Out of Market, Out of Mind

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Abstract

In certain antitrust settings, it is sometimes claimed that otherwise cognizable benefits (efficiencies, procompetitive effects) do not count in the balance if they arise in a different "market" from the locus of harm. Such an omission would be pernicious. If broadly applied, it would condemn many movements of resources to their best uses, the lifeblood of a well-functioning economy. After all, when supply and demand shift or drastic innovations channel resources in new directions—whether by contracts, internal decisions of firms (including monopolists), or acquisitions—they necessarily move resources away from being deployed somewhere else. An immediate implication is that, at a fundamental level, healthy economic activity routinely leaves some suppliers and customers worse off, no matter how widespread and substantial are the benefits to others. Attempts to regulate an economy that ignore "out-of-market" benefits would undermine its basic operation. It would be dangerous to expand this type of limitation on sound analysis and decision-making; instead, any such restrictions should be expunged.

Forthcoming, Antitrust Law Journal

Keywords: out-of-market benefits, merger regulation, merger efficiencies, antitrust, competition policy

JEL Codes: D61, K21, L40

* Harvard University and National Bureau of Economic Research. I am grateful to Dale Collins, Daniel Francis, Carsten Koenig, Aileen Nielsen, Vartan Shadarevian, Carl Shapiro, Steven Shavell, conference and workshop participants, and the editors and referees for helpful discussions and comments; Levi Moneyhun and Dina Rabinovitz for research assistance; and Harvard University's John M. Olin Center for Law, Economics, and Business for financial support. Disclaimer: I consult on antitrust matters, and my spouse is a lawyer who has mostly represented financial services firms.

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Introduction

It is sometimes claimed that "out-of-market" benefits do not count in antitrust, particularly with regard to merger assessment.[1] Thus, if a merger causes a small harm in market A to deliver a huge benefit in market B, it is prohibited—but it would be allowed if the market happened to be defined to combine A and B. This notion in merger law receives some support from *Philadelphia National Bank*,[2] and Clayton Act Section 7's repeated use of "any" might be interpreted in this manner.[3] Nevertheless, such a limitation has not been at the center of merger challenges over the decades, and it does not seem to have discouraged myriad acquisitions across the economy that would seem to be within the contemplated prohibition.

Recently, however, the 2023 Merger Guidelines embrace this approach, reversing course from the 2010 Horizontal Merger Guidelines, which had indicated a willingness to consider "inextricably linked" efficiencies in other markets.[4] This long-dormant limitation showed further signs of resurgence in 2024. The decision enjoining the JetBlue/Spirit merger adopts an out-of-market limitation under which it appears that (hypothetically) the merger should have been blocked even if it were found likely to result in significantly lower fares through improved competition for almost all travelers if it also would modestly raise fares for the select few who fly first class.[5] The issue also arose but was not decided in governments' Sherman Act Section 2

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[1] *See, e.g.*, 4A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 972a (2024).

[2] United States v. Phila. Nat'l Bank, 374 U.S. 321, 370–71 (1963).

[3] 15 U.S.C. § 18.

[4] *Compare* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, MERGER GUIDELINES 32 (2023) [hereinafter 2023 MERGER GUIDELINES] ("the Agencies will not . . . credit benefits outside the relevant market that would not prevent a lessening of competition in the relevant market"), *with* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 30 n.14 (2010) [hereinafter 2010 MERGER GUIDELINES] ("In some cases, however, the Agencies in their prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s)."); *see also* 2023 MERGER GUIDELINES, at 33 ("To successfully rebut evidence that a merger may substantially lessen competition, cognizable efficiencies must be of a nature, magnitude, and likelihood that no substantial lessening of competition is threatened by the merger in any relevant market."). The 2004 EU Merger Guidelines, although not addressing the subject as explicitly, strongly suggest a limitation to in-market benefits. *See* GUIDELINES ON THE ASSESSMENT OF HORIZONTAL MERGERS UNDER THE COUNCIL REGULATION ON THE CONTROL OF CONCENTRATIONS BETWEEN UNDERTAKINGS, 2004 O.J. (C 31) 5, ¶ 79 ("The relevant benchmark in assessing efficiency claims is that consumers will not be worse off as a result of the merger. For that purpose, efficiencies should be substantial and timely, and should, in principle, benefit consumers *in those relevant markets where it is otherwise likely that competition concerns would occur*." (emphasis added)). *See also* Jan M. Rybnicek & Joshua D. Wright, *Outside In or Inside Out? Counting Merger Efficiencies Inside and Out of the Relevant Market*, *in* 2 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE 443, 453–56 (Nicholas Charbit et al. eds., 2014) (discussing other jurisdictions' treatment of the issue in merger regulation).

[5] United States v. JetBlue Airways, NO. 23-10511-WGY, at 104–07 (D. Mass. 2024). The variant in the text that involves lower fares for most and higher fares for first class (which is analogous to but reversed from the postulated situation in the case itself) is developed in section III.B. The 2023 Merger Guidelines, in addressing product repositioning, can be understood to find objectionable a merger that would enable the offering of innovative new

case challenging practices involving Google Search.[6] And the court's summary judgment opinion in the FTC's challenge to Meta's acquisition of WhatsApp (also under Sherman Act Section 2) expressed skepticism whether it could consider even large benefits through improving the target's capabilities in its own market if there were incidental and smaller anticompetitive risks in the acquirer's market, as long as the latter were more than de minimis.[7]

Under this view, if a merger would harm some modest group of customers in some small but distinct "market," it should be blocked regardless of how great are its benefits to vastly more consumers in some other market.[8] Are we out of our minds?

Consider some straightforward implications of this logical construct in settings outside antitrust:

- Should a drug be administered that has a reasonable prospect of saving the patient's life? Not if it will cause a rash on some separate part on their body. Contrariwise: Should we recommend cosmetic surgery even though it poses a significant risk of killing the patient because that is an out-of-organ effect and hence should be ignored?

- Should a family move to a safer neighborhood with better schools for their children? Not if it is too far from the only good bakery. After all, such a harm should not be balanced against the out-of-neighborhood benefits.

- Should one change jobs for better pay and working conditions? Not if, unlike the current job, the new one is on the fourth floor and there is no elevator, a disadvantage that, as a matter of principle, may not be deemed outweighed by benefits along other dimensions.

We could also consider examples where the benefits and harms are to different people: Ban a life-saving drug that would, for a small minority of patients, cause a net adverse effect, even a

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products if that would result in the removal of any previous product variant preferred by any customer group, regardless of the overall benefits to customers. *See* 2023 MERGER GUIDELINES, *supra* note 4, at 39.

[6] United States v. Google, Case No. 20-cv-3010, at 255–57 (D.D.C. 2024). The court stated that the law was unclear under Sherman Act Section 2, but the question did not need to be resolved because the court found that the defendant had failed to establish the proffered cross-market benefits.

[7] FTC v. Meta Platforms, Inc., Civil Action No. 20-3590, at 81–83 (DDC 2024). The court mysteriously addresses the issue even though "the parties have not briefed this unsettled question," *id*. at 83, while citing the FTC's brief on the matter. It also states that "[t]he weight of authority nonetheless appears to be broadly against recognizing out-of-market procompetitive justifications without very good justification," *id*. at 82, citing a single circuit court case and two commentaries, after having noted that the Supreme Court had accepted out-of-market benefits in at least one Sherman Act case (citing NCAA v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 117 (1984)). The Supreme Court's more recent decision in *NCAA v. Alston*, 141 S. Ct. 2141 (2021), can only be understood as predicated on a wholesale rejection of the idea that out-of-market procompetitive effects are to be ignored. *See infra* note 66.

[8] Although not falling under the out-of-market terminology, some have objected to making tradeoffs across consumers in the same market (for example, making tradeoffs over time or across consumers with different preferences among products deemed to be in the same market). For discussion of a range of commentary on tradeoffs across consumers, see note 17, below. *See also infra* note 59 (discussing guidelines under TFEU 101 that restrict tradeoffs across markets unless the same consumers are involved). The analysis presented throughout this article on the pernicious effects of ignoring out-of-market benefits is equally applicable to ignoring benefits to different consumers in the same market.

mild one. Refuse to build a needed new elementary school in a district with a growing student population because, in the reconfiguration of attendance catchments, children in some neighborhoods would have to travel farther to get to school.

Trade-offs abound with almost any significant decision. Focusing on isolated pockets of costs, or benefits, to the exclusion of everything else makes no sense.

Consider the implications of broadly applying this sort of exclusionary principle throughout antitrust law:

- Should we allow a firm to enter into a contract to purchase some assets or services to upgrade its operations? Not if any well-identified group, however small, preferred the former deployments of those assets or services.

- Should we deem a firm with monopoly power to be "competing on the merits" if it innovates to produce a life-saving drug or a fantastic electronic device that will be adored by a hundred million customers? Not if it will no longer be economical for the firm—or perhaps one of its rivals—to continue to offer lesser products that serve distinct, niche "markets."

- Should we block a merger that results in lower prices and higher quality for most customers? Not if any well-identified group, however small, loses their preferred option. Or block an acquisition of a target in another "market" that produces tremendous benefits? Not if it may have an incidental effect of slightly reducing competition in some other "market."

Society would not sensibly operate regimes, enforce rules, or employ decision protocols that proceeded in this fashion. Whether as part of competition policy or otherwise.

Nor have antitrust agencies broadly attacked or antitrust tribunals systematically condemned this vast range of economic activity. Nevertheless, some commentators and advocates advance this restrictive approach, the 2023 Merger Guidelines embrace it, and a few courts have recently taken notice. The new merger guidelines are particularly notable because they expand coverage to significant domains of non-horizontal mergers—for which benefits and harms will often lie in different markets—while simultaneously reversing course by newly rejecting all consideration of out-of-market benefits. Hence, we cannot safely assume that past antitrust activity reliably predicts future enforcement.

It is thus a prudent time to step back and examine this subject more deeply. Despite having been in the air at least since *Philadelphia National Bank*, neither commentators nor courts have systematically analyzed the nature, domain, and consequences of an out-of-market limitation on the consideration of benefits in applying antitrust law. We should begin with first principles that provide the foundation for antitrust regulation and sound decision-making more broadly.

Psychologists sometimes refer to the phenomenon "out of sight, out of mind," a human tendency to ignore what is unseen.[9] More apt here is an "ostrich policy," under which decision-makers bury their heads in the sand so they can pretend that dangers thus unseen do not exist.[10] These depictions are offered as sharp criticisms, not as guidelines for effective decision-making. So why does some antitrust discourse advance such an approach, indeed, without even mentioning its patent folly?

The tremendous social costs of this type of decision rubric cannot be justified by difficulties of assessment. Should regulators, doctors, and patients really focus on just the rash if the life-saving effect is uncertain and difficult to assess for many patients? To be sure, in light of information collection costs and processing challenges, we should not consider literally everything when making every decision. Reasonable differences of opinion will exist as to how far to go in various contexts, whether in making a particular decision or in designing a context-specific protocol. But it is nonsensical to uniformly ignore—entirely—all effects, no matter how large, how broad, and how certain, simply because they occur in some "other" realm (market), and thus to base decisions entirely on somehow-domain-limited effects. The problem is much worse when the omitted effects are often, even typically, important and direct rather than rare or negligible.

Focusing on antitrust applications and considering the United States for concreteness, the potentially affected population is hundreds of millions of people whose preferences and circumstances (income, occupation, geography, family configuration) vary substantially. Almost any action of any significance will have heterogeneous effects. Even highly desirable actions with broadly beneficial consequences almost always result in some harm to somebody, often thousands or millions of somebodies. And the harmed group will sometimes be identifiable: perhaps they are geographically clustered; perhaps they tend to disproportionately purchase certain products. Likewise, incredibly undesirable actions often benefit at least some small, identifiable group.

Any decision rule that counts one set of effects and ignores the other will, therefore, err quite often. One might conjecture that it would err half the time. But the problem is much worse with something like the out-of-market exclusionary principle: if *any* harm to *any* group *always* means that actions are prohibited, then significant heterogeneity implies that beneficial actions will *usually* be prohibited, and especially consequential ones will *almost always* be prohibited. These frequent, detrimental prohibitions are imposed regardless of the magnitude of the resulting social loss. The more a competition regime follows an ostrich-like approach—the more domains are covered and the more isolated are the admissible loci of adverse effects—the more disastrous will be the consequences.

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[9] *See, e.g.*, Chantal den Daas, Michael Häfner & John de Wit, *Out of Sight, Out of Mind: Cognitive States Alter the Focus of Attention*, 60 EXPER. PSYCH. 313 (2013); *see also, e.g.*, Brad M. Barber, Terrance Odean & Lu Zheng, *Out of Sight, Out of Mind: The Effects of Expenses on Mutual Fund Flows*, 78 J. BUS. 2095 (2005).

[10] *See, e.g.*, Thomas L. Webb, Betty P. I. Chang & Yael Benn, *"The Ostrich Problem": Motivated Avoidance or Rejection of Information About Goal Progress*, 7 SOC. & PERSONALITY PSYCH. COMPASS 794 (2013); *see also, e.g.*, Niklas Karlsson, George Loewenstein & Duane Seppi, *The Ostrich Effect: Selective Attention to Information*, 38 J. RISK & UNCERTAINTY 95 (2009).

A blindered protocol that triggers condemnation based on an island of harm, without regard to the larger sea of benefit, has been advanced particularly in the merger context, as noted above. Such analytical constraints in other antitrust settings currently seem much more limited, if present at all. The idea that antitrust law should ignore all benefits so long as there is any harm to some group of customers or counterparties seems to be rejected, powerfully even if implicitly, by central doctrines. *Chicago Board*'s seminal articulation of the rule of reason asks whether challenged actions more promote or suppress competition, suggesting a weighing of competing effects, when necessary—a view that is at least formally embraced by every U.S. circuit court.[11] Indeed, Justice Brandeis's analysis appreciated that some traders were harmed by off-trading-floor price inflexibility, but he found a greater good in promoting a public market.[12] New, better products are widely lauded as the essence of "competition on the merits" by a monopolist even though some existing products—that some customers may well have preferred—may be discontinued by the innovative firm or displaced when competitors no longer find it profitable to continue their previous offerings.

