
COMMENTS

STILL MOCKING JUDICIAL POWER?

DETERMINING DEFERENCE ACCORDED TO THE JUSTICE DEPARTMENT IN REVIEW OF CONSENT DECREES IN HORIZONTAL MERGERS

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I. INTRODUCTION

Pursuant to the Tunney Act, consent agreements between the U.S. Department of Justice Antitrust Division and potential antitrust violators are subject to judicial review. Passed in 1974 to ensure that such consent decrees are “in the public interest,” the Tunney Act appears to grant judges unlimited discretion in accepting or rejecting proposed agreements.¹ Even after amendments in 2004, the Act does not define “public interest,” provide guidance for rejecting consent agreements, or set the level of deference courts should accord to the Justice Department.²

Much has been written about how the Tunney Act *should* operate.³ However, less has been devoted to how the Tunney Act operates in practice. This paper examines horizontal mergers in order to determine the level of deference courts provide the Justice Department when reviewing consent agreements. To do so, this paper begins with a discussion of mergers and consent agreements, before examining the Tunney Act in depth, with special attention paid to comparisons between the Act and the Administrative Procedure Act. Against this legal background, the paper analyzes how courts applied the Tunney Act in two recent cases: the Anheuser-Modelo merger, in which Anheuser-Busch purchased the maverick firm Grupo Modelo, and the US Airlines-American Airlines merger, in which American Airlines and US Airways

¹ Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 (2012).

² *See id.*

³ *See, e.g.,* Lloyd C. Anderson, *Mocking the Public Interest: Congress Restores Meaningful Judicial Review of Government Antitrust Consent Decrees*, 31 VT. L. REV. 593 (2007) (discussing how courts should apply the 2004 amendments to the Tunney Act); Lloyd C. Anderson, *United States v. Microsoft, Antitrust Consent Decrees and the Need for a Proper Scope of Judicial Review*, 65 ANTITRUST L.J. 1 (1996) (discussing the misapplication of the Tunney Act in *United States v. Microsoft*, 56 F.3d 1448 (D.C. Cir. 1995)); Lawrence M. Frankel, *Rethinking the Tunney Act: A Model for Judicial Review of Antitrust Consent Decrees*, 75 ANTITRUST L.J. 549 (2008) (discussing what the proper scope of judicial review and deference should be); Joseph G. Krauss et. al., *The Tunney Act: A House Still Standing*, 6 ANTITRUST SOURCE 1 (2007) (discussing the extent of Tunney Act review and how it should be applied in the future); James Rob Savin, *Tunney Act '96: Two Decades of Judicial Misapplication*, 46 EMORY L.J. 363 (1997) (discussing the history, judicial application, and misapplication, of the Tunney Act, and how it should be applied in the future).

combined to create the largest airline in the world.⁴ Because nearly all Tunney Act decisions occur at the district court level, the final section discusses the precedential-like nature of District Court approvals of consent agreements and the potential impact on the Justice Department.⁵

Determining the courts' level of deference is especially important in the context of mergers because consent agreements have virtually replaced formal adversarial proceedings. This paper only examines horizontal mergers. Though the same concepts likely apply to vertical mergers, combination mergers, and Sherman Act cases, more research should be done before assuming that courts apply the same level of deference in these cases. In particular, the degree of deference can depend on the extent of an evidentiary record, and consent decrees in Sherman Act cases will typically include a more substantial record for the court to evaluate.

II. HORIZONTAL MERGER REVIEW: THE CLAYTON ACT AND CONSENT AGREEMENTS

Section 7 of the Clayton Act and the Hart-Scott-Rodino Act form the basic law and process, respectively, for horizontal merger review.⁶ Under the Hart-Scott-Rodino Act, significant mergers must be reported to the Federal Trade Commission and Department of Justice for antitrust review.⁷ If the review raises competition issues (as defined by the Clayton Act), the merging companies must provide the Agency with additional information demonstrating that the merger is not

⁴ Tom Schoenberg & Sara Forden, *AB InBev Wins U.S. Approval for \$20.1 Billion Modelo Deal*, BLOOMBERG (Apr. 20, 2013, 12:00 AM), <https://www.bloomberg.com/news/articles/2013-04-19/ab-inbev-u-s-file-agreement-in-court-on-modelo-acquisition>; Jay Mouawad, *American and US Airways Announce Deal for \$11 Billion Merger*, N.Y. TIMES (Feb. 13, 2013), <http://dealbook.nytimes.com/2013/02/13/american-and-us-airways-said-to-vote-for-merger>.

⁵ Both the Federal Trade Commission (FTC) and Department of Justice (DOJ) review antitrust violations. Which agency takes the case depends on historical practices. For simplicity, this paper focuses on the Justice Department.

⁶ 15 U.S.C. § 18a (2012). *See also* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES, at 1 (Aug. 2010), <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf> [hereinafter *2010 Horizontal Merger Guidelines*]; *see generally* *Merger Review*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/media-resources/mergers-and-competition/merger-review> (last visited Sept. 20, 2016) (listing all FTC merger review press releases).

⁷ § 18a.

anticompetitive.⁸ The Agency then decides whether to close the investigation or take legal action in district court.⁹

A. The Clayton Act

Section 7 of the Clayton Act states that:

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.¹⁰

The Clayton Act allows the Justice Department to enjoin potentially anticompetitive mergers before they are consummated.¹¹ Broadly speaking, the anticompetitive harm that concerns the Justice Department can be divided into two often-overlapping categories: unilateral and coordinated effects.¹²

Mergers causing unilateral effects “tend to create a monopoly”¹³ and arise “even if the merger causes no changes in the way other firms behave.”¹⁴ For example, in *United States v. LM U.S. Corp Acquisition*

⁸ Merging firms can challenge the Justice Department’s determination that the merger will be anticompetitive by demonstrating that it will generate merger-specific efficiencies, such as innovation or providing two maverick firms with economies of scale to allow them to disrupt a market. See U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 49 (2006), <https://www.ftc.gov/sites/default/files/attachments/review/commentaryonthehorizontalmergerguidelinesmarch2006.pdf>. This paper assumes that the merging companies have not demonstrated procompetitive justifications. This is an assumption that does not impact the outcome of the paper because if there were procompetitive justifications for a merger, the Justice Department would drop the case and allow the merger to be completed.

⁹ See DEP’T OF JUSTICE ANTITRUST DIVISION, POLICY GUIDE TO MERGER REMEDIES III.A (2004), <https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf>; see also *Merger Review*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/media-resources/mergers-and-competition/merger-review> (last visited Sept. 20, 2016) (describing the investigation process).

¹⁰ 15 U.S.C. § 18 (2012).

¹¹ *Id.*

¹² 2010 *Horizontal Merger Guidelines*, *supra* note 6, at 1.

¹³ § 18.

¹⁴ 2010 *Horizontal Merger Guidelines*, *supra* note 6, at 3.

Inc.,¹⁵ Landmark Aviation sought to acquire Ross Aviation.¹⁶ Both companies were the only fixed base operators—businesses providing flight support services, such as fueling, hangar rentals, and other services, to airlines—at Scottsdale Municipal Airport.¹⁷ The merger would lead to a monopoly, “eliminat[ing] the competitive constraint[s] each impose[] on the other . . . [and would] likely result in higher prices . . . and a lower quality of service for customers in violation of Section 7 of the Clayton Act.”¹⁸

The DOJ estimates unilateral effects by using market share as a proxy for market power.¹⁹ The market is defined by the hypothetical monopolist test: assuming the proposed market were run by one firm, the market is correctly defined if a small but substantial increase in price would not lead consumers to purchase a substitute product.²⁰ For example, in *LM U.S. Corp Acquisition, Inc.*, the product market was the group of fixed base operators and the geographic market was Scottsdale Municipal Airport.²¹ Fixed base operators were the product market because customers could not obtain flight services without a fixed base operator—the service had no substitute.²² Scottsdale Municipal Airport was the geographic market because obtaining services at another airport was not an economically practical alternative as customers had selected the Scottsdale Municipal Airport for its proximity to Scottsdale.²³ Therefore, “a small but significant post-acquisition increase in the prices for fuel, hangar space, and other . . . services at [the airport] would not cause general aviation customers to switch to other airports in sufficient quantities to make such a price increase unprofitable.”²⁴

¹⁵ Complaint at 2, *United States v. LM U.S. Corp Acquisition Inc.*, No. 1:14-cv-01291 (D.D.C. Oct. 30, 2014).

¹⁶ *Id.* at 3.

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 5.

¹⁹ *2010 Horizontal Merger Guidelines*, *supra* note 6, at 7.

²⁰ *Id.* at 10. A “small but substantial increase” is generally considered to be five percent. *Id.* The Horizontal Merger Guidelines outline, in far more detail, the process of defining the product market and geographic market and for determining the market share of individual firms.

²¹ Complaint, *LM U.S. Corp.*, *supra* note 15, at 4.

²² *Id.* at 2.

²³ *Id.* at 4–5.

²⁴ *Id.*

In contrast to mergers causing unilateral effects, mergers causing coordinated effects impact other firms' behavior by "increasing the risk of coordinated, accommodating, or interdependent behavior among rivals,"²⁵ thus violating the Clayton Act by "substantially lessen[ing] competition."²⁶

"Increasing the risk of *coordinated, accommodating, or interdependent* behavior" describes a tendency of the market to form three types of conduct: coordinated (or "collusive"), accommodating (or "tacit"), and interdependent (or "parallel").²⁷ To avoid confusion, this paper prefers "collusive, tacit, and parallel."²⁸ Collusive conduct exists when multiple firms explicitly negotiate how they will or will not compete—such agreements violate the criminal provisions of the Sherman Act.²⁹ Tacit coordination also involves a common understanding, but unlike collusive conduct, tacit coordination is enforced implicitly, through firms detecting and punishing defectors.³⁰ Finally, parallel behavior describes a Cournot oligopoly, where, although individually firms act rationally and competitively, market forces inevitably lead to price increases or quality decreases.³¹

²⁵ 2010 *Horizontal Merger Guidelines*, *supra* note 6, at 2.

²⁶ 15 U.S.C. § 18 (2012).

²⁷ 2010 *Horizontal Merger Guidelines*, *supra* note 6, at 2 (emphasis added).

²⁸ See generally EINER ELHAUGE, UNITED STATES ANTITRUST LAW AND ECONOMICS (2d ed. 2011) (presenting economic analyses for antitrust analysis and antitrust law through the use of selected cases). Such terms are also common from the Justice Department and Federal Trade Commission; it is not clear why the Agencies decided to depart from the norm in the Horizontal Merger Guidelines.

²⁹ 2010 *Horizontal Merger Guidelines*, *supra* note 6, at 24. Coordinated behavior is the same as concerted behavior and violates Section 1 of the Sherman Act. 15 U.S.C. § 1 (2012) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

³⁰ 2010 *Horizontal Merger Guidelines*, *supra* note 6, at 24–25.

