2011

Rethinking Merger Efficiencies

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Recommended Citation
RETHINKING MERGER EFFICIENCIES

Daniel A. Crane*

The two leading merger systems—those of the United States and the European Union—treat the potential benefits and risks of mergers asymmetrically. Both systems require considerably greater proof of efficiencies than they do of potential harms if the efficiencies are to offset concerns over the accumulation or exercise of market power. The implicit asymmetry principle has important systemic effects for merger control. It not only stands in the way of some socially desirable mergers but also may indirectly facilitate the clearance of some socially undesirable mergers. Neither system explicitly justifies this asymmetry, and none of the plausible justifications are normatively supportable. The most likely positive explanations for the asymmetry stem from institutional frictions between the lawyer and economist classes in the antitrust agencies, self-preservationist biases by antitrust regulators, and misplaced ideological opposition to industrial concentration. In principle, the probability-adjusted net present value of merger risks should be treated symmetrically with the probability-adjusted net present value of merger efficiencies.

TABLE OF CONTENTS

INTRODUCTION ........................................... 348
I. MERGER EFFICIENCIES' LEGAL MALAISE......................... 351
   A. The Predictive Context of Merger Decisions.............. 351
   B. U.S. Legal Principles..................................... 355
   C. EU Legal Principles...................................... 358
II. SYSTEMIC EFFECTS OF FORMAL ASYMMETRY.................... 360
   A. Incidence, Intensity, and Effect of Efficiencies Discourse in Administrative Negotiations............ 360
   B. The Liberalization of Merger Policy...................... 364
   C. Effects on Distribution of Proposed and Challenged Mergers.............................................. 368
III. SOURCES OF HOSTILITY TO MERGER EFFICIENCIES........... 370
   A. Productive Efficiencies Do Not Always Benefit Consumers....................................................... 371
   B. Efficiencies Claims Are Difficult to Prove............... 374

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Merger law exhibits an unexplained and unexamined differentiation between probabilistic costs and benefits. In the two leading merger systems—those of the United States and the European Union—merger law implicitly requires a greater degree of predictive proof of merger-generated efficiencies than it does of merger-generated social costs. As a matter of both verbal formulation in the governing legal norms and observed practice of antitrust enforcement agencies and courts, the government is accorded greater evidentiary leniency in proving anticompetitive effects than the merging parties are in proving offsetting efficiencies.

To illustrate, suppose that the best available economic evidence holds that a horizontal merger is 40 percent likely to create $100 in net present value consumer welfare losses and 40 percent likely to create $100 in net

present value efficiencies that would be passed on to consumers. Putting aside enforcement costs, the expected value of the merger to consumers is zero. Therefore, all else being equal, there is no reason to challenge the merger, particularly given the high costs of enforcement. Under prevailing norms and practices, however, the merger would likely be challenged. Superficially, at least, the articulated legal mechanism for this differentiation would be a disparity in the standards of proof for the government’s affirmative case and the defendant’s rebuttal case.

The systemic consequences of this asymmetry are significant, in a way that has not previously been appreciated. It might appear that the only consequence of a more stringent approach to claims of merger efficiencies is that some mergers that are close calls on the anticompetitive effects side of the ledger will be prohibited even though, on balance, they might actually benefit society. Since merger policy has been relatively lenient overall in the past three decades, false positives in a handful of close-call merger cases might seem to be a relatively trivial consequence of an unexplained evidentiary asymmetry.

This view incorrectly assumes that the only consequence of stringency on proof of efficiencies falls on the efficiencies side of the ledger. There are good reasons to think that this is not true—that courts and agencies selectively compensate for not giving much weight to merger efficiencies claims by demanding too much proof of anticompetitive effects from government antitrust enforcers. In an alternative legal regime where efficiencies and risks were equally weighted and parties therefore had a greater incentive to come forward with evidence of efficiencies, some mergers that today proceed unchallenged might be challenged since courts and enforcers could become more credulous of anticompetitive effects theories in cases without plausible efficiencies claims. Rebalancing the weighting of efficiencies and anticompetitive effects could have a significant effect on the overall mix and distribution of merger challenges.

This Article interrogates the differential treatment of costs and benefits and argues that it is unjustified and counterproductive. A potential merger efficiency should be given weight equal to an equally likely anticompetitive risk of the same magnitude. To put it more formally, the probability-adjusted net present value of merger risks should be treated symmetrically with the probability-adjusted net present value of merger efficiencies.

This proposition may seem intuitively obvious given ordinary cost-benefit analysis principles, but there are a number of reasons why symmetrical weighting might not hold in the merger context. Merger efficiencies might be disfavored because they tend to be captured by producers rather

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2. The efficiencies and harms of mergers are almost always predicted ex ante, because most jurisdictions that prohibit anticompetitive mergers, including the United States and the European Union, require premerger notification and clearance of most categories of potentially troubling mergers. Hence, the merger review function occurs before actual harms or efficiencies are known. See infra Section I.A.
than consumers, while the consumers bear the full weight of anticompetitive effects. Similarly, short-run efficiencies may be disfavored because they can create long-run market dominance that creates further inefficiencies as the merging firms eventually exercise market power. Efficiencies claims may also be treated with skepticism because, unlike anticompetitive effects theories, efficiencies theories are inherently speculative. Finally, such claims may be suspect because of a general view that large corporate mergers are more often the product of kingdom building by imperialistic CEOs than efforts to generate shareholder value, or that managers proposing mergers suffer, as a class, from optimism bias.

Merger efficiencies may also be running up against the expression of political or ideological values in merger policy. Efficiency doctrine and practice may express residual manifestations of the precautionary principle, a requirement that proponents of economic changes eliminate the possibility of social welfare losses before those changes are approved. Or the veiled antipathy to merger efficiencies may be a holding place for ideological resistance to large aggregations of economic power, even when those aggregations advance short-run consumer interests.

This Article interrogates and rejects each of these possible justifications for cost-benefit asymmetry. It argues in favor of a formal principle of symmetrical treatment of expected costs and benefits from future mergers. However, treating costs and benefits symmetrically does not necessarily entail a comprehensive overhaul in the way that merger efficiencies are considered or the weight they are given in merger review. Courts and agencies sometimes discount certain efficiency claims for justifiable reasons. Some efficiency claims are inherently speculative or unlikely to advance consumer welfare. Rather, adoption of the symmetry principle would add rigor and transparency to merger review and reveal circumstances where well-founded efficiency defenses may be subordinated to confused analysis or weakly articulated policy objections.

Part I of this Article sets the stage by describing the prospective context of merger review decisions, which require agencies and sometimes courts to make predictive assessments of the consequences of mergers that have not yet occurred. It then describes the asymmetrical treatment between merger costs and benefits as a positive matter in the law and practice of United States and European antitrust agencies and courts. Although these two leading and often competing merger control jurisdictions differ in many ways on the substance and institutional framework of merger review, they share a common and unexplained devaluation of merger efficiencies as compared to their treatment of predicted anticompetitive merger costs.

Part II analyzes the systemic consequences of the understood norm of agency and court discounting of merger efficiency arguments. While this phenomenon has generally been viewed just to stand in the way of some mergers potentially beneficial to society, the asymmetry principle may in fact result in an overall suboptimal mix of approved and disapproved mergers, since the principle tends to create a suboptimal amount of information
that would be useful in predicting and evaluating both efficiencies and anti-
competitive effects.

Parts III and IV consider the current regime and offer a new merger re-
view framework. Part III identifies a number of possible grounds for asymmetrical treatment and rejects each one as normatively insufficient to justify a principle of asymmetry. Part IV proposes a path forward for more fluid integration of efficiency concerns in merger review. It considers the role that burdens of proof should play on efficiencies questions. It also acknowledges that a principle of symmetrical treatment cannot be applied in a numerically rigid way but rather should serve as a mnemonic device to stimulate a rebalancing in some key drivers of merger policy. Finally, it considers the additional complexity costs that a symmetry principle might entail.

I. MERGER EFFICIENCIES' LEGAL MALAISE

A. The Predictive Context of Merger Decisions

Unlike adjudicatory decisionmaking, which usually involves recon-
structing past facts and sorting through their legal implications, regulatory decisionmaking inherently involves predictions about the future. When the Food and Drug Administration ("FDA") decides whether to allow the marketing of a new drug, the Environmental Protection Agency ("EPA") determines whether to allow a new pesticide, or the National Highway Traffic Safety Administration ("NHTSA") adopts rules for new automobile safety features, the agency must make predictions about the respective costs and benefits of the innovations. Still, even in these regulatory contexts where future paths and not past conduct are in question, the agencies usually can base their decisions on a sampling of information reflecting the innovation's properties. The FDA can review clinical trials, the EPA can order testing of the pesticides, and the NHTSA can simulate the robustness of the safety devices in crash tests. The predictions are thus extrapolations from controlled experiments to real world interactions.


4. See generally RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATION-
ALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR
HEALTH (2008).

ScienceResearch/SpecialTopics/RunningClinicalTrials/default.htm (last visited Aug. 29, 2011) (explaining the regulatory framework for running clinical trials).


7. See WILLIAM T. HOLLOWELL ET AL., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN.,
UPDATED REVIEW OF POTENTIAL TEST PROCEDURES FOR FMVSS NO. 208 (1999),
By contrast, most modern merger review requires predictions about the likely consequences of an event that has not yet occurred and that cannot be sampled, studied, or tested. With few exceptions, merger challenges occur before mergers have closed. In the United States, this is due to the Hart-Scott-Rodino Act of 1976, which requires parties making stock or asset acquisitions that meet certain dollar thresholds to file a premerger notification document with both the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ"). The parties may not close the merger transaction until thirty days after filing the premerger notification. If prior to the close of the thirty days whichever agency is handling the case has concerns about the transaction, it can file a dreaded "second request" for information. The parties are then prohibited to close the merger until certifying substantial completion of the second request, a process that can take upwards of six months. Because most mergers are time sensitive, parties have strong incentives to seek resolution with the agencies by restructuring their deals to assuage any competitive concerns or else to abandon the deals rather than to litigate.

The European Union follows an even stricter premerger clearance system. Subject to various technical exceptions, parties to a merger must file a premerger notification form and await a final decision by the European Commission (the "Commission" or "EC") before closing the transaction. The review can take up to 105 days. If the Commission chooses to prohibit a merger, the parties must then seek annulment of the Commission decision in the European General Court, a process that can take over a year even on a
"fast track." As in the United States, most firms abandon or restructure deals that the Commission challenges rather than choosing to litigate.

Further, antitrust principles prohibit "gun jumping," any preclosing integration or coordination of the firms on such matters as price and output. The upshot is that in the horizontal cases, which are by far the largest set of challenged merger cases, the firms must continue to behave as arm's-length competitors during the time period when the potential anticompetitive effects of their proposed merger are under evaluation. Thus, on neither the predictive anticompetitive effects side nor the predictive efficiencies side do the agencies have sample data from which they can extrapolate results before they must make their decision.

In evaluating likely anticompetitive effects, the agencies generally consider one of two kinds of theories—coordinated interaction and unilateral effects. In some markets, they consider the possibility that the merger will increase concentration to the point that tacit or explicit collusion (such as price fixing or market division) among the remaining firms in the market would be facilitated. These "coordinated interaction" theories tend to depend heavily on structural assumptions—for example, that concentration levels above a certain Herfindahl Hirschman Index ("HHI") in markets characterized by certain features (for example, high fungibility of goods, transparency of pricing, entry barriers, strong mechanisms for detecting price cutting, and a history of past collusion) tend to result in increased opportunities to collude.