Antitrust law's implicit but robust acceptance of a capacious view, which includes rather than ignores so-called out-of-market benefits, is even broader. As will be developed below, if a firm (even if a monopolist, covered by Sherman Act Section 2[13]) buys a warehouse to expand its distribution network or a chip maker purchases land for a new fabrication plant, these acquisitions (covered by Clayton Act Section 7[14]), which are also contracts (covered by Sherman Act Section 1[15]), are not flatly illegal if the seller had used the facility or land to compete in some other "market" and the diminution of competition there would be nontrivial. Indeed, every time a firm hires an employee who had worked in some other occupation in limited supply in a remote location, competition there is reduced. Hence, largescale acceptance of the principle that out-of-market benefits never count whenever there exists any isolated harm would upend the application of major provisions of competition law and cripple the economy.

To frame the inquiry into whether out-of-market benefits should be ignored, Part I begins by highlighting basic features of how well-functioning market behavior improves resource allocation in an economy. Much antitrust assessment engages in static analysis that takes firms' existence, capabilities, and areas of operation as given when evaluating the effects of a challenged action. But it is well understood if not always emphasized that an economy's dynamics, including the forces that produce an equilibrium and that change that equilibrium as technology evolves and other conditions change, are of central importance. Firms enter and exit different sectors, with resources flowing from lower- to higher-valued uses. Product improvement and breakthrough innovation leave some firms, facilities, and providers of services behind as resources are redeployed to higher-valued uses. This phenomenon—Schumpeter's "perennial gale of creative destruction"[16]—has played out over centuries from the time when

[11] *See* Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)
[12] *See id*. at 239–41.
[13] 15. U.S.C. § 2.
[14] 15 U.S.C. § 18.
[15] 15. U.S.C. § 1.
[16] JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 83 (1942).

most individuals worked in agriculture performing manual labor; over the course of decades in developed economies with the rise of steam power, railroads, piped water, electrification, and modern conveniences; and today in the transition away from fossil fuels and the ongoing transformations in the tech and health care sectors.

A well-functioning economy is not one frozen in place but the opposite: one that constantly evolves and reinvents itself in response to economic forces, large and small. The core harm of behavior regulated by competition law is interference with the movement of resources to their best uses, whether through price-fixing or horizontal mergers that raise price (leading to inefficiently low resource use for their own output and concomitantly excessive resource use for outputs elsewhere) or monopolistic practices that raise entry barriers or otherwise inhibit these resource flows. The key point is that any sensible understanding of the value and best methods of protecting competition entails determining how to reduce obstacles to these shifts, which inevitably have winners and losers, rather than trying systematically to thwart the redeployment of resources to their best uses.

Part I continues by explaining how a choice to ignore so-called out-of-market benefits in core antitrust settings would be antithetical to these basic tenets of a well-functioning economy. Most activity in a market economy is conducted using contracts, which are subject to Sherman Act Section 1. Myriad routine contracts, including those necessary to implement the resource flows just discussed, would be illegal if out-of-market benefits had to be ignored. Sherman Act Section 2 covers actions by firms with monopoly power (including all their contracts, some of which involve acquisitions, considered next). If costs in any identifiable market triggered illegality, a broad swath of actions by powerful firms—in particular, their most valuable ones—would be impermissible because their new and improved products, production facilities, and distribution systems inevitably strand some suppliers or consumer groups and displace activities of other firms.[17] Similarly, Clayton Act Section 7, which applies to all acquisitions of assets in

[17] Although atypical, it has been suggested that otherwise legal acts by monopolists be deemed illegal when the benefits accrue to consumers who may not fully overlap with those bearing the costs. *See* Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695, 1742 (2013) (arguing that allegedly predatory pricing should be regarded to harm consumers even if their gain in the predation period exceeds their loss in the recovery period because the two groups of consumers need not be the same). By contrast, a district court at the class certification stage rejected the idea that one should ignore benefits involving, in that case, different goods that were purchased in the same market (by presumably overlapping consumers). *See* Kottaras v. Whole Foods Mkt., 281 F.R.D. 16 (D.D.C. 2012). Relatedly, Crane's analysis of the subject repeatedly emphasizes that supposedly cross-market effects may involve the same consumers, failing to appreciate the point of part I, below, regarding the ubiquity of effects across unrelated sectors that often involve nonoverlapping populations. *See* Daniel A. Crane, *Balancing Effects Across Markets*, 80 ANTITRUST L.J. 397 (2015). Werden's investigation emphasizes how the increasing tendency to employ narrower markets makes it more likely that efficiencies may arise outside the market in which anticompetitive effects may occur, likewise failing to note that the lack of overlap is present in a wide range of acquisitions (without regard to such differences in market definition) once the scope of the problem is appreciated. *See* Gregory J. Werden, *Cross-Market Balancing of Competitive Effects: What Is the Law and What Should It Be?*, 43 J. CORP. L. 119, 121–22 (2017). Yun is more favorable to cross-market balancing, but he would limit generosity to situations involving effects that tend to fall on closely related groups (specifically, those in "interdependent markets," such as cases involving complements or different stages in a single supply chain). *See* John M. Yun, *Reevaluating Out of Market Efficiencies in Antitrust*, 54 ARIZ. ST. L.J. 1261, 1293–96 (2022). The Areeda and Hovenkamp treatise asserts (no authority is given) that antitrust law broadly prevents consideration of benefits in other markets, and they give as a fundamental justification that benefits to some consumers should not be

the economy—regardless of whether the acquisition is horizontal, vertical, or unrelated and of whether it involves the acquisition of an entire firm or of a single asset—would outlaw much of the foregoing economic activity if isolated costs could not be regarded to be outweighed by otherwise cognizable and even overwhelming benefits that materialized elsewhere. For example, disruptive entry that requires the acquisition of assets currently used in a different economic activity (which it often does) would be outlawed.

Part II addresses the strange but critical role of market definition in addressing which, if any, out-of-market benefits are to be ignored. After all, if only in-market benefits may be considered, then market definition is central. Given that market definition has long been understood to be problematic—indeed, counterproductive—this predicate for the exclusion of out-of-market benefits is undermined.

But the problem is much worse in the present (nonstandard) application because all approaches to market definition, from the Hypothetical Monopolist Test in modern merger guidelines[18] to the *Brown Shoe* factors,[19] aim to address the entirely unrelated question of substitution. Market definition inquiries choose to include substitute products or geographies in the "market" when substitution is close enough to constrain pricing power significantly. But the answer to that question has nothing to do with whether it makes sense to ignore intrinsic benefits of practices, whether by monopolists, merging parties, or any other firm. Compare: Although medical education and medical science separately teach and study different organs or systems in the body—aggregating only those closely related in function—the reasons for such organization in no way suggest that drug approval and treatment decisions should ignore all costs or benefits relating to organs or systems that are taught in separate courses. Returning to antitrust, we should keep in mind that ultimately it is the *action under scrutiny* that is to be permitted or prohibited, so the outcome will affect all costs and benefits that are caused by that practice.

Part III examines institutional considerations that underlie suggestions to ignore out-of-market benefits in some antitrust applications. The first is administrative practicality, including problems of proof.[20] It may be too easy for defendants in some settings to advance far-fetched procompetitive justifications, so it seems appealing to draw some lines that exclude certain justifications altogether. Although this motivation has some validity, defining markets in an arbitrary fashion and then ignoring even inextricably linked benefits is not a sound means of addressing this concern. Instead, it should be confronted directly. Neither the FDA nor EPA

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regarded to offset harms to others (without any hint of appreciation of the radical implications of this view). *See* AREEDA & HOVENKAMP, *supra* note 1, ¶ 972a.

Opposing perspectives, more in line with that in the present article, have also been advanced. Rybnicek and Wright observe that if effects on different groups of consumers are not to be balanced—only one is counted and the other is ignored—then one is arbitrarily favoring one group over another. *See* Rybnicek & Wright, *supra* note 4, at 456. Ducci offers substantial discussion of how the core justifications for adopting a consumer welfare standard affirmatively favor the inclusion of effects on all consumer groups. *See* Francesco Ducci, *Out-of-Market Efficiencies, Two-Sided Platforms, and Consumer Welfare: A Legal and Economic Analysis*, 12 J. COMP. L. & ECON. 591, 612–16 (2016).

[18] *See* 2023 MERGER GUIDELINES, *supra* note 4, at 41–42.

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

[20] Administrative concerns are advanced in support of the out-of-market limitation by AREEDA & HOVENKAMP, *supra* note 1, ¶ 972a. For criticism, see Crane, *supra* note 17, at 401–02, 409–11.

ignore entire classes of harms or costs wholesale; instead, they employ context-specific assessments to determine which are likely to be consequential. In the process, they may be appropriately skeptical of self-interested presentations by firms seeking favorable treatment, but this concern does not lead them to completely omit what are often the most important factors. Society obviously cares greatly about the benefits of new drugs and the costs of environmental regulation; it would be nonsensical to disregard these effects on the ground that regulated parties are self-interested and, accordingly, some of their proffers are overstated or pretextual.

The second institutional consideration is the constraint imposed by existing statutes and doctrine. For over a century, courts have not rigidly interpreted Sherman Act Sections 1 and 2, and over the past half century they have emphasized economic substance over form.[21] The Supreme Court initially interpreted Section 1's literal prohibition of all contracts "in restraint of trade" in a manner that seemingly outlawed a wide domain of economic activity.[22] But since 1911, antitrust law has followed *Standard Oil*'s rule of reason,[23] interpreted by *Chicago Board* as favoring the promotion rather than suppression of competition, taking everything into account.[24] Sherman Act Section 2 similarly employs the rule of reason, which is central to monopolization's second element that requires an exclusionary act, itself understood as something that inhibits rather than advances the market's operation.[25] A firm with significant market power—sufficient to be deemed monopoly power—is permitted to introduce new, better products even though this often means discontinuing old ones—including by rendering competitors' offerings unprofitable—that identifiable consumers wish would remain available. Likewise, monopolists may open new, state-of-the-art plants, distribution centers, or retail outlets to provide better, cheaper products at lower prices to more consumers, even if that activity strands some suppliers or consumers who found the existing production or distribution footprint to be more favorable. Clayton Act Section 7, like Sherman Act Section 1, is written in a manner susceptible to rigid interpretation, and *Philadelphia National Bank* in 1963 concluded that a proffered out-of-market benefit should be ignored.[26] Furthermore, because the Supreme Court has not issued a substantive merger ruling since 1975, the Court has not yet fully applied its more modern, economic-substance-focused antitrust jurisprudence to mergers (although lower courts in every circuit have). Nevertheless, the foundation for wholesale exclusion of out-of-market benefits is weak, both in the doctrine itself and in light of how the restriction frontally assaults the central thrust of modern competition law and policy.

Part IV concludes. We would indeed be out of our minds to operate a competition regime that ignored out-of-market benefits in light of the fact that such benefits are the most important source of value generated by a market economy. Antitrust law should and largely does aim to oppose the erection of obstacles to the movement of resources to their highest-valued

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[21] Regarding the latter, see, for example, the discussion of Supreme Court cases in Louis Kaplow, *The Meaning of Vertical Agreement and the Structure of Competition Law*, 80 ANTITRUST L.J. 563, 612–17 (2016).
[22] *See, e.g.*, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).
[23] Standard Oil Co. v. United States, 221 U.S. 1, 49–68 (1911).
[24] *See* Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.").
[25] *See* United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).
[26] *See* United States v. Phila. Nat'l Bank, 374 U.S. 321, 370–71 (1963).

uses. The perspective advanced in this article hardly means that antitrust law should tilt toward defendants. Laissez-faire has significant virtues and important limits; antitrust law is designed to address the latter in order to enhance the former. In addition, many so-called out-of-market benefits that defendants advance may well not be merger-specific or otherwise plausible. This article is addressed only to the question of when, if ever, benefits should be ignored even though the decision-maker is convinced (or would be, if its head were not in the sand) that they are otherwise admissible, real, and exceed any anticompetitive harm, by whatever standard is deemed appropriate to assess the effects of firms' behavior.

I. Out-of-Market Antitrust and Resource Flows in a Well-Functioning Economy

The most important consideration in determining the proper treatment of out-of-market benefits is an understanding of the relationship between these benefits and the operation of a market economy. Competition policy seeks to preserve and protect the economy's central functions while avoiding collateral damage. The fundamental, fatal defect in the suggestion that competition regulation should ignore out-of-market benefits is that they constitute the core of what a well-functioning economy delivers to society. Section A elaborates this thesis, and section B examines how the main branches of antitrust law each aim to further rather than undermine this enterprise.

A. Resource Flows in a Well-Functioning Economy

The analysis in this section is familiar, indeed, rudimentary. But we need to begin with foundations to make sure that what we build will not collapse. Existing discourse on the exclusion of out-of-market benefits has lost sight of the big picture.

The reasons that a well-functioning economy delivers huge social benefits are hardly complicated, and they can best be appreciated from a bit of a distance. Economic choices involve opportunity costs, for the resources used in any activity could instead have been utilized elsewhere. Now, if we were to contemplate only that elsewhere, there would always be a cost with no offsetting benefit. And it is almost as bad if we consider only that elsewhere along with the fraction of benefits (sometimes large, but often negligible) that happens to fall in the same domain as that elsewhere.[27] Trade-offs abound even in a perfectly functioning economy. Although the actual economy is far from perfect—regarding competition, information, externalities, and more—it remains essential to keep both sides of resource flows in view when assessing how they may best be regulated.

Let us begin with basics. Suppose that the economy has been in an equilibrium, but then something happens in sector *S*. Perhaps tastes have changed so that individuals now more strongly prefer to consume goods or services in that sector (demand has shifted up). The familiar story proceeds to explain why this change will cause additional resources to flow into sector *S*. Perhaps existing firms will expand; perhaps new firms will enter. Resources are flowing *to* what

[27] This caveat is overly generous, for the standard view that ignores out-of-market benefits would prohibit an action if there exists *any* elsewhere that has more cost than benefit.

is now a higher-value use compared to where they were deployed previously. But note the immediate implication: those resources are flowing *from*, that is, *out of* other sectors. By implication, the marginal value of resources elsewhere is relatively lower than before—that is, relative to where they are now flowing to.