³¹ *Id.* Interdependent behavior is not prohibited by the Sherman Act. *Id.* at 25 ("Coordinated interaction includes conduct not otherwise condemned by the antitrust laws."). Interdependent behavior describes a Cournot oligopoly, which describes the tendency of each firm to make rational choices that result in supra-competitive prices. which Cournot oligopolies exist when firms have similar marginal costs, can choose whatever *output* level maximizes profits, and sell homogeneous goods. In contrast, if firms cannot control the output, but can control the price, then each firm, even in a concentrated market, will undercut the other, leading to competitive prices (a situation also called "Bertrand Coordination"). See ELHAUGE, *supra* note 28, at 590–93 (describing a Cournot oligopoly and when a market tends toward one instead of Bertrand Coordination).

Unlike unilateral effects, which are determined by estimating market power from market share,³² the risk of coordination cannot be measured precisely. Instead, the Justice Department evaluates coordinated effects by examining market concentration and the degree the market is vulnerable to collusive, tacit, or parallel coordination.³³ The Justice Department challenges mergers when the market is concentrated, the merger increases that concentration, the market is vulnerable to coordination, and the merger could enhance that vulnerability.³⁴ When a market is sufficiently concentrated and the merger increases concentration too much, the merger is presumptively anticompetitive, regardless of vulnerability.³⁵

The DOJ uses the Herfindahl-Hirschman Index (HHI), which is the sum of the squares of the individual firms' market shares, to measure market concentration.³⁶ For example, in a market with three firms holding ten percent, thirty percent, and sixty percent market shares, the HHI would be $100 + 900 + 3,600 = 4,600$. Both the pre-merger HHI and the change in HHI are relevant. The Justice Department rarely challenges mergers that increase the HHI by less than 100.³⁷ Similarly, the DOJ rarely challenges mergers where the pre-merger HHI is below 1,500, even if the increase is substantially above 100.³⁸ Mergers "potentially raise significant competitive concerns and often warrant scrutiny" when they both increase the HHI by more than 100 and the

³² 2010 *Horizontal Merger Guidelines*, *supra* note 6, at 20. This is not to imply that unilateral effects are simple, as the Justice Department must still define the product market and geographic market and accurately measure market shares. *See id.* at 7–19. Although monopoly power cannot be determined precisely, the Justice Department presumes that a firm with a sufficiently large market share can act monopolistically. Thomas G. Krattenmaker et al., *Monopoly Power and Market Power in Antitrust Law*, 76 *GEO. L.J.* 241, 246 (1987). Market share, and increases in market share after a merger, are relatively easy to measure compared to measuring the tendency of the market to coordinate. *See 2010 Horizontal Merger Guidelines*, *supra* note 6, at 16–17.

³³ 2010 *Horizontal Merger Guidelines*, *supra* note 6, at 25.

³⁴ *Id.*

³⁵ *Id.* at 19.

³⁶ *Id.* at 18–19. HHI ranges between 10,000, indicating a monopoly ($100^2 = 10,000$) to a number approaching zero, indicating perfect competition (where $m = \text{market share of firm } n$). *Id.*

³⁷ *Id.* ("Mergers involving an increase in the HHI of less than 100 points are unlikely to have adverse competitive effects and ordinarily require no further analysis.")

³⁸ *Id.*

market had a pre-merger HHI of over 1,500.³⁹ In highly concentrated markets where the pre-merger HHI is over 2,500, mergers that increase the HHI by 200 are “presumed to be likely to enhance market power” and require significant procompetitive justifications or remedies.⁴⁰

A merger can also be presumptively anticompetitive if it eliminates a maverick firm, even if the HHI does not increase by more than 100.⁴¹ Maverick firms are those that play disruptive roles in the market to the general benefit of consumers; despite occupying only a tiny percentage of the market, maverick firms check the ability of dominant players to raise prices or decrease quality.⁴² Such mergers may not increase the HHI by 100 because maverick firms tend to be very small.

In addition to market concentration, the Justice Department considers the market’s vulnerability to coordinated effects. The most significant evidence of vulnerability is past practices by market leaders; previous or failed express collusion among firms enjoying a substantial market share demonstrates vulnerability (unless market conditions have changed significantly since the collusion).⁴³ Past collusion attempts demonstrate that market leaders prefer collusion over competition and that the market is sufficiently concentrated—or in the case of failed attempts, almost sufficiently concentrated—to support collusion.⁴⁴

The Justice Department usually relies on other market conditions to demonstrate vulnerability to coordinated effects, such as the extent to which competitive initiatives, for example pricing and capacity, can be “promptly and confidentially” observed.⁴⁵ The ability to observe

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 25.

⁴² *Id.* at 3–4. Examples of maverick firms include Boost Mobile, which offers prepaid, contract-free cellphone plans; Spirit Airlines, which heavily price discriminates to provide a low-service, lower-cost option to travelers; and Uber, which provides a low-cost alternative to taxis. See BOOST MOBILE, <https://www.boostmobile.com> (last visited July 3, 2016); SPIRIT, <https://www.spirit.com> (last visited July 3, 2016) (examples of Spirit Airlines’ price discrimination are on file with the author); UBER, <https://www.uber.com> (last visited July 3, 2016). For a discussion on maverick firms within mergers and coordinated effects, see Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U. L. REV. 135 (2002).

⁴³ 2010 *Horizontal Merger Guidelines*, *supra* note 6, at 25.

⁴⁴ *Id.*

⁴⁵ *Id.* at 26.

competitive initiatives promptly and confidently allows firms to anticipate strong reactions and provides a mechanism to engage in tacit collusion. For example, in the airline industry, airlines use easily-observable ticket fares to detect and punish other airlines for discounting prices.⁴⁶ When one airline discounts on one route, others respond by aggressively discounting on *another* route where the discounting airline prefers higher fares.⁴⁷ Such “cross-market initiatives” deter price competition.⁴⁸

Access to information alone doesn’t support potential coordination. The Department also looks at the potential reward from using anticompetitive methods to attract customers away from rivals: a large reward incentivizes anticompetitive behavior.⁴⁹ Finally, the Justice Department examines whether firms would be able to hold on to those customers attracted away from rivals using anticompetitive means.⁵⁰

In sum, the Justice Department considers a merger anticompetitive when it results in either a firm gaining enough market power to raise prices or decrease quality competitively, or it results in a market that is vulnerable to coordinated effects, and, in both instances, the merging parties cannot provide procompetitive justifications for the anticompetitive effects of their combination. When this is the case, the Justice Department will sue in District Court to enjoin the merger. Such lawsuits always end in consent agreements: settlements between the merging parties and the DOJ, where the new firm agrees to take steps to remedy the anticompetitive concerns.

B. Consent Agreements

In the vast majority of mergers flagged as potentially anticompetitive, the companies trying to merge drop their attempted

⁴⁶ See Amended Complaint at 16, *United States v. US Airways Grp., Inc.*, No. 1:13-cv-01236-CKK (D.D.C. Sept. 5, 2013).

⁴⁷ See *id.* Airlines can observe ticket prices not only through the same methods consumers do, such as GoogleFlights, but through the Airline Tariff Publishing Company, which airlines use to monitor and analyze each other’s fares and fare changes and implement strategies to coordinate prices. *Id.* Use of APTCO was so prevalent that it led to a lawsuit in 1992, followed by a Tunney Act consent decree (now expired) to prevent use of APTCO as a signaling device. *Id.*

⁴⁸ 2010 *Horizontal Merger Guidelines*, *supra* note 6, at 26.

⁴⁹ *Id.*

⁵⁰ *Id.*

merger because maintaining a merger during consent negotiations is expensive.⁵¹ For those that continue, the case almost always ends in a consent agreement between the merging parties and the DOJ. In writing these consent agreements (also called “remedies” because they are intended to remedy the competitive harm the merger causes), the Justice Department is guided by three general principles:

1. “[T]he remedy should focus on preserving competition, not protecting individual competitors.”⁵²

2. The remedy must “flow from the theory or theories of competitive harm” alleged in the complaint.⁵³

3. The remedy should be “carefully tailored” to the harm and “effectively address each of the [Justice Department’s] competitive concerns.”⁵⁴

Remedies can be structural or conduct-based.⁵⁵ A structural remedy alters the market (typically by divestiture of assets), while a conduct remedy involves promises to avoid anticompetitive behavior.⁵⁶ The government prefers structural to conduct remedies.⁵⁷ Consent agreements are frequently formed before the complaint is filed, and the Department brings the complaint and the settlement to the District Court on the same day.⁵⁸

⁵¹ ELHAUGE, *supra* note 28, at 587–88.

⁵² U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION, POLICY GUIDE TO MERGER REMEDIES (June 2011) at 2 [hereinafter *2011 Remedies Guide*], <https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf>.

⁵³ *Id.* at 4.

⁵⁴ *Id.* at 3–4; *see also id.* at 4 (stating that there must be a “close, logical nexus between the proposed remedy and the alleged violation”).

⁵⁵ *Id.* at 2.

⁵⁶ *Id.* For example, in 1992 the Justice Department sued the airline industry for using the Airline Tariff Publishing Company as a signaling device to facilitate agreements on fares, and the lawsuit ended in a consent decree where the airlines agreed not to continue that practice. *See Amended Complaint, U.S Airways Grp.*, *supra* note 46, at 16.

⁵⁷ *See* U.S. DEP’T OF JUSTICE ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES, at III.A (Oct. 2004), <https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf>.

⁵⁸ *See, e.g.*, *United States v. ConAgra Foods, Inc.*, No. 1:14-cv-00823 (D.D.C. May 20, 2014) (noting the complaint and settlement were filed on same day); *United States v. Continental AG*, No. 1:14-cv-02087 (D.D.C. Dec. 11, 2014) (noting the complaint and

Consent agreements, as alleged in the complaint, are best analyzed through the framework of the Clayton Act because they must offer remedies that “flow from the theory or theories of competitive harm”.⁵⁹ Given that unilateral effects concern only the firms in negotiations with the DOJ, while coordinated effects concern the entire market (and therefore parties not bound by the settlement), it is easier to address the unilateral, rather than coordinated, effects of mergers.

The Justice Department primarily uses divestiture to address unilateral effects. For example, in *United States v. LM U.S. Corp Acquisition Inc.*, discussed briefly above,⁶⁰ the consent agreement required Landmark Aviation to divest Ross Aviation’s assets at Scottsdale Municipal Airport to Signature Flight Support Corporation or “another acquirer in such a way as to satisfy the United States in its sole discretion that the operations can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the relevant market.”⁶¹

The fact that Landmark could divest to another acquirer demonstrates that the Justice Department was mostly concerned about unilateral effects. Because remedies must “flow from the theory or theories of competitive harm,”⁶² and because coordinated effects describe market conditions and tendencies towards collusion, tacit coordination, or parallel behavior, if coordinated effects were present, the Justice Department would not allow the divestments to go to another firm without substantial proof that the firm would upset the market.⁶³

settlement were filed on same day); *United States v. Cinemark Holdings, Inc.*, No. 1:13-cv-00727 (D.D.C. May 20, 2013) (noting the complaint and settlement were filed on same day).