16. See John Davies & Robert Schlossberg, Judicial Review of Antitrust Agency Merger Clearance Decisions, ANTITRUST, Fall 2006, at 17, 21–22 (2006) (describing the European "fast-track" judicial review procedure which can take seven to nineteen months as compared to an average of thirty-one months for cases not on a fast track).

17. The European Commission rarely reaches a prohibition decision in merger cases since most questionable mergers are resolved by the merging parties making "commitments" that resolve any competitive concerns. The Commission's statistics show that the Commission only reached twenty-one prohibition decisions over the twenty-year period from 1990 to 2010. Directorate Gen. of Competition, European Comm’n, Merger Statistics (June 30, 2011) [hereinafter Merger Statistics], http://ec.europa.eu/competition/mergers/statistics.pdf. In the same period, it allowed ninety-three mergers with "commitments." Id.


21. See id. § 7.2 (discussing these factors under the heading "Evidence a Market is Vulnerable to Coordinated Conduct").
In other markets—particularly differentiated goods markets—collusion is less likely to result even with increases in concentration, and the agencies tend to focus on the possibility that the merger would allow the merging parties to increase price or reduce quality even without tacit or explicit collusion. In these cases, the agencies apply a "unilateral effects" theory to determine whether the merged firms would be able to increase prices or decrease quality even without cooperation by the other firms in the market. The key factor in such an analysis is whether consumers consider the products sold by the merging parties to be each other's best substitutes—meaning that customers tend to substitute preferentially between the goods or services of the merging parties. Critical to these types of analyses are the diversion ratios between the two firms' products. The agencies also pay close attention to the possibility of price discrimination against vulnerable populations of customers, which a merger may facilitate even if it does not permit price increases to the market as a whole.

The sources of information that the agencies consider in deploying the coordinated interaction and unilateral effects models vary by the type of case. Increasingly, the agencies place priority on experience with similar cases. Where the necessary market share and demand elasticity data are available, economists in the agencies may run merger simulations to estimate the price effects resulting from the merger, although simulation models may be more important in theory than in practice.

Fewer than 5 percent of all mergers scrutinized by the antitrust agencies in the United States and the European Union give rise to competitive concerns. Weighing against concerns about anticompetitive effects are


24. Id.

25. Id. A diversion ratio is "the fraction of unit sales lost by the first product due to an increase in its price that would be diverted to the second product." Id.

26. Id. § 3.

27. Id. § 2.1.2.


30. Pitofsky reported an estimate of less than 5% in 2007. Pitofsky, Efficiency Consideration, supra note 1, at 1413. More recent data suggest that the number may be smaller. Sokol and Fishkin report total Hart-Scott-Rodino filings and second requests for the period 2005–2010. During that period, second requests were issued in 2.3% (2008) to 4.3% (2009) of

potential efficiencies from the merger. Generically, merger efficiencies can include economies of scale or scope, technological complementarity, reduced transportation or other distribution costs, reduced capital costs, product line specialization, the deployment of scarce managerial talent across a wider portfolio of assets, and positive innovation effects due to the combination of research and development laboratories or intellectual property portfolios. To a large extent, predictions about these efficiencies depend less on models and more on fact-specific data than is true on the anticompetitive effects side of the ledger.

The upshot is that merger control is an inherently predictive exercise. While the quality of models and data concerning proposed mergers varies by issue, merger law is inherently about divining future industrial paths in light of the exogenous shock of firm integration. It is for this reason that probability principles play such an important role in steering the contours of merger review.

B. U.S. Legal Principles

Section 7 of the Clayton Act, as modified by the 1950 Celler-Kefauver Amendments, forms the substantive bedrock of U.S. merger policy. Its terse text—which prohibits mergers and asset acquisitions whose effect "may be substantially to lessen competition"—makes no reference either to a threshold of probability for a finding of anticompetitive effects or to any possibility of an efficiencies defense.

In explicating the text of section 7, the Supreme Court has read the word "may" as providing some indication of the threshold of proof necessary for a finding that a merger is predictively anticompetitive. In oft-repeated dicta from its 1962 opinion in Brown Shoe Co. v. United States, the Court observed that "Congress used the words 'may be substantially to lessen competition' . . . to indicate that its concern was with probabilities, not certainties." Reflecting on Celler-Kefauver's legislative history, the Court noted that "[s]tatutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities," thus suggesting that the threshold of necessary probability lies somewhere between the "clear-cut" and the "ephemeral." Summing up the threshold of probability question, the Court concluded that "[m]ergers with a probable anticompetitive effect were to be proscribed by this Act."

34. Brown Shoe, 370 U.S. at 323.
35. Id.
The elliptical use of "probable" evokes a commonly used, if not precisely defined, threshold in the hierarchy of U.S. legal probability—probable cause, which is the quantum of probability necessary for the issuance of a search warrant under the Fourth Amendment. The Supreme Court has denied that probable cause is susceptible of "precise definition or quantification into percentages," but practitioners and commentators often understand it to lie in the 40–45 percent range. A survey of federal judges found an average percentage of 46 percent for probable cause. In any event, the Supreme Court's repeated invocation of "probability" as the relevant threshold of proof for merger harms suggests that the government's burden in seeking to enjoin a merger is less than a preponderance of the evidence.

Complicating this assessment is the fact that most litigated merger proceedings are decided on preliminary injunctions rather than trials on the merits. In typical preliminary injunction proceedings, the plaintiff needs to establish a "substantial likelihood of success on the merits," a threshold higher than probable cause and probably higher than a preponderance of the evidence. But since the ultimate standard of proof is probability, not preponderance, the government's effective burden is merely to prove a "substantial likelihood" that it will eventually be able to show probable cause to block the merger—a combination that seems to make the government's burden shrink exponentially. Further, when the FTC sues for a preliminary injunction to block a merger so that it may conduct a full administrative review of the merger, courts have held that the FTC need only raise "serious, substantial, difficult, and doubtful" issues about the merger. This seems to collapse the necessary threshold of probability on anticompetitive effects even further.

This bias in favor of harms over efficiencies is reflected in the text of the Horizontal Merger Guidelines (the "Guidelines"). The Guidelines implicitly treat efficiencies and anticompetitive risks asymmetrically by insisting that efficiencies be proven to a very high degree of certainty in order to jus-

39. See Moffitt, supra note 1, at 1710 (analyzing preliminary injunction decisions from the past twenty-five years).
40. See, e.g., United States v. Melrose E. Subdivision, 357 F.3d 493, 504 (5th Cir. 2004) (observing that a substantial likelihood of success on the merits is presumably a higher standard than probable cause).
42. The Horizontal Merger Guidelines were substantially overhauled in 2010.
Rethinking Merger Efficiencies

It is evident that risks need not be proven with great certainty in order to block a merger. In order to find anticompetitive effects, the Guidelines require only "reliable" evidence about the "likely effects of a merger." On the other hand, the Guidelines project an attitude of suspicion at the least, and hostility at the most, toward efficiencies claims. They note that "[e]fficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms. Moreover, efficiencies projected reasonably and in good faith by the merging firms may not be realized." Because of these difficulties of proof, the agencies impose the following requirements on the merging parties:

[T]he merging firms [must] substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific.

They then go on to warn that "[e]fficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means," and that "[p]rojections of efficiencies may be viewed with skepticism, particularly when generated outside of the usual business planning process." The Guidelines then explicitly state that the agencies will not give equal weight to efficiencies and harms: "In conducting this analysis, the Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies." The Guidelines then suggest a sliding scale approach where the magnitude and degree of proof necessary for relying on offsetting

43. The same was true under the recently replaced 1992 Guidelines. Thus, for example, section 1 of the 1992 Guidelines explained that the overall analysis was focused on whether firms "likely would" take certain actions given their economic interests. There was no requirement to verify that the firms actually would raise prices post merger, just that doing so would be consistent with a rational actor model. On the other hand, section 4 sternly warned that efficiencies defenses were not to be made lightly. Efficiencies could not just be predicted; they had to be verified through empirical evidence. When potential adverse competitive effects were expected to be "large," verified efficiencies had to be "extraordinarily great." U.S. DEP'T OF JUSTICE & FTC, HORIZONTAL MERGER GUIDELINES (rev. ed. 1997) [hereinafter HMG 1997], available at http://www.justice.gov/atr/public/guidelines/hmg.htm.

44. HMG 2010, supra note 19, § 2.2.1.

45. Id. § 10.

46. Id.; see also U.S. DEP'T OF JUSTICE & FTC, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 52 (2006) [hereinafter COMMENTARY ON HMG], available at http://www.justice.gov/atr/public/guidelines/215247.pdf ("Efficiency claims that are vague, speculative, or unquantifiable and, therefore, cannot be verified by reasonable means, are not credited.").

47. HMG 2010, supra note 19, § 10.
efficiencies increases exponentially with the quantity of predicted anticompetitive effects.48

The asymmetrical treatment between expected harms and efficiencies is not merely a function of parsing the Guidelines' text. Despite some greater sympathy toward efficiencies in recent years, practitioners report that the agencies usually react with coolness to efficiencies arguments.49

C. EU Legal Principles

EU merger law derives from the EC Merger Regulation.50 Unlike section 7 of the Clayton Act, paragraph 29 of the Merger Regulation specifically recognizes efficiencies defenses.51 Nonetheless, the scope of the efficiencies defense and its correspondence with the threshold of proof necessary to show predicted anticompetitive effects remain subject to some doubt.52

Under EU case law, the Commission is accorded a “margin of discretion” in making its predictions about anticompetitive effects from mergers.53 The courts defer to Commission decisions so long as the “evidence relied on is factually accurate, reliable and consistent” and the record “contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.”54 On the other hand, the merging parties bear the burden of proving that efficiencies are “likely to materialise” and generally must use “precise and convincing” evidence to do so.55

The EC’s horizontal merger guidelines place the burden of proving efficiencies on the merging parties and require that the efficiencies claims “be verifiable such that the Commission can be reasonably certain that the effi-

48. Id.
51. Id. § 29 (“In order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned. It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.”).
52. See generally Fabienne Ilzkovitz & Roderick Meiklejohn, European Merger Control: Do We Need an Efficiency Defence?, 3 J. Industry, Competition, & Trade 57 (2003).
54. Id. ¶ 30.
55. Id. ¶ 406.
ciencies are likely to materialise." The nonhorizontal guidelines seem to strike a softer tone on efficiencies, suggesting that expected efficiencies and anticompetitive effects need to be weighed in the vertical and conglomerate context. However, they later repeat that proving efficiencies is the parties' burden and that the same criteria of verifiability as apply under the horizontal guidelines apply to vertical and conglomerate mergers. Read as a whole, the nonhorizontal guidelines "appear to suggest that the pro-competitive effects of a merger should be subject to more exacting evidentiary standards than theories of competitive harm."