This simple logic is applicable to all manner of everyday changes in tastes and costs, to occasional disruptions (a snowstorm) and opportunities (the Superbowl is in town), but also to changes in technology, whether gradual or transformative. Indeed, entire new sectors may be created, and operations in other sectors may be rendered obsolete or of sufficiently low relative value that few resources remain there.

What may be viewed as the injection of new resources is subject to a similar logic. Workers first entering the labor market and fresh savings available for investment are directed to the highest-value uses (the highest wages or returns), whether they involve novel, quickly growing sectors, or existing ones that, for one reason or another, have good uses for additional inputs.[28] All such new resources that go into one sector are, to that extent, not flowing into other sectors.

When the economy reaches a new equilibrium—an ever-moving target that is never really hit before it shifts yet again—resources will have been allocated such that their marginal value is the same everywhere, if the economy functions perfectly. But the economy only gets to that point (or moves closer to it) because these resources are flowing from lower- to higher-value uses.

Whatever the "market" may mean (within a broad, conventional range)—a subject deferred to part II—most of these resource flows are from inside one market to outside of it, that is, to other markets. Indeed, relative to closely related markets that may be admissible in antitrust assessments, many of these flows are wildly out of market. Hence, if out-of-market benefits are to be ignored, and resource flows blocked, whenever the "market" from which they flowed is left depleted, we would be shutting down much of the economy and destroying most of the value that the economy generates.

Consider, for example, the decades, indeed centuries, during which most of the population of the United States and the rest of the developed world (and much of the developing world more recently) moved from agriculture to manufacturing and services. Labor and capital shifted dramatically, and new labor was overwhelmingly redirected. This phenomenon was also evident in the geographic relocation of much of the population. Similar shifts subsequently took place with respect to mining, manufacturing, and just about everything else of economic significance.

[28] Regarding labor in particular (but much more), prices, wages, and returns are a shorthand for everything that pertinent actors value. For example, workers care about wages, benefits, working conditions, and locations (because of family, friends, schools, lifestyle, and so forth). Hence, as is familiar, equilibrium here includes workers moving across jurisdictions, which has concomitant effects on the housing market, with firms likewise locating, expanding, and contracting accordingly.

As these movements of labor and capital take place, much is stranded. When towns empty, wages and business activity fall for those left behind. And even in a narrow sense, competition often falls as well. For example, at some point along the way, one of two remaining general stores may close, rendering the remaining one a monopolist. Moreover, great hardship is often involved, at least in the short and medium run, both for many who leave and for those who stay put. Yet all these effects—focusing on where the resources have flowed out—are part of a larger story that necessarily includes the effects where the resources flow in. A well-functioning economy features countless such movements, large and small, on an ongoing basis. Broadly speaking, government policy should aim to enable these adjustments to occur smoothly. The main role for intervention lies outside competition policy, in such realms as providing a safety net, offering retraining, and disseminating information.[29] Competition policy should be in the business of removing, not creating, impediments to the economy's resource flows.

This perspective is concomitantly related to incentives for workers, investors, and firms. These flows take place because of the gain that the involved actors hope to realize. Workers who change occupations or locations look not only to the loss in earnings from any jobs they quit but also to the gains from the new ones they take. Investors look not only at their costs—what they invest rather than consume, or their opportunity costs from not investing elsewhere—but also at their gains. Likewise for firms.

All these decisions involve trade-offs. Actors have incentives to move resources from one activity to another precisely when there is a greater payoff from the latter than the former. No actors in their right minds consider only what is given up and not what is gained. No one would ever change anything, unless the present activity is so bad that, even viewed in isolation, it is not worthwhile. Thus, firms will shut down when they are making losses even if this puts them out of business. But many choices involve redeployment. And even shutdowns, moving from negative to zero profits, are moves upwards. Furthermore, the labor, tangible assets, and financing that is withdrawn in a shutdown is itself redeployed to something else. Blocking shutdowns not only wastes resources in the moment but undermines ex ante incentives in much the same way that depriving actors of positive gains does. Entry, other investment, and innovation, even taking a new job, would be greatly discouraged if, once started, actors were not allowed to stop when it became apparent that the venture was not worth pursuing any longer. Since the most innovative activity and much entry often results in failure (think startups), denying permission to stop would deter most from starting in the first place.

There are also important economic activities that directly move resources from one sector or location to another. All transportation does this: railroads bring agricultural produce from farms to the city; barges move timber; all modes of human transport are in significant part used to bring workers to jobs. When this happens, certain identifiable groups in all these points of origin may well be losers. If society prohibited the transport of agriculture and timber, consumers who live much closer to where things naturally grow may face lower prices. If workers could not get themselves to higher-paying jobs, many would work elsewhere, bidding

[29] This point relates to the discussion in section III.A of the appropriate specialization and assignment of policy levers to different government agencies.

down wages there, some of which would be passed through to local consumers (not all of whom may be commuters who thus lose more from being denied access to better jobs).

Consider the long-term redeployment out of agriculture, the transition from horses and buggies to modern transportation, from human and animal power to steam and electricity, or more modern shifts to decarbonize the economy. Almost all productivity gains relative to baselines that were orders of magnitude lower centuries ago are attributable to resource flows, necessarily entailing flows out of … somewhere. And myriad shorter term and often narrower adjustments—a single worker moving, a small shop discontinuing some items while adding others—likewise entail reductions of something in connection with expansions of something else. Resources flow in a well-functioning economy.

Finally, consider how the foregoing relates to "competition," including how much, if any, of the resource flows that have been discussed entail anticompetitive or procompetitive acts or effects. These remarks will be confined to rough economic intuition, with legal aspects deferred to section III.B. Regarding both the economic and legal realms, however, the term competition is notoriously elusive, some would say useless for either purpose.[30] After all, perfect competition is an abstraction, not something that can exist or that regulation should seek to impose, because doing so would require wiping out or badly distorting much economic activity (should every firm be broken into atomistic bits?). Nor can we readily define what counts as a move in a competitive direction because competition means many things and has multiple dimensions. No one has explained how to construct a competition index that points the way, much less explained why following any such direction would be a good idea (again, should all firms be made ever smaller?).

That said, the term competition is usually taken to encompass some sense of what type of economic activity is contemplated and what actions are usually regarded as involving the promotion or suppression of competition, even though it is often unclear and contestable. Most important for present purposes, shutting down individuals' and firms' ability to move economic resources across sectors in the manner described here would widely be regarded to entail a wholesale suppression of competition. One might choose to regard some or most of the outflows as anticompetitive since they often entail less intense "competition" in the exited sector, in one or more senses of that term. And, quite often, the outflows indeed cause prices to rise and quantities to fall in that sector. But if one were to adopt this characterization of resource outflows, then surely the resource inflows to other sectors would be deemed procompetitive. Moreover, our general understanding of a well-functioning "competitive" economy is one in which such flows are frequent, substantial, and unfettered, not one in which they are largely absent or widely prohibited.

The key message is that, however one chooses to define terms, the process by which resources ebb and flow among different sectors would *as a whole* generally be regarded as

[30] *See, e.g.*, Paul J. McNulty, *Economic Theory and the Meaning of Competition*, 82 Q.J. ECON. 639 (1968); Louis Kaplow & Carl Shapiro, *Antitrust*, *in* 2 HANDBOOK OF LAW AND ECONOMICS 1073, 1132–36 (A. Mitchell Polinsky & Steven Shavell eds., 2007); LOUIS KAPLOW, RETHINKING MERGER ANALYSIS, ch. 8.D (2024); Daniel Francis, *Antitrust without Competition*, 74 DUKE L.J. 353 (2024).

constitutive of a competitive economy, not its *antithesis*. For example, concepts like free entry and exit are regarded to be critical in a competitive economy; the former is an important concomitant of inflows and the latter for outflows. Likewise, many resource flows are the result of individual firms' actions, such as the introduction of new products along with the retirement of old ones. When an incumbent firm or upstart engages in disruptive innovation that displaces most other firms in a sector or even erases a sector from the economy, that is regarded as one of the most important forms of competition.

B. Out-of-Market Antitrust

Section A explores resource flows in a well-functioning economy and touches on the relationship between these flows and notions of competition. This section considers how these themes play out in each major domain of antitrust law. In doing so, it is helpful to consider a thought experiment—contrary to the status quo—wherein antitrust law is imagined to broadly embrace the principle that out-of-market benefits should be ignored in assessing whether a challenged action constitutes a violation. The discussion sets to the side other doctrinal considerations that may be relevant if such a sweeping limitation were actually to be embraced. Let us now contemplate what such a competition regime and the resulting economy would look like in rough terms.

The discussion examines contracts, acts by monopolists (satisfying Section 2's monopoly power requirement), and acquisitions. Specifically, it considers whether there are net losses of competition when possibly associated benefits are out of the market, in the sense that they may arise concerning different products or geographies or, perhaps more simply, different groups of consumers, workers, or other counterparties.[31] Whether these implications are indeed counterfactual (because the benefits are cognizable procompetitive effects or efficiencies) or instead may follow under existing law (because otherwise cognizable benefits do not count when they are out of market) is deferred to section III.B. Nevertheless, this section closes by briefly contrasting this out-of-market antitrust thought experiment with antitrust as conventionally understood.

Contracts.—Consider section A's discussion of the flow of resources between sectors, entry and exit, and innovation, including the rearrangement of all manner of activities such as individual workers' decisions to change jobs, occupations, or locations—often at the same time. In a market economy, most of this activity is effectuated with contracts: workers supplying their labor; investors purchasing stocks and bonds or venture funds taking a stake in a startup; individuals forming partnerships; firms buying land, equipment and supplies or selling through distributors, retailers, or directly to final customers. Indeed, all economic activity that occurs outside the household (subsistence farming, making dinner) is governed by contracts. Even many of firms' so-called unilateral actions—such as setting the prices for their own wares—matter only when contracts are ultimately consummated, and in any event most activity inside

[31] Note that recent U.S. merger guidelines explicitly recognize the possibility that a merger may be harmful because the merging firms may target particular groups of consumers, via price discrimination. *See* 2010 MERGER GUIDELINES, *supra* note 4, at 6–7, 12–13; 2023 MERGER GUIDELINES, *supra* note 4, at 44–45.

organizations involves operation under the terms of existing contracts between the firm and its workers and suppliers of capital.

Our inquiry here asks what the economy would look like if a competition regime prohibited all contracts that reduced "competition" in some identifiable "market"—perhaps regarding a particular set of products or services, in a particular geography, or to an identifiable group of consumers. Clearly, such a regime would shut down most economic activity. If this edict became effective at some particular moment, it would freeze the economy then in place. But maybe it would not be understood in quite so restrictive a manner because firms may be allowed to shift production between products serving the same customers in the same places, so it would merely shut down much economic activity (including the most significant), but not all of it.

Anything broader would, however, seem to hit a wall. Expansions would require securing additional inputs, some of which inevitably would flow out of the production of other products, produced or sold in other places, using different workers, or serving different consumers. And securing those inputs would require contracts. Likewise for relocating a plant, launching a new product, or reconfiguring a distribution system.

And all of this is before we consider secondary, albeit direct impacts of this contractual activity. One firm's new product, which it could produce and distribute only by entering into contractual arrangements, may render nonviable one of its other products or some other firms' products. And if it so happened that the end result was less of some product, in some location, available to a perhaps idiosyncratic but identifiable customer group, we would have a locus of activity—which might be a "market"—where competition falls. The quantities are lower, there may be fewer producers, and in the case of withdrawn products and other forms of exit, quantities would have fallen to zero (which economists sometimes model as the corresponding prices approaching infinity). Likewise with the contracts required to transport goods and humans discussed above. Or a new online job service that enters into contracts with employers to post ads for potential workers to view, the consequence of which is both to enable many of these flows that involve labor and perhaps also to reduce competition involving more traditional employment services in various local labor markets, on which some nonmoving workers and firms continue to rely.

This discussion drives home that the resource flows in a well-functioning economy, including the flows *out* of some sectors, are effectuated by contracts. Concomitantly, a vast swath of such contracts would be rendered illegal if a sufficient condition for condemnation was the existence of some identifiable domain in which there were net costs—regardless of whether the other side of the coin involves benefits that are presumptively or actually larger, even much larger. Under the imagined blindered view that ignores out-of-market benefits entirely, contracts—especially those that are most consequential—would widely be regarded as suppressing competition.

Acts of Monopolists.—Whatever may be the definition of monopoly power (or, in other jurisdictions, dominance), let us here focus attention on monopolists' many actions. As already explained, most are effectuated by contracts—how else do monopolists acquire their inputs or

sell their outputs?—raising the problems just mentioned.[32] Relatedly, many of those contracts involve asset acquisitions, considered below.

Setting that to the side, consider monopolists' actions broadly, however they are implemented. It is understood that we must distinguish good behavior, sometimes called "competition on the merits," from bad. As difficult as that may be, the focus here is on what would seem to be undoubtedly good actions. Suppose, for example, that a monopolist improves its product.[33] So far, so good. But what if the only cost-effective way to do this involves retooling its production process in such a manner that it is no longer possible to continue producing the older version. Some identifiable class of consumers, perhaps a small idiosyncratic group or possibly a larger one, may prefer the old design.[34] Or they may like the new one well enough but, for them, the higher price necessary to cover the cost leaves them worse off—even if almost everyone else is happy to pay the premium and cannot wait for delivery. Similarly, some input suppliers may be left worse off, and those who gain will raise their prices, thereby disadvantaging other firms that must purchase from them.

Monopolists often make such changes and many others having similar effects. New products may best be produced in different locations, which may reduce competition for labor in the original place but raise it in the new one. Or it may lower transportation costs for most consumers but raise them for those close to the old plant. Product innovation may require hiring more workers in some occupations but fewer in others. Indeed, none of these examples require new products and services. Countless adjustments to operations have similar effects. Moreover, many of these changes—even from simply expanding the output of an existing plant that produces an existing product—draw resources from others (resources flow out), typically having negative effects there. Quantity reductions, not only from price increases but simply from cutting back on or discontinuing unpopular or increasingly costly products, often have direct negative effects where those products had been produced.

Hence, if we were to condemn monopolists' actions whenever they resulted in outflows from some identifiable sector, regardless of the inflows to others, we would find ourselves prohibiting most of their activities. Or, perhaps at the moment when they first become a monopolist (or dominant)—however that may be determined—regulators would essentially freeze their actions forever after. (But that may not be for very long because, once that was done, they would not remain dominant much longer.)