⁵⁹ *2011 Remedies Guide*, *supra* note 52, at 4.

⁶⁰ *See supra* notes 13–15 and accompanying text.

⁶¹ Competitive Impact Statement at 6, *LM U.S. Corp Acquisition Inc.*, No. 1:14-cv-01291 (D.D.C. July 30, 2014). For other examples of consent agreements in the unilateral context, see Motion and Memorandum in Support of Final Judgment at 2, *United States v. Gen. Elec. Co.*, No. 1:11-cv-01549 (D.D.C. Nov. 22, 2011) (requiring GE to divest the Coverstream Electric Machinery Holding Company business before merging with the only other producer of goods produced by the Coverstream division); *United States v. Signature Flight Support Corp.*, No. 1:08-cv-01164 (Fla. D.C. 2008) (requiring, in a case also about fixed base operators, Signature to divest all of Hawker Beechcraft’s existing and future fixed base operation facilities at Indianapolis International Airport because Signature and Hawker Beechcraft were the only two fixed base operators at that airport).

⁶² *2011 Remedies Guide*, *supra* note 52, at 4.

⁶³ *Id.* at 7–8.

When addressing coordinated effects, the remedies should line up with the reasons for finding coordinated effects in the first place.⁶⁴ For example, if a market is susceptible to coordination because it will be too concentrated following the merger, the consent agreement may require the combined company to divest to a “vigorous and independent competitor,”⁶⁵ as the Justice Department did in *United States v. Verso Paper Corp.*⁶⁶ There, Verso Paper and Newpage Holdings, two paper producers, sought to merge. Post-acquisition, the market would be highly concentrated, facilitating tacit coordination because “[a] small number of producers dominate the industry, and producers regularly obtain information from customers about their options and competitors’ prices and product availability.”⁶⁷ The divestments had to be made to Catalyst Paper Corporation, which would establish a vigorous and independent competitor, preserving the preexisting competitive structure of the markets.⁶⁸

If the risk of coordination exists because the merger eliminates a maverick firm, the Justice Department requires that the “vigorous and independent competitor”⁶⁹ has “maverick-like interests and incentives.”⁷⁰ Especially if the Justice Department is concerned with coordinated effects among a small set of post-merger competitors, such as an oligopoly, the divestments should be to a firm outside that set.⁷¹ For example, in *United States v. Anheuser-Busch*,⁷² Anheuser-Busch (the makers of Budweiser) sought to purchase Grupo Modelo (the makers of Corona), a maverick firm within the beer industry.⁷³ After the merger, two beer companies, Anheuser and MillerCoors, would account for 65

⁶⁴ *Id.* at 4.

⁶⁵ *Id.* at 28; see also Competitive Impact Statement at 17, *United States v. ConAgra Foods, Inc.*, No. 1:14-cv-00823 (D.D.C. May 20, 2014).

⁶⁶ Complaint at 1, *United States v. Verso Paper Corp.*, No. 1:14-cv-02216-TSC (D.D.C. Dec. 31, 2014).

⁶⁷ *Id.* at 8.

⁶⁸ Response to Public Comments at 8, *Verso Paper*, No. 1:14-cv-02216 (D.D.C. May 18, 2015).

⁶⁹ *2011 Remedies Guide*, *supra* note 52, at 28; see also Competitive Impact Statement, *ConAgra Foods Inc.*, *supra* note 65, at 17.

⁷⁰ *2011 Remedies Guide*, *supra* note 52, at 28.

⁷¹ *Id.*

⁷² Complaint at 1, *United States v. Anheuser-Busch InBev SA/NV*, No. 1:13-cv-00217 (D.D.C. Jan. 31, 2013).

⁷³ *Id.* at 1, 9.

percent of all sales.⁷⁴ Anheuser and MillerCoors priced their beers in a tacit coordination scheme where one would raise prices as a signal to the other to follow.⁷⁵ Modelo subverted that price structure and prevented Anheuser and MillerCoors from raising prices indiscriminately.⁷⁶ To address the elimination of Modelo, the Justice Department required a complex divestiture scheme to ensure that at least one independent company would continue supplying Corona beer to the United States: Anheuser had to divest all of Modelo's ownership in Crown Imports, the distributor of Corona beer, to another company, and provide that company with a perpetual license to create and sell Corona beer in the United States.⁷⁷ The company receiving the divestiture assets also had to increase its brewing capacity to meet American demand so that it would not be dependent on Anheuser to sell Corona in the United States.⁷⁸

Finally, when the risk of coordinated effects is a risk of parallel behavior, the Justice Department might rely on a combination of

⁷⁴ *AB Inbev and SABMiller Merger Focuses on Markets Outside U.S.*, FORBES (Nov. 16, 2015, 8:36 AM), <http://www.forbes.com/sites/greatspeculations/2015/11/16/ab-inbev-and-sabmiller-merger-focuses-on-markets-outside-the-u-s/#4ef8bc312cdc>.

⁷⁵ Although such actions are troubling, and may seem as if they should violate antitrust laws, recall that “[c]oordinated interaction includes conduct not otherwise condemned by the antitrust laws.” *2010 Horizontal Merger Guidelines*, *supra* note 6, at 25. This degree of tacit coordination, absent explicit agreements or other anticompetitive factors, is not per se illegal under Section 1 of the Sherman Act. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (“Tacit collusion . . . [is] not in itself unlawful.”). Therefore, it would be analyzed under Section 2 of the Sherman Act, which would only occur if there was a dangerous probability that Anheuser or MillerCoors would succeed in obtaining a monopoly. Likely, each individual firm would not have enough market power to demonstrate monopolization. See William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 952–68 (1981) (surveying case law).

⁷⁶ Complaint, *Anheuser-Busch*, *supra* note 72, at 3 (“Modelo has resisted [Anheuser]-led price hikes. . . . [Anheuser] internal documents acknowledge that Modelo has put ‘increasing pressure’ on [Anheuser] by pursuing a competitive strategy *directly at odds* with [Anheuser]’s well-established practice of leading prices upwards.”).

⁷⁷ Competitive Impact Statement at 10, *United States v. Anheuser-Busch InBev SA/NV*, No. 1:13-cv-00127-RWR (D.D.C. Apr. 19, 2013). Whether the divestment scheme actually would lead to an independent supplier is addressed below, in Part III.A. For another example of the Justice Department requiring the merging firms to establish an independent competitor, see *United States v. Verso Paper Corp.*, No. 1:14-cv-02216-TSC (D.D.C. Dec. 31, 2014) (settlement filed May 18, 2015). In *Verso Paper*, the Justice Department required Verso to transfer two paper mills to a “vigorous and independent competitor” to preserve competition. Response to Public Comments at 4, *Verso Paper*, No. 1:14-cv-02216-TSC (D.D.C. Dec. 31, 2014).

⁷⁸ Competitive Impact Statement, *Anheuser-Bush*, *supra* note 77, at 10.

divestments, establishment of a viable competitor, and conduct remedies. Though all three are frequently used to address other forms of potential coordination, a combination strategy is particularly useful for parallel behavior when the problem stems from market failure and not anticompetitive behavior. This was likely the case in *ConAgra Foods*, where two of the three largest flour millers in the United States agreed to merge.⁷⁹ The Justice Department asserted that this would likely lead to parallel effects.⁸⁰ The market for flour is transparent, giving millers insight into rivals' costs, prices, output, and capacity.⁸¹ Flour is also a homogeneous product with relatively inelastic demand.⁸² Together, this meant that by making rational, competitive decisions, each mill would be making the same decision as their rivals—pushing prices above costs despite not agreeing to do so.⁸³ To address the potential parallel behavior, the Justice Department required the new company to divest four mills to an “independent and economically viable competitor”⁸⁴ and enacted conduct requirements that prevented information from being too readily available between the companies.⁸⁵

III. THE TUNNEY ACT

Consent decrees are not automatically enacted. In response to claims that the Justice Department abused consent decrees, Congress passed the Tunney Act, which requires the Justice Department to follow additional procedures while subjecting consent decrees to judicial

⁷⁹ Complaint at 2, *United States v. ConAgra Foods, Inc.*, No. 1:14-cv-00823 (D.D.C. May 20, 2014).

⁸⁰ Competitive Impact Statement, *Anheuser-Bush*, *supra* note 77, at 10.

⁸¹ *Id.* at 11.

⁸² *Id.* “Elasticity” describes the impact of price on demand. A relatively inelastic good, such as cigarettes or insulin, will not experience significant changes in sales should the price increase, and a firm can increase price and increase profits.

⁸³ As mentioned above, these factors form the presumption of a Cournot oligopoly, though the Justice Department does not use that word. If firms have constant marginal costs, homogeneous products, relatively unlimited quantity, and information is easily observed, then the market will tend towards supra-competitive prices. Flour is a homogeneous product and it is reasonable to expect that flour mills would have similar marginal costs. This would suggest a tendency of the market to form a Cournot oligopoly, leading to monopolistic pricing despite each firm making the competitively best decisions. See ELHAUGE, *supra* note 28, at 590–93 (describing a Cournot oligopoly and when a market tends towards one instead of Bertrand Coordination).

⁸⁴ Competitive Impact Statement, *ConAgra Foods*, *supra* note 65, at 23–27.

⁸⁵ Complaint, *ConAgra Foods*, *supra* note 79, at 12.

review.⁸⁶ To diminish the risk of political influence, the Tunney Act requires a notice and comment period, a competitive impact statement, and Justice Department responses to comments.⁸⁷ To ensure that consent decrees fit generally within the scope of antitrust laws and to prevent judicial “rubber stamping” of the decrees, the Tunney Act requires judicial review to ensure that consent decrees are “in the public interest.”⁸⁸ However, Congress neither defined “public interest” nor defined the scope of review or degree of deference to be accorded to the Justice Department.

A. Determining Public Interest and Deference: Pre-2004

Courts quickly settled on a narrow definition of public interest: consent decrees are valid as long as they are “within the reaches of public interest”—they do not have to be the best resolution.⁸⁹ Judges do not have to embark on full antitrust review of the merger and consent decree—this recognizes that a consent decree is a compromise made under the discretion of the Justice Department.⁹⁰

The degree of deference took longer to define, in part because of a lack of appellate review; because courts rarely reject consent agreements, there are virtually no incentives for parties to appeal.⁹¹ The appellate

⁸⁶ See, e.g., *United States v. AT&T*, 552 F. Supp. 131, 136–37 (D.D.C. 1982) (explaining the history of the *Western Electric* case: after originally suing in 1949, the Justice Department entered into a consent agreement in 1953 that imposed only limited relief and did not require the divestiture of Western Electric, despite originally being a goal of the DOJ. The limited relief seemed influenced by lobbying of the new Republican administration.); *United States v. ITT Corp.*, 349 F. Supp. 22, 25 (D. Conn. 1972), *aff’d sub nom. Nader v. United States*, 410 U.S. 919 (1973) (upholding consent decree many believed inadequate).