As in the United States, European practitioners report that efficiencies defenses are difficult to sustain in horizontal merger cases. In vertical merger cases, consistent with the softer approach in the guidelines, efficiencies defenses have sometimes been accepted. For example, in the TomTom/Tele Atlas merger, the Commission found that the vertical integration between a map supplier and a maker of navigations systems would likely reduce prices to consumers by a small amount since the vertically integrated firm would eliminate double marginalization. However, as in many other cases, the efficiencies argument appears to have merely been the icing on the key finding—that the merged firms would not have an incentive to behave anticompetitively. It is unclear whether efficiencies concerns are doing substantial, independent work in European merger policy. At a minimum, EU


58. Id. ¶¶ 52–53.


60. See, e.g., Alexandros Papanikolaou & Michael Rosenthal, Merger Efficiencies and Remedies, in The European Antitrust Review 2011 (2011), available at http://www.globalcompetitionreview.com/reviews/28/sections/98/chapters/1083/merger-efficiencies-remedies/ ("[i]n practice, merging parties invoking the 'efficiency defence' in horizontal mergers are likely to continue to face an uphill battle with the Commission."); Robbert Snelders & Simon Genevez, Merger Efficiencies and Remedies (2006), available at http://www.cgsh.com/files/Publication/74073f21-9a08-4be3-a28b-6077c3d867eb/PublicationAttachment/7be91738-3d07-4061-a47-61745c9a62f2/MC06-Chapter-2-Cleary-Gottlieb.pdf (noting cases in which "the Commission's approach to efficiencies has been either ambiguous or outright hostile").

law and practice, like U.S. law and practice, treats probability-adjusted risks and benefits asymmetrically in merger review.

II. SYSTEMIC EFFECTS OF FORMAL ASYMMETRY

The formal position of the antitrust enforcement agencies and courts in the United States and the European Union is that merger efficiencies count only weakly, if at all, toward sustaining the legality of questionable mergers. The most obvious implication of this coolness toward efficiency claims is that some mergers that would be cleared in a more efficiency-hospitable jurisdiction would not be cleared in the United States and the European Union. Under this assumption, a change in norms or practices resulting in a more hospitable reception for efficiencies should result in a net increase in the number of cleared mergers—in other words, in a net liberalization of merger policy.

But that conclusion may be unjustified. Solicitude for efficiencies may already play a role in merger policy, but simply not at the level of individual case analysis. Part of the movement toward liberalization of merger policy in the last two or three decades may already reflect a commitment to allowing efficient mergers without undertaking an individualized look at efficiencies claims. A more particularized inquiry into merger efficiencies might not result in a further net liberalization of merger policy but instead only in a redistribution of the portfolios of permitted and prohibited mergers.

To set the stage for an answer to these questions, this Part first surveys the incidence and intensity of efficiencies discourse in merger negotiations between the merging parties and the government agencies. It then provides a snapshot of the overall liberalization of merger policy in the United States and European Union in the past several decades. Finally, it considers the systemic effects on the landscape of merger control that could follow from a rebalancing of merger costs and benefits.

A. Incidence, Intensity, and Effect of Efficiencies Discourse in Administrative Negotiations

Much of the academic writing on merger efficiencies assumes a decisional model in which the antitrust agencies can exercise prosecutorial discretion to not challenge questionable mergers because of efficiencies, but courts usually serve as the ultimate arbiters of mergers' legality.62 Hence, much of the scholarly work on merger efficiencies has focused on judicial attitudes toward efficiencies.63

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62. See, e.g., Fisher & Lande, supra note 1; Kolasky & Dick, supra note 1, at 208 (discussing the role of efficiencies in judicial decisions regarding mergers); Moffitt, supra note 1.

63. See, e.g., Kolasky & Dick, supra note 1 (arguing that the article “also shows the influence the Guidelines have had on gaining judicial acceptance of the importance of effi-
The available empirical work suggests that judges do purport to take efficiencies into account but that efficiencies actually play little role in merger cases. In a recent empirical study of twenty-three U.S. merger cases litigated between 1986 and 2009, Jamie Moffitt finds that "[a]lthough courts claim to be balancing merger-generated efficiencies with other negative factors affecting market competition," they are actually "making an assessment of the relevant concentration in the applicable market and then allowing that initial assessment to color their recognition of claimed efficiencies." Courts may thus be "stampeding" the efficiency factor based on their conclusions regarding market concentration and possible anticompetitive effects.

But courts are no longer significant players in the formulation of U.S. merger policy. As noted in the previous Part, the Hart-Scott-Rodino Act has pushed most merger control decisions into the agencies and away from the courts. For example, in 1983 when Fisher and Lande computed the "Type 3" costs of the greater complexities that an efficiencies defense would entail, they estimated 20 to 25 litigated merger cases per year. Their estimates were based on averages from the last decade showing 9 FTC cases, 7 DOJ cases, and 5 private cases annually. Since the early 1980s, however, merger enforcement has moved increasingly in the direction of informal administration without litigation. Over the period from 1990 to 2009, the FTC and the DOJ only litigated approximately 39 cases in court, fewer than a net of 2 per year for both agencies. For the last decade, 2000 through

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64. Moffitt, supra note 1, at 1698.
65. See Barton Beebe, An Empirical Study of the Multifactor Tests for Trademark Infringement, 94 Calif. L. Rev. 1581, 1581–82 (2006) (describing the tendency of courts in trademark cases to "stampede" in multifactor analysis by using their decisions on a small number of critical factors to determine the remaining factors).
66. See generally Sokol & Fishkin, supra note 30, at 47 (objecting to Moffitt’s focus on litigated cases as failing to capture actual dynamics of merger control).
67. See supra text accompanying notes 8–13.
68. Fisher & Lande, supra note 1, at 1675.
69. Id. at 1675 n.312.
71. This estimate is drawn from a study of data compiled in the FTC and Department of Justice’s Hart-Scott-Rodino Annual Report. See, e.g., U.S. Dep’t of Justice & FTC, Hart-Scott-Rodino Annual Report: Fiscal Year 2010 (2010), available at http://www.ftc.gov/os/2011/02/1101hrreport.pdf. The FTC maintains a database of all thirty-three annual reports. See Bureau of Competition: Annual Competition Enforcement Reports, FTC, http://www.ftc.gov/bc/anncompreports.shtm (last visited Aug. 18, 2011) [hereinafter Annual Reports] (covering the time period from 1977 to 2010). The estimate is based on the reported number of cases in which the agencies filed a complaint in federal court and the court took some action. In a much larger number of cases, the agencies filed for a preliminary or permanent injunction and either the parties contemporaneously filed for a consent decree or the merging parties abandoned the transaction without a judicial decision. See id.
2009, only 15 merger cases were litigated.\textsuperscript{72} Private antitrust challenges to mergers are also relatively infrequent.\textsuperscript{73}

The same is true in the European Union. Litigation over merger cases has become extremely infrequent. The European Commission has only prohibited two mergers since 2002,\textsuperscript{74} which means that most merger decisions have been made through internal administrative processes. Since a brief spurt of activity in 2002, the European courts have had little work to do on merger policy.

The upshot is that most discussions of merger efficiencies take place informally in nonpublic dialogue between the merger parties (or really, their lawyers and hired economists) and the lawyers and economists in the anti-

\begin{footnotesize}
\begin{enumerate}
\item[(72)] \textit{Id.} (synthesizing the relevant annual reports).
\end{enumerate}
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trust enforcement agencies. To the extent that bargaining between the parties and the government occurs, it occurs “in the shadow of the law,”75 in the sense that it is influenced by the parties’ expectations about judicial outcomes should they litigate. In most cases, however, the law’s shadow is comparatively light, since most merging parties are unwilling to litigate in court should the agency decide to oppose the merger.76 The agencies’ merger guidelines set the stage for the administrative bargains, although the guidelines are not legally binding77 and their predictive power on agency attitudes is not always strong.78

Despite the prohibitive odds that efficiencies will make a difference in most cases, merging parties usually go through the motions and make efficiency arguments. A survey of 20 leading antitrust practitioners conducted by Jon Baker and Carl Shapiro in 2007 revealed that the antitrust agencies had become significantly more receptive to efficiencies claims than they were a decade before.79 Still, the data suggest that efficiencies arguments are seldom dispositive, except perhaps in very close-call merger cases. A recent study of 186 merger cases at the FTC found that internal staff memoranda reported efficiencies claims in 147 out of 186 cases.80 In the cases in which the FTC staff reported the claimed dollar value of the claimed efficiencies, the mean figures ranged from $191 million to $237 million depending on the time period.81 The claimed efficiencies represented an average of 8.1 percent of the transaction’s reported value.82 Efficiencies claims did not meet with particularly great success, at least in the FTC’s Bureau of Competition (which is generally manned by lawyers). The Bureau of Competition


76. Robert Pitofsky, Proposals for Revised United States Merger Enforcement in a Global Economy, 81 GEO. L.J. 195, 225 (1992); see also Crane, supra note 70, at 51-57 (discussing the modern move away from litigating merger cases).

77. FTC v. H.J. Heinz Co., 246 F.3d 708, 716 n.9 (D.C. Cir. 2001) (“[T]he Merger Guidelines are not binding on the court.”).

78. See Christine A. Varney, Assistant Att’y Gen., Antitrust Div., Dep’t of Justice, An Update on the Review of the Horizontal Merger Guidelines, Remarks as Prepared for the Horizontal Merger Guidelines Review Project’s Final Workshop 3 (Jan. 26, 2010), available at http://www.justice.gov/atr/public/speeches/254577.pdf (“A consistent theme running through the panels is that there are indeed gaps between the Guidelines and actual agency practice—gaps in the sense of both omissions of important factors that help predict the competitive effects of mergers and statements that are either misleading or inaccurate.”).


81. Id. at 12.

82. Id.
discussed 342 efficiency claims (multiple efficiencies could be claimed in a single transaction); it rejected 109, accepted 29, and offered no conclusion on 204. 

Efficiencies claims fared considerably better at the FTC’s Bureau of Economics (which is generally manned by economists), which considered 311 efficiencies claims; that bureau accepted 84, rejected 37, and made no decision on 190.

Two factors are notable in these data. The first is the significant difference in perspective between the lawyer and economist classes in the agencies—an issue to which this Article returns in Part III. The second is the relative unimportance of efficiencies in merger analysis. The practice in the antitrust agencies seems to be liberal invocation of efficiencies arguments by the parties without a serious expectation of moving the agencies in most cases. To the extent the agencies ultimately cite efficiencies considerations in clearing mergers, antitrust practitioners report that they are often treated as “icing on the cake” in cases where there are no serious concerns about anticompetitive effects. As former FTC Chairman Tim Muris has observed, “Too often, the Agencies found no cognizable efficiencies when anticompetitive effects were determined to be likely and seemed to recognize efficiency only when no adverse effects were predicted.”

As in the courts, efficiencies discourse appears frequently in merger administration, but its influence on overall merger policy seems to be weak.

B. The Liberalization of Merger Policy

Thus far, we have been considering the efficacy of efficiencies arguments as independent factors in merger policy as though efficiencies and anticompetitive effects were the credits and debits in a tidy system of double-entry bookkeeping that only interacted when tallied at the bottom of the page. But, in fact, perspectives on efficiencies can enter merger policy at a variety of different points. A Bayesian prior belief that many mergers produce desirable efficiencies may push judges, legislators, or antitrust enforcers to take a solicitous view of mergers as a general proposition, even if they fail to credit case-specific efficiency arguments much of the time.

