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INTERAGENCY MERGER REVIEW IN LABOR MARKETS

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As empirical evidence of labor market concentration mounts, academics and policymakers advanced proposals to challenge or reverse its effects on workers' wages and labor market options. Prominent among these is more aggressive review of the labor market effects of mergers by the Department of Justice (DOJ) and the Federal Trade Commission (FTC). This Essay argues for an alternative intervention: because placing exclusive jurisdiction over the labor market effects of mergers in the DOJ and FTC will be fundamentally limited for historical, doctrinal, institutional, and expertise-based reasons and as a matter of prophylactic policy, the National Labor Relations Board ("NLRB") should have concurrent jurisdiction to review and approve mergers that the DOJ or FTC determine will substantially or moderately increase labor market concentration in a relevant labor market under a "public interest" standard.

The Essay first outlines the limitations of existing proposals to regulate labor market effects exclusively through the antitrust agencies' merger review. Second, it catalogs and evaluates the range of interagency coordination between the antitrust and regulatory agencies on merger reviews, including but not limited to the antitrust agencies' concurrent jurisdiction with the Federal Communications Commission. This overview documents how, in a significant number of industries outside of labor markets, regulatory agencies review and condition mergers under a "public interest" standard and based on their industry-specific knowledge and expertise. That deeper background of shared interagency jurisdiction contextualizes and supports the proposed extension of concurrent jurisdiction to labor agencies in merger reviews with labor market effects. Finally, the Essay provides recommendations for how the Board's concurrent jurisdiction could operate to integrate its expertise into the evaluation of post-merger labor market effects.

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INTRODUCTION

Evidence of labor market concentration, mergers' suppressive effects on wages, employer collusion through wage-fixing and no-poaching agreements, rampant use of non-compete agreements, and broader labor market failures resulting in employer buyer power has drawn sharp attention to labor market regulation by antitrust scholars and enforcers, creating an unprecedented reform effort to apply antitrust law to employers' conduct.[1] Proposals range from more aggressive civil and criminal enforcement against wage-fixing and no-poaching agreements[2] to expanding the Sherman Act's monopolization standards to incorporate anticompetitive employer conduct.[3] Most prominently, however, they concentrate on more thorough Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") merger review to reduce labor market concentration and prevent its unilateral and coordinated effects—reduced hiring resulting in under-, mis-, and unemployment, artificially suppressed

1. *See* Hiba Hafiz, *Labor Antitrust's Paradox*, U. CHI. L. REV. (forthcoming 2020); Alexander Colvin & Heidi Shierholz, *Noncompete Agreements* (Econ. Pol'y Inst. Dec. 10, 2019), https://www.epi.org/publication/noncompete-agreements/; David Arnold, *Mergers and Acquisitions, Local Labor Market Concentration, and Worker Outcomes* (Oct. 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476369; Eric Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts* (Sept. 13, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3453433 [https://perma.cc/8QZ7-62C9]; José Azar et al., *Estimating Labor Market Power* (Sept. 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3456277; Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 INDIANA L.J. 1031 (2019); Suresh Naidu & Eric Posner, *Labor Monopsony and the Limits of the Law* (Jan. 13, 2019) (unpublished manuscript), https://ssrn.com/abstract=3365374 [https://perma.cc/ZE5S-2ZJG]; Ioana Marinescu & Eric Posner, *Why Has Antitrust Law Failed Workers?*, 104 CORNELL L. REV. (forthcoming 2020), https://ssrn.com/abstract=3335174 [https://perma.cc/P39V-48FC] [hereinafter Marinescu & Posner, *Why Has Antitrust*]; BRIAN CALLACI, *Vertical Restraints and the Creation of the Fissured Workplace*, *in* THE HISTORICAL AND LEGAL CREATION OF A FISSURED WORKPLACE: THE CASE OF FRANCHISING 45-72 (2019); Evan Starr, THE USE, ABUSE, AND ENFORCEABILITY OF NON-COMPETE AND NO-POACH AGREEMENTS (2019), https://eig.org/wp-content/uploads/2019/02/Non-Competes-2.20.19.pdf [https://perma.cc/G3JS-E4FR]; Suresh Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 556-60 (2018); Ioana Marinescu & Eric Posner, *A Proposal to Enhance Antitrust Protection Against Labor Market Monopsony* (Roosevelt Inst. Working Paper No. 11, 419, 2018), https://rooseveltinstitute.org/wp-content/uploads/2019/01/RI_ ProposalToEnhanceAntitrustProtection_ workingpaper_11419-1.pdf [https://perma.cc/9GW8-H5DD] [hereinafter Marinescu & Posner, *Proposal to Enhance*]; José Azar et al., *Concentration in U.S. Labor Markets: Evidence from Online Vacancy Data* (IZA DP Working Paper No. 11379, 2018), http://ftp.iza.org/dp11379.pdf [https://perma.cc/8GPY-9G8J]; David Berger et al., LABOR MARKET POWER (2018), https://ideas.repec.org/p/red/sed018/170.html [https://perma.cc/CLU8-XDLC]; Arindrajit Dube et al., *Monopsony in Online Labor Markets* (NBER Working Paper No. w24416 (Mar. 20, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3143341 [https://perma.cc/S72L-8PE5]; Alan Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* (NBER Working Paper No. 24831, 2018).