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[32] *See* Kaplow, *supra* note 21, at 618–28.

[33] There are subtleties involving what may be regarded as predatory product innovation—*see, e.g.*, Janusz A. Ordover & Robert D. Willig, *An Economic Definition of Predation: Pricing and Product Innovation*, 91 YALE L.J. 8 (1981)—that are set aside here: that is, assume that no such characterization is plausible.

[34] I have often found myself in such a class. That 1987 Toyota Corolla was good. Not great, but good, and good enough for me. But it is long gone. The current bottom-trim-line Corolla has numerous features and improvements, costing thousands of dollars, that I and others value barely at all. (Disclosure: I actually have different needs, so it is no longer a Corolla, but for what I now buy, I prefer the older, lower-end, bottom trim line that is gone.) Or consider those who wanted to stay mostly off the grid—a self-control device, in part—who can no longer find flip phones to their liking. Or those seeking to purchase VCRs for their old tape collections.

Some might suggest that such problems may be avoided if most important actions by monopolists were deemed essentially immune from competition regulation. The rational for such broad exemption might be that product improvements and the like are almost always beneficial, so it is not worth the effort and may even be dangerous to attempt to scrutinize them individually.[35] But for the purpose of the current inquiry, this suggestion is misplaced. If indeed we are seriously entertaining the idea that, in principle, we should prohibit all acts by monopolists that involve harms from outflows in any identifiable sector, regardless of the benefits from inflows in others, then we should on these grounds favor the reverse: a perhaps irrebuttable presumption of prohibition. The reason is that even good acts by monopolists typically have these effects. A permissive presumption or immunity has appeal *precisely because the out-of-market benefits are typically larger than the in-market harms*. That is, the broad deference given to monopolists' product improvements and certain other acts is grounded in the opposite view to the one being entertained here: out-of-market benefits are not only considered but are taken to be decisive in favor of permissibility.

Acquisitions of Assets.—Section III.B will further develop the point (really, a reminder) that what is often called merger control is, at least in the United States, actually about all acquisitions of assets (a central target of the 1950 amendment to Clayton Act Section 7). An immediate implication is that a significant subset of the contracts and acts by monopolists already discussed are likewise asset acquisitions: buying land for a new plant, a building (office, factory, or warehouse), equipment, light bulbs, intellectual property rights, goods to sell in a grocery store, and so forth. Although not coextensive with contracts, asset acquisitions are ubiquitous and are obviously essential to nearly all significant resource flows in a well-functioning economy.

Like everything else considered so far, many asset acquisitions, especially the most consequential ones, remove or redirect resources so as to reduce those available in some sectors. When a semiconductor firm (whether or not a monopolist) buys buildings on contiguous parcels in order to tear them down to make way for its new chip fabrication facility, the acquired assets are no longer available to the sectors where they were formerly deployed. A new hospital built on a former parking lot may enable remaining parking lots to raise parking prices.[36] One can readily imagine scenarios in which there is a material reduction in local competition, for example, when one of a few firms or operations in an area is purchased and extinguished to make way for something else.[37] Even if a displaced firm ultimately transfers activities elsewhere, its original location may be left with less competition. And the chip fabrication plant will hardly take up the slack in those other sectors. The same holds true when the acquirer does not destroy the prior facilities but merely redeploys them to its own, higher-value use in serving some other sector. This is so even in mundane cases where a firm takes over a warehouse or occupies a significant portion of office space in some sufficiently distinct geography, displacing or driving

[35] *See infra* section III.A (addressing administrative considerations).

[36] In these and other examples, reduction in supply tends to raise price even if competition is perfect, but when there are few competitors, additional price increases often result.

[37] For example, suppose that before the acquisition there are three equal-sized firms in some local product market, with one extinguished by the acquisition. A three to two change means that the Herfindahl-Hirshman Index (HHI) goes from 3333 to 5000, an increase of 1667, easily triggering the structural presumption under the 2023 Merger Guidelines (and most others).

up prices of such facilities for firms in other sectors at that same location. Again, preventing losses in any identifiable sector regardless of the benefits in others would put a halt to much economic activity, indeed, much of the most important activity. Asset acquisitions are everywhere.[38]

Major cross-sector flows, whether between unrelated goods and services, separated geographies, or simply distinct customer groups, are also commonplace in conventional mergers as such. Combining two local hospitals, grocery stores, or law firms may generate benefits in some product or service lines valued by some customers but at the expense of others. Consider two solo legal practitioners in some area that form a partnership to enable specialization at some tasks—perhaps arranging financing for local businesses—while discontinuing work on others, such as writing wills or handling divorces. If each set of activities is viewed as distinct, then identifiable outflows in even one product line serving one customer group call for condemnation, regardless of the magnitude of the benefits in others. Almost all significantly beneficial acquisitions, whether those conventionally viewed as horizontal mergers or otherwise, would on this reckoning be prohibited. Looking more broadly at significant new products or services over the ages, from lifesaving drugs to sliced bread, it is hard to think of any that did not, along the way, involve numerous asset acquisitions having the feature that there was some loss one could identify that was offset (perhaps massively) by other benefits, but ones lying elsewhere. Indeed, elsewhere was the point.

Conventional Antitrust Contrasted.—The thought experiment's radical implications are, of course, entirely unlike antitrust as we know it. Sherman Act Section 1 is understood to be aimed at practices like price fixing that generate excessive prices—above those in a well-functioning market—that in turn result in insufficient economic activity (quantity) in that sector relative to others. Sherman Act Section 2 is particularly concerned about monopolists' erecting entry barriers that inhibit or eliminate the very sorts of resource flows highlighted here. Clayton Act Section 7 aims to block horizontal mergers that raise prices (and thus reduce quantities), not to block all manner of asset acquisitions (mostly nonhorizontal, although these are fully covered by Section 7) that move those assets to different sectors. Section III.B will revisit these points when examining existing law, with particular attention to Section 7 because that is where the prospect of ignoring out-of-market benefits has most been discussed. But even without consideration of any of the details, it is obvious that conventional antitrust under each of the major statutory provisions does not operate in a manner that bans this huge swath of economic activity.

[38] Some take the view that "merger efficiencies" are rare, failing to remember, as section III.B explains, that Clayton Act Section 7 covers asset acquisitions (and, as noted above in this section, Sherman Act Section 1 covers contracts)—and that vertical and even unrelated acquisitions are covered. Is it really imagined that most consequential transactions in the economy generate no economic benefits? Relatedly, it is often said in applying Section 7 that internal growth is preferred, but as the text explains, such growth almost always involves asset acquisitions subject to the same standards. What is implicitly being suggested—and sometimes may be true—is that different ways of acquiring various assets from different sellers will have different consequences. For present purposes, however, the concern is that a broad range of substantial asset acquisitions in all forms would be prohibited if out-of-market benefits were to be universally ignored.

II. But What Is a "Market"?

If otherwise cognizable benefits—whether styled as procompetitive effects, efficiencies, or something else—count when they are in the market but are ignored when they are out of the market, then it is critical to understand what "market" is deemed to mean for this purpose. In existing discussions, "market" seems to mean a so-called relevant antitrust market, and in particular the market in which anticompetitive effects arise.[39] There are two obvious and fatal problems with this construction even putting aside the substantive criticism in part I. First, the criteria for defining an antitrust market—having mainly to do with the extent to which substitution constrains price increases—have nothing to do with whether it might make sense to ignore large classes of benefits and, if so, which ones. Second, market definition is incoherent even on its own terms and in a manner that undermines this supplemental usage of this protocol.

A. What's Market Definition Got to Do with It?

Nothing.

The factors relevant to market definition have no relationship to any potentially good reasons for excluding considerations of various benefits or costs of challenged practices. Market definition is ordinarily seen as a means to help determine *whether and how much prices may rise* (or quantity or quality may fall) by focusing on *competitive constraints* on merging firms, monopolists, joint ventures, and so forth. Here, by contrast, market definition—the *same* market definition—is being used to delimit what benefits are admissible in an assessment of whether costs exceed benefits by an amount sufficient to prohibit an activity. This is a qualitatively, indeed entirely, different usage. Part I shows that it is a terrible idea to ignore out-of-market benefits, whereas this section explains that the central concept of "market" has no nexus with the subject at hand.[40]

Consider a dermatologist considering how to treat a patient's rash.[41] If the rash is type *A*, it originates locally and is best treated with drug *X*, but drug *X* gets into the bloodstream and often causes severe liver damage. If the rash is type *B*, it originates from the bloodstream and will go away on its own, thus requiring no treatment. Suppose that the dermatologist uses the best diagnostic test, and it points to type *A*. Should the dermatologist administer drug *X* and ignore the side-effect because the test result shows that the rash does not originate in the

[39] *See* 2023 MERGER GUIDELINES, *supra* note 4, at 32 ("When assessing this argument, the Agencies will not credit . . . benefits outside the *relevant market* that would not prevent a lessening of competition in *the relevant market*." (emphasis added)).

[40] The central theme of this section can be stated in a more semantic fashion. We cannot in principle select a "relevant market" until we have answered the question: relevant *to what*? Existing doctrine imagines that market definition is relevant to ascertaining anticompetitive effects (which, as section B explains, has been shown to be mistaken), but it has never been stated how the criteria for market definition have any conceivable bearing on which benefits should be considered, if indeed some reason can be given for including only some but not others in the first place.

[41] The same logic applies to the FDA's consideration of whether to approve a drug, or of what medical conditions a drug is approved to treat.

bloodstream, making this side-effect an out-of-organ (or out-of-system) harm? What if the American Academy of Dermatology, recognizing that too many unsightly and annoying rashes are going untreated, had issued an edict to "Treat All Rashes, Wherever They Are!" The answers are obvious. Any dermatologists administering the treatment should lose their licenses. In the inevitable malpractice suits that would ensue, the defensive invocation of the American Academy of Dermatology's edict would be ignored: What doctor would interpret this edict literally, commanding them to ignore severe side-effects?

Let us return to market definition. Whether using the *Brown Shoe* factors, merger guidelines' Hypothetical Monopolist Test (HMT), or otherwise, the inquiry is mostly about the degree of substitution (usually demand substitution). And substitution matters because of the competitive constraint it provides. Specifically, if firms (whether a monopolist under Section 2, merging firms under Section 7, or a joint venture under Section 1) operating in a narrow market are sufficiently constrained from raising prices by other firms operating in a broader market, then the broader market would be deemed the relevant antitrust market. But if they would not, protocols choose the narrow market.

The degree of substitution, and in particular whether it is just above or below some threshold for choosing the broad market rather than the narrow one, has nothing to do with whether it makes sense to include completely or exclude entirely otherwise cognizable benefits from the challenged activity that arise in the broad but not in the narrow market. Sometimes it makes sense to use a test devised for one purpose for something else as well. A blood test for one disease may also be an indicator of some other disease. But often not. And never when what the test measures is entirely unrelated to that something else we are considering. It is remarkable that this simple, logical point has been overlooked altogether in most prior discussions of this subject.[42]

Part I already explained why the exclusion of out-of-market benefits, whatever that term might mean, makes no sense. One can imagine, taking a two-dimensional metaphor, that the costs and benefits of some action each have varying intensity in different parts of the contemplated domain. Assuming, as we are here, that the action can only be prohibited or allowed altogether, the natural approach is to weigh all the benefits and costs. The out-of-market

[42] The text throughout this article amply illustrates the mischief that results from making this error. Consider a further, rather specialized illustration in the merger context. Two merging firms each operate in both the narrow market and that part of the broad market not included within the narrow one (and assume that each domain is the same size and in all respects of the same importance). It is stipulated that the merger generates upward pricing pressure that translates into a 2% price increase in each domain. But the merger also generates efficiencies that will push down prices by 10% in the broad-only domain (but they have no effect in the narrow domain). To summarize: the merger raises price by 2% in the narrow realm and reduces price by 8% in the broad-only one of equal size. Under the HMT, for example, if the hypothetical monopolist (but not this merger) can raise prices 5.1% (just above a presumed 5% critical level for the SSNIP) in the narrow market, the principle of ignoring out-of-market-benefits requires the merger to be blocked. But if only 4.9%, the narrow market is no longer relevant (only the broad one is relevant), so the benefits are then in-market and the merger is to be allowed. The actual effects of this merger in the narrow and broad markets, recall, are stipulated to be identical in both cases. Here, the problem is not only that substitution has nothing to do with whether it makes sense to count the benefits, but also that some of the other deficiencies of market definition that will be noted in section B imply that the market may well be defined (even with respect to substitution) for reasons quite loosely connected with the relevant competitive concerns.

exclusion asks instead whether we can find any part of this domain, however small, where we can draw a circle (or perhaps some less regular shape) that includes more costs than benefits and, if we can, then we prohibit the action regardless. More precisely, under the market definition paradigm, we do not ask if we can draw any such circle, but only ones that an entirely unrelated market definition machinery permits us to draw, and we then prohibit the action if any one of those circles contains more costs than benefits. Even limiting the protocol to so-called relevant antitrust markets completely fails to rescue this exclusion, all the more so when one recognizes the complete disconnect between the two questions.[43]

Lest one think that this objection is merely abstract or objecting to how precise lines are drawn, recall the myriad examples throughout part I. In almost all of them, resources move from one to another *wholly unrelated sector*. (A local hair salon and pizza shop are leveled to construct a chip fab plant supplying the world.) Hence, no conceivable market definition, as that concept is generally understood in antitrust analysis, would include inextricably related benefits and costs—that is the benefits and costs of the particular *action* under scrutiny, for it is the action that is to be permitted or prohibited. This observation reinforces the point that relevant antitrust markets have nothing whatsoever to do with the question at hand. It is not a matter of whether markets are drawn particularly narrowly, using one or another particular technique. It is more like prohibiting firms from undertaking new projects except when the local temperature exceeds 100 degrees and then arguing about whether the magnitude of the resulting disaster might depend somewhat on the type of thermometer used.

B. What about Market Definition's Own Problems?

It has long been recognized that market definition is highly problematic, which makes it all the more strange that any modern discussion suggesting the exclusion of out-of-market benefits should omit consideration of market definition. Inattention to the market definition paradigm's deep defects helps to explain how the gulf identified in section A has gone unnoticed.