Indeed, one prevailing normative view is precisely this—that legal systems should take into account merger efficiencies by articulating relatively lenient merger standards across the board rather than trying to explore efficiencies arguments on a case-by-case basis. In perhaps the most influential article to make this point, Fisher and Lande argue against allowance of a merger efficiency defense on a case-by-case basis on the ground that efficiencies, although often present in mergers, are hard to detect on a case-specific basis. They also observe that allowing an efficiencies defense

83. Id. at 16.
84. Id. at 22.
85. Muris, supra note 1, at 731.
86. Fisher & Lande, supra note 1, at 1651–68.
would increase both Type 1 and Type 2 error costs and what they style Type 3 error costs—the increased costs to businesses, enforcers, and decision makers from the increased complexity and unpredictability of an efficiencies defense. Instead of allowing an efficiencies defense on a case-by-case basis, Fisher and Lande would “rais[e] the market-share thresholds of presumptive illegality to account for potential efficiency gains,” thus recognizing an efficiency defense by liberalizing merger policy overall.

It may be the case that Fisher and Lande’s recommendation has been de facto accepted in the last two decades. It is certainly the case that the U.S. antitrust enforcement agencies have revised upward their presumptions on the thresholds of market concentration necessary for horizontal mergers to raise competitive concerns. Under the Horizontal Merger Guidelines in place from 1992 to 2010, markets were considered unconcentrated if the Herfindahl-Hirschman Index (“HHI”) was below 1,000; moderately concentrated if it was between 1,000 and 1,800; and concentrated if it was above 1,800. Under the 2010 Guidelines, markets are considered unconcentrated if the HHI is below 1,500; moderately concentrated if it is between 1,500 and 2,500; and concentrated if it is over 2,500. The agencies have also raised the thresholds for the increase in concentration resulting from a merger to raise competitive concerns.

One should be careful about reaching the conclusion that the antitrust agencies have become generally more permissive with respect to mergers based merely on this HHI inflation for at least two reasons. First, the concentration zones designated in the guidelines as raising competitive concerns do not necessarily indicate serious trouble for mergers falling in those zones. At least prior to the 2010 revisions (and we do not yet have data for enforcement under the new Guidelines), many mergers that fell into the Guidelines’ danger zones nonetheless passed agency scrutiny. Hence, the 2010 revisions may be more reflective of past and ongoing liberality than constitutive of new liberality. Second, concentration ratios have become less

87. *Id.* at 1670.
88. *Id.* at 1669.
89. The HHI index is computed by squaring the sums of the market shares of the market participants. See HMG 2010, *supra* note 19, § 5.3.
91. HMG 2010, *supra* note 19, § 5.3.
92. Under the 1992 Guidelines, an increase of over 100 in a highly concentrated market created a presumption that the merger would create market power or facilitate its exercise. HMG 1997, *supra* note 43, § 1.5.1. Under the 2010 Guidelines, an increase of over 200 in highly concentrated markets result in a presumption that the merger will create market power or facilitate its exercise. HMG 2010, *supra* note 19, § 5.3.
significant in merger analysis in the past two decades. In large part, this is a function of a shift in priority from coordinated interaction theories to unilateral effects theories where concentration figures are less significant.

But these are quibbles with the evidentiary significance of the guidelines revisions in demonstrating increasing merger liberality. Even if the liberalization of concentration ratios does not alone signal an overall liberalization of merger policy, there is little doubt that merger policy is far more liberal today than it was twenty or thirty years ago.

Not only have the agencies relaxed their formal concentration criteria in merger cases but the prospects for defendant victories in litigated cases have improved dramatically in the last several decades as well. In his dissent in United States v. Von’s Grocery Co. in 1966, Justice Stewart could comment sarcastically that “[t]he sole consistency that I can find is that in litigation under § 7 [of the Clayton Act], the Government always wins.” Even as late as the early 1980s, Fisher and Lande asserted that “defendant merger victories not surprisingly have been relatively rare.” If anything, the trend in the last decade has been toward defendant victories in litigated merger cases.

94. Under the 2010 Horizontal Merger Guidelines, it may no longer be necessary to define a relevant market in every case. See HMG 2010, supra note 19, § 4 (“Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition . . . .”). See generally Louis Kaplow, Why (Ever) Define Markets?, 124 HARV. L. REV. 437 (2010) (arguing that market definition is incoherent and unproductive in antitrust cases).

95. See Carl Shapiro, The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years, 77 ANTITRUST L.J. 49, 54 (2010) (noting that “[i]n recent years, more DOJ investigations have involved unilateral effects than coordinated effects”); see also Joseph Farrell & Carl Shapiro, Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition, B.E. J. THEORETICAL ECON., Jan. 2010, art. 9, 1 (arguing that a market definition “approach can be clumsy and inaccurate in industries with differentiated products where the theory of harm is related to unilateral . . . effects”). Part of the impetus for the shift toward unilateral effects theories may reflect an overall shift in merger policing from homogeneous goods markets—where markets are relatively easier to define, market shares are easier to compute, and hence market concentration changes are easier to calculate—to differentiated goods or services markets where markets are difficult to define robustly, shares are difficult to calculate robustly, and hence concentration indices are often close to meaningless.

This new focus on differentiated goods markets and unilateral effects theories may have been driven in part by fundamental changes in the economy itself. As the economy has continued its evolution away from bricks and mortar and traditional manufacturing industries toward information and technology industries, it has moved in the direction of differentiation and heterogeneity of brands. See generally CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 22–23 (1999) (describing characteristics of information economies).

96. See generally D. Daniel Sokol, Antitrust, Institutions, and Merger Control, 17 GEO. MASON L. REV. 1055, 1128–29 (2010) (describing a survey of antitrust practitioners reporting ambiguous views as to whether merger enforcement at the Justice Department was more lenient in the Bush Administration than in the Clinton Administration and a uniform view that merger review at the FTC was not more lenient under Bush than under Clinton).


98. Fisher & Lande, supra note 1, at 1583.
Rethinking Merger Efficiencies

with prominent government defeats in cases like United States v. Oracle Corp. ("Oracle-PeopleSoft") and FTC v. Arch Coal, Inc. During the 2000s, defendants won half of the preliminary injunction actions brought by the FTC or the DOJ. To the extent the shadow of the law plays a significant role in the regulatory administration of mergers, merger control has shifted in a decidedly promerger direction.

Although the European model of merger review is quite different from the U.S. model, and European merger control is generally tighter than U.S. merger control, Europe has seen a similar trend toward a more active judicial role in questioning European Commission decisions prohibiting mergers in the last decade. During the early 2000s in particular, the European Court of Justice reversed the Commission’s merger prohibition decisions in a surprising string of cases that departed significantly from the court’s prior willingness to accord the Commission discretion in merger cases. Since those decisions, the Commission seems to have become considerably more cautious in its prohibition decisions, to the point that some academic commentators and Commission officials wonder whether it has become too lenient in merger enforcement.

There is no doubt that merger policy in both the United States and the European Union is more liberal than it was three decades ago in the United States or a decade and a half ago in Europe. What is impossible to say to any great certainty is whether solicitude over merger efficiencies has significantly influenced this trend. Whether or not it has, the comparatively liberal state of merger policy today has implications for any reconsideration of the asymmetrical treatment of merger anticompetitive risks and efficiencies. Any movement toward greater consideration of merger efficiencies could propel overall merger policy in a yet more lenient direction, which could in turn induce political backlash against the overall trend in merger policy.

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101. According to the agencies’ joint Hart-Scott-Rodino Act annual reports, the agencies won six preliminary injunction cases and lost six during the 2000-2009 period. See Annual Reports, supra note 71.
105. Significantly, as a presidential candidate, then-Senator Barack Obama criticized the Bush Administration’s merger policy: “Regrettably, the current administration has what may be the weakest record of antitrust enforcement of any administration in the last half century. . . . As president, I will direct my administration to reinvigorate antitrust enforcement. It will step up review of merger activity and take effective action to stop or restructure those
C. Effects on Distribution of Proposed and Challenged Mergers

The apparent implication of revaluing merger efficiencies relative to anticompetitive effects is that courts and regulators would begin to permit some number of marginal mergers that they previously would have disallowed. To the extent the antitrust system is currently disallowing or discouraging a significant number of beneficial mergers, a reorientation of the relevant legal and administrative norms could result in net social welfare improvement. Indeed, the mergers currently screened out by prevailing norms may be precisely the most beneficial ones. Jamie Moffitt argues that the courts’ hostility to merger efficiency defenses chills businesses’ willingness to propose “exactly those [deals] that have the greatest potential to enhance competition”—high-efficiency transactions in concentrated industries.106

On the other hand, viewed as a proposal to liberalize merger policy, the normative appeal of the symmetry principle seems to depend not merely on its internal logic but also on some prior belief that contemporary merger policy in the United States, the European Union, or other jurisdictions is excessively restrictive. Since some commentators believe that U.S. merger policy in particular has already become too permissive,107 the mere internal logic of the symmetry principle may seem an insufficient reason to recalibrate merger policy in favor of even more liberal merger review.

But revaluing merger efficiencies relative to anticompetitive effects does not require holding constant the rest of merger policy. Even without any formal adjustment to other aspects of merger law, revaluing merger efficiencies could end up having no net effect on overall merger policy liberality. Indeed, an explicit symmetry principle could induce legal decisionmakers to give greater credence to anticompetitive effects theories in some cases than they presently do. Several possible systemic reactions to an enhanced willingness by agencies or courts to credit merger efficiencies arguments point toward neutrality in overall merger leniency.

First, assuming that Fisher and Lande’s proposal to embed prior beliefs about merger efficiencies in overall leniency toward mergers captures part of the influence for merger liberalization in the last several decades, then a higher valuation of efficiencies could alter courts’ and agencies’ overall willingness to prohibit certain classes of mergers. Assuming that merger-control institutions display an unconscious tendency to increase the


106. Moffitt, supra note 1, at 1742–43.

threshold of proof required for anticompetitive effects theories because they are prohibited, culturally or legally, from giving significant weight to merger efficiencies arguments, then a reversal of the norm on efficiencies could also lead to a reversal of the norm on anticompetitive effects theories.

Second, alteration in the efficiencies norm could alter overall regulatory or legal decisionmaking processes on mergers by affecting judges’ or regulators’ assessments of the probability of anticompetitive effects. Decisionmakers asked to assign a probability value to two related events may anchor their determination of one event’s probability on their assessment of the other event’s probability. Judges or regulators asked to decide on the absolute probability that a merger will produce anticompetitive effects might tend to lowball the probability because of a general skeptical inclination as to proof of speculative future events but raise their estimate of the probability of harms if asked to assess that probability at the same time that they were assessing the probability of efficiencies.

One might object that if judges or regulators systematically raised their estimates of future anticompetitive effects when faced with efficiencies defenses, then merging parties would have diminished incentives to make efficiencies claims in the first place. If that were to occur, the agencies might respond by affirmatively insisting that the merging parties in close-call cases provide the efficiencies justifications for their mergers. A related objection focuses on net effects. If the only effect of adopting the symmetry principle were that judges and regulators would become less skeptical of anticompetitive effects claims, then the symmetrical treatment project would not result in a true revaluation of merger efficiencies and, indeed, would seem pointless. But even if revaluing efficiencies defenses did not lead to an overall increase in the number of permitted mergers, it could still have a salutary effect on the selection of mergers that are permitted and prohibited. In the class of marginal merger cases—the class most likely to be affected by any adjustment in legal principle—there might well be a socially beneficial increase in permission for mergers creating net consumer (or social) benefits and a corresponding decrease in mergers creating net consumer (or social) harm.