2. *See, e.g.*, ANTITRUST DIV., U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 3 (2016).

3. *See* Marinescu & Posner, *Proposal to Enhance*, *supra* note 1.

compensation, employer collusion, distributive impacts on increasing inequality, and more—to better ensure robust labor market competition.[4]

While fruitful, these proposals focus exclusively on reforming *antitrust* agencies' merger review of labor market effects, applying current antitrust standards to labor market effects or slightly clarifying those standards to the particular circumstances of buy-side merger effects in labor markets. In so doing, they do not sufficiently contend with the limitations of exclusive antitrust agency jurisdiction as a historical, doctrinal, institutional, and expertise-based matter as well as a matter of prophylactic policy. They also ignore the benefits of interagency labor market regulation in contributing to long-term labor market health and reinforcing antitrust merger policy.

To overcome these limitations of the current reform agenda, this Essay proposes integrating labor antitrust merger enforcement with labor law enforcement through interagency merger review between the antitrust agencies and the National Labor Relations Board ("NLRB" or "Board"). Specifically, if the antitrust agency's screening of larger mergers through the Hart-Scott-Rodino merger review process predicts post-merger labor market concentration levels as "moderately" or "highly concentrated," the NLRB's review and sign-off should be required for merger approval. In conducting its review, the Board would apply a "public interest" standard to evaluate whether the merger could result in harms substantially frustrating or impairing the objectives or implementation of the NLRA, including ensuring equal bargaining power between employers and employees, and would consider a range of industry- and firm-specific evidence for properly benchmarking impacts of the merger on relative bargaining power and productivity-maximizing wages. In doing its merger assessment, the Board could rely on analysis from a revived Division of Economic Research,[5] but could also solicit data and guidance from the merging parties, Department of Labor, the Equal Employment Opportunity

4. *See* Naidu et al., *supra* note 1; Marinescu & Hovenkamp, *supra* note 1. *See also Testimony Before House Subcommittee on Antitrust, Commercial, and Administrative Law (Judiciary Committee), Hearing Entitled "Antitrust and Economic Opportunity: Competition in Labor Markets," Subcomm. on Antitrust, Competition Policy, and Consumer Rights*, 116th Cong. (2019) (statement by Doha Mekki) [hereinafter Mekki Statement]; *"Oversight of the Enforcement of the Antitrust Laws," Senate Comm. on the Judiciary*, 115th Cong. 20-23 (2018) (statement of Joseph Simons) [hereinafter Simons Statement]; ORG. FOR ECON. CO-OPERATION AND DEV., MARKET CONCENTRATION—NOTE BY THE UNITED STATES (2018), https://one.oecd.org/document/DAF/COMP/WD(2018)59/en/pdf [https://perma.cc/F28G-DMLH].

5. For proposal on repealing ban on Board economist hiring (29 U.S.C. § 154(a)) and re-establishment of a Division of Economic Research, see Hiba Hafiz, *Economic Analysis of Labor Regulation*, 2017 WIS. L. REV. 1115 (2017). A repeal has been proposed in the Protecting the Right to Organize (PRO) Act, H.R. 2474, 116th Cong. (2019).

Commission ("EEOC"), competitors, employees, and customers of the merging parties, and the general public. Finally, the Board could review the merging employers' efficiency defenses and rebuttals under a *worker* welfare standard, leaving any consumer welfare concerns to antitrust agency review. The Board would be authorized to condition merger approval on ensuring robust labor protections for employees of the merged firm, including but not limited to establishing a default opt-out union, mandatory arbitration leading to a first collective bargaining agreement, or other conditions.[6]

Interagency merger review and "public interest"-based merger conditions are not unusual *outside* of labor markets. In a number of industries, regulatory agencies supplement the antitrust agencies' limited product market, consumer welfare-focused review to evaluate broader public welfare effects within and beyond that market. Joint merger review between the DOJ and the Federal Communications Commission ("FCC") (telecommunications mergers) and Federal Energy Regulatory Commission ("FERC") (electric power mergers) are prominent examples.[7] In fact, interagency jurisdiction and/or cooperation on merger review spans more and less aggressive regulatory agency intervention, including in the railroad, banking, shipping, airline, and agricultural industries.[8] A common thread in interagency review is accommodation of competition law and policy with the distinct policy goals of regulatory regimes tasked with fulfilling separate statutory mandates and some form of "public interest" standard.[9] Responsibility for merger review ranges from regulatory agencies with exclusive jurisdiction (and the antitrust agencies playing an advisory role, like the Surface Transportation Board) to concurrent jurisdiction (FCC/FERC) to mandated consultations and advisory roles for regulatory agencies.[10] Thus, regulatory agencies condition mergers on satisfying the "public interest" under their regulatory mandates and involve

6. *See infra* Part III.

7. *See* Communications Act of 1934, 47 U.S.C.A. §§ 214, 310(d) (West 1997); *see generally* Federal Power Act, 16 U.S.C. § 824a(b) (2018); Merger Policy under the Federal Power Act, 61 Fed. Reg. 68,595 (1996) (policy statement) [hereinafter FERC MPS].

8. *See infra* nn. 67-113 & accompanying text.

9. *See, e.g.*, 47 U.S.C.A. §§ 214(a), 310(d) (directing FCC to determine whether a proposed transaction would serve "the public interest, convenience, or necessity"); 16 U.S.C. § 203(a)(4) (directing FERC to approve mergers only if it finds they would be "consistent with the public interest"); 49 U.S.C. § 11324(c) (directing STB to approve mergers only if it finds they would be "consistent with the public interest"); Bank Merger Act, 12 U.S.C. § 1828(c) (2017) (directing federal banking agencies to consider proposed mergers' probable effect on the public interest); Bank Holding Company Act of 1956 § 3(c), 12 U.S.C. § 1842(c) (2017) (same).

10. *Id.*

data and expertise exchanges on factors exacerbating post-merger effects on those mandates.

A framework of concurrent jurisdiction through regulatory sharing is critical for developing a coherent, structural approach to labor market regulation that systematically addresses employer buyer power and its effects on inequality and constraining workers' access to economic opportunity. And mandating integration of antitrust and labor law enforcement in labor markets can aid in dissipating the tension between the consumer and worker welfare standards that has historically held back labor antitrust enforcement against employers. This Essay is a first step in that direction. Part I outlines the current proposals for merger review in labor markets and explains their doctrinal, methodological, and regulatory limitations. Part II provides an overview of current interagency merger review frameworks, drawing from them best practices to apply to interagency merger review in labor markets. Finally, Part III proposes and defends a framework for concurrent jurisdiction of the antitrust agencies and the NLRB in merger reviews.

I. CURRENT PROPOSALS FOR MERGER REVIEW IN LABOR MARKETS

A recent sea change in labor economics has shifted the once-dominant view that employer monopsony—or buyer power to reduce labor inputs and artificially suppress wages—is unlikely to a view that it is pervasive and that labor markets are imperfectly competitive.[11] The realities of labor market concentration as well as employer collusion and extensive use of labor market restraints in employment contracts—with limited ability for successful worker challenge—has prompted new commitments and proposals from both antitrust agencies and antitrust scholars, expanding tools once reserved for ensuring product market competition into labor markets.

A. Antitrust Agencies' Proposed Review of Mergers' Labor Market Effects

Antitrust enforcement in labor markets has a long and sordid history of targeting worker combinations, collective action, and strikes as unlawful

11. *See, e.g.*, *supra* note 1; ALAN MANNING, MONOPSONY IN MOTION 29-52 (2003); Alan Krueger, *Reflections on Dwindling Worker Bargaining Power*, JACKSON HOLE ECON. SYMPOSIUM 1 (Aug. 24, 2018), https://www.kansascityfed.org/~/media/files/publicat/sympos/2018/papersandhandouts/824180824kruegerremarks.pdf?la=en [https://perma.cc/Q5J3-7GB5].

restraints of trade, focusing on worker "cartels" while ignoring employer combinations and cartel activity.[12] In the merger context, until very recently, enforcement agencies almost exclusively regarded merger's workforce reductions and other adverse labor market effects on workers as procompetitive efficiencies, in part due to the rise of the Chicago School as the dominant intellectual force behind modern antitrust. In other words, they assumed that reduced labor costs were a *desirable* effect of a merger.[13] The anticompetitive effects of mergers that could result from increased labor market concentration were at best underenforced and underdiscussed. The 1968, 1982, 1984, 1992, and 1997 Horizontal Merger Guidelines made no reference to mergers that enhance market power on the buying side, and when consideration of mergers' buy-side effects was introduced in the 2010 Guidelines, the antitrust agencies made no mention of whether or how to assess such effects in labor markets.[14]

The antitrust agencies have committed to reviewing the labor market effects of proposed mergers when conducting their standard merger review just as they have product market effects in the past. Review of a proposed merger's impact on labor market concentration occurs as part of the agencies' merger assessment under Clayton Act, Section 7, the Hart-Scott-Rodino Amendments, and the 2010 Horizontal Merger Guidelines.[15] The standard mechanism of assessing labor market concentration effects would begin with applying the same standards to labor input markets as those

12. *See, e.g.*, DANIEL ERNST, LAWYERS AGAINST LABOR (1995); FELIX FRANKFURTER & NATHAN GREEN, THE LABOR INJUNCTION (1930); Sanjukta Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969 (2016).

13. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § V.A (1982) (outlining merger defenses based on claims of "specific efficiencies"); U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 3.5 (1984) (listing as "cognizable efficiencies" "reductions in general selling, administrative, and overhead expenses"); U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4 (1992) (same); U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4 (1997) (stating mergers generating significant efficiencies that "enabl[e] the combined firm to achieve lower costs in production . . . than either firm could have achieved without the proposed transaction" as "primary benefit of mergers to the economy"); U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (2010) [hereinafter 2010 Guidelines] (stating that "incremental costs reductions may reduce or reverse any increases in the merged firm's incentive to elevate price" and "make coordination less likely or effective by enhancing the incentive of a maverick to lower price or by creating a new maverick firm"); DAVID SCHEFFMAN ET AL., 20 YEARS OF MERGER GUIDELINES ENFORCEMENT AT THE FTC 47-48 (2002), https://www.justice.gov/archives/atr/20-years-merger-guidelines-enforcement-ftc-economic-perspective [https://perma.cc/CLU8-XDLC] (describing FTC accountants' role in assessing merger-specific efficiencies, including "reviews of labor costs and related union agreements to assess savings related to headcount reductions, reviews of labor rates and anticipated reductions"); *see also* Kevin Caves & Hal Singer, *When the Econometrician Shrugged*, 26 GEO. MASON L. REV. 395 (2019). For FTC's new stance, see Simons Statement, *supra* note 4.

14. *See* 2010 Guidelines, *supra* note 13, § 12; Naidu et al., *supra* note 1, at 540.

15. 15 U.S.C. § 18a (2012).

used on product market effects, deeming labor markets with post-merger concentration levels that exceed 2,500 on the Herfindahl-Hirschman Index (HHI) as "highly concentrated" and markets with HHI between 1,500 and 2,500 to be "moderately concentrated."[16] Mergers that increase the HHI level in labor markets by more than 100 points should "raise significant competitive concerns" to warrant scrutiny, while those resulting in an increase of more than 200 points should "be presumed to be likely to enhance market power," rebuttable by "persuasive evidence showing that the merger is unlikely to enhance market power."[17]

Enforcement agencies have committed to applying the consumer welfare standard to labor market effects but have not been clear on either what "consumer welfare" might mean in the labor market setting or how they would address circumstances where mergers harm workers but benefit consumers. First, the DOJ and FTC stated in their Guidance to Human Resource Professionals that while they would consider no employer defenses in *per se*, or "hard core," wage-fixing and horizontal no-poaching cases, they may consider defenses when reviewing employers' use of non-compete clauses or information-sharing.[18] This suggests that, when non-"hard-core" activity among employers—such as proposed mergers—is reviewed, the agencies will consider efficiencies gained or possibly benefits to consumers from labor market restraints.[19] In Congressional testimony, FTC Chair Joseph Simons stated that the FTC would review "potential anticompetitive impacts on labor" when analyzing mergers, but failed to specify how those anticompetitive effects would be weighed against any merger-specific efficiencies.[20] And when asked whether "the 'consumer welfare' standard accounts for labor market concerns," he responded: "Yes. Antitrust enforcement protects the competitive process, which benefits consumers, in labor markets as it does for other markets."[21] Counsel to the Assistant Attorney General of the Antitrust Division at DOJ, Doha Mekki, echoed this equivocation, committing to assess mergers' labor effects under a *consumer* rather than worker welfare standard: "the consumer welfare standard is flexible enough to take into account harm to

16. 2010 Guidelines, *supra* note 13, at § 5.3. For scholarly proposals detailing the application of the 2010 Guidelines to labor markets, see Marinescu & Hovenkamp, *supra* note 2, at 1058; Naidu et al., *supra* note 2, at 574-91.

17. 2010 Guidelines, *supra* note 13, at § 5.3.

18. ANTITRUST DIV., *supra* note 2, at 3; Simons Statement, *supra* note 4, at 35.

19. ANTITRUST DIV., *supra* note 2, at 4 (describing naked wage-fixing and no-poaching agreements as "hardcore cartel conduct"); Hafiz, *Labor Antitrust's Paradox*, *supra* note 1.

20. Simons Statement, *supra* note 4, at 31

21. *Id.* at 24.

competition that is localized in an upstream labor market," but clarifying that, "while there is often a symmetry between upstream and downstream harms, the law does not require evidence of harm to competition in a downstream product market for liability under Section 7."[22]

B. Scholars' Proposals for Review of Mergers' Labor Market Effects

Propelled by evidence of labor market concentration, employers' labor market restraints, and antitrust agency inaction, commentators have proposed innovative reforms to the agencies' assessment of labor market effects in their merger review. Professors Eric Posner, Glen Weyl, Suresh Naidu, Herbert Hovenkamp, Ioana Marinescu, and Marshall Steinbaum have incorporated industrial organizations ("IO") and labor economics research and methods—"structural labor economics"[23]—to theorize and empirically analyze employer market power effects on concentration levels and workers' compensation to better inform agencies' merger review.[24] Mirroring the agencies' own IO approaches to assessing product market effects of mergers but instead in labor markets, they model and explain how easily integrable their approaches are to current agency practice.[25]

The IO approach seeks to identify when firms can profitably pay workers below their marginal revenue product ("MRP"), or an MRP "proxy" wage, recognizing that "real-world" competitive wages "are likely to fall below marginal revenue product because of search frictions and job differentiation" (since labor markets are naturally monopsonistic).[26] An assumption of the approach is that, under competitive conditions, the market will set wages based on alternative uses for relatively homogeneous units of worker productivity and skill; you can expect price differentiation assuming relative uniformity of labor inputs *only* based on firms' acquisition of market power. Market power can be assessed through measures of employer concentration using the Herfindahl-Hirschman Index (HHI) or through "downward wage pressure" measures.[27] In sum, IO

22. Mekki Statement, *supra* note 4, at 3.

23. Naidu et al., *supra* note 1, at 584.

24. *See, e.g.*, Scott Hemphill & Nancy Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 1742 (2018); ALAN KRUEGER & ERIC POSNER, A PROPOSAL FOR PROTECTING LOW-INCOME WORKERS FROM MONOPSONY AND COLLUSION (2018), https://www.hamiltonproject.org/papers/a_proposal_for_protecting_low_income_workers_from_monopsony_and_collusion [https://perma.cc/666C-T7YD]. *See also supra* note 1 (collecting sources).

25. Naidu et al., *supra* note 1, at 539, 542, 584. *See also* Marinescu & Hovenkamp, *supra* note 1.

26. Marinescu & Posner, *Proposal to Enhance*, *supra* note 1, at 13.

27. *See generally* Naidu et al., *supra* note 1, at 539, 578-80. For HHI-based analysis, see Marinescu & Hovenkamp, *supra* note 1, at 1037-51; Marinescu & Posner, *Why Has Antitrust*, *supra*

models employers' ability to suppress wages based on assumptions of how profit-maximizing firms would exploit their market position relative to others by reducing labor inputs and setting a monopsonistic wage, adopting as the ideal benchmark wages at the "competitive" level approximating the MRP of labor.[28]

Scholars have proposed instituting these methods and updating the Merger Guidelines "to provide a detailed legal framework, comparable to that already provided for product market power, for evaluating the effects of a merger on labor markets."[29] Naidu, Posner, and Weyl propose that agencies presumptively block mergers that increase labor market concentration substantially or exert downward wage pressure below a meaningful threshold, absent the merging firms' demonstration of efficiency gains (reducing redundancies, increased productivity) of sufficient magnitude to overcome wage decreases and job eliminations.[30] Marinescu and Hovenkamp support a broader efficiency defense that the merger would lead to the same or greater output with significantly fewer workers through labor-saving technology, but also argue that the existence of non-compete agreements should be an exacerbating factor on a given concentration level's significance during a merger review.[31] These proposals to kickstart merger enforcement in labor markets focus exclusively on enforcement through the antitrust agencies.

C. Limitations of Current Approaches to Merger Review in Labor Markets

Current approaches to antitrust merger review of labor market effects are fundamentally limited for historical, doctrinal, institutional, and expertise-based reasons and as a matter of prophylactic policy. First, as previously discussed, the history of antitrust agency practice in labor markets has been directed at worker combinations, not employer combinations.[32] As will be more fully discussed in this Subsection, this legacy has impacted not only the doctrinal evolution of antitrust law as a common law statute as applied in labor markets, but has also had deeper impacts on the institutional culture and expertise of the antitrust agencies.

note 1, at 38-39; Steinbaum, *supra* note 1, at 10-12. For the structural model approach, see Naidu et al., *supra* note 1, at 574-95.

28. *Id.*

29. Naidu et al., *supra* note 1, at 548.

30. Naidu et al., *supra* note 1, at 591-92, 594-95.

31. Marinescu & Hovenkamp, *supra* note 1, at 1060.

32. *See* sources cited *supra* note 12; Brishen Rogers, *The Limits of Antitrust Enforcement*, BOS. REV. (Apr. 30, 2018).

Even though the antitrust agencies have announced a newfound commitment to reviewing the labor market effects of mergers, neither agency has ever blocked a merger based on an increase in labor market concentration.[33] While the DOJ *has* enforced against mergers in part because they were likely to create or enhance monopsony power in the health care setting, the government and the court focused on the mergers' *product* market effects.[34]

Second, there are real doctrinal and institutional limitations to exclusively deploying the antitrust laws to protect worker welfare. As of now, substantive antitrust doctrine and judicial review standards for approving mergers ignore labor market effects, worker welfare, and "public interest" considerations in favor of consumer welfare and the antitrust agencies' discretion.[35] As a preliminary matter, the 2010 Merger Guidelines require that a proposed merger's benefits exceed its costs in a single relevant market when assessing merger-specific efficiencies.[36] The agencies are required to assess a merger's market concentration effects in "one or more relevant markets in which the merger may substantially lessen competition," including any relevant buy-side or labor market(s).[37] But their historical practice of ignoring labor market effects has continued even after their declared commitment to Congress to consider such effects, as the DOJ