But the matter is worse because defects in the market definition exercise are more serious than most admit. The discussion in this section, drawing on prior work, highlights some of the most pertinent considerations.[44]

First, in order to choose a relevant market—consider the choice between a narrower and a broader one—we must have a criterion. Remarkably, almost the entire literature, as well as court

[43] The formulation in the text supposes, in line with what seems to be intended in statements advancing the out-of-market exclusion, that benefits are excluded if they fall outside *any* relevant market in which harm is present. An opposite approach might be to exclude them only if they fall outside *all* relevant markets. This alternative is less restrictive, but it still has no nexus to the matter at hand (and, as explained, would exclude the largest benefits of major transactions in many settings).

[44] The criticisms in this part draw on those first advanced in Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437 (2010), and most recently developed in KAPLOW, *supra* note 30, §§ 3.A & 6.B, and Louis Kaplow, *Replacing the Structural Presumption*, 84 ANTITRUST L.J. 565 (2022) [hereinafter Kaplow, *Structural Presumption*]. For references to and discussions of some of the debate (which does not substantially address the logical claims most relevant to this article), see Louis Kaplow, *Market Definition Alchemy*, 57 ANTITRUST BULL. 915 (2012), and Louis Kaplow, *Market Definition: Impossible and Counterproductive*, 79 ANTITRUST L.J. 361 (2013).

opinions and government guidelines, says practically nothing about what that criterion might be. This omission makes the market definition paradigm quite fuzzy, blurring its analysis and making it easier to miss the core point in section A that the market definition exercise is entirely unrelated to the subject under examination here.

The criterion that seems implicit in most discussions of market definition is that one should choose the market that leads to the best prediction or presumption about some practice's anticompetitive effects, such as whether and how much a horizontal merger will lead to higher prices. That is why so much attention is devoted to substitution as a competitive constraint. And that is why section A accordingly concluded that relevant antitrust markets are chosen for reasons having nothing to do with which if any benefits should be ignored in antitrust assessments.

Once we make this criterion explicit, we see that market definition is at best a circular endeavor.

- Which market, narrow or broad, is the better market? The one that leads to better inferences or presumptions.
- What is a better inference or presumption about, say, a proposed merger's effects on price? An inference or presumption about price effects is better if it is closer to what the actual price effects are most likely to be.
- And how do we then determine what those actual effects are most likely to be? By using any and all means available: course-of-business documents, views of industry actors, experts who may use data and might perform econometric analysis.
- *But market definition can never be one of those means because we have not yet defined the market.*

The simple and unavoidable conclusion is that, as a logical matter, the market definition exercise is circular. We must first determine, based on all available information, our best estimate of the ultimate issue; that, in turn, is employed as an *input* into market definition. As it happens, the market definition protocol is *far worse* than this because information is distorted or discarded along the way, and other necessary inputs are lost in the shuffle; but these serious deficiencies are not central for present purposes.[45]

Consider what this deep circularity problem means for determining which benefits are out of market. Even if, contrary to part I and section II.A, we were to use conventional market definition to determine which benefits to ignore, we would confront this problem. For standard usages, an agency or judge could employ a form of crass reverse-engineering, either consciously or subconsciously, and there are reasons to believe that this circumvention is somewhat prevalent

[45] *See* sources cited *supra* note 44. Regarding other necessary inputs, in order to know whether choosing the narrow or broad market involves less prediction error one needs, in addition to one's best estimate (as highlighted in the text), the prediction one would make conditional on choosing the narrow or broad market, additional challenges that remain unaddressed. Regarding broad markets, there are no economic models from which any such inferences are possible. In narrow markets, for settings in which we might reasonably apply some economic model, predictions can vary by orders of magnitudes for given market share configurations, and it is easy to construct cases in which cases are badly misordered (a merger raising prices significantly is safe harbored while one raising prices negligibly is presumptively challenged).

in standard applications of market definition. That is, the decision-maker will be immersed in a great deal of information that indicates whether or not, say, the merger is likely to raise prices significantly. Despite the inherent uncertainties of prediction and the challenges of interpreting evidence and resolving battles of experts, some conclusion will ultimately be reached. If the conclusion is that the merger will likely raise prices, the agency and the judge (in an early part of the written opinion) can claim that the narrow market is correct, all things considered. When reaching the opposite conclusion, the broad market would be deemed the only relevant one. Happily, although this practice is imperfect, may not reflect official protocols and caselaw, and lacks transparency, it at least tends to result in the decision-maker choosing the better outcome.[46]

What would the analogy to reverse-engineering look like with regard to out-of-market benefits? Precisely because of the nexus problem identified in section A, there are notable obstacles.

To do reverse-engineering correctly, one would first have to determine whether the out-of-market benefit *ought to* be counted. The analysis in part I suggests that the answer should always be in the affirmative. (For possible administrative reservations, see section III.A.) That would make life easy. In every case, the market could be defined as the entire economy—or, with some more focused effort, broad enough to include all nontrivial out-of-market benefits. The latter such market may be quite odd, such as in the earlier examples where resources leave some activities in one geography to be deployed to entirely unrelated activities in different geographies (such a market might need to combine a retail sector in some county with chip manufacturing in the world). Moreover, none of these approaches look at all like what is considered when undertaking antitrust market definition, so it is harder to imagine that such reverse-engineering would be undertaken.

There is another huge problem, particularly if one adopts the typical out-of-market exclusionary view under which an activity is illegal under antitrust law if it reduces competition (generates relevant harm) in *any* relevant market. To circumvent the broad economic shutdown described in part I, it would be necessary to deem all of the conventionally narrower markets (perhaps all those narrower than the entire economy) *irrelevant* for antitrust purposes. But then nothing would ever be illegal under many of the standard rubrics.

The only escape from this conundrum would be more thoughtful reverse-engineering. First, the decision-maker decides everything—anticompetitive harms and countervailing benefits—without regard to anything whatsoever about markets, whether traditional competitive effects (the domain of familiar market definition exercises) or the possible exclusion of out-of-market benefits. The former would be analyzed directly, and regarding the latter, all out-of-market benefits (and costs) would count. One would then determine the best outcome. Second, one would choose a market definition accordingly, choosing the narrow one if condemnation is

[46] Werden, who endorses market definition, expresses a rather different concern: that courts will be induced to gerrymander market definition to avoid ignoring out-of-market efficiencies. *See* Werden, *supra* note 17, at 122; *see also* Yun, *supra* note 17, at 1291 (expressing concern that courts may be motivated to adjust market definition for efficiencies in ways that might undermine the analysis of anticompetitive effects). Note further that the broader problem addressed in the text to follow is not addressed.

the answer to be ratified but the broad one (which would lead to a conclusion of no anticompetitive effects and hence no need to consider offsetting benefits) if the action is to be permitted.

In the many settings in which out-of-market benefits are what justify permitting the action, one would not be allowed to say this if the rule were understood to prohibit their consideration. That is, if one adopted a narrow market definition because that seemed the right way to analyze the possible anticompetitive effects presented by the case at hand, one might then feel forced to disregard notably larger out-of-market benefits. Reflection on market definition's infirmities reveals the suggestion that out-of-market benefits be omitted to be a fraught exercise, even if one did wish to ignore some of them. Moreover, the present discussion reinforces the main point in in section A: that the normal understanding of the market definition process is entirely unrelated to when, if ever, some benefits should be disregarded even though, in all other respects (for example, verifiability and merger-specificity), they should be considered.

III. Institutional Considerations

A. Administration

Administrative concerns about the difficulty and costs of predicting the effects of mergers, monopolists' acts, joint ventures, and more are central to the design and operation of a successful regime of competition regulation. This important point, of course, also applies to drug approval, environmental protection, macroeconomic policy, tax collection, defense, and foreign affairs. A number of broadly applicable principles are germane to whether competition agencies and courts should attempt to impose limits on the consideration of otherwise relevant costs and benefits of their rules, protocols, and applications in individual cases.

The natural starting point is that all relevant costs and benefits should be considered. Competition regulation like other government action should seek to promote the social good. There should be no a priori limitations; restrictions require justification.

One of the most important bases for limitation involves specialization.[47] It is usually optimal to assign certain tasks to particular agencies that in turn are designed to conduct the requisite analysis and are given the appropriate tools for their task.[48] Hence, it may well make sense to leave macroeconomic considerations to the central bank and those setting budgets, while confining competition and environmental regulators, the postal service, and most other parts of government to their own core domains. The optimal design of complex organizations, and

[47] Another type of limitation, associated with constitutional law, involves constraints imposed on government actors to protect fundamental rights or limit abuses of power. These seem essentially unrelated to restrictions on the consideration of out-of-market benefits, ones that would be fully considered if they were in-market. We can imagine broader restrictions on certain factors (such as in competition regulation of the media), but these likely would operate along different dimensions from the question under consideration here.

[48] *See* KAPLOW, *supra* note 30, ch. 7.D.

certainly of national governments, is a challenging and contentious task for many reasons, but the broad contours of sensible domain restriction are readily appreciated.[49]

But just as it would be highly counterproductive, say, for environmental regulators to ignore all the costs of their regulations, considering only the benefits—or to include only the benefits arising in the locality of the regulation (say, the vicinity of a powerplant), ignoring those downstream, downwind, or more broadly—it would be undesirable for competition agencies to ignore large portions of the costs or benefits inextricably connected to what they contemplate prohibiting. In these cases, there is no other agency or branch of government–-perhaps with fully overlapping authority—to consider the other side of the balance and push firms in the opposite direction on many of the same activities. It is difficult even to imagine what that would look like. It would seem to require a super-agency to resolve all the conflicts, since the two hypothesized narrowly operating agencies would frequently, on most important matters, seek to regulate in opposite ways. For example, the benefit-focused environmental regulator might require every control imaginable, indeed, shutting down nearly all economic activity. And the cost-only agency would allow everything, rejecting even minimal regulation that creates massive benefits. Hence the need for a super-authority, indeed, in literally every case. Instead, of course, we have just one agency that is accordingly tasked with considering together both benefits and costs when assessing the desirability of proposed regulations (although it might assign to sub-units more focused analysis of particular factors, combining their work products when reaching an ultimate decision).

For competition regulation, part I establishes that actions involving both costs and benefits, often arising in different markets (whatever that may mean), are ubiquitous. Indeed, they are at the center of the most important activity in a well-functioning economy, whether modest adjustments in light of myriad small changes in supply or demand or drastic innovation that works through the economy over years, decades, or centuries. Hence, any notion that, as a rule, out-of-market benefits would be ignored, perhaps left to some other agency that might overrule the competition agency, is a nonstarter. Further analysis is required in any domain to determine what jurisdictional boundaries make sense, but in rough terms this consideration overwhelmingly favors broadly including rather than systematically ignoring so-called out-of-market benefits.

Another aspect of the appropriate focus and division of responsibilities among government agencies concerns specialization and the related matching of policy instruments to social problems. This article is not the place to address the larger debate about the proper objectives of antitrust law. But it is worth noting that one possible motivation for ignoring ubiquitous out-of-market benefits is that even isolated local costs may be compelling, such as

[49] *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), presents an interesting boundary case and set of concerns, albeit one that is not about out-of-market benefits but rather one, more like those in the text, that arguably falls in a different domain, safety in that case. Likewise, one would expect the Supreme Court to reject a defense to price fixing or otherwise illegal practices by cigarette manufacturers or coal producers predicated on the argument that, because their products are undesirable on account of internalities or externalities, thwarting competition is beneficial. No claim is advanced in this article regarding which of these judgments are correct as a matter of sound regulatory design or existing law. Instead, the point is to illustrate that more subtle domain limitations might be appropriate, but ones that are unrelated to the out-of-market limitation.

when declining communities lose additional jobs. As noted from the outset, one could combat this problem through aggressive regulation that in essence freezes resources in place (should the United States have done this in 1800, or in 1900, or in 2000?). Aside from the overall balance of benefits and costs, this sort of cost is usually best addressed by other types of policies, such as job retraining, unemployment insurance, and other features of a social safety net. Another point—which often plagues highly indirect approaches to social problems—is poor targeting. Many in- versus out-of-market tradeoffs do not involve these issues. And some cut the opposite way: we might bar a firm from revitalizing a community by building a new plant on the ground that certain products or occupations may suffer from the redeployment of resources.

A different type of administrative concern involves the challenges of predicting the effects of firms' actions or of retrospectively determining what they did (such as in price-fixing cases). Relatedly, proof requirements need to be calibrated with respect to effects that are, in principle, relevant. This too is a challenging problem. But it likewise is not one that favors ignoring broad swaths of benefits *because they happen to fall outside some market*, indeed, ones that would be fully included if the boundary were drawn differently, and ones that may be more predictable and more important in many settings than are the in-market costs.[50] That proposition is the subject of parts I and II.

To pursue the matter further, it may sometimes be true that benefits arising in markets that are more distant in some sense may be more speculative. The same may be true in examples offered throughout concerning the regulation and practice of medicine. But whether and the extent to which this is true varies greatly with the particulars.

In many settings, the concern may simply not arise, and in others it may cut the opposite way—that is, any in-market anticompetitive effects may be more speculative than the out-of-market benefits. Moreover, in-market anticompetitive effects can only be regarded as privileged if one picks a particular market, defined in a particular manner, as the focus. For example, if a semiconductor company acquires a warehouse in a rural area to clear the way for a new chip fabrication facility, it is only the choice to focus on the local warehouse market rather than on a national or global chip market—the actual aim of the transaction—that places the benefits outside rather than inside the market (and, likewise, the costs inside rather than outside the market). It may be more natural in this illustration and many others, if one had to choose a metaphorical framing, to say that the supposed anticompetitive effect is the one that is outside the market and thus should be ignored. But choices of metaphors should not straitjacket analysis, either way. It is also important to keep in mind that, throughout this article, attention is limited to benefits that otherwise would be cognizable, that is, that would be regarded as established and relevant if those very same benefits were in-market—a point emphasized in section II.A.