Finally, it is possible that antitrust regulators have an exogenously determined appetite for merger prohibition decisions, in effect a “merger quota” that they need to fill regardless of the merits of individual merger applications. Within a particular political and economic context, regulators may approach merger control with a rough and perhaps unconscious sense of the number of prohibition decisions—or, more generally, requirements that parties restructure questionable deals—they need to produce in order to justify their budgetary allocations, show themselves to be sufficiently tough

but not obstacles to business progress, and satisfy political demand for action from Washington or Brussels. Much of the ideological discourse about the stringency of antitrust activity consists of counting up merger challenges and other antitrust enforcement activity within particular administrations.\textsuperscript{109}

If even a soft and fluctuating merger quota exists, then a decision to revalue efficiencies could lead to an increase in permission for some categories of mergers and a decrease in permission for other categories.

It is impossible to demonstrate or quantify the effect of any of these factors with certainty, but it seems probable that the relative coolness to merger efficiency arguments may not simply diminish the number of procompetitive mergers with high efficiencies but also alter the overall portfolio of mergers that firms consider and propose and that agencies and courts allow and prohibit. This by itself is not a sufficient reason to adopt a symmetry principle whereby efficiencies and harms of equal weight and probability should be equally weighted. It is, however, a reason to scrutinize the set of possible justifications for the principle of asymmetry embedded in U.S. and EU law and practice and currently being emulated by the scores of merger control regimes developing around the world.\textsuperscript{110}

III. SOURCES OF HOSTILITY TO MERGER EFFICIENCIES

Neither U.S. nor EU law—including the relevant statutory or treaty provisions, implementing regulations or enforcement guidelines, and case law—contains an explicit acknowledgment of, or justification for, the asymmetry between predictive harms and efficiencies described in the previous Section. To be sure, numerous statements—political, legal, and economic—as to the reasons for downplaying efficiencies defenses appear from time to time, but the relevant legal sources make no effort to provide a systematic account for the asymmetry. This Part identifies and critically evaluates seven possible justifications or explanations. The first four—that productive efficiencies do not benefit consumers, that efficiencies claims are hard to verify, that many mergers are driven by managerial kingdom building rather than increasing shareholder value, and that corporate managers suffer from optimism bias when predicting efficiencies—probably account for much of the anti-efficiencies defense bias in current U.S. practice. A fifth assertion—that efficiencies build undue market dominance—once had currency in the United States and may still have currency in the European Union and other jurisdictions. A sixth category of analysis—status quo bias—is part normative justification and part positive explanation. Finally, a residual category of argument—centered on the need to preserve a place for

\textsuperscript{109} See, e.g., Kovacic, \textit{supra} note 107, at 918 (responding to criticisms of Bush-era merger enforcement).

\textsuperscript{110} See \textsc{Fox \\ & Crane}, \textit{supra} note 14, at 451 (discussing proliferation of merger control regimes around the globe).
noneconomic social or political values in merger control—cuts across time and geographic boundaries.

A. Productive Efficiencies Do Not Always Benefit Consumers

The most probable explanation for the asymmetry is an implicit concern that any efficiencies generated by the merger will be captured by the merging firms but not passed on to consumers. Since Oliver Williamson's seminal article in 1968,111 it has been well understood that mergers can simultaneously generate efficiencies and consumer harm if the merging firms appropriate the efficiencies solely for themselves as cost savings and fail to pass them on to consumers. Total societal welfare may be maximized if the cost savings exceed the sum of the consumer deadweight losses (and wealth transfers, if we count those as social costs), and yet consumer welfare may fall.

Where mergers generate total welfare increases but diminish consumer welfare, the merger-control regime must decide whether to accept a total welfare or consumer welfare (or allocative efficiency, its cognate) standard. In both the United States and the European Union, the currently prevailing regimes seem to favor a consumer welfare standard. Under EU law, any merger efficiencies must be sufficient to offset the anticompetitive impact on consumers,112 which means that cost savings from mergers that are not passed on to consumers count for nothing. The U.S. agencies are less clear on this point, but the bottom line seems to be a commitment to a consumer welfare perspective. The current guidelines state that "[t]he Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market" and that "the Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market, e.g., by preventing price increases in that market."113

By contrast, Canada explicitly follows a total welfare standard, with apparent implications for the relative weighting of efficiencies and harms. The Canadian Competition Act114 not only allows a merger defense but also commits Canada to a total welfare standard for mergers under which predicted harms are to be balanced against cost savings from the merger, whether or not those savings are ultimately passed on to consumers. Canadian case law calls for a "balancing weights standard" under which "any increase in surplus arising from the efficiency gain from the merger is balanced against the deadweight loss resulting from the likely anti-competitive

112. EU Horizontal Merger Guidelines, supra note 56, ¶ 79.
113. HMG 2010, supra note 19, § 10.
114. R.S.C. 1985, c. C-34 (Can.).
effects of the merger and, where appropriate, some portion (including possibly all or none) of the associated transfer of surplus from consumers to producers.\footnote{115} Canadian law places the burden of proving harms on the Competition Bureau and the burden of proving offsetting benefits on the merging parties,\footnote{116} but seems to place no greater weight on either side of the scale.

The U.S. and European commitment to a consumer welfare criterion for merger review may provide a strong positive explanation for the asymmetrical treatment of harms and efficiencies, but it is not a normatively appealing one. Even assuming that a normative commitment to consumer welfare rather than total social welfare is appropriate, this is no reason to discriminate against efficiencies in the proof requirement. If the commitment to the consumer welfare objective is what motivates the dismissal of certain forms of efficiency defenses, then the hostility to efficiencies claims should be limited to those that are not passed on to consumers. Instead, both the U.S. and European guidelines cut twice against efficiencies defenses, first by insisting that only consumer-benefiting efficiencies be recognized and second by requiring heightened proof as to even consumer-benefitting efficiencies.

One might respond that both jurisdictions’ guidelines are not really double-discounting efficiencies but rather reflecting the fact that antitrust agencies will cast a jaundiced eye on efficiencies claims since efficiencies often will not benefit consumers. But casting a jaundiced eye on efficiencies writ large would only be appropriate if the agencies did not have adequate tools for predicting which merger efficiencies would be passed on to consumers and which would be appropriated by the merging firms. In fact, antitrust economics has predictive tools for making those determinations. Generally, it is understood that fixed cost savings are likely to be appropriated by the merging firms but that marginal cost savings are likely to be passed on, to some degree, to consumers.\footnote{117} Economists have developed models for determining the level of marginal cost reductions necessary to prevent price increases in unilateral effects cases in differentiated goods\footnote{118} and, separately, in coordinated interaction cases involving homogeneous


\footnote{116. Id. at 2.}


\footnote{118. See Gregory J. Werden, A Robust Test for Consumer Welfare Enhancing Mergers Among Sellers of Differentiated Products, 44 J. Indus. Econ. 409 (1996).}
products. Other economic work shows that, as a general matter, 50 percent should be the minimum pass-through for marginal cost reductions assuming linear demand.

To be sure, all of these models are subject to challenge and criticism, and some of them might not be strong enough to stand up to a Daubert challenge in court. But these sorts of models are similar to the models used to predict anticompetitive effects and should therefore be considered in the same light. Lack of certain knowledge on consumer pass-on is not a sufficient reason for undifferentiated hostility to efficiencies defenses even if a jurisdiction believes that only consumer-benefiting efficiencies should count. Given those premises, the appropriate approach is to require evidence of consumer-benefiting efficiencies, not to cast a pall over efficiencies claims as a class.

One institutional explanation for the asymmetry of treatment is that the lawyer class in the antitrust agencies distrusts the economist class. As a class, economists (including many of the staff economists working in the antitrust enforcement agencies) tend to support a total welfare standard for antitrust, believing that antitrust is a poor vehicle for addressing distributive concerns. By contrast, the lawyer class—reflecting the "consumer welfare" perspective of the courts and a moralistic concern about wealth redistribution and consumer rights—tends to prefer a consumer welfare standard.

This asymmetry in perspective between the economist and lawyer classes shows up in empirical work concerning the separate analysis of efficiency claims by lawyers working in the FTC's Bureau of Competition


122. See, e.g., Kenneth G. Elzinga, The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?, 125 U.Pa. L. Rev. 1191 (1977) (summarizing economic arguments in favor of an efficiency standard); Fisher & Lande, supra note 1, at 1649 ("M)ost economists argue that the antitrust laws are a very poor method of wealth redistribution, and that sound public policy requires one to separate redistributive concerns completely from efficiencies analysis."); Heyer, supra note 117, at 29 (arguing for a total welfare standard); Kolasky & Dick, supra note 1, at 230 (noting that most economists argue for a total welfare approach); Gregory J. Werden, Monopsony and the Sherman Act: Consumer Welfare in a New Light, 74 Antitrust L.J. 707, 708 n.5 (2007) ("Many economists advocate what is termed a total surplus or total welfare standard.").

and the economists working in the FTC's Bureau of Economics. In the study of internal staff reports regarding 147 transactions for which a second request for documents was issued, the study's authors found that the Bureau of Competition's lawyers accepted 8 percent of efficiencies claimed by the merging parties whereas the Bureau of Economics' economists accepted 27 percent of the parties' efficiency claims. The FTC's economists seem to lend considerably greater credence to efficiencies claims than do their lawyer peers.

Empirical work has shown that the lawyer class tends to predominate in influence over the economist class in the antitrust enforcement agencies. The devaluation of merger efficiencies in the merger guidelines and in case law may reflect the lawyer class's effort to prevent the emergence of an implicit total welfare standard. The mere articulation of the consumer welfare standard in guidelines and case law may be perceived (consciously or unconsciously) as insufficient to ensure that only consumer-welfare-enhancing efficiencies count in the relevant calculus.

B. Efficiencies Claims Are Difficult to Prove

One possible reason for the marginalization of efficiencies defenses is that efficiencies may be difficult to prove. Both the U.S. Horizontal Merger Guidelines and the agencies' commentaries on the guidelines note that many purported efficiencies are simply never proven or could be achieved in ways less restrictive of competition. Even in cases where the merging parties prevail in court or before the agencies in arguing that the merger is unlikely to create anticompetitive effects, they often lose on the question of whether they have shown offsetting efficiencies. For example, in the Oracle-PeopleSoft litigation, Judge Walker rejected the Justice Department's anticompetitive effects claims and also dismissed Oracle's efficiency justifications as unproven.

The justification for this systematic skepticism that efficiencies claims have not been proven with adequate certainty cannot be merely that the efficiencies claims concern a future event—the parties' cost curve following the consummation of the merger—and hence are inherently speculative. Predic-
tions about anticompetitive effects share the same property—they rely on probabilistic efforts to divine the future.  

A more serious objection is that the current state of economic thinking has robust tools for establishing anticompetitive effects but not so robust models for forecasting efficiencies. Hence, one might believe that given specified demand diversion ratios, unilateral anticompetitive effects of a certain magnitude are highly likely to follow if the merging parties are the producers of each other’s best substitutes. One might also believe that predictions about combining productive inputs such as factories, machines, intellectual property, or distribution channels are inherently speculative because there are no tested and reliable models for predicting such effects. Combining these two prior beliefs, one would then approach anticompetitive effects stories with greater credulity than efficiencies stories.

But this explanation—even if an accurate positive account—does not provide a strong normative justification for the asymmetrical treatment of costs and benefits. For one, in at least one circumstance—innovation theory—the antitrust authorities treat harms and efficiencies asymmetrically even though they derive from the identical mechanism—innovation through research and development. Under the 2010 Guidelines, the agencies highlight concerns over the reduction of innovation incentives as a possible anticompetitive effect of mergers. For example, section 6.4 of the Guidelines states that “[t]he Agencies may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger.” On the other hand, when discussing efficiencies defenses, the Guidelines state that research and development synergies “are potentially substantial but are generally less susceptible to verification and may be the result of anticompetitive output reductions.”