⁸⁷ See 15 U.S.C. § 16.

⁸⁸ 15 U.S.C. § 16; see also H.R. Rep. No. 93-1463 (1973), *reprinted in* 1974 U.S.C.C.A.N. 6537; 119 Cong. Rec. 24598 (1973) (statement of Sen. Tunney) (referencing “inequitable and improper” settlements).

⁸⁹ *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975). See generally Frankel, *supra* note 3, at 556–64 (describing judicial interpretations of the Tunney Act prior to the 2004 Amendments).

⁹⁰ *Gillette Co.*, 406 F. Supp. at 715. See generally Frankel, *supra* note 3, at 557–64 (describing judicial interpretations of the Tunney Act prior to the 2004 Amendments).

⁹¹ See generally *infra* Part V (discussing the precedential nature of Tunney Act review proceeding). In fact, the Supreme Court has indicated that, by granting the judicial branch the power to check executive branch settlements, the Tunney Act violates separation of powers principles. *AT&T*, one of the few cases that was appealed to the Supreme Court, was summarily affirmed without an opinion. *Maryland v. United States*, 460 U.S. 1001, 1001

level finally had a chance to describe deference in *United States v. Microsoft*, where the D.C. Court of Appeals overturned Judge Sorkin's rejection of a consent decree in a Sherman Act case between Microsoft and the Justice Department.⁹² Judge Sorkin refused to find the agreement in the public interest because it failed to remedy anticompetitive concerns not alleged in the complaint.⁹³ In overturning *Microsoft I*, the Court of Appeals articulated a standard of deference: judges were to overturn a consent decree only if the original complaint was so narrow—or drafted under such improper influences—that it made a “mockery of judicial power.”⁹⁴ Any other reason would amount to the court second-guessing the Justice Department's expertise or require the court to “effectively redraft the complaint.”⁹⁵

The mockery standard appears to be the highest level of deference (and thus the lowest standard of review) that could possibly be accorded; unless the complaint itself was clearly enacted improperly or failed to consider obvious anticompetitive issues, the court must accept that the agreement adequately addresses all anticompetitive harms. The

(1983). Chief Justice Burger and Justices White and Rehnquist dissented, appearing to disagree that the Tunney Act was constitutional at all, as it required the District Court to, one, assume there was an antitrust violation; two, know the scope and effects of the assumed violation without a trial, and; three, question the discretion of the Justice Department, “which is committed to the executive by Article II.” *Id.* at 1006 (Rehnquist, J., dissenting). However, “it is entirely possible that the real concern was the district court's requiring modifications to make the decree ‘better,’ rather than simply deciding whether the decree was worthy of being entered as a judicial order.” Frankel, *supra* note 3, at 559.

⁹² *United States v. Microsoft Corp. (Microsoft II)*, 56 F.3d 1448, 1449 (D.C. Cir. 1995). Note that unlike most cases discussed in this paper, *Microsoft* was a Sherman Act case, not Clayton Act/merger clearance case.

⁹³ *United States v. Microsoft Corp. (Microsoft I)*, 159 F.R.D. 318, 332 (D.D.C.), *rev'd*, 56 F.3d 1448 (D.C. Cir. 1995). For an overview of the Microsoft antitrust proceedings, see Natalie L. Krodel, Comment, *The Tunney Act: Judicial Discretion in United States v. Microsoft Corporation*, 62 BROOK. L. REV. 1293 (1996).

⁹⁴ *Microsoft II*, 56 F.3d at 1462. As Lawrence Frankel points out in *Rethinking the Tunney Act*, it is not clear *how* a judge would determine whether a complaint was made in the “mockery of judicial power” as this would be essentially second-guessing core prosecutorial decisions on what to include in the complaint. Frankel looks to the concerns that led to the adoption of the Tunney Act for a clue, hypothesizing that perhaps one of the things the court was referring to was evidence of improper considerations, such as large donations made to candidates favored by the Attorney General—“[i]nterpreting the law to suggest that the judge must still enter the decree because he was prohibited from considering allegations not in the complaint would . . . lend the imprimatur of the court to a corrupt process, thereby arguably making a ‘mockery of judicial power.’” Frankel, *supra* note 3, at 562 n.65.

⁹⁵ *Microsoft II*, 56 F.3d at 1459.

considerations for remedies discussed above—that the remedy should be “carefully tailored” to the harm and “effectively address each of the [Justice Department’s] competitive concerns”⁹⁶—would not be analyzed under *Microsoft II*’s mockery of judicial power test.

Cases following *Microsoft II* interpreted the mockery standard as exceptionally narrow. The D.C. Circuit had another opportunity to review the Tunney Act in *Massachusetts School of Law v. United States*,⁹⁷ and held that anything less than the highest scope of deference would raise constitutional questions.⁹⁸ Later, in *United States v. Pearson PLC*,⁹⁹ the court stated that *Microsoft II* had “made it clear that the public interest inquiry authorized by the Tunney Act is so limited in scope as to be very nearly a ministerial task.”¹⁰⁰ Despite the fact that the *Pearson* court “defined [public interest] in accordance with antitrust laws,” such a scope of review entirely precludes considering the interests of the public.¹⁰¹

However, Congress disagreed because such interpretations “misconstrued the plain meaning of the Tunney Act and returned to the practice of ‘rubber stamp’ review of antitrust settlements.”¹⁰² In 2004, Congress amended the Act, clarifying that the purpose was “to ensure that the entry of antitrust consent judgments is made in the public interest.”¹⁰³ Although the scope of review was still narrow— “[n]othing in [the Act] . . . require[d] the court to conduct an evidentiary

⁹⁶ 2011 Remedies Guide, *supra* note 52, at 3–4.

⁹⁷ See *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776 (D.C. Cir. 1997).

⁹⁸ See *id.* at 783.

⁹⁹ *United States v. Pearson PLC*, 55 F. Supp. 2d 43 (D.D.C. 1999).

¹⁰⁰ *Id.* at 45 (stating “Appellate decisions . . . have made it clear that the public interest inquiry authorized by the Tunney Act is so limited in scope as to be very nearly a ministerial task.”); see also *Mass. Sch. of Law*, 118 F.3d at 783 (noting “[t]he district court must examine the decree in light of the violations charged . . . and should withhold approval only if any of the terms appear ambiguous, if the enforcement mechanism is inadequate, if third parties will be positively injured, or if the decree otherwise makes ‘a mockery of judicial power.’”) (quoting *Microsoft II*, 56 F.3d at 1462).

¹⁰¹ *Pearson*, 55 F. Supp. 2d at 46.

¹⁰² See S. 1797, 108th Cong. (2003), Antitrust Criminal Penalty Enhancement and Reform Act of 2003; see also Anderson, *supra* note 3, at 613 (“The legislative history of the 2004 amendments makes clear that the mandate to consider the enumerated factors is intended to create a ‘robust and meaningful’ standard of judicial review.”) (citation omitted).

¹⁰³ Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108–237, tit. II, § 221(a)(1) (2004).

hearing”¹⁰⁴—limiting review to the *Microsoft* “mockery” standard would “misconstrue the meaning and Congressional intent in enacting” the Act.¹⁰⁵ Despite declaring the mockery standard to be against Congressional intent, the 2004 Amendments still did not dictate a standard of deference.¹⁰⁶

It is helpful to imagine deference on a spectrum: on one end, reflecting a low degree of deference (and high standard of review) is the “clearly erroneous” standard, where courts overturn findings supported by the lower court or agency if the appellate court holds a “definite and firm conviction that a mistake has been committed.”¹⁰⁷ On the other end of the spectrum is *Microsoft*’s “mockery of judicial power” standard, reflecting a very high degree of deference (and low standard of review). There, a court assumes that all aspects of a complaint have been addressed, overturning consent decrees only if the complaint itself is missing forms of harm, or was formed in an unlawful way, to such an extent that accepting the decree would make a mockery of the judicial system.¹⁰⁸ In the middle, then, are the “substantial evidence” and “arbitrary and capricious” standards of review.

It is clear that deference is bounded on one end by *Microsoft*’s mockery standard; Congress explicitly stated that the courts had misconstrued the meaning of the Act.¹⁰⁹ Utilizing the amendment process, the lowest form of deference the courts should give was determined when Congress removed amendments that required courts to determine public interest “based on *substantial evidence* and reasoned analysis.”¹¹⁰

¹⁰⁴ 15 U.S.C. § 16(e)(2).

¹⁰⁵ § 221(a)(1).

¹⁰⁶ See generally 15 U.S.C. § 16 (explaining that the Tunney Act does not require a trial or evidentiary record in civil antitrust cases).

¹⁰⁷ *Concrete Pipe & Prods., Inc. v. Const. Laborers Pension Tr.*, 508 U.S. 602, 622 (1993).

¹⁰⁸ *Microsoft I*, 159 F.R.D. 318, 331 (D.D.C.), *rev’d*, 56 F.3d 1448 (D.C. Cir. 1995).

¹⁰⁹ Because *Microsoft II* did not clearly define what the court meant by “mockery of judicial power,” this paper, like other papers evaluating the Tunney Act, see Anderson *supra* note 3, at 33 (discussing the misapplication of the Tunney Act in *United States v. Microsoft*, 56 F.3d 1448 (D.C. Cir. 1995)), treats the mockery standard as how it was defined by the courts following the decision, even if that standard is not what the *Microsoft II* court intended.

¹¹⁰ Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108–237, tit. II, § 221(a)(1), 118 Stat. 661, 668 (2004) (emphasis added); see also Anderson, *supra* note 3, at 612 (“This legislative history demonstrates that . . . Congress overturned the . . . ‘mockery’ standard of review. Congress did not intend, however, to go to the other

“Substantial evidence” is a standard in administrative law for formal rulemaking and formal adjudications, which require full trial procedures.¹¹¹ Under substantial evidence, the court asks whether the agency interpreted the law correctly and whether there was a “rational connection between the facts found and the policy choice made.”¹¹² As the name suggests, it is most useful when there is a substantial evidentiary record to evaluate. The Tunney Act, however, does not require a trial or evidentiary record.¹¹³ Consent agreements are designed to replace trials, and Congress did not intend the 2004 Amendments to change this assumption because they repealed the “substantial evidence” language by adding that “[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing.”¹¹⁴

Removing the “substantial evidence” language implies that courts must apply a more deferential standard when reviewing consent agreements than when reviewing formal agency rulemaking and adjudications. However, removing the “substantial evidence” language could be interpreted as Congress recognizing that a standard that relies on a record, as substantial evidence does, is not the correct level of deference for a process where the court expressly does not have to conduct evidentiary hearings, much like how in review of administrative proceedings, only formal agency actions, which have substantial evidentiary records, receive substantial evidence review.¹¹⁵

For actions that lack evidentiary records, the rough equivalent to substantial evidence is arbitrary and capricious review.¹¹⁶ In particular, courts apply arbitrary and capricious review to notice-and-comment rulemaking, which resembles the process dictated by the Tunney Act.¹¹⁷ Under arbitrary and capricious review, agency actions are overturned

extreme and require “trial de novo of the advisability of antitrust consent decrees.” What Congress did intend is that courts utilize . . . ‘a robust and meaningful standard of judicial review’”) (citations and footnotes omitted).