[50] This point deserves emphasis. At stake are effects that the competition agency would fully consider in many instances if other, unrelated facts were different, and that it would fully consider in other investigations involving different firms and practices. *Cf.* Rybnicek & Wright, *supra* note 4, at 459 (arguing that, in merger cases, all efficiencies should be treated symmetrically, without regard to the market within which they fall). Moreover, like with the efficacy and safety of a particular drug—and using the language of the 2010 Horizontal Merger Guidelines—we are considering only benefits inextricably linked to the transaction that generates the costs.

It is also relevant that it often may be quite difficult to estimate out-of-market benefits even though the circumstances may lead us to infer that they are likely to be significant and, more importantly, in excess of in-market costs. Indeed, this is so in many of the examples throughout this article. If considering whether to enjoin, say, a monopolist's new product development and launch, it may be quite difficult, even for the firm itself, to ascertain the future effects—many new products fail—and all the harder for an agency or court to make such a determination. But in most settings, the context suggests that the expected benefits are sufficiently likely to outweigh the expected costs that the action would be allowed, and perhaps deemed presumptively legal (even irrebuttably so in some contexts). Of course, in other settings, such as when merging firms proffer efficiencies, it may be hardly obvious that they are real, even on an ex ante basis, and we are often concerned that they may be pretextual, attempting to cover for a merger motivated precisely by the consequent increase in prices. The point here is that this challenge must be confronted regardless of whether such efficiencies are inside or outside the ultimately chosen relevant market.[51] Depending on the nature of the proffered efficiencies, out-of-market ones may be more or less credible, depending on the circumstances.

Moreover, the notion that some effects are speculative and thus should be ignored is facile. Many have appropriately recognized that competition regulation can be undermined by too ready acceptance of suggestions to ignore uncertain anticompetitive effects by labeling them, in a conclusory fashion, as too speculative. By contrast, uncertain benefits, including ones that might be deemed out of market, readily include the most important social benefits generated by a market economy. The FDA may sensibly refuse to authorize a drug that certainly cures rashes but might—we are not at all sure—cause significant numbers of deaths. Likewise, it may sensibly authorize a drug that certainly causes rashes but might save significant numbers of lives. We care about magnitudes, not just probabilities, for both costs and benefits. More precisely, we care about expected net social effects, taking into account the probability and magnitude of both harms and benefits, as best they can be determined.

Antitrust law continues to struggle with problems of proof and the calibration of proof burdens.[52] This struggle is relevant to out-of-market benefits, but it is likewise applicable to in-

[51] Piecemeal assignment of obscure heightened proof burdens or arbitrary omission of central factors is an irrational response to these challenges. As elaborated in the references cited in note 52, a rational decision-maker will recognize parties' incentives to advance claims and realize that experts can often be found to support weak arguments. Such a decision-maker will therefore not accept them wholesale but instead approach them with appropriate skepticism. But neither would a sensible decision-maker ignore all such claims out of hand, particularly when the basic principles elaborated in part I indicate that in many settings such benefits are common and significant, and when the result of wholescale exclusion would be to shutter much of the economy. Sensible rejection of "anything goes" should not imply that "everything stops."

[52] In other writing, notably on efficiencies and the structural presumption, I have shown that the familiar burden-shifting framework is internally incoherent in some respects, inconsistently articulated and applied, and substantially masks the real issues. *See* Louis Kaplow, *Efficiencies in Merger Analysis*, 83 ANTITRUST L.J. 557, 614–18 (2021); Kaplow, *Structural Presumption*, *supra* note 44, at 606–19. Further development of the proper decision-analytic framework for antitrust analysis is offered in KAPLOW, *supra* note 30, chs. 2, 6.A, 6.B. For economic analysis of how optimally to set proof burdens, see Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738 (2012); Louis Kaplow, *Likelihood Ratio Tests and Legal Decision Rules*, 16 AM. L. & ECON. REV. 1 (2014); and Louis Kaplow, *On the Optimal Burden of Proof*, 119 J. POL. ECON. 1104 (2011).

market benefits—and, as just noted, to in-market costs. Indeed, the very same benefits are in one or the other category depending on the outcome of a market definition exercise that, as part II elaborates, has nothing to do with any of these issues regarding whether benefits (or costs) of firms' actions are difficult to prove.[53] This nexus objection is therefore fundamental to administrative concerns as well.

B. Legal Doctrine

This article focuses on how economic analysis provides the proper underpinning of sound competition policy, in order to inform competition law and practice. This section turns to the current state of legal doctrine in the United States as it pertains to the consideration of out-of-market benefits.

1. Sherman Act Sections 1 and 2

Sherman Act Section 1 prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce."[54] For convenience, present discussion focuses on contracts, a category broad enough to cover much activity in a market economy.

As noted in the introduction, the Supreme Court moved quickly from a literal, expansive, and highly restrictive interpretation of Section 1 to the rule of reason. On its face, Section 1 prohibits all contracts that "restrain" trade, but even a simple agreement to sell my watch to Jill restrains trade in some sense. Justice White, the dissenter in the earliest cases, wrote the majority opinion in *Standard Oil* in 1911, announcing the rule of reason for both Sections 1 and 2.[55] *Chicago Board* in 1918 doubled down on *Standard Oil*'s anti-literalism: "But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to

[53] As explored below in note 65, the majority in *Ohio v. Am. Express Co*., 138 S. Ct. 2274 (2018), seems to have chosen a two-sided market, deeming a market consisting of only the merchant side as inappropriate, for fear of excluding seemingly relevant benefits to cardholders on the other side of the market. "Price increases on one side of the platform likewise do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services. . . . Thus, courts must include both sides of the platform—merchants and cardholders—when defining the credit-card market. To be sure, it is not always necessary to consider both sides of a two-sided platform. A market should be treated as one sided when the impacts of indirect network effects and relative pricing in that market are minor." *Id*. at 2286. Of course, this "save" is unavailable in the multitude of settings in which resources move between two unrelated sectors.

[54] 15 U.S.C. § 1.

[55] Standard Oil Co. v. United States, 221 U.S. 1, 49–68 (1911). As is familiar, the earliest cases, despite their literal interpretation, contemplated exceptions such as for covenants not to compete in association with the sale of one's business. *See, e.g.*, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 328–29 (1897). Justice White's dissent ridiculed this patent inconsistency. *See id*. at 352 (White, J., dissenting) ("Thus, after insisting that the word 'every' is all-embracing, it is said, from the necessity of things, it will not be held to apply to covenants in restraint of trade which are collateral to a sale of property, because not 'supposed' to be within the letter or spirit of the statute. But how, I submit, can it be held that the words 'every contract in restraint of trade' embrace all such contracts, and yet at the same time, it be said that certain contracts of that nature are not included? The asserted exception not only destroys the rule that is relied on, but it rests upon no foundation of reason.").

restrain, is of their very essence."[56] More famously, *Chicago Board* proceeded to state the still-governing embellishment: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[57] Justice Brandeis, deploying his signature "kitchen sink" approach,[58] went on to exonerate the challenged practices that unquestionably restricted competition in one realm (unfettered price-setting in back-alley dealings) in order to boost competition in another (trading on the exchange floor), which he regarded to be the more important effect.[59] Thus, beginning more than a century ago, Sherman Act jurisprudence rejects literalism and embraces a broad consideration of a challenged practices relevant effects under the rule of reason.[60]

Nor has a broad restriction on consideration of what might be deemed out-of-market benefits emerged in modern jurisprudence.[61] Instead, the last half-century of Supreme Court

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[56] Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

[57] *Id*.

[58] *See id*. ("To determine that question, the court must ordinarily consider the facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed, the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.").

[59] By contrast, the European Commission's guidelines on TFEU 101 reject tradeoffs across different consumers in different markets. *See* GUIDELINES ON THE APPLICABILITY OF ARTICLE 101 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION TO HORIZONTAL CO-OPERATION AGREEMENTS, 2023 O.J. (C 259) 1, ¶ 583 ("Although the weighing of the positive and negative effects of the restrictive agreements is normally done within the relevant market to which the agreement relates, where two markets are related, efficiencies generated on separate markets can be taken into account, *provided that the group of consumers that is affected by the restriction and that benefits from the efficiencies is substantially the same*." (emphasis added)); *see also id*. ¶ 584 (similar).

[60] Remarkably, this straightforward observation about the Supreme Court's longstanding approach is largely ignored in discussions of whether there is an out-of-market limitation under the Sherman Act. The most extensive treatment appears in Yun, *supra* note 17, yet he does not cite *Chicago Board* even once (or discuss the straightforward argument in the text). Indeed, although Yun (*id*. at 1279–80) offers a significant discussion of *Sullivan v. Nat'l Football League*, 34 F.3d 1091 (1st Cir. 1994), quoting a number of passages appearing on page 1112 of that opinion, he omits that the court followed those statements (later on the same page) with a citation and long quotation from Justice Brandeis advancing this very point. Yun does quote the end of the *Sullivan* court's subsequent sentence, remarkably omitting the contrast from the unquoted portion, which states that "courts should generally give a measure of latitude to antitrust defendants in their efforts to explain the procompetitive justifications for their policies and practices." *Id*. at 1112. Moreover, he critically mismatches his statement in text (which emphasizes his article's theme of focusing on related *markets*) with the court's language he quotes in the supporting footnote (which focuses instead on whether the proffered justifications are related to the *challenged practice*, the present article's focus). *See* Yun, *supra* note 17, at 1280 & n.102.

[61] Werden similarly argues that no out-of-market exclusion exists under the Sherman Act's rule of reason, advancing partly overlapping arguments (particularly with regard to his emphasis on the Supreme Court's vertical restraints cases). *See* Werden, *supra* note 17, at 126–32. Nevertheless, he argues that such a restriction is (and, it seems, should be) part of the structured rule of reason apparatus invoked by modern courts, *see id*. at 132–40, an approach sharply criticized in Louis Kaplow, *Balancing Versus Structured Decision Procedures: Antitrust, Title VII Disparate Impact, and Constitutional Law Strict Scrutiny*, 167 U. PA. L. REV. 1375, 1391–09 (2019). Indeed, the deficiencies I identify there may help to explain the resulting confusion in *Amex*, *see id*. at 1405 n.54, which in turn relates to the intersection of the two-sided markets question and worries about excluding relevant out-of-market benefits, as discussed here in notes 53 and 65. *See also* Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 989–90 (9th Cir. 2023) (noting that existing law is unclear on the admissibility of such benefits—although stating that the Ninth Circuit and Supreme Court have recognized them—but failing to decide the question because it had not been properly raised and was inapt in any event).

cases, particularly Sherman Act Section 1 cases that have narrowed or overturned rules of per se illegality, have consistently embraced a consideration of relevant economic effects rather than letting formalistic considerations dictate outcomes.[62] Particularly notable for present purposes is *Sylvania*'s move to a rule of reason for vertical non-price restraints.[63] The Supreme Court called, in essence, for the balancing of interbrand benefits against intrabrand harms. The Court has, of course, advanced some limitations on what defenses may be considered, deeming certain considerations outside the domain of competition law (which rationale relates to the subject of section III.A).[64] But it has not endorsed wholesale rejection of benefits for being out of market, which as explained in section I.B would outlaw a broad swath of contracts that move resources across sectors of the economy.[65] To the contrary.[66]

Sherman Act Section 2 similarly employs the rule of reason. Most relevant for present purposes is the second element of a monopolization offense, which requires (in addition to monopoly power, the first element) "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[67] As elaborated in section I.B and throughout much of this article, multitudes of these permissible actions entail harms in one or more distinct domains with benefits lying elsewhere or diffused sufficiently broadly that, despite their much greater magnitude, they often would not outweigh the harm to at least one isolated group of victims.

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[62] *See* Kaplow, *supra* note 21, at 612–17. This fifty-year history is particularly relevant to understanding language in *United States v. Topco Assoc.*, 405 U.S. 596, 610–11 (1972), that expresses reluctance to balance effects across sectors. Even in *Topco* itself, the argument was advanced in the context of a per se rule that prohibited the consideration of *any* benefits, and the Court was particularly hostile to the notion that the Topco members should themselves be permitted to undertake this balancing. *See also* Yun, *supra* note 17, at 1274–77, 1285 (similarly viewing *Topco* as focused on focusing on the disregard of efficiencies under a per se rule). (In this respect, it is odd that the court in United States v. Google, Case No. 20-cv-3010, at 255 (D.D.C. 2024), points to *Topco* as support for rejecting cross-market benefits because, under *Topco*'s per se prohibition, in-market benefits are also to be rejected. The court in FTC v. Meta Platforms, Inc., Civil Action No. 20-3590, at 81–82 (DDC 2004), rejected *Topco* for other reasons, likewise failing to note this central problem with the FTC's reliance on *Topco*.) In any event, *Sylvania* in particular, as the subsequent text here explains, takes the opposite position in reversing a related per se rule and insisting that courts balance the pertinent effects. Werden similarly rejects any such reading of *Topco* and finds no support for the contrary view in appellate opinions. *See* Werden, *supra* note 17, at 127–29.

[63] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51–57 & nn.19, 22 & 27 (1977).

[64] *See supra* note 49 (discussing *Engineers*' rejection of defenses, there regarding safety, and other likely domain restrictions that are predicated on the view that competition is undesirable in some realms).

[65] Confusion on this and other issues has been created by the litigation in *Ohio v. Am. Express Co*., 138 S. Ct. 2274 (2018). Specifically, it appears that the Supreme Court majority may have been motivated to insist on a two-sided market rather than a one-sided market focused on the merchant side because otherwise benefits on the cardholder side may have had to be ignored (even if they justified the challenged behavior) because of their being out of the market. *See supra* note 53 (quoting *Amex*); Christine S. Wilson & Keith Klovers, *Same Rule, Different Result: How the Narrowing of Product Markets Has Altered Substantive Antitrust Rules*, 84 ANTITRUST L.J. 55, 84 & n.165 (2021).

[66] For example, in *NCAA v. Alston*, 141 S. Ct. 2141 (2021), the Supreme Court considers throughout whether and to what extent NCAA restrictions on the labor market for athletes can be justified by providing a product involving amateur sports that will be more appealing to customers. None of the discussion would have made any sense if out-of-market benefits (promoting amateur sports for the benefit of sports fans) were to be ignored in considering harms in the labor market (for college athletes), which were taken to exist in that appeal. The opinion (and those below) could have been single-sentence rejections of the NCAA's entire case if an out-of-market limitation existed.

[67] *See* United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

Many examples have been given, from new products that displace older versions, to relocated plants, shifted supply chains, or reconfigurations of distribution networks. One does not see the government or private plaintiffs routinely succeed by demonstrating isolated harmful effects, or such parties even attempting to do so. Many actions that create benefits in one realm and harm in another are regarded to be presumptively legal, perhaps even irrebuttably legal (absent claims of predation or other more particularized objections), in large part *because* of the typical, substantial benefits, many of which are out of market as that concept is being used here.[68] That is what the routine invocation of "competition on the merits" is taken to embrace, however problematic this circular formulation of the boundaries of permissible conduct may be.[69]

Consider some further implications regarding an out-of-market restriction for monopolization cases. *Microsoft* and many of the contemporary challenges to major technology companies centrally involve allegations of dominant incumbent firms seeking to block entrants, disruptive and otherwise.[70] But if one were to ignore out-of-market benefits under either Sherman Act Section 1 or Clayton Act Section 7 (considered momentarily), many such entry efforts would already be stymied because significant contracts, including acquisitions, necessary to enter or expand successfully to take on a dominant incumbent firm would then be illegal: after all, such entry, especially if substantially successful, would cause many isolated losses that, under the restrictive view, could not be justified by the ensuing benefits. Can a monopolist thus defend against entry barrier claims under Section 2 if it can show that its actions could not have had anticompetitive effects because any entry it may have inhibited would have been illegal anyhow? If we regard that suggestion as ridiculous, it seems to follow that courts (and everyone

[68] Consider the conclusory argument that the harm from a monopolist's product withdrawal is not an "anticompetitive" harm and thus simply does not count toward illegality. Yet monopolists' reducing quantity (here, to zero) and raising price (here, as many economists would state, implicitly approaching infinity) are classic anticompetitive harms. As emphasized in the text, the *reason* that *these* sorts of quantity reductions and price increases are not regarded to be problematic is their close nexus to the introduction of the new or improved products, which generate benefits that are presumed (perhaps irrebuttably) to exceed the harms in question.

[69] Google proffered what were taken to be cross-market benefits in defending against the government challenge to Google Search. The court rejected them as insufficiently proved and thus chose not to resolve what it deemed to be the unclear state of the law on this question under Sherman Act Section 2. *See* United States v. Google, Case No. 20-cv-3010, at 255–57 (D.D.C. 2024). The primary Section 2 case the court cites is *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451, 482–84 (1992), where the Court found allowable what might be viewed as out-of-market benefits but noted that they required proof and hence could not a basis for granting summary judgment to a defendant advancing them. As noted in the introduction here, the summary judgment decision in FTC v. Meta Platforms, Inc., Civil Action No. 20-3590, at 81–83 (DDC 2004), also expressed skepticism about whether out-of-market benefits could be considered in a Section 2 case (although it was a challenge to an acquisition, ordinarily brought under Clayton Act Section 7), even though the parties had not briefed the argument and even though the court's short discussion acknowledged a Supreme Court case accepting their consideration. *See supra* note 7. The discussion concludes by stating that there will need to be "a strong showing that such effects are *relevant* in this case," and that the defendant will have to show at trial "*why*" its defenses are cognizable. *Id*. at 83 (emphasis added). These passages are obscure: the defense under consideration is that the defendant Meta (then Facebook) acquired the target WhatsApp in order to greatly boost the latter's capabilities, and that the claimed anticompetitive effect in the acquirer's market was incidental and insignificant by comparison. Accordingly, such benefits are patently relevant—unless, that is, one rules them inadmissible for reasons unrelated to the substantive claim—and this clear and direct relevance explains why they should be considered. Just what it is that has to be shown at trial that bears on whether the court should ignore the defense in spite of any facts establishing its validity and significance is hard to imagine from the court's brief discussion.

[70] *See, e.g.*, United States v. Microsoft Corp. 253 F.3d 34 (D.C. Cir. 2001).

else) could not imagine that Sherman Act Section 1 or Clayton Act Section 7 contain the hypothesized limitation.

2. Clayton Act Section 7

Despite the foregoing, Clayton Act Section 7 is the most plausible provision where one can imagine imputing a restriction on the consideration of out-of-market benefits. The familiar logic is that the text of Section 7, roughly speaking, prohibits any anticompetitive effect that arises anywhere whatsoever,[71] so if a sufficient island of harm can be identified, even in a vast sea of benefits, the acquisition is forbidden.[72] *Philadelphia National Bank*'s decision to exclude certain proffered benefits, although not justified in this manner, gives some life to the suggestion.[73] It is also embraced by the 2023 Merger Guidelines,[74] reversing position from the 2010 Merger Guidelines (without explanation or elaboration),[75] and the notion is invoked in the recent district court decision enjoining the JetBlue/Spirit merger.[76] Finally, Section 7 is where commentators have focused their attention.[77]

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[71] 15 U.S.C. § 18.

[72] Keep in mind that we are only considering inextricably linked harms and benefits. For example, if a spinoff can avoid the harms while retaining the benefits, then the benefits would not be merger-specific (that is, specific to the complete merger) and hence would be noncognizable in any event.

[73] United States v. Phila. Nat'l Bank, 374 U.S. 321, 370–71 (1963).

[74] As mentioned in the introduction, this proclamation is all the more remarkable because the 2023 Merger Guidelines simultaneously expand the domain of likely challenges to many classes of non-horizontal mergers, where it is much more likely—and for some, typical—that mergers' core benefits will lie in different "markets" from those that are the locus of potential harm.

[75] The pertinent language from each is quoted in note 4.

[76] United States v. JetBlue Airways, NO. 23-10511-WGY, at 104–07 (D. Mass. 2024).

[77] *See, e.g.*, Crane, *supra* note 17, at 397; Judd E. Stone & Joshua D. Wright, *The Sound of One Hand Clapping: The 2010 Merger Guidelines and the Challenge of Judicial Adoption*, 39 REV. INDUS. ORG. 145, 154 (2011) (suggesting that merger guidelines' movement toward narrower markets may increase the effect of *Philadelphia National Bank*'s supposed exclusion of out-of-market benefits); Wilson & Klovers, *supra* note 65, at 83–84 (suggesting that the use of narrower market definitions may justify a more relaxed approach to out-of-market benefits); Yun, *supra* note 17 (focusing on Clayton Act Section 7 yet devoting some attention to Sherman Act Section 1). This raises the question why there are so few cases on the issue. One possibility is that the competition agencies (consistent with the leeway noted in the 2010 Merger Guidelines, but not the new version in 2023; *see* note 4 *supra*) abstain from challenging what they regard as desirable mergers, perhaps only deploying the limitation on the merging parties' efficiency defense when they are challenging mergers for which they conclude that the defense fails on other, substantive grounds. Crane, *supra* note 17, at 400 also addresses this question:

> The market-specificity rule has been explicitly invoked in relatively few judicial decisions. There are several possible explanations for this. It may be that few cases present clear instances of efficiencies in one market and anticompetitive effects in another. It also may be that the [*Philadelphia National Bank*] rule is sufficiently clear that merging parties do not find it worth their while to advance balancing arguments that would likely fail. Or, it may be an artifact of the reality that, subsequent to the passage of the Hart-Scott-Rodino Act, relatively few merger cases have been litigated to the point of judicial decision. If that is the case, the rule may still be doing important work behind the scenes in negotiations between the agencies and merging parties.

As suggested throughout the present article, however, an out-of-market limitation would in fact obliterate a broad swath of firms' activities, particularly since Section 7 covers all asset acquisitions, not just "mergers." Hence, it must be that prospective acquirers, sellers of assets or whole firms, and the agencies are acting as if they do *not* really believe that such a restriction exists or would be taken seriously in most of its domain.

Whatever is the proper interpretation of current law, we can see from all the foregoing that maintenance of such a restriction faces an up-hill battle even as a doctrinal matter: it entails a frontal assault on competition law and its articulated policies more broadly; it would shut down some of the most important activity in the economy; it might undermine important provisions like Sherman Act Section 2's application to entry barriers; and it runs counter to the central thrust of the past half-century of Supreme Court antitrust decisions. Yet the idea seems to have some currency, and the absence of substantive Supreme Court merger decisions since 1975 may leave some doctrinal doubt.

Begin with Clayton Act Section 7 itself, the first paragraph of which currently reads:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.[78]

Two passages are worth emphasis here.

First, often forgotten is the breadth of Section 7 as a consequence of the 1950 amendments that extended the prohibition to all acquisitions: not just horizontal ones, and also not just "mergers" (involving stock / shares) but all acquisitions of assets. Indeed, the word "merger" does not appear in the body of Section 7. The 1980 amendments further switched to the word "person" (defined to include corporations). Hence, the predicate now reads: "*[n]o person … shall acquire the whole or any part of the assets of another person* … where …."

However one chooses to interpret the passages that follow this language, it is important to keep in mind that the interpretation applies to *all* acquisitions of *any* assets by *any* person from *any* other person. This author's impression is that many discussions of "merger" law in the United States are oblivious to this breadth. For example, a legislative proposal that comes close to preventing some large firms from making any acquisitions whatsoever would make illegal their purchase of paper clips. And employing, say, a de minimis exception of $50 million would still render illegal key, even totally unrelated purchases of land, buildings, and more.[79] Buying a single commercial cargo plane would be illegal. So much for internal growth!

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[78] 15 U.S.C. § 18.

[79] The Platform Competition and Opportunity Act of 2021, H.R. 3826, 117th Cong. (June 11, 2021), arguably prohibits all future acquisitions (i.e., purchases of anything) by covered platforms. *See id.* § 2(a)(2). The covered firms may defend each purchase, one by one, by presenting clear and convincing evidence, but among what must be shown is that the acquired asset does not assist the platform in boosting or maintaining its market position with respect to the sale or provision of any products or services, which might be understood to include anything that improves these products or services. *See id*. § 2(b). (Perhaps the paper-clip purchase is allowed, as long as the platform can show that paper clips are unhelpful.) The Senate version of this legislation, the Platform Competition and Opportunity Act of 2021, S. 3197, 117th Cong. (November 4, 2021), contains a $50 million de minimis exception. *See id*. § 2(b)(2).)

Second, let us focus on the language most relevant to the specific question of exclusion of out-of-market benefits: "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect …." As an aside, this language is also often misunderstood, and even regularly misquoted in a consequential manner (for example, in the 2023 Merger Guidelines' section on market definition).[80] The combination of the three "any's" along with the "or" suggests that this language—probably viewed by Congress from its first incarnation in 1914 through the 1980 amendments as jurisdictional—most plausibly means something like "anywhere whatsoever, as long as we are talking about commerce in the United States." (Many lawyers and economists may be unaware that, in 1914, the jurisdictional reach of federal statutes with respect to interstate commerce was an important constitutional question and front-of-mind more broadly regarding the permissible boundaries of congressional action.)

One can consider what implications, if any, this clause has for substantive antitrust doctrine. Some, drawing on *Brown Shoe*, see it as the basis for a market definition requirement, entailing a product market ("line of commerce") and geographic market ("section of the country"). I have previously expressed skepticism about this suggestion, one that is importantly undercut (particularly with respect to a product market requirement) by the phrase added in the 1980 amendments: "*or* in any activity *affecting commerce*."[81] Perhaps if market definition was thus understood to lack a statutory foundation, and it was further realized that the 1962 *Brown Shoe* decision (and others in the 1960s and 1970s) obviously cannot be read to interpret this addition from the 1980 amendment—along with market definition having always lacked an economic foundation—market definition would vanish in this realm. That would make it all the more difficult to fashion an in- versus out-of-market boundary that toggled on market definition. But such speculation is not part of current thinking, whatever the reasons.

More specifically, the "any's" language in Section 7, regardless of its implications for a market definition requitement, may be given the literal interpretation that, indeed, the existence of a single island of substantially lessened competition or tendency to monopoly does render an asset acquisition illegal, regardless of any surrounding sea of enhanced competition or greater tendency to disrupt a more substantial monopoly elsewhere. Pertinent examples were offered in section I.B and throughout. A disruptive entrant purchases a plant or warehouse in a remote area to convert it to a new use that enables its disruption elsewhere (geographically or regarding different products). Such an acquisition may well leave some in that locality with fewer job choices and lower wages (those in occupations employed by the current use but not the new one) and local customers with fewer choices and higher prices (such as when one of two existing warehouses is acquired to be put to a different use, giving the remaining warehouse a monopoly). Because Section 7 abandoned its limitation to horizontal acquisitions in the 1950 amendments, this prohibition would apply when the acquisition is for an unrelated use (and the aforementioned harms may actually be more likely). Similar logic applies to routine internal expansion, such as

[80] *See* MERGER GUIDELINES, *supra* note 4, at 39 (omitting, without ellipses, the phrase "or in any activity affecting commerce," which, if it had been acknowledged, arguably would have been understood to undermine the statutory basis for much of the discussion that follows in those guidelines; *see* Louis Kaplow, *The 2023 Merger Guidelines and Market Definition: Doubling Down or Folding?*, 65 REV. INDUS. ORG. 7, 32–33 (2024)).
[81] *See, e.g.*, Kaplow, *Structural Presumption*, *supra* note 44, at 609 & n.96.

when a firm seeks to open an additional plant in a depressed area. Again, however large the benefits even in that locale, some distinct occupations may face job losses and lower wages (those workers now facing greater local monopsony power from remaining employers), and likewise for consumers (who may face more market power from the remaining sellers, now that one of them may have been removed from a line of commerce already subject to supracompetitive pricing). Even two local residents forming a partnership that requires their purchase of some assets from other persons can have such effects. Or one solo practice acquiring another; recall the example where two lawyers who form a partnership plan to stop preparing wills in order to specialize in transactional work.[82]

If lessening competition or tendency to monopoly is viewed entirely locally, the prohibition would be triggered, and the obvious, typical benefits—that are ubiquitous and central to the proper functioning of the economy—would have to be ignored because they are out of market (or out of whatever and wherever). In addition to constituting a shockingly destructive policy, it seems difficult to impute such an intention to the enacting Congresses in 1914, 1950, or 1980 or to the Supreme Court, either a half century ago or today.

Philadelphia National Bank is the other most plausible doctrinal basis for a wholesale exclusion of out-of-market benefits under Section 7, but there are challenges to interpreting the opinion in this manner (setting aside whether any such interpretation would be followed by the current Supreme Court, or any in the past half century).[83] The key passage is:

> [I]t is suggested that the increased lending limit of the resulting bank will enable it to compete with the large out-of-state banks, particularly the New York banks, for very large loans. We reject this application of the concept of "countervailing power." If anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader. For if all the commercial banks in the Philadelphia area merged into one, it would be smaller than the largest bank in New York City. This is not a case, plainly, where two small firms in a market propose to merge in order to be able to compete more successfully with the leading firms in that market. Nor is it a case in which lack of adequate banking facilities is causing hardships to individuals or businesses in the community. The present two largest banks in Philadelphia have lending limits of $8,000,000 each. The only businesses located in the Philadelphia area which

[82] Or, closer to *Philadelphia National Bank*, coming next: suppose that two small law firms, each partly serving local clientele, merge to specialize, moving their offices to the city, no longer taking small matters or any in fields where they have abandoned practicing. Or an individual, new to an area, simply buys an existing business (clearly an acquisition) and plans to discontinue some product lines where few competitors remain.

[83] Werden expresses significant skepticism about whether *Philadelphia National Bank* should be regarded to embrace an exclusion of out-of-market benefits; some of his reasons overlap with those presented here. *See* Werden, *supra* note 17, at 122–26. One of his suggestions is that the Supreme Court may have been rejecting balancing across customer groups rather than across markets, *see id*. at 125, which (he does not mention) may be far more restrictive, as many of the illustrations in part I, above, indicate.

> find such limits inadequate are large enough readily to obtain bank credit in other cities.[84]

Note first that the Court's rejection of the merging banks' proffered justification is not formalistic, rooted in any literal reading of the aforementioned language in Section 7. Instead, like much of the rest of the opinion, it is grounded in reasoning about the merger's likely effects, including whether accepting the justification in the case at hand would entail allowing additional mergers that themselves would be undesirable because of their adverse economic effects.

Second, the reasoning itself, although brief[85] and in respects problematic, is largely consistent with a concern for all effects, including out-of-market benefits, rather than any limitation, wholesale or otherwise. The key out-of-market benefit offered, under the Court's analysis, is nonexistent because those benefits are fully available without the merger. That leaves only the in-market harm.

The Court does appear to contemplate some restriction on *in-market* benefits, specifically, limiting them to where smaller firms are enabled to compete better with larger ones. But most of that discussion seems better understood as expressing skepticism about whether the merger at hand, involving two of the largest banks, really serves that end either. *Philadelphia*

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[84] United States v. Phila. Nat'l Bank, 374 U.S. 321, 370–71 (1963). Also of relevance is the next paragraph in the opinion, *id*. at 371.

> This brings us to appellees' final contention, that Philadelphia needs a bank larger than it now has in order to bring business to the area and stimulate its economic development. . . . We are clear, however, that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and, in any event, has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.

One way to interpret this passage is in line with the ideas developed in section III.A: that possible benefits of stimulating the local economy as such are outside the domain of competition law. For example, they might best be addressed by subsidies or other actions rather than by exemptions from generally applicable laws, be they antitrust, environmental, or otherwise. Instead, the Court may indeed have contemplated some further limitation; if so, its contours are unclear from this brief passage, but it seems to express skepticism of broader, more diffuse, and thus perhaps more speculative and difficult-to-prove effects. *See* Crane, *supra* note 17, at 409–11. Stepping back, the limited discussion is a bit strange in that it seems to accept as a premise the point the Court had just rejected; that is, the Court believed that any firms operating in Philadelphia that needed huge loans could readily get them in New York. Finally, the Court (in the ellipsed material) refers to some of its background discussion earlier in the opinion, which includes, 374 U.S. at 334 n.10 (emphasis added): "Appellees offered testimony that the merger would enable certain economies of scale . . . . But this attempted justification, which was not mentioned by the District Court in its opinion and has not been developed with any fullness before this Court, *we consider abandoned*." Thus, the entire discussion of the subject seems, unlike other parts of the opinion, more of an afterthought, which helps to explain why it constitutes only two paragraphs at the end of a fifty-page opinion.

[85] *See* Crane, *supra* note 17, at 401 ("The *PNB* decision spends all of a paragraph articulating the market-specificity rule.").

National Bank does not seem to offer much support for a wholesale exclusion of out-of-market benefits, that is, when they are found to be real and substantial, meeting all relevant criteria.[86]

A recent district court decision[87] blocking the merger of JetBlue and Spirit seems to draw some support from the idea that out-of-market benefits should be ignored, with isolated pockets of perhaps much smaller harm being sufficient to condemn a merger.[88] So, as noted in an elaborate example in an earlier footnote, a merger creating upward pricing pressure of 2% for two distinct, equal-sized groups and producing otherwise cognizable efficiencies of 10% that

[86] Recall further that, at the time of *Philadelphia National Bank*, it was unclear whether *any* benefits of mergers counted and, indeed, whether efficiencies might be viewed negatively, supporting a decision to block a merger that would offer better products at lower prices. *See id*. at 403 ("*PNB* reflects a more generalized antipathy to efficiencies arguments than the attitude prevailing today."). It would be surprising if the current Supreme Court, or those deciding cases since *Sylvania* in 1977, would adopt that stance. *Cf*. Stone & Wright, *supra* note 77, at 155 ("[T]he limitation on out-of-market efficiencies embodied in *Philadelphia National Bank* originates from an era of antitrust where these formalistic, simplifying assumptions were neither based in economic theory nor on evidence of competitive realities."). The 2023 Merger Guidelines' embrace of the out-of-market limitation, *see* MERGER GUIDELINES, *supra* note 4, at 32, is presented in a brief phrase, without elaboration or any explanation for the reversal of position from the 2010 Merger Guidelines. That passage appears in a brief section on all aspects of the consideration of merger efficiencies, with earlier reference in that segment to passages from 1960's Supreme Court cases taking a negative view of efficiencies. For past half century, however, it is appreciated that courts overwhelmingly refer to *Brown Shoe*'s invocation of the idea that "[i]t is competition, not competitors, which the Act protects" (Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962))—essentially ignoring the following sentence that begins with "[b]ut" and refers to protecting small business even if costs and prices are higher. Indeed, *Philadelphia National Bank* itself elsewhere states: "'[C]ongressional concern [was] with the protection of *competition*, not *competitors*.' *Brown Shoe Co*., *supra*, at 370 U. S. at 320. In an oligopolistic market, small companies may be perfectly content to follow the high prices set by the dominant firms, yet the market may be profoundly anticompetitive." 374 U.S. 367 n.43. Hence, it is rather murky the extent to which the Supreme Court ever fully embraced small business protectionism under Section 7, a moot point in light of its subsequent decisions (although there exist no modern Supreme Court cases on the substance of Section 7).

[87] This case is noted both because of its recency and because of the apparent infrequency with which courts have addressed the out-of-market limitation in the merger context. *See* Crane, *supra* note 17, at 399–400 (finding only a couple of cases); Werden, *supra* note 17, at 126 & n.44 (arguing that Crane's two cases do not support his claim, and finding only one appellate case on point, but only in dictum); Yun, *supra* note 17, at 1279–80 (discussing two circuit court cases).

[88] United States v. JetBlue Airways, NO. 23-10511-WGY, at 104–07 (D. Mass. 2024). Note that if a sufficiently strong view is taken of this idea advanced at the end of the opinion, much of the preceding hundred pages could have been omitted because the proffered benefits would be irrelevant and even a sliver of harm to a small group of customers, which may not have been seriously contested, would be enough to block the merger. In *Anthem*, the district court touched on the issue (although not by name) in a brief paragraph that quoted some of the pertinent language in *Philadelphia National Bank*. United States v. Anthem, Inc., 236 F. Supp. 3d 171, 252 (D.D.C.), *aff'd*, 855 F.3d 345 (D.C. Cir. 2017). In what the government had argued was an independent basis for finding the merger illegal—creating monopsony power to extract lower rates from health care providers—the merging parties had cast as an efficiencies defense, claiming that the savings would be passed on to consumers. The district court did not feel the need to resolve that dispute, finding that the proffered efficiencies were not verifiable, merger specific, or sufficiently likely to be passed on to consumers. *See id*. at 251–53. It is unclear how much role the brief invocation of language from *Philadelphia National Bank* played in the court's analysis, particularly because the court offered neither a specific interpretation of those murky passages nor an explicit connection to the arguments under consideration. Interestingly, although the efficiencies defense was the focus of the appeal and yielded a significant opinion (along with a concurrence and dissent), the appellate opinions did not raise the issue or refer to that part of *Philadelphia National Bank*.

would be fully passed through for one of the groups—resulting in prices 2% higher for one group and 8% lower for the other—would be blocked.[89]

Consider another example, "inspired by" the facts of *JetBlue* (in the Hollywood sense): Suppose (unlike in the actual case) that the only direct effect of the merger would be to shift previous JetBlue flights to the Spirit ultra-low cost model. Suppose further that the effect of this shift would be to provide lower fares for almost everyone on all affected routes and, furthermore, that this would lead legacy carriers to reduce prices as well. However, because the JetBlue planes and routes would no longer offer first class seats (just some Spirit-style, much inferior Big Front Seats), first class passengers would face fewer choices and higher fares. Moreover, the government is able to prove that they are a "relevant" customer group that can indeed be targeted with higher fares by the legacy carriers. The merger would, on the view that any island of anticompetitive effect makes out a violation, have to be blocked.

Whatever differential weight should be given to one versus another group of customers (many, including the present author, would argue: none) a rule that blocks all mergers with any identifiable locus of harm would be catastrophic. It is difficult to believe that a president would want to run on a platform of aggressive enforcement that systematically harmed most people, often greatly, or that an agency head would enjoy testifying before a congressional committee (run by either party) asking for a tenfold budget increase in order to stop myriad highly beneficial transactions.[90] More relevant for this section, the question is whether such an interpretation of Section 7 would convince a modern court that was fully briefed on the matter and truly appreciated the consequences of the wholesale exclusion of out-of-market benefits.

IV. Conclusion

Antitrust law largely and unsurprisingly condemns activities whose effects are detrimental overall. It is hard to imagine any sensible policy in any domain that would, in a broad class of settings, ignore most or all of an action's benefits—or, alternatively, most or all of its costs. The suggestion that antitrust law, in particular Clayton Act Section 7, should ignore all otherwise cognizable benefits when they are "out of market" makes no sense and indeed would have remarkably detrimental consequences. This limitation, which is of questionable legal provenance under Section 7 (and has close to none under Sherman Act Sections 1 and 2), should be nipped in the bud.

The core difficulty with the notion of ignoring out-of-market benefits is that they are ubiquitous in a well-functioning economy and at the core of the gains that market economies

[89] *See supra* note 42.

[90] Similarly, can one imagine a consumer advocacy group rallying its supporters to support legislation to disallow consideration of out-of-market benefits throughout antitrust law, that is, if they were honest and not confused? Here's their pitch: "We recognize that, in any case in which the prohibition is decisive—which arises precisely when out-of-market consumer benefits are greater than in-market harms—you, our supporters, will be made worse off as a whole. And we understand that, across the full gamut of cases in the future, almost all of you will individually be made worse off, many substantially so. But we know you are with us on the 'stick to the market' principle, so please urge your representatives to vote yes!"

have delivered over centuries. They are a necessary consequence of the flow of resources into their highest value uses because such resources accordingly flow out of somewhere else. This phenomenon is present for myriad small adjustments that occur continually and for the most significant, innovative activity that creates enormous benefits over the course of generations. It is central to the positive welfare properties of a market economy. Even in the presence of substantial imperfect competition, including monopolies, it is the goal of competition law to remove impediments to this process rather than to shut it down.

A secondary but important defect in the idea of ignoring out-of-market benefits is its reliance on market definition. In addition to the deep illogic of the market definition paradigm, market definition has a further, fatal flaw in the present context: the complete lack of nexus between the determinants of a relevant antitrust market and any plausible reason for ignoring an action's benefits. Why should a benefit be counted when the cross-elasticity of demand for some good is just high enough to combine the market in which the benefit arises with that in which the harm resides, but instead be ignored entirely when the cross-elasticity is slightly lower? Particularly when this cross-elasticity is entirely unrelated to any basis for counting rather than ignoring the benefit.

The larger problem is that benefits often arise in markets entirely separate from the locus of a practice's costs, particularly when truly significant redeployments of resources occur. In such cases, market definition—no matter how broadly or narrowly markets are defined and what technique is used to do so—cannot help but ignore these benefits. Thus, the restrictive approach would prohibit most of the largest gains that an economy can produce. In this regard, the 2023 Merger Guidelines' simultaneous extension to broad domains of non-horizontal mergers—where gains will quite often fall in markets different from those where harm may arise—while extinguishing consideration of any out-of-market benefits is an extremely dangerous development. Of course, agencies may choose to eschew that destructive path, and courts may not be receptive if they tried to follow it.

Administrative concerns may sensibly limit a competition agency's or a court's consideration of some effects, particularly when they are highly speculative or more properly fall under the jurisdiction of other government institutions (such as with macroeconomic policy). But these sorts of concerns offer no basis for ignoring the direct and often most important effects of firms' actions (such as the introduction of new products) that are central to the operation of a market economy. Regarding the law, it is more than a century since the Supreme Court abandoned the pretense that Section 1 bans nearly all contracts; it is well established that Section 2 does not prevent monopolists from improving existing products and introducing new ones; and it is unimaginable that Section 7 prohibits all transactions that redeploy acquired assets to new sectors, including expansion of nascent firms that aim to disrupt powerful incumbents.

For more than half a century, the Supreme Court has rejected formalism that departs from economic substance in antitrust jurisprudence, whether in the name of statutory interpretation or small business protectionism. Ignoring out-of-market benefits is a far more radical and detrimental decision constraint than any of those abandoned rules. Out-of-market benefits should be *front* of mind, not out of our minds, when they constitute direct, otherwise cognizable benefits from the activity under scrutiny. The antitrust community, official agency guidance, and

the courts should explicitly recognize the folly of the suggestion that antitrust law ignore consideration of out-of-market benefits.