Some economists claim that innovation effects from mergers are too speculative to predict with anything approaching scientific rigor, but that should lead to equal discounting of innovation-harm theories and innovation-enhancement defenses. The Guidelines appear to give credence to innovation-harm theories even while discounting innovation-enhancement defenses. Whether or not this is justified in some way, the explanation

130. See supra Section I.A.
131. One might simultaneously believe that there are good models for predicting whether marginal cost savings will be passed on to consumers, see supra text accompanying notes 117–120, and that there are not good models for predicting whether mergers will achieve marginal cost savings.
132. HMG 2010, supra note 19, § 6.4.
133. Id. § 10.
cannot be a difference in prior beliefs about the likelihood that innovation effects can be proven to an adequate level of probability.  

Beyond the example of inconsistency with respect to innovation theories, the asymmetrical treatment of harms and benefits cannot be justified conceptually based on the relative differences in strength of probabilistic proof. That parties may not be able to prove efficiencies in fact does not justify maintaining a different standard of proof. It is circular to say that efficiencies should not be lightly used to justify potentially anticompetitive mergers because efficiencies are difficult to prove, and then reject a particular instance of purported efficiencies because it failed to meet the high standard of proof.

C. Mergers Are Driven by Kingdom Building Rather Than Increasing Shareholder Value

A related explanation for efficiency claim skepticism may derive from a general suspicion that mergers are driven by corporate managers eager to enlarge their “fiefdoms” rather than to maximize returns to shareholders. Various empirical studies have shown that many large corporate mergers generate negative shareholder returns. For instance, Scherer and Ravenscraft showed that the massive merger wave that peaked during the 1960s resulted in manufacturing inefficiencies that reduced U.S. real gross national product by between 0.074 and 0.101 percentage points between 1968 and 1976. Carl Shapiro, the recent deputy assistant attorney general for economics at the DOJ’s antitrust division, has taken the position that “[e]vidence from the finance, managerial, and economics literatures shows that many mergers do not work out well . . . . This evidence certainly does not support the view that merger-specific efficiencies are common or that claims of efficiencies made by merging parties should generally be credited.”

But even assuming that this empire building/agency cost account of merger activity is true as to some portion of mergers, it does not provide a sufficient reason for a merger policy asymmetry between costs and efficiencies either. Even if large corporate mergers as a class systematically fail to

135. Empirical work has shown, albeit weakly, that the FTC staff tend to give greater weight to dynamic efficiency claims than to static efficiency claims, suggesting an implicit inflation in the value of dynamic efficiency claims to match the staff’s overall willingness to accept dynamic inefficiency claims (i.e., theories of harm to innovation incentives resulting from the post-merger exercise of market power). COATE & HEIMERT, supra note 80, at 19.


138. Baker & Shapiro, supra note 79, at 256.

139. There are, of course, competing views. See generally GEORGE J. BENSTON, CONGLOMERATE Mergers: Causes, Consequences, and Remedies (1980).
generate efficiencies, that finding provides relatively little information on the likelihood that the specific class of mergers under consideration in difficult merger review decisions is inherently unlikely to create efficiencies. For instance, Scherer and Ravenscraft’s study focused on conglomerate mergers, which are not generally a subject of antitrust scrutiny.\footnote{140} As Scherer has written more recently, “One might expect opportunities for cost savings and benefits from complementarity to be much stronger for horizontal and vertical mergers than for conglomerates, and so the record of widespread failure we documented may simply have become irrelevant.”\footnote{141} As to the class of mergers in which the efficiency defense generally comes into play, there is no reason for strong prior beliefs on whether efficiencies are likely or unlikely.

### D. Counterattacking Optimism Bias

A possible justification related to, but analytically distinct from, the last two discussed is that governments and courts need to adjust the standard of proof because parties to proposed mergers are systemically overoptimistic.\footnote{142} Generically, business managers make overly optimistic predictions about the future success of their firms, including the efficiencies that they could capture from a merger.\footnote{143} Thus, if one were to take the set of all mergers that managers consider, ask the managers to predict what efficiencies they might capture from the merger, and then track actual results postmerger, one would expect that sum of captured efficiencies to be less than the sum predicted by managers. Furthermore, not all managers who consider mergers carry through with the idea. The ones most likely actually to propose a merger are the most optimistic ones. Hence, the set of merger proposals that antitrust agencies have to screen may be skewed by systematic overoptimism.\footnote{144} Since regulators and courts lack good information on

\footnote{140. Alan Devlin, Antitrust in an Era of Market Failure, 33 Harv. J.L. & Pub. Pol’y 557, 596 (2010) (“Conglomerate mergers, which are combinations of firms that are neither vertically nor horizontally related, do not bear the potential for unilateral or coordinated price effects and have not been an object of U.S. antitrust concern in this generation.”).}

\footnote{141. Scherer, supra note 137, at 330.}


\footnote{143. See Anand Mohan Goel & Anjan V. Thakor, Rationality, Overconfidence and Leadership 3-4 (Univ. of Mich. Ross Sch. of Bus. Working Paper Ser., Paper No. 00-022, 2000), available at http://deepblue.lib.umich.edu/bitstream/2027.42/356482/b2034712.0001.001.pdf (showing that overconfident managers are more likely to be selected as leaders than less confident managers).}

\footnote{144. Jonathan B. Baker & Carl Shapiro, Detecting and Reversing the Decline in Horizontal Merger Enforcement, Antitrust, Summer 2008, at 29, 33 (“There is considerable evidence that acquiring firms are systematically over-optimistic about the efficiencies they can achieve through acquisition. This evidence does not support the view that merger-specific efficiencies are common or that claims of efficiencies made by merging parties should generally be credited.”).}
which mergers would actually generate efficiencies, they may need to respond to this systematic bias by requiring particularly compelling proof of efficiencies.

The problem with this justification for a differential standard of proof for efficiencies and harms is that it assumes that only one side of the ledger manifests bias. In order to justify a principle of legal or administrative asymmetry, it would need to be the case that the proponents of theories of harm manifest a lesser degree of systematic bias than the proponents of efficiencies. In civil litigation, for example, it is obvious that the plaintiffs are biased to see the facts most favorably to themselves and hence bring many meritless cases. This would be a good reason to require proof by a standard greater than preponderance of the evidence except for the fact that defendants are equally biased in the direction of denying liability and seeking exculpation. The accommodation is that the fact finder must scrutinize each side of the ledger with some degree of skepticism, although the standard of proof remains set at equipoise (except in those cases where, for collateral reasons, some higher degree of proof is preferred).145

Conceding that merger proponents are biased to believe that efficiencies will result, what is the evidence that merger opponents are neutral with respect to anticompetitive effects? The first class of relevant merger opponents is the business interests that sometimes mobilize to persuade the antitrust agencies to block a merger. For example, when Google announced its intention to purchase ITA Software, a provider of software services to internet travel search sites, a coalition of rivals including Microsoft, TripAdvisor, Expedia, Kayak, and Hotwire launched a public relations campaign to convince antitrust enforcers to block the deal.146 Likewise, the European Commission’s decision to block GE’s acquisition of Honeywell may have been influenced by GE’s competitors, concerned about a more powerful rival.147 It is not unusual to observe competitors scrambling to oppose mergers that may diminish their relative standing in the market.

Often, the pressures against mergers are more subtle and, indeed, difficult to assess. Rivals of the merging firms have complex incentives. They may disfavor the merger because it creates a stronger competitor, favor the merger because it creates a more concentrated market in which tacit collusion is easier, disfavor the merger because it creates a more concentrated market that makes the rivals’ own future acquisitions harder to justify, or favor agency approval because it sets a precedent for their own future deals

(on the theory that competition in the market is robust). It is impossible to capture the direction or magnitude of this bias as a class. Customers also have incentives with respect to mergers of their suppliers that are difficult to map.

A second kind of bias concerns the incentives of antitrust enforcers. Public choice literature suggests that antitrust enforcers are not merely detached public servants on a truth-seeking expedition. They are susceptible to all of the usual biases and influences of regulators. They may oppose mergers in order to aggrandize their own agency’s influence, justify their agency’s budget, get into newspaper headlines, support a political party’s standing, pacify a member of Congress, advance an ideological agenda, or promote their individual careers.

This is not to say that antitrust enforcers are untrustworthy as a class. Rather, it is to acknowledge that systematic bias in merger control is not unilateral. Unless one believes that the optimism bias of merger proponents is so strong that it swamps all other influences—a proposition without substantial support—there is no reason to deviate from symmetry in the standards of proof for efficiencies and harms.

E. Efficiencies Create Undue Dominance

The previous lines of argument rested on skepticism that mergers often generate efficiencies. A different line of argument accepts that mergers often do generate efficiencies and affirmatively counts them against the merger on the theory that efficiencies acquired through merger upset the balance of the playing field and tend toward long-run dominance in the merging firms.

This suspicion of merger efficiencies as creating unwholesome competitive advantages has a storied history in U.S. case law. In Brown Shoe, the Court found that the efficiencies created by vertical integration between a shoe manufacturing company and a shoe retailer counted against a vertical merger since “by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, [the merging parties] can market their own brands at prices below those of competing independent retailers.” The FTC extended this view in Foremost Dairies, Inc., where it rejected a dairy industry merger that would likely have resulted in significant synergies and access to capital markets. It held that a

148. See generally HMG 2010, supra note 19, § 2.2.3 (discussing the difficulties with relying on competitors’ opinions in merger cases).

149. See Ken Heyer, Predicting the Competitive Effects of Mergers by Listening to Customers, 74 Antitrust L.J. 87 (2007).


153. Id. at 1083–84.
showing "that the acquiring firm possesses significant market power in some markets or that its over-all organization gives it a decisive advantage in efficiency over its smaller rivals" demonstrates a violation of section 7 of the Clayton Act. In *FTC v. Procter & Gamble Co.*, the Supreme Court backed away from the view that efficiencies could count against a merger, holding that they could count neither for nor against a merger. Procter & Gamble remains, by virtue of inertia, the official position in Supreme Court jurisprudence, although the Court has not decided a merger case since 1976 and it is doubtful that it would follow that position today.

On the European side, something similar may have happened in the review of the GE/Honeywell merger. The EC's portfolio effects theory depended on a prediction that the combination of the resources of GE's various divisions, including GE Capital and GE's engine divisions, with Honeywell's avionics products would allow the merged firms to charge lower prices to their consumers and hence distort the level playing field. Although Mario Monti—the EC's Competition Commissioner—denied that the portfolio effects theory was a rejection of an efficiency defense, it is hard to understand the argument as anything other. The specific theories invoked, such as the elimination of double marginalization through bundling and leveraging the ability to extend credit across larger commercial enterprises, are precisely the kinds of efficiency defenses often raised in vertical and horizontal cases. The Commission also appeared to hold efficiencies against a merger in two earlier cases, Aerospatiale/De Havilland and Boeing/McDonnell-Douglas, and in a more recent case, Vodafone AirTouch/Mannesmann.