¹¹¹ 5 U.S.C. § 556(d) (2012).

¹¹² *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 31 (1983). Inherent in substantial evidence is a *Chevron*-style analysis of agency interpretation of law and an arbitrary and capricious analysis of agency interpretation of fact.

¹¹³ See generally 15 U.S.C. § 16 (2012) (explaining that the Tunney Act does not require a trial or evidentiary record in civil antitrust cases).

¹¹⁴ § 16(e)(2).

¹¹⁵ See Administrative Procedure Act, 5 U.S.C. § 706(2)(E) (2012).

¹¹⁶ *Id.*

¹¹⁷ *State Farm*, 463 U.S. at 42–43.

when found unreasonable.¹¹⁸ Though the court defers to the agency on the facts—in part because there is no factual record to analyze—they still embark on a more than cursory review of the logic behind the agency’s findings.¹¹⁹

Removing the “substantial evidence” language implies that Congress did not intend for courts to use a more deferential standard than arbitrary and capricious review. However, the mere fact that Congress wants the standard to be somewhere between the arbitrary and capricious and the mockery standard does not help guide the Justice Department. The gap between the two standards is significant. The mockery standard requires the court to preserve an unreasonable consent decree as long as it is not against the public interest, an unacceptable result under arbitrary and capricious review.¹²⁰ This paper turns to cases after the 2004 Amendments to determine where, between the two options, the degree of deference lies.

B. Cases Since the 2004 Amendments

In some decisions since the 2004 amendment, dicta support a standard similar to arbitrary and capricious. In *SBC Communications*,¹²¹ one of the few cases since 2004 to receive a memorandum opinion, the court stated that “the relevant inquiry is whether there is a factual foundation for the government’s decisions such that its conclusions . . . are reasonable.”¹²² However, the court also wrote that the 2004 Amendments “effected minimal changes, and that [the] scope of review remains sharply proscribed by precedent and the nature of Tunney Act

¹¹⁸ *Id.* at 43 (articulating in *State Farm*, in arbitrary and capricious review, “[A] court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’ In reviewing that explanation, we must ‘consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.’ . . . we may not supply a reasoned basis for the agency’s action that the agency itself has not given. We will, however, ‘uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.’”) (citations omitted).

¹¹⁹ *Id.* (explaining that the agency was required to articulate a satisfactory explanation for its actions, which exhibited a “rational connection between the facts found and the choice made.”) (citation omitted).

¹²⁰ See generally Frankel, *supra* note 3, at 591–94.

¹²¹ 489 F. Supp. 2d 1 (D.D.C. 2007).

¹²² *Id.* at 15–16.

proceedings.”¹²³ According to the *SBC* court, the 2004 Amendments only overruled *Massachusetts School of Law’s* interpretation of the mockery standard; they did not alter pre-existing case law.¹²⁴

Unfortunately, *SBC* relied on a unique procedural approach to the Tunney Act that required multiple rounds of briefing, arguments by amici and parties, and considerable evidence.¹²⁵ The consent decree was not entered until well after the parties closed the mergers; part of the court’s finding that the narrow complaint was within the reaches of public interest could reflect a reluctance to unravel a merger completed over a year before.¹²⁶ Therefore, although *SBC* demonstrated a level of deference, the case may not be useful for future cases.

With the exception of the cases discussed in Part IV of this paper, cases since the 2004 Amendments have not helped decipher the level of deference. In part, this is because in many of these cases—even those that receive memorandum opinions—the mergers and accompanied consent decrees are arguably in the public’s interest, and therefore do not illuminate when courts will reject a consent decree. For example, the court repeated “reasonableness” as a standard in *United States v. Sinclair Broadcasting Group*,¹²⁷ but there, the court found no public benefit to a trial because the parties had fully complied with the Tunney Act and had

¹²³ *Id.*

¹²⁴ *Id.* at 11, 13. The *SBC* Court articulated an example of mockery standard: a complaint would make a mockery of judicial power if it “only addressed the telephone connections for a single household residence, but none other in the entire country.” *Id.* at 11. This is unlike the standard hypothesized by Lawrence Frankel in *Rethinking the Tunney Act*, where he notes that it is not clear *how* a judge would determine whether a complaint was made in the “mockery of judicial power,” as this would be essentially second-guessing core prosecutorial decisions on what to include in the complaint. Frankel, *supra* note 3, at 562 n.65. Looking to the concerns that led to the adoption of the Tunney Act, Frankel hypothesizes that perhaps the court was referring to evidence of improper considerations, such as large donations made to candidates favored by the Attorney General—“[i]nterpreting the law to suggest that the judge must still enter the decree because he was prohibited from considering allegations not in the complaint would . . . lend the imprimatur of the court to a corrupt process, thereby arguably making a ‘mockery of judicial power.’” *Id.* Unlike Frankel’s standard, the example provided by the *SBC* Court *does* require the court to second-guess the prosecutorial discretion of the Justice Department.

¹²⁵ *SBC*, 489 F. Supp. at 9; *see also* Frankel, *supra* note 3, at 574 (describing the unique procedure in *SBC*).

¹²⁶ *Id.* at 24.

¹²⁷ *United States v. Sinclair Broad. Grp.*, 74 F. Supp. 3d 468, 474 (D.D.C. 2014).

not received any public comments.¹²⁸ Merely articulating the reasonableness standard does not help define what makes a consent decree too unreasonable to be accepted.

The court came close to rejecting a consent agreement in *United States v. Comcast Corp.*,¹²⁹ but the case still does not cogently define the scope of review for the government's findings that the harms alleged were addressed.¹³⁰ In *Comcast*, the judge applied a less deferential scope of review than in *SBC* and other cases, but focused review on the consent decree's *enforceability*, not the rationality of the economic reasoning.¹³¹ Though supporting a less deferential standard than mockery, the judge's concerns in *Comcast* were principally outside the anticompetitive arena, such as the proper functioning of a complex arbitration mechanism.¹³² Determining whether an arbitration method will work is well within a court's competence; it does not suffer from the same expertise and executive discretion issues that analyzing a settlement suffers.¹³³

IV. APPLYING THE TUNNEY ACT

Since the court has not rejected a consent agreement since 2004, one way to analyze the degree of deference is to examine cases where the court might have denied the consent agreement under the Administrative Procedure Act. Two such cases are *United States v. Anheuser-Busch* and *United States v. US Airways*. Both cases may have fallen short of a "reasonable" requirement as required by arbitrary and capricious review. However, the cases demonstrate a less deferential standard than "mockery of judicial power." By examining the extent of unreasonableness and what the court elected to overlook, this paper comes to the conclusion that the courts apply a level of deference that is just short of *Microsoft's* "mockery of judicial power" deference.

A. The Anheuser-Modelo Merger

¹²⁸ *Id.*

¹²⁹ *See* *United States v. Comcast Corp.*, 808 F. Supp. 2d 145 (D.D.C 2011).

¹³⁰ *See id.* at 149.

¹³¹ *Id.* ("Thus, it remains to be seen how well the FCC arbitration process will work . . . under the new streamlined approach created by the proposed Final Judgment.")

¹³² *Id.*

¹³³ *See* Frankel, *supra* note 3, at 620.

As discussed above, *Anheuser-Busch* was a horizontal merger between Anheuser, the producer of Budweiser, and Modelo, the producer of Corona.¹³⁴ The merger would eliminate Modelo and leave two beer companies, Anheuser and MillerCoors, accounting for 65 percent of all sales.¹³⁵ The Justice Department believed this would facilitate coordinated pricing between Anheuser and MillerCoors.¹³⁶

Modelo was a maverick firm whereas Anheuser worked alongside MillerCoors in a tacit coordination strategy that “reduced competition and increased prices[.]”¹³⁷ Meanwhile, Modelo had resisted Anheuser-led price increases.¹³⁸ In fact, Anheuser’s internal documents stated that Modelo pursued a competitive strategy “directly at odds” with Anheuser’s practice of price increases.¹³⁹ Aware of the Justice Department’s concern for mergers eliminating maverick firms, Anheuser proposed a plan to compensate for Modelo’s elimination.¹⁴⁰

The plan requires some background knowledge. Modelo relied on an importer, Crown Imports, to sell Corona beer in the United States. Modelo owned a 50 percent interest in Crown Imports.¹⁴¹ The other half was owned by Constellation Brands, a company completely separate from Anheuser.¹⁴² Under Anheuser’s plan, Anheuser would sell Modelo’s 50 percent interest to Constellation and grant Constellation a ten-year license to sell Modelo’s most popular beers in the United States, allowing Corona beer to be sold in the United States uncontrolled by one of the companies making up the 65 percent market share.¹⁴³

The Justice Department denied the plan because it did not meet the requirements of the Policy Guide to Merger Remedies: the sale would remove a uniquely positioned maverick but the divestments were

¹³⁴ Complaint, *Anheuser-Busch*, *supra* note 72, at 2.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Response to Public Comments at 4, *Anheuser-Busch*, No. 1:13-cv-00127-RWR (D.D.C. Sept. 13, 2013). For an explanation of why such actions, though troubling, do not violate antitrust laws, see Landes & Posner, *supra* note 75, at 952–68.

¹³⁸ Complaint, *Anheuser-Busch*, *supra* note 72, at 4.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 8–9.

¹⁴¹ *Id.* at 8.

¹⁴² *Id.*

¹⁴³ *Id.* at 4.

not going to a firm with “maverick-like interests and incentives.”¹⁴⁴ The sale would not create an “independent, fully-integrated brewer with permanent control of Modelo brand beer in the United States.”¹⁴⁵ Without the brewing capacity to meet demand for Corona, while being granted only a ten-year license, Constellation would be fully dependent on Anheuser.¹⁴⁶ Therefore, Constellation had neither the desire nor the proper incentives to subvert Anheuser and MillerCoors’ tacit coordination scheme. They would be unlikely to act as a maverick firm, and the plan did not meet the Policy Guide for Remedies.

