwind mergers with substantial demonstrated efficiencies. If a merged company has derived such efficiencies from a transaction, unwinding that transaction would often inflict commensurate *in*efficiencies on consumers.[74] And that fact would weigh against any divestiture remedy, as we next discuss.

C. The Government Must Show That the World Will Be Competitively Better Off in the Future If the Merger Is Unwound Now

To this point, we have identified two essential elements the government must prove to establish liability for long-consummated mergers. These could be

[73] Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, *supra* note 54, at 224; *see also* Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, *supra* note 53, at 1347 ("[T]here is legitimate concern that an automatic rule [invalidating mergers on the basis of alleged post-consummation predatory pricing] would have undesirable dampening effects on the competitive behavior of acquiring firms; that firms might desist from charging as low a price as their economic circumstances warranted, fearing that they might unjustifiably be found to have been predatory, and therefore be forced to divest.").

[74] *See* 5 Areeda & Hovenkamp, Antitrust Law, *supra* note 8, ¶ 1205a, at 307 n.3 ("A merger that was unlawful when consummated but that would not be so adjudicated at the time of suit would not be dissolved, because the equitable remedy would not serve the goal of improving competition.").

called "retrospective" showings: that the but-for world would have developed so as to make it more competitive than the real world, and that the basis for drawing that conclusion was available at the time of the transaction. Yet even if the government establishes liability, it must further show that whatever remedies it proposes would serve the public interest; courts have no obligation to impose a structural remedy after finding an antitrust violation if they conclude that doing so would disserve the interests of equity.[75] Thus, if the government seeks to unwind a consummated merger, it must prove that the *prospective* benefits of that structural remedy outweigh the *prospective* harms, including the costs and unintended consequences that often arise from corporate de-integration and inevitably increase with time.

In cases involving mergers that were consummated many years ago, that calculus will often counsel against structural remedies for proven violations, particularly if conduct remedies are available as alternatives. As discussed, Congress enacted the HSR legislation precisely because it is often difficult to unscramble the eggs—that is, to restore the competitive status quo ante—even if suit is brought promptly after consummation. For example, a central purpose of most horizontal mergers is to cut costs by eliminating redundant assets such as plants, stores, back-office systems, and personnel. Once those redundant assets are eliminated and the merging parties are efficiently integrated, it may be infeasible to operate the two companies separately, or the costs of breaking them up after integration may exceed the benefits of trying to recreate the status quo ante.[76] Indeed, courts routinely cite such pragmatic concerns when they enjoin the parties from consummating a merger pending full review on the merits, even if such review could be conducted promptly afterwards.[77]

Those problems may be greatly compounded when the government allows years to go by before challenging a consummated merger. A case in

[75] *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 105 (D.C. Cir. 2001) (en banc) (per curiam) ("[A] district court is afforded broad discretion to enter that relief it calculates will best remedy the conduct it has found to be unlawful.").

[76] *See* Part I, *supra*; *see also, e.g.*, Analysis of Agreement Containing Consent Order to Aid Public Comment, Whole Foods Mkt., Inc. and Wild Oats Mkts., Inc., Dkt. No. 9324, 74 Fed. Reg. 10,914, 10,916 (FTC 2009) ("The absence of pre-consummation relief from the district court, and Whole Foods' subsequent integration activities, have made it more difficult for the Commission to obtain complete relief in this matter.").

[77] *See, e.g.*, FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 352–53 (3d Cir. 2016) (granting preliminary injunction because, "should the Hospitals consummate the merger and the FTC subsequently determine that it is unlawful, divestiture would be the FTC's only remedy. At that point, since it is extraordinarily difficult to unscramble the egg, it will be too late to preserve competition if no preliminary injunction has issued") (internal quotation marks omitted) (footnote omitted) (citations omitted); FTC v. H.J. Heinz Co., 246 F.3d 708, 726 (D.C. Cir. 2001) (upholding preliminary injunction because if the merger were to close and the FTC were to deem it unlawful, "Beech-Nut's manufacturing facility will be closed, the Beech-Nut distribution channels will be closed") (internal quotation marks omitted); FTC v. Sysco Corp., 113 F. Supp. 3d 1, 87 (D.D.C. 2015) (granting a preliminary injunction because, if the merger were to close and the FTC were to deem it unlawful, it would be difficult to "recreate pre-merger competition" by "restor[ing] the parties to their pre-merger state").

point is the FTC's decision not to impose a divestiture remedy in its landmark *Evanston* hospital-merger decision in 2007.[78] The Commission acknowledged that "[s]tructural remedies are preferred for Section 7 violations" because they are often "the most appropriate means for restoring competition lost as a consequence of a merger or acquisition."[79] But the Commission decided against a structural remedy in *Evanston* because "[a] long time has elapsed between the closing of the merger and the conclusion of the litigation. This does not preclude the Commission from ordering divestiture, but it would make a divestiture much more difficult, with a greater risk of unforeseen costs and failure."[80]

Conclusion

As they should be, the antitrust agencies are devoting considerable resources to analyzing America's tech sector. This initiative is most likely to be remembered for successes rather than failures if the agencies focus on remedying present anticompetitive conduct rather than on challenging long-consummated mergers that the agencies themselves elected not to challenge during their original review. As discussed, such challenges would—and should—trigger proof burdens that the government is very unlikely to meet.

[78] Opinion of the Commission, Evanston Nw. Healthcare Corp., Dkt. No. 9315 (FTC Aug. 6, 2007), https://www.ftc.gov/sites/default/files/documents/cases/2007/08/070806opinion.pdf. *Evanston* was the FTC's first major hospital-merger decision after completing the retrospective studies discussed in *supra* note 23.

[79] *Id.* at 89.

[80] *Id.*; *see also* Fiona Scott Morton, *Why 'Breaking Up' Big Tech Probably Won't Work*, Wash. Post, July 16, 2019, https://www.washingtonpost.com/opinions/2019/07/16/break-up-facebook-there-are-smarter-ways-rein-big-tech/.