Assuming for the sake of argument that merger efficiencies sometimes destabilize competition and create market dominance, these are not reasons for undifferentiated hostility to merger efficiencies. Even if some merger efficiencies harm competition, these are surely a minority of all merger cases. The merging firms may be merging simply to catch up with other firms that have already achieved particular efficiencies. Or, other nonmerg-
ing firms have alternative paths for matching efficiencies generated by the merging parties and a new incentive to do so.

Moreover, the claim that efficiencies will likely occur and, in the long run, destabilize competition to the detriment of consumers is necessarily more speculative on average than a merger efficiencies defense since it relies on proof not only that efficiencies will occur but that they will subsequently destabilize competition. It makes no sense to hold defendants to a high standard of proof that procompetitive efficiencies would result if the merger were approved and simultaneously hold the government to a low burden of proof that anticompetitive efficiencies would result. What's sauce for the goose is sauce for the gander.

F. Status Quo Preference

Another cluster of possible reasons for a principle of asymmetry relates to a general preference for the status quo over change. The relevant phenomena could be grouped under a number of different headings, including risk aversion, endowment effect, loss aversion, status quo bias, and the precautionary principle. For simplicity, I consider them under the headings of loss aversion, the precautionary principle, and deconcentration as a political value.

1. Loss Aversion

Antitrust regulators may react asymmetrically to potential losses and gains. It is well established in behavioral theory that decisionmakers, including regulators, sometimes weight potential losses more than potential gains of an equivalent magnitude.\textsuperscript{161} If regulators consider the competitive status quo the relevant baseline, then anticompetitive effects may count as losses whereas merger-specific efficiencies may count as gains. This would then explain the asymmetry principle—that efficiencies must be more certain than harms in order to offset the harms.

A more particular explanation for asymmetry concerns the political consequences of prohibiting or approving a merger. An antitrust enforcement agency will face blame for price increases resulting from a merger but rarely for price decreases that did not occur because a merger was wrongly blocked.\textsuperscript{162} Hence, the agencies have a greater incentive to block mergers.


\textsuperscript{162} For example, commentators have blamed high oil prices on lax merger enforcement in the oil industry. See PUB. CITIZEN, MERGERS, MANIPULATION, AND MIRAGES: HOW OIL COMPANIES KEEP GASOLINE PRICES HIGH, AND WHY THE ENERGY BILL DOESN'T HELP 1 (2004), available at http://www.citizen.org/documents/oilmergers.pdf ("The United States has allowed multiple large, vertically integrated oil companies to merge over the last five years, placing control of the market in too few hands. The result: uncompetitive domestic gasoline markets.")
that might result in gains to consumers than to approve mergers that might result in losses to consumers.

While loss aversion may explain the asymmetry principle's existence, it cannot justify the principle normatively. Even assuming that consumer loss aversion is normatively neutral, regulatory loss aversion is categorically undesirable unless it channels the preferences of political constituents in a democratically legitimate way. There is no good reason to think that consumers, as a class, would exhibit loss aversion as to merger decisions as a class. To be sure, the consumers affected by a particular merger—say one involving dog food—might exhibit loss aversion as to that particular merger. But consumers who buy dog food also buy toothpaste, DVD players, and life insurance, all of whose industries are also subject to merger policy. As to the class of merger activities, they are diversified and therefore should prefer a strategy that maximizes their overall wellbeing, even if would it lead to occasional price increases. Regulatory loss aversion in the merger context seems merely to reflect the self-preservationist biases of regulators.

2. Precautionary Principle

Another source of status quo bias or preference may derive from more general theories of cost-benefit analysis. Cass Sunstein has identified a "precautionary principle" at work in almost every legal system. Under the precautionary principle, when a new behavior—such as the introduction of a new drug—creates a risk of harm, the proponents of the new behavior bear a heavy burden of disproving the likelihood of harm before the change should be allowed. Thus, for example, if a new drug might cause cancer as a side effect, it should be kept off the market until the issue is fully studied and the cancer risk ruled out. Merger harms may thus be given more weight than merger efficiencies because the merging parties—the proponents of change—bear the burden of ruling out the possibility that their activity will lead to harm.

As Sunstein notes, however, this principle can be "paralyzing" because it prohibits both action and inaction. For example, suppose that the drug creates a 10 percent risk that 100 people will die but a 10 percent probability that 100 people will be saved. Allowing the new drug risks killing 100 people but disallowing the new drug also risks killing 100 people. What is called for in such a situation is not an application of some a priori principle

166. Id. at 1004.
about avoiding risks but rather a cost-benefit analysis given the relative probabilities and magnitudes of the respective risks of action and inaction.

Nonetheless, there may be circumstances when some version of the precautionary principle carries weight. The first strain involves changes—such as pollution leading to global warming or deregulation of nuclear facilities—that entail an uncertain probability of irreversible catastrophic consequences. The second involves changes with uncertain, and potentially unjust, distributive consequences. Neither of these strains of precautionary principle theory provides support for a principle of asymmetry in merger review.

The irremediable catastrophic event strain of the precautionary principle has no application to mergers. Merger policy involves calculations of risk—bounded predictions—rather than complete uncertainty. The consequences of anticompetitive mergers, even if undesirable, are hardly ever catastrophic. Most significantly, mergers are not irremediable. It is possible (although difficult) to force parties to unwind an anticompetitive merger if they begin to exercise anticompetitive power because of the merger.

If anything, the option to unwind mergers that turn out to be anticompetitive suggests that efficiencies should be given more weight than theories of harm. Once a merger is blocked, there is virtually no chance that the merger will be allowed at some future point. This is for two reasons. First, given the time sensitivity of most mergers, deals that are not consummated quickly are usually never consummated. Second, once an agency or court has blocked a merger for antitrust reasons, subsequent events will not usually provide it an occasion to rethink its position and allow the merger to transpire. If the market remains essentially static, then there will usually be little reason to make a different prediction about competitive effects a few years after the initial decision. If the market changes considerably, for example because of entry or exit of firms, significant changes in consumer demand, or the introduction of new technologies, the merger review calculus of the agencies


168. See, e.g., Sunstein, supra note 165, at 1035 (explaining that many advocates of the precautionary principle are principally motivated by “protecting the most vulnerable people from risks to their safety and health”).

169. See Peter L. Bernstein, Against the Gods: The Remarkable Story of Risk 133 (1996) (discussing the distinction between uncertainty and risk and explaining that “[u]ncertainty means unknown probabilities” while risk is measurable).


171. See supra text accompanying notes 8–13.
changes, but so does the merger calculus of the parties. One finds very few examples of mergers initially prohibited but then allowed a few years later.

The upshot is that the option value of disallowing a merger after consummation is greater than the option value of allowing a merger after initial prohibition. Even if the option value of unwinding a merger is small given the costs to the agencies and parties, given that the option value of allowing a merger in the future is close to zero, option theory cuts in favor of either neutrality between harms and efficiencies or a slight preference for efficiencies.

The other argument sometimes made in support of some version of the precautionary principle is that because changes in social or economic structures—such as mergers—have distributive consequences, regulatory decisionmakers need to rule out the possibility that the distributive changes would be unjust if the merger were approved. But that argument has little to do with merger policy, since regulatory decisionmakers generally lack good information on the distribution of gains and losses from mergers as between classes of consumers. They do know something about the predicted distribution of gains and losses between producers and consumers—and in consumer welfare jurisdictions at least insist the net consumer position be predicted as positive. But this is very different from being able to predict that a merger will lead to a welfare gain for old people and a welfare loss for poorer people, or other such trade-offs within the consumer class that might be expected in other regulatory contexts, such as those dealing with the side effects of drug therapies or changes in workplace safety rules.

The same is true of mergers. It makes no sense to give more weight to merger risks than to benefits of equal probability and magnitude. The risks and benefits simply need to be weighed given the best available evidence about their relative probabilities and magnitudes.

3. Deconcentration as a Political Value

A final potential reason for discriminatory treatment of risks and efficiencies relates to what Bob Pitofsky has referred to as antitrust’s “political content.” Perhaps mergers that increase concentration to certain thresholds should be barred for political or social reasons, even if there are efficiencies sufficient to offset any harms to consumers.

The “political content” argument could come in two very different flavors, and distinguishing between them is essential to testing the soundness of the proposition. One version of the argument—consistent with the mid-twentieth-century U.S. congressional concern with a “rising tide of

172. See, e.g., Sunstein, supra note 165.
concentration” in the U.S. economy—would worry about the overall level of concentrated economic power in the private sector. The other version would be concerned about aggregations of market power in specific, culturally or politically sensitive industries.

The “rising tide” argument depends on an empirical observation that a particular nation's economy has reached a concentration danger zone that justifies condemning mergers of a certain threshold, even if those mergers are justified by consumer-friendly efficiencies. It is far from true that such a case could be made today, certainly at least for the U.S. economy. To take one snapshot, in 1980 the U.S. economy had 2.7 million corporations, 1.4 million partnerships, and 9.7 million nonfarm sole proprietorships. Two decades later, after a period generally thought to have been characterized by lax merger enforcement, the economy had 5.5 million corporations, 2.0 million partnerships, and 17.7 million nonfarm sole proprietorships. The top 1,000 firms accounted for a smaller share of gross domestic product than they did fifty years earlier.

Further, even if one were to find “rising tide” arguments generally appealing, there is an instrumental mismatch between a deconcentration policy objective and hostility to efficiencies defenses. Many gargantuan corporate mergers raise few antitrust concerns because the merging firms have few or no competitive overlaps or because they occur in relatively unconcentrated markets. Such mergers contribute far more to an increasing consolidation of economic power in the economy as a whole than do many mergers of small companies that attract antitrust attention because they occur in concentrated markets.

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175. United States v. Von’s Grocery Co., 384 U.S. 270, 276 (1966) (“The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy. To arrest this ‘rising tide’ toward concentration into too few hands and to halt the gradual demise of the small businessman, Congress decided to clamp down with vigor on mergers.” (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962))).


177. Id.

178. As a matter of legal doctrine and legislative intent, one might argue that U.S. law requires a rejection of even efficiency-creating mergers that signal “incipient” concentration increases that could lead to future competitive problems. See generally Robert H. Lande, Resurrecting Incipiency: From Von’s Grocery to Consumer Choice, 68 ANTITRUST L.J. 875 (2001). However, incipiency values can be embedded in the government’s theory of harm and need not detract from a consideration of efficiencies. For example, the government might express its theory of harm as the probability that the merger under consideration would precipitate a chain of events causing an increase in market concentration, which in turn could produce anticompetitive harms to consumers. That theory would then be considered on a probability-adjusted net present value basis in light of efficiencies potentially resulting from the merger.
The second argument—that aggregations of market power in culturally or politically sensitive industries may be undesirable even if those aggregations result in efficiencies—is also not a general justification for an asymmetrical approach to merger costs and benefits. Assuming that political or social considerations sometimes count in favor of blocking a merger, such values should not be concealed in an implicit hostility to efficiencies. Instead, they should be affirmatively expressed and weighed against other values in the context of merger review in the limited set of cases to which they apply.

Suppose, for example, that a large media merger increases concentration to levels that raise competitive concerns or achieves vertical integration that could potentially be used to block competitors from access to essential inputs. Suppose that the merger would also generate large efficiencies that would be passed on to consumers. Further suppose that there is a legitimate concern that concentrating too much power over news or entertainment in single managerial hands would lead to cultural or political hegemony—concerns that were raised with respect to AOL's merger with Time Warner179 and Comcast's acquisition of NBC.180 Step one in the analysis should require weighing the anticompetitive risks to consumers against the efficiencies, using an equal probability burden. At the second stage in the analysis, the separate political or social concerns should be raised and addressed in a transparent and open way.

To be sure, different values—such as consumer welfare and avoidance of cultural hegemony—are often difficult to compare because they are incommensurable. But that is all the more reason to raise and explore each value separately, as opposed to burying one value in an implicit reluctance to recognize another.

IV. REVALUING MERGER EFFICIENCIES

The preceding Part questioned the possible legal, economic, and political justifications and explanations for asymmetrical treatment of merger costs and efficiencies. Since none of those justifications are sufficient to justify asymmetrical treatment, ordinary principles of cost-benefit analysis should apply to merger review. In particular, the predicted costs of mergers from the postmerger exercise of market power should presumptively be

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179. See Frank Rich, Journal: Two 21st Century Foxes Elope, N.Y. TIMES, Jan. 15, 2000, at A17 (“If you believe that the Internet is the greatest explosion of free expression and cultural resources of the past century, what happens when it is merchandised as a mass-market product by the biggest corporations in history?”).

equally weighted with the predicted efficiencies of mergers with an equal present value.\textsuperscript{181}

In order to operationalize a symmetrical approach, attention needs to be paid to three implementation issues. The first concerns the relationship between the standard of proof and the burden of proof. The second concerns questions of commensurability and balancing. The third concerns the increased costs that would arise from injecting greater complexity into merger review.

\textbf{A. Standards of Proof and Burdens of Proof}

This Article calls for a symmetrical standard of proof for merger efficiencies and predicted anticompetitive effects. That does not mean, however, that the government should be required to disprove possible efficiencies as part of its evaluation of the case. The weighting of costs and benefits is a separate question from the allocation of the burden of proof. As a general matter, burdens of proof should be allocated to the party who can obtain the relevant information at the lower cost.\textsuperscript{182} In merger cases, the information validating efficiency claims is often uniquely in the possession of the merging parties, and it therefore makes sense that the merging parties should bear the burden of sustaining efficiencies claims. Conversely, the government should ordinarily bear the burden of establishing predictive anticompetitive effects.\textsuperscript{183}

If the government and merging parties were held to the same standard of proof—preponderance of the evidence, for example—then, conceptually, harms and efficiencies would be given equal weight despite the different allocations of burdens of proof. This does not mean, however, that the merging parties would find it as easy to prove efficiencies as the government would to prove harms. It may be the case that certain classes of efficiencies are difficult to demonstrate even to fairly low thresholds of proof on a case-specific basis, even though there is a high degree of probability that they frequently appear in mergers.\textsuperscript{184}

If probabilities of harm are easier to demonstrate on an individualized basis than probabilities of efficiencies, even though in the aggregate both

\textsuperscript{181} See generally Simons & Crane, supra note 49. The present value qualifier is necessary to highlight the fact that some efficiencies may not materialize for several years. For example, if two merging firms plan to close their existing inefficient plants and open a single new and more efficient plant within three years following the merger (but only if they are able to merge—making the new plant a merger-specific efficiency), the future efficiencies resulting from the merger should be discounted to reflect the fact that the possible anticompetitive harms could begin immediately following consummation of the merger.

\textsuperscript{182} See Christopher B. Mueller & Laird C. Kirkpatrick, Evidence § 3.1 (4th ed. 2009).


\textsuperscript{184} See Fisher & Lande, supra note 1, at 1653–54.
harms and efficiencies are similarly likely in the relevant categories of cases, then merger policy will display a bias in favor of theories of harm even if it adopts an explicit symmetry principle. If so, then some systematic adjustment toward leniency, of the type advocated by Fisher and Lande, might still be justified. However, the first-order preference should be to treat harms and benefits symmetrically on an individualized basis and only make a systematic correction to the extent necessary in light of the system's actual experience with a principle of symmetry.

B. Balancing and Problems of Commensurability

Many commentators assert—as do the Horizontal Merger Guidelines—that the interplay between predictions of harm and predictions of efficiencies cannot come down to “balancing.” The influential Areeda and Hovenkamp treatise argues as follows: ‘Balancing’ implies an ability to assign a common unit of measurement to the two things being balanced, and determine which outweighs the other. Except in the clearest cases, this is simply not what courts are capable of doing.

Indeed, it is often difficult to assign specific weights to anticompetitive effects and offsetting efficiencies given (a) uncertainty in the robustness of methodological tools, (b) data limitations with respect to future events, and (c) the likely timing in which anticompetitive effects or efficiencies may take effect and their subsequent duration. Small predictive differences generated by imprecise methodological tools and imperfect data make large differences in assigning probability-adjusted values. In most cases, it will be impossible to apply the suggested formula—assign equal weight to probability-adjusted net present values—mathematically and therefore to engage in anything approaching rigorous balancing. The “40 percent probability of a $100 loss or gain” hypothetical presented in the Introduction is just that—a hypothetical.

But the failure of commensurability is not a reason to abandon symmetrical treatment as an analytical principle. Rather, it is a reason to use the principle of symmetrical treatment as a policy mnemonic device, much as we already use mathematically indeterminate concepts like probable cause

185. See supra text accompanying notes 86–92.
186. See AREEDA & HOVENKAMP, supra note 156, § 6.04e3, at 6–38; Craig W. Conrath & Nicholas A. Widnell, Efficiency Claims in Merger Analysis: Hostility or Humility?, 7 Geo. Mason L. Rev. 685, 686 (1999) (“The difficult challenge presented by such an efficiencies defense is whether there is a coherent way to balance the potential anticompetitive effects against its potential efficiency benefits.”); cf. Renckens, supra note 1, at 179 (arguing that balancing of efficiencies and theories of harm can only take place under a total welfare effects framework).
187. See 4A AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 976e, at 105 (3d ed. 2009).
188. But see Coate, supra note 1, at 206–07 (arguing that econometric tools have sufficiently developed to permit calculations of net effects of efficiencies and increases in market power to be computed in some cases).
and reasonable suspicion to capture probability values around identified legal decisions. At present, the Guidelines contain a mnemonic device of asymmetry—"the Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies." They do not pretend that merger review involves precise computations of the probabilities of harms and benefits and a specified discount—say 20 percent—on the probability-adjusted net present value of expected efficiencies before efficiencies are balanced against harms. If the mnemonic device of asymmetry is insupportable, as argued in this Article, then the proper response is to implement a mnemonic device of symmetry.

Changing verbal formulations in merger guidelines or case law is, of course, not enough to effectuate meaningful change in agency or judicial practice. The real point is that agencies and courts should be asked to think about merger efficiencies (at least those likely to be passed on to consumers) and predicted harms as concepts with equal prima facie dignity. By various institutional, legal, political, and administrative mechanisms, merger efficiencies have been deflated. They deserve a more hospitable welcome.

**C. Costs of Increased Complexity**

The final consideration concerns the enhanced costs of revaluing merger efficiencies. Commentators, particularly Fisher and Lande, have argued against individualized efficiencies defenses on the grounds that they increase both transaction costs—to parties, agencies, and courts—and uncertainty costs, since predicting whether a court or agency will accept an efficiencies argument is difficult. To be sure, an explicit or implicit revaluation of merger efficiencies will induce parties to spend more time presenting efficiencies arguments and require courts and agencies to spend more time considering them. That in itself is not a sufficient objection unless the marginal social benefit of a more fine-tuned merger review system is less than the marginal cost of processing more information. Two observations suggest that the costs of individualized efficiencies review are not great given the status quo.

First, Fisher and Lande presented a choice between no individualized consideration of efficiencies and symmetrical treatment of efficiencies and harms. In fact, both the United States and the European Union currently allow parties to make efficiencies arguments. As noted earlier, the FTC study shows that parties usually do and that the staff responds to them. Neither the agencies nor the parties spend as much time on efficiencies arguments as they would if a symmetry principle were adopted, so there

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189. HMG 2010, supra note 19, § 10.
190. Fisher & Lande, supra note 1, at 1677.
191. Id. at 1652.
192. See supra text accompanying notes 79–84.
would be some marginal cost to putting a greater weight on efficiencies. But
the marginal cost need not be large, given that much of the information is
already collected and disseminated.

Second, it is doubtful that a greater receptivity to efficiencies claims
would substantially increase the unpredictability of merger decisions in the
agencies. Fisher and Lande expressed their concern over unpredictability
costs at a time when merger review was far more predictable than it is today.
Structural presumptions, such as four-firm ratio tests and the HHI, still
dominated merger analysis.\textsuperscript{193} Over the last three decades, antitrust analysis
has progressively deemphasized structural factors, moved toward more
sophisticated econometric tools, and increasingly emphasized unilateral
effects theories of anticompetitive harms.\textsuperscript{194} The 2010 Horizontal Merger
Guidelines reflect these trends:

These Guidelines should be read with the awareness that merger analysis
does not consist of uniform application of a single methodology. Rather, it
is a fact-specific process through which the Agencies, guided by their ex-
tensive experience, apply a range of analytical tools to the reasonably
available and reliable evidence to evaluate competitive concerns in a lim-
ited period of time.\textsuperscript{195}

The analysis has become far more nuanced and technical—and therefore
less predictable. Lawyers can no longer offer their clients clean predictions
in many potentially close cases.

The fact that merger analysis has become less predictable is not a reason
to pile on additional and unnecessary unpredictability. But given that merger
review teams—both at the parties and at the agencies—already require the
involvement of economists and industry experts in close cases and that these
teams already consider efficiencies to some extent, relatively little marginal
cost or unpredictability would be added by directing these teams to take
efficiencies more seriously.

**CONCLUSION**

Merger policy has long been dominated by a focus on only one side of
the ledger—anticompetitive effects. The reasons offered for ignoring the
other side of the ledger are weak and often contradictory. A principle of
symmetrical treatment of predicted harms and efficiencies would improve
merger policy, without necessarily liberalizing it in undesirable ways.

For cultural and institutional reasons, the United States and the
European Union are relatively unlikely to recognize a symmetry principle in

\textsuperscript{193} Deborah A. Garza, Market Definition, the New Horizontal Merger Guidelines, and
the Long March Away from Structural Presumptions, \textit{Antitrust Source}, Oct. 2010, at 1, 2
(explaining importance of structural presumptions in 1968 and 1982 Horizontal Merger
Guidelines).

\textsuperscript{194} See \textit{supra} text accompanying notes 95–96.

\textsuperscript{195} HMG 2010, \textit{supra} note 19, § 1.
the near future. Both jurisdictions have already had to overcome a view that efficiencies should count against mergers. Even conceding that efficiencies should play some small role in merger analysis was a big step. The United States and the European Union are unlikely to take the final step to a symmetry principle any time soon—particularly given the maintenance of principles of asymmetry in recent merger guidelines revisions.

But the evolution of norms on the ground often precedes the evolution of norms on the books. Particularly as the agencies move away from structural presumptions and focus their attention on unilateral anticompetitive effects theories in differentiated markets, there is an opportunity for greater attention to efficiencies that may offset competitive concerns.

And then there is the rest of the world. At present, "[a]t least 86 jurisdictions have premerger notification regimes,"196 many of them instituted in the last few years. In many developing countries, economic growth (as opposed to short-run consumer welfare) ranks high among the priorities for the antitrust regime. Merger-generated efficiencies may receive a more cordial reception in jurisdictions eager to stimulate industrial development. The symmetry principle may first take root outside the traditional antitrust regimes.

196. Fox & Crane, supra note 14, at 302.