The final consent agreement still relied on divesting Modelo’s U.S. business to Constellation, but created structural mechanisms to ensure that Constellation was not reliant on Anheuser.¹⁴⁷ For example, the decree required Constellation to expand a certain brewery so it could produce enough Modelo Beer to replicate Modelo’s competitive role, and required Anheuser to grant Constellation a “perpetual and exclusive” license—as opposed to the temporary license proposed by Anheuser—to ten Modelo beers.¹⁴⁸

The structural plan kept Constellation fully independent and addressed fears of retribution. However, it is not clear that independence was the reason for Constellation’s reluctance to subvert pricing. In its complaint, the Justice Department stated that Constellation “ha[d] already shown” that it did not share Modelo’s maverick incentives; Constellation, despite being independent from Anheuser, had “urged *following* [Anheuser]’s price leadership.”¹⁴⁹ Beyond the requirement for Constellation to increase brewing capacity, the consent agreement did not require any conduct changes for Constellation. It merely gave it the ability to act as a maverick firm—an ability Constellation had always

¹⁴⁴ 2011 Remedies Guide, *supra* note 52, at 28 n.54.

¹⁴⁵ Response to Public Comments, *Anheuser-Busch*, *supra* note 137, at 4.

¹⁴⁶ *Id.* Although Anheuser tangentially could have exerted *some* control over Constellation before the merger, it is unlikely that Constellation, at that time, felt reliant on Anheuser. While Anheuser owned 35.3% of Modelo, and Modelo owned 50% of Constellation, both the Justice Department and Anheuser agreed that Anheuser’s 35.3% ownership did not provide them “voting or other effective control of” Modelo and did not prevent Modelo from acting as a maverick firm. If the 35.3% ownership didn’t prevent Modelo from acting as a maverick firm, it should not have precluded Constellation from doing so. Complaint, *Anheuser-Busch*, *supra* note 72, at 19.

¹⁴⁷ Response to Public Comments, *Anheuser-Busch*, *supra* note 137, at 5.

¹⁴⁸ Competitive Impact Statement, *Anheuser-Busch*, *supra* note 77, at 2–3.

¹⁴⁹ Complaint, *Anheuser-Busch*, *supra* note 72, at 10 (emphasis in original).

enjoyed but not advocated for. Constellation had maverick-like incentives, but did not appear to have the maverick-like interests necessary to prevent a tacit coordination scheme from consuming the market.¹⁵⁰

Anheuser demonstrates how deferential courts are to assertions by the Justice Department that the remedy successfully addresses the harms in the complaint. The court accepted, without analysis, that Constellation would be an “independent distributor,” despite evidence that Constellation was unwilling to actually act independently.¹⁵¹ Compare this to the analysis in *Motor Vehicles Manufacturers Association v. State Farm*,¹⁵² an administrative law case analyzed under arbitrary and capricious review.¹⁵³ There, the Supreme Court overturned the National Highway Traffic Safety Administration’s rescission of regulations that required either airbags or automatic seat belts in new cars because the Agency had failed to consider the “obvious” option of rescinding just the automatic seat belt requirement while still requiring air bags.¹⁵⁴ The equivalent of this type of review in the Tunney Act context would be similar to Judge Sorkin’s review in *Microsoft I*. Clearly, the level of deference accorded to agencies under the Tunney Act is far higher than that accorded under the Administrative Procedure Act; instead of extensively analyzing the case, the consent agreement, and alternatives, the *Anheuser* court accepted the Justice Department’s findings as true without significant review.

¹⁵⁰ See *2011 Remedies Guide*, *supra* note 52, at 28. This important excerpt states in full: “If the concern [in the merger] is one of coordinated effects among a small set of postmerger competitors, divestiture to any firm in that set would itself raise competitive issues. In that situation, the Division likely would approve divestiture only to a firm outside that set.” *Id.* “Indeed, if harmful coordination is a concern because the merger is removing a uniquely positioned maverick, the divestiture likely would have to be to a firm with maverick-like interests and incentives.” *Id.* at n.54. See also Response to Public Comments at 40, *United States v. US Airways Grp.*, No. 1:13-cv-01236-CKK (D.D.C. Mar. 10, 2014), <https://www.justice.gov/atr/case-document/file/514496/download> (quoting footnote in full in response to comments from Delta, who requested to receive divestiture assets in the *US Airways* settlement agreement).

¹⁵¹ See Response to Public Comments at 5, *United States v. US Airways Grp.*, No. 1:13-cv-01236-CKK (D.D.C. Mar. 10, 2014), <https://www.justice.gov/atr/case-document/file/514496/download> (discussing how the Final Judgment will mandate that Anheuser-Busch and Modelo license specific brands to Constellation to facilitate independence and competition).

¹⁵² 463 U.S. 29 (1983).

¹⁵³ *Id.* at 42–43.

¹⁵⁴ *Id.* at 46, 49.

However, that the Justice Department entered into a consent agreement in conflict with the complaint does not mean the level of deference is as high as *Microsoft's* mockery standard. The outcome also could have been due to “an underlying weakness in the government’s case” or the government granting concessions in the negotiation process.¹⁵⁵ There is no guarantee that the government would have been able to demonstrate at trial that Anheuser’s plan ineffectively addressed coordinated effects. While *Anheuser* demonstrates that the level of deference is substantially greater in Tunney Act cases than in Administrative Procedure Act cases, it does not help define an upper bound to deference, since the court could have been extremely deferential for other reasons.

B. *The US Airways-American Airlines Merger*

Like *Anheuser*, *US Airways* concerned coordinated effects: the merger of American Airlines and US Airways would eliminate a maverick firm in a highly concentrated market that historically preferred tacit coordination over competition on the merits.¹⁵⁶ Before the merger, four airlines, Southwest, Delta, American, and United controlled almost 65 percent of the domestic market.¹⁵⁷ Of the four, American, Delta, and United (along with US Airways) are “legacy airlines,” which formed prior to deregulation in 1978.¹⁵⁸ Legacy airlines participate in substantial code sharing partnerships, fly internationally, and offer options such as first and business class.¹⁵⁹ The legacy airline market “increasingly

¹⁵⁵ See *United States v. SBC Comm., Inc.*, 489 F. Supp. 2d 1, 15 (D.D.C. 2007) (quoting *Microsoft II*, 56 F.3d at 1461).

¹⁵⁶ Complaint at 3, 5, *United States v. US Airways Grp., Inc.*, No. 1:13-cv-01236-CKK (D.D.C. Sept. 5, 2013); see also *United States v. Am. Airlines*, 743 F.2d 1114, 1115 (5th Cir. 1984) (finding criminal attempted monopolization); *United States v. Braniff Airways, Inc.*, 453 F. Supp. 724, 725 (W.D. Tex. 1978) (denying various defenses to criminal antitrust prosecution); *Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.*, 349 F. Supp. 1064, 1068 (D. Haw. 1972), *aff'd* 489 F.2d 203 (9th Cir. 1973) (finding defendants stated cause of action for predatory intent).

¹⁵⁷ Bureau of Labor Stats., Office of the Assistant Secretary for Research and Tech., *Transportation Statistics*, U.S. DEP’T OF TRANSP., www.transtats.bts.gov (last visited Apr. 6, 2016). These numbers are measured in domestic revenue passenger miles.

¹⁵⁸ C.S., *Legacy vs Low-Cost Carriers*, THE ECONOMIST (Mar. 26, 2013, 6:08 PM), <http://www.economist.com/blogs/gulliver/2013/03/legacy-vs-low-cost-carriers>.

¹⁵⁹ *Id.*

prefer[s] tacit coordination over full-throated competition.”¹⁶⁰ Unsurprisingly, the Justice Department has extensive experience with legacy airlines.¹⁶¹

By eliminating US Airways, the merger would thus eliminate US Airways’ “Advantage Fares,” which offered a lower-priced alternative, through connecting flights, to consumers.¹⁶² Nonstop flights offered by other legacy airlines were demonstrably cheaper on routes where US Airways offered Advantage Fares.¹⁶³ The merger would also eliminate American Airline’s restructuring plan, a plan which US Airways had called “industry destabilizing”¹⁶⁴ and that industry leaders were confident would succeed.¹⁶⁵

In addition to the coordinated effects, the merger would also lead to unilateral effects by eliminating direct competition between American Airlines and US Airways on thousands of heavily-traveled routes.¹⁶⁶ As a result, the combined American Airlines (“New American”) would control a majority of slots and gates in multiple hub airports. For example, at Ronald Reagan National Airport, New American would control 69 percent of all slots.¹⁶⁷

Despite facing a merger that the Justice Department stated would cause “hundreds of millions of dollars of harm to American consumers annually,”¹⁶⁸ the Department agreed to a consent agreement. The

¹⁶⁰ *U.S. Airlines Face Antitrust Probe Into Possible Price Collision*, BLOOMBERG (July 1, 2015), <http://www.bloomberg.com/news/articles/2015-07-01/u-s-justice-department-opens-antitrust-probe-into-airlines>.

¹⁶¹ Complaint, *US Airways*, *supra* note 156, at 3.

¹⁶² *Id.* at 4.

¹⁶³ *Id.* at 4–5.

¹⁶⁴ *Id.* at 5–6.

¹⁶⁵ *Id.* at 9.

¹⁶⁶ *Id.* at 3.

¹⁶⁷ *Id.* at 3, 6 (explaining that whether right to land at a particular airport is a “slot” or “gate” depends on how the airport is regulated by the government).

¹⁶⁸ *Id.* at 3. The elimination of a maverick firm is particularly concerning in markets such as the airline market because of the difficulty for new firms to break into the industry. If a market is easily entered into, then firms cannot maintain supra-competitive prices for too long without new entrants entering to subvert their pricing scheme, but if a market has high barriers to entry, then firms can maintain supra-competitive prices without enduring punishment by new maverick firms. The airline industry is not only highly concentrated but arguably the hardest industry for new firms to break into: not only are the costs significant, but government regulations make it nearly impossible for an airline to receive new gates and slots at many

agreement addressed the unilateral effects by requiring New American to divest gates and slots at highly concentrated airports, and the coordinated effects by requiring the divestments to be to three low-cost carriers: Southwest, Virgin America, and JetBlue.¹⁶⁹ The majority of the divestments went to Southwest.¹⁷⁰

Low-cost carriers are airlines that did not fly interstate until after deregulation; unhindered by the costs of deregulation, these airlines frequently operate as maverick firms, pioneering pricing methods that undercut the legacy airlines.¹⁷¹ Through numerous price-saving mechanisms such as extensive price discrimination, flying older planes, and hedging on oil, per-unit costs for low-cost carriers average about 28 percent less than for legacy carriers.¹⁷²

The idea behind the consent agreement was that by divesting to low-cost carriers, the merger would lead to the Southwest Effect.¹⁷³ The Southwest Effect describes the effects of a low-cost carrier entering a

airports. New airlines are unlikely to form, and the current airlines are unlikely to substantially expand without market conditions changing significantly.

Though not mentioned in the Competitive Impact Statement or Complaint, this could be why, despite their tacit coordination, Anheuser and MillerCoors were unable to price their products significantly above the competitive price: it is simply too easy for local breweries to check their price increases.

¹⁶⁹ Final Judgment at 5–12, *US Airways*, No. 1:13-cv-01236-CKK (D.D.C. Apr. 25, 2014).

¹⁷⁰ *Id.*

¹⁷¹ C.S., *Legacy vs Low-Cost Carriers*, THE ECONOMIST (Mar. 26, 2013 6:08 PM), <http://www.economist.com/blogs/gulliver/2013/03/legacy-vs-low-cost-carriers>. See generally Severin Borenstein, *The Evolution of U.S. Airline Competition*, 6 J. ECON. PERSPECTIVES 45 (1992) (describing in detail the differences between legacy carriers and low-cost carriers).

¹⁷² John Kwoka et al., *Segmented Competition in Airlines: The Changing Roles of Low-Cost Carriers in Fare Determination* (Feb. 6, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2212860. Note that these numbers were taken prior to the AirTran/Southwest and US/American mergers.

¹⁷³ *United States v. US Airways Grp.*, 38 F. Supp. 3d 69, 78 (D.D.C. 2014) (citing Jan K. Brueckner et al., *Airline Competition and Domestic U.S. Airfares: A Comprehensive Reappraisal*, 2 ECON. TRANSP., 1 (2013); Kwoka et al., *supra* note 172; Steven Morrison, *Actual, Adjacent, and Potential Competition: Estimating the Full Effect of Southwest Airlines*, 35 J. TRANSP. ECON & POL. 239 (2001)).

new airport for the first time.¹⁷⁴ The effects were often substantial, up to a 30 percent decrease in ticket prices.¹⁷⁵

On its face, the consent agreement appears to adequately address the coordinated concerns. However, like in *Anheuser*, the agreement required divestment to a party the Justice Department had originally claimed would not alleviate the anticompetitive effects of the merger.¹⁷⁶ In the *US Airways* complaint, the Department argued that low-cost carrier competition would *not* prevent anticompetitive effects due to having “networks and business models that are significantly different from the legacy airlines” and being imperfect substitutes for flights offered by legacy airlines.¹⁷⁷

In addition to the contradiction, the basic economic basis of the consent agreement may have been flawed: recent studies indicate that the Southwest Effect may be less significant—or may reverse—as the low-cost carrier gains more market share.¹⁷⁸ That is, as the low-cost carrier “evolve[s] into a more traditional carrier with service throughout the country and a network much more akin to a hub-and-spoke carrier,” the airline’s pricing system comes to resemble legacy pricing systems.¹⁷⁹ This effect has been seen, somewhat ironically, in Southwest itself; Southwest, now the most popular domestic airline,¹⁸⁰ frequently leads industry-wide fare increases.¹⁸¹ It may have been unreasonable for the

¹⁷⁴ Martin Dresner et al., *The Impact of Low Cost Carriers on Airport and Route Competition*, 30 J. TRANSP. ECON. & POL’Y 309 (1996); Morrison, *supra* note 173, at 239; Timothy Vowles, *The Southwest Effect in Multi-Airport Regions*, 7 J. AIR TRANSP. MANAGEMENT 251, 251 (2001).

¹⁷⁵ Kwoka et al., *supra* note 172, at 8.

¹⁷⁶ See Complaint, *US Airways*, *supra* note 156, at 33 (“In many relevant markets, [low-cost carriers] do not offer any service at all, and in other markets, many passengers view them as a less preferred alternative to the legacy carriers.”).

¹⁷⁷ *Id.*

¹⁷⁸ Kwoka et al., *supra* note 172, at 7. In particular, Kwoka et al. report that Southwest’s “unit costs now more closely resemble[] those of the legacy carriers than other LCCs.” *Id.*

¹⁷⁹ *Id.* at 8–9.

¹⁸⁰ Office of the Assistant Secretary for Research and Tech., *Bureau of Transportation Statistics*, U.S. DEP’T OF TRANSP., www.transtats.bts.gov (last visited Apr. 6, 2016).

¹⁸¹ See Jeffrey Dastin, *U.S. Airlines Raise Fares \$3 in First Sector-wide Hike Since June*, REUTERS (Jan. 5, 2016 4:31 PM), <http://www.reuters.com/article/us-airlines-prices-usa-idUSKBN0UJ1TP20160105> (identifying the move as initiated once Southwest matched Delta’s increase; “[t]he industry has never met a Southwest fare increase it didn’t match, for as far back as our records go.” (quoting an analyst)); Hugo Martin, *Airfares Just Got More Expensive, and It’s the Third Price Jump This Year*, L.A. TIMES (Feb. 23, 2016, 1:35 PM),

Justice Department to conclude that the divestments would “effectively address each of the [Justice Department’s] competitive concerns.”¹⁸² Even without access to recent studies suggesting this, it is logical to assume that the Southwest Effect would not exist for Southwest when it is the most popular airline in the country. As a firm gains market power, it does not need to act as a maverick to maintain a foothold on the market and the incentives to undercut price decrease. In addition to the contradiction, Southwest may not have been a firm with “maverick-like incentives” necessary to alleviate coordination.

Moreover, Southwest may not have been a firm outside the small set of post-merger competitors raising coordination concerns.¹⁸³ On July 1, 2015, the Justice Department began investigating United, Delta, American, and *Southwest* for criminal antitrust violations.¹⁸⁴ While investigations are not violations, the fact that the Justice Department included Southwest, and no other low-cost carriers,¹⁸⁵ indicates that at least the criminal antitrust division at the Justice Department considers Southwest part of the legacy airline oligopoly.

In *Anheuser*, the contradictions could have been the result of a weak case. That was not true in *US Airways*. The Justice Department knew that past airline mergers had led to reductions of service.¹⁸⁶ The complaint cited 1,258 city pairs with HHIs high enough to presume anticompetitive effects, including routes such as Los Angeles to

<http://www.latimes.com/business/la-fi-airlines-match-third-airfare-hike-of-2016-20160223-story.html> (identifying Southwest as the initiator); Hugo Martin, *Six Airlines Match Southwest’s \$10 Fare Hike*, L.A. TIMES (Sept. 14, 2012), <http://articles.latimes.com/2012/sep/14/business/la-fi-southwest-fare-hike-20120914>; Lauren Thomas, *U.S. Airlines Try New Fare-Hike Strategies Because Ticket Prices Maxed Out*, SKIFT (Jun. 15, 2015, 12:00 PM), <http://skift.com/2015/06/15/u-s-airlines-try-new-fare-hike-strategies-because-ticket-price-s-maxed-out> (“Southwest showed ‘significant’ fare increases, and was joined by other carriers in piecemeal fashion.”).

¹⁸² 2011 Remedies Guide, *supra* note 52, at 3–4; *see also id.* at 4 (stating that there must be a “close, logical nexus between the proposed remedy and the alleged violation. . .”).

¹⁸³ *See id.* at 28 (“If the concern [in the merger] is one of coordinated effects among a small set of post-merger competitors, divestiture to any firm in that set would itself raise competitive issues. In that situation, the Division likely would approve divestiture only to a firm outside that set.”).

¹⁸⁴ Jack Nicas et al., *Justice Department Probes Airlines for Collusion*, WALL ST. J. (July 1, 2015), <http://www.wsj.com/articles/justice-department-probes-airlines-for-collusion-1435775547>.

¹⁸⁵ *Id.*

¹⁸⁶ Amended Complaint, *US Airways*, *supra* note 46, at 25.

Philadelphia, New York to Washington D.C., and Philadelphia to Chicago.¹⁸⁷ American Airlines and US Airways offered no procompetitive justifications for the number of anticompetitive effects, pointing only to “unspecified or unverified ‘synergies.’”¹⁸⁸ Far from being a weak case, this was arguably one of the strongest Clayton Act cases the Justice Department had brought in decades.

That the court approved the settlement demonstrates the extent of deference. The District Court deferred to the Justice Department’s determination that Southwest was an adequate substitute for legacy airlines, in contradiction with the Justice Department’s complaint. The District Court also deferred to the Justice Department’s determination that Southwest was not part of the oligopoly implicated by the coordinated effects. Finally, the District Court deferred to the Justice Department’s determination that Southwest would continue to exert the Southwest Effect, despite substantial market power and evidence to the contrary.¹⁸⁹

The memorandum opinion, like *Anheuser*, clearly demonstrates that the level of deference is higher than arbitrary and capricious review: Judge Kollar-Kotelly only lightly touches on the potential unreasonableness of the consent decree. Unlike how she would analyze the consent agreement under substantial evidence or arbitrary and capricious review, she does not require the Justice Department to address both positive and negative facts, such as their assertion that low-cost carriers are not effective substitutes for legacy airlines.¹⁹⁰

¹⁸⁷ *Id.* at app. A.

¹⁸⁸ *Id.* at 6.

¹⁸⁹ The Opinion addresses these arguments, but states that this would require the court to “decid[e] whether [the] merger[] as a whole run[s] afoul of the antitrust laws.” *United States v. US Airways Grp.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (quoting *United States v. SBC Comm., Inc.*, 489 F. Supp. 2d 1, 3 (D.D.C. 2007)). For this reason, the third point is the most tenuous. However, it is hard to imagine a court would always ignore the out-of-market benefits rule—would a court have accepted the US Airways-American Airlines merger if the divestments had been made to non-passenger airlines, such as FedEx? The answer is likely no. The out-of-markets benefits rule is inherently tied up with determining whether the harms in the complaint are adequately addressed. If all of the benefits of divestment are to a different market, then none of the benefits can alleviate the competitive concerns in the harmed market.

¹⁹⁰ See *Universal Camera Corp. v. Nat’l Labor Relations Bd.*, 340 U.S. 474, 488 (1951). In fact, the Order makes a number of antitrust mistakes, in particular, accepting as cognizable procompetitive justifications the increased services offered by low-cost carriers, arguably violating the out-of-markets benefits rule. See Letter from The American Antitrust Institute to

However, despite citing *Microsoft* thirteen times, the opinion also provides evidence that the level of deference is not as high as the mockery standard. It appears that the court required the Justice Department to address the contradiction between the complaint, which stated that low-cost carriers were not adequate substitutes and would not prevent anticompetitive harm, and the consent agreement, which relied on low-cost carriers to prevent coordinated effects.¹⁹¹ The Justice Department provided “significant evidence to support its prediction that [low-cost carriers] will provide meaningful and effective competition” in their response to public comments.¹⁹² This requirement is somewhat similar to a requirement in administrative law, where changes of agency policy course by administrative agencies must be supported by recognition, proof that the change is reasonable, and an explanation for the change.¹⁹³ Though the Justice Department did not acknowledge or explain their change of heart, they did address the competitive abilities of Southwest, JetBlue, and Virgin America.

This suggests that to approve a settlement that may contradict the complaint, the court must find that the Justice Department lacked a strong case or, if the case appears to be strong on the merits, the Justice Department must provide further facts to support the settlement. This was also seen in *SBC*, where, despite claiming to use the mockery standard, the judge required extensive hearing procedures and evidence before deciding the case.¹⁹⁴ It was seen again in *United States v. Abitibi-Consolidated*,¹⁹⁵ where the Justice Department submitted additional declarations from economists to support their conclusion that the harms had been addressed.¹⁹⁶ Submission of additional evidence and full hearings is inconsistent with the mockery standard, where the judge

William H. Stallings, Chief Transp., Energy & Agric. Section Antitrust Div. United States Dep’t of Justice (Feb. 7, 2014) (on file with the American Antitrust Institute).

¹⁹¹ See *US Airways*, 38 F. Supp. 3d at 76–77.

¹⁹² *Id.* at 81.

¹⁹³ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 517 (2009) (“[T]he Commission forthrightly acknowledged that its recent actions have broken new ground, taking account of inconsistent prior Commission and staff action and explicitly disavowing them as no longer good law.”) (internal quotation marks omitted).

¹⁹⁴ See *SBC*, 489 F. Supp. 2d at 9–10; see also Frankel, *supra* note 3, at 574 (2008) (describing the unique procedure in *SBC*).

¹⁹⁵ *United States v. Abitibi-Consol. Inc.*, 584 F. Supp. 2d 162, 166 (D.D.C. 2008), *judgment entered*, No. CIV.A. 07-1912(RMC), 2008 WL 5155751 (D.D.C. Nov. 6, 2008).

¹⁹⁶ *Id.* at 166.

makes her decision on the basis of the complaint, competitive impact statement, and response to public comments.¹⁹⁷

That this is the level of deference is further supported by the fact that analyzing cases in this way is well within judicial competence. Evidence that the Justice Department has a weak case may be demonstrated by the fact that the complaint and consent agreement were filed on the same day, weaknesses inherent in the complaint, or economic common sense—all factors which judges are well-equipped to use and do not require second-guessing Justice Department discretion. The additional evidence brought forth by the Justice Department can similarly be accepted on its face, but still, it must demonstrate a connection between the facts found and consent agreement.

In other words, the standard of deference is such that a consent agreement contradicting a strong complaint will be rejected—even if the complaint itself does not make a mockery of judicial power. This separates the post-2004 standard from the mockery standard, where a contradictory consent agreement would be accepted, as the court would take the Justice Department at its word that, despite the contradiction, the consent agreement addresses all the competitive harms.¹⁹⁸ Unlike the mockery standard, the post-2004 Amendments standard may require at least some additional evidence that the methods taken to address the competitive harm will work.

It will take a court actually rejecting a consent agreement to firmly establish whether this is the upper limit to deference. When that will be the case is difficult to know. Frankel, in *Rethinking the Tunney Act*, suggests that a consent agreement that only addresses one of the five markets impacted would be rejected,¹⁹⁹ an example similar to the one offered in *SBC*, where the court stated that a consent agreement that only addressed *one* private home, when the merger impacted the entire country, would not be in the public interest.²⁰⁰ But it is unlikely that the case will be so clear. The case to finally establish an upper limit to the court's deference likely will be one similar to *Microsoft*, where common

¹⁹⁷ United States v. Enova Corp., 107 F. Supp. 2d 10, 16–17 (D.D.C. 2000).

¹⁹⁸ See Frankel, *supra* note 3, at 609–11.

¹⁹⁹ *Id.* at 611. Frankel argues that the level of deference should be the same as it is in administrative law cases, despite the fact that Congress rejected “substantial evidence” in the 2004 Amendments. *Id.*

²⁰⁰ United States v. SBC Commc'ns Inc., 489 F. Supp. 2d 1, 13 (D.D.C. 2007).

knowledge implies that the remedies will not address the harms in a comprehensive complaint—perhaps, for example, in a merger between two of the three remaining legacy airlines: Delta, United, and American.

V. PRECEDENCE

A settlement approved by the District Court is “a judicial act by a branch of our government.”²⁰¹ Although District Court rulings do not have force of law, several factors of antitrust enforcement and Tunney Act proceedings give the outcomes—and especially the deference accorded by the District Court—a “quasi-precedential” nature.

First, “in practice, almost all substantive decisions about mergers are made by the enforcement agencies.”²⁰² The majority—95 percent—of deals do not make it to the second request stage at all.²⁰³ Those that do usually drop a proposed merger instead of proceeding to court because it is difficult to maintain merger finances.²⁰⁴ Therefore, the vast majority of these decisions are made at the administrative level.

Second, the District Court is almost always the first and last court to review consent decrees, especially in mergers, because there is rarely a reason to appeal when a court approves a settlement. The merging parties and the Agency are both satisfied with the outcome, and high litigation costs, lack of information, and frequent issues with meeting standing and injury requirements usually create insurmountable burdens to private parties attempting to block mergers.²⁰⁵ Without courts denying consent agreements, this will likely continue.

²⁰¹ Jay L. Himes, Chief of Antitrust Bureau, Office of New York Attorney General, Remarks at Comptel Plus Spring Convention and Expo, Judicial Review of Justice Dep’t Consent Decrees: Is the Tunney Act Glass Half-Empty or Half-Full? at 12 (Feb. 28, 2007), http://www.incompas.org/files/tunney-act_himes.pdf; see also James C. Noonan, Note, *Judicial Review of Antitrust Consent Decrees: Reconciling Judicial Responsibility with Executive Discretion*, 35 HASTINGS L.J. 133, 133–34 & n.8 (1983) (“Unlike a private agreement, a consent decree, once it has been accepted by a court, has the same legal effect as a judgment After entry, the legal effect of an antitrust consent decree on the rights of the parties, including the rights of the Government, are adjudicatory rather than contractual in nature.”) (quoting Report of the Antitrust Subcomm., Comm. on the Judiciary, Consent Decree Program of the Dep’t of Justice, 86th Cong., 1st Sess. 7–9 (1959)).

²⁰² ELHAUGE, *supra* note 28, at 588.

²⁰³ *Id.* at 587.

²⁰⁴ *Id.* at 587–88.

²⁰⁵ *Id.* at 588.

Third, because of the lack of appellate review, District Courts frequently cite themselves, further reinforcing their holdings.²⁰⁶ The Justice Department also cites District Court opinions when stating the standard of review under the Tunney Act for proposed final judgments.²⁰⁷ In fact, *US Airways* has already been cited in competitive impact statements sent to the court.²⁰⁸ This is especially important in the merger context: because of the Clayton Act and Hart-Scott-Rodino process, the Supreme Court has not decided a case about the substantive standards governing mergers since the enactment of the Hart-Scott-Rodino Act.²⁰⁹ Prior Supreme Court holdings are antiquated, such as condemning a merger when the market share was as low as five percent.²¹⁰ Old Supreme Court standards would not approve most of the current mergers allowed today. Therefore, the law in action on mergers is enforcement policy, requiring District Courts and the Justice Department to work together in defining the standards.

Recognizing the precedential-like nature of District Court review of consent decrees is especially important because the level of deference guides not only future courts, but the Justice Department as well by

²⁰⁶ See, e.g., *United States v. US Airways Grp.*, 38 F. Supp. 3d 69, 76 (D.D.C. 2014) (citing, among others, *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1 (D.D.C. 2003)).

²⁰⁷ For example, the Competitive Impact Statement for *United States v. Continental AG* cites *United States v. US Airways*, 38 F. Supp. 3d 69, *SBC*, 489 F. Supp. 2d 1, *United States v. InBev N.V./S.A.*, No. 08-cv-1965 (JR), 2009 WL 2778025 (D.D.C. Aug. 11, 2009), *Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37 (D.D.C. 2001), and *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982). See Competitive Impact Statement at 18–23, *United States v. Continental AG*, No. 1:14-cv-02087 (D.D.C. Dec. 11, 2014). *ConAgra Foods* and *Cinemark Holdings* repeat the same citations, with the exception of *US Airways*. See Competitive Impact Statement, *ConAgra Foods*, *supra* note 65, at 23–27; Competitive Impact Statement at 16–20, *United States v. Cinemark Holdings, Inc.*, No. 1:13-cv-00727 (D.D.C. May 20, 2013). Though not compared line-by-line, the Justice Department appears to use virtually the same language in all sections concerning the Tunney Act standard of review.

²⁰⁸ See, e.g., Competitive Impact Statement at 19–23, *Continental AG*, No. 1:14-cv-02087.

²⁰⁹ See, e.g., Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865, 866 (1996) (“[S]ince HSR became effective in 1978, only about 22 percent of the mergers that have been formally challenged by the agencies have actually been litigated in district court—compared to about 50 percent in the decade preceding HSR.”).

²¹⁰ ELHAUGE, *supra* note 28, at 588 (“Thus, in practice, almost all substantive decisions about mergers are made by the enforcement agencies rather than the courts.”).

demonstrating when investigatory actions become too unreasonable to be within the public interest. For example, under other standards of review, it would not be arbitrary for the court to inquire into other investigations the Justice Department was making or preparing to make. Had the *US Airways* court rejected the consent decree because the Justice Department was preparing to investigate criminal antitrust violations in the airline industry, the Justice Department would change their conduct *during* consent negotiations—in the future, they *would* ask the criminal division what investigations were planned. Therefore, even though District Court decisions lack true precedential value, their ability to guide the Justice Department, in tandem with their lack of appellate review, creates a system of “quasi-precedence.” It is necessary to understand, and not overlook, the outcomes of these cases.

VI. CONCLUSION

The deference courts accord to the Justice Department is significant. Between expertise issues, separation of powers concerns, and Congress’s rejection of the substantial evidence standard, the Tunney Act already sets the level of deference high. Practical considerations—such as allowing room for the Justice Department to make concessions—further limit the scope of review, as seen in the Anheuser-Modelo merger. Judicial application of the Tunney Act not only demonstrates this high degree of deference, but also evidences courts’ reluctance to second-guess actions of the Justice Department. Such decisions, while not binding on other courts, act to guide the Justice Department in the scope of their considerations, leading to an almost precedential nature.

However, these decisions also indicate an unwillingness to offer the Department a level of deference reaching *Microsoft*’s mockery of judicial power. District Courts may be hesitant to second-guess the executive decisions of the Justice Department, but they still require a clear connection between the consent agreement and the harms alleged in the complaint. When that connection is not clear, courts will require additional evidence or inquire into the strength of the Justice Department’s case.

Whether the degree of deference should approach the Administrative Procedure Act’s arbitrary and capricious standard is for a different paper. It is certainly true that the Justice Department requires significant discretion in order to enter into consent decrees freely—too

little discretion, and the Department will avoid bringing cases at all. It also may be true, however, that despite the 2004 amendments, courts are applying a degree of deference just a few shades away from the very “judicial rubber stamping” the Tunney Act was designed to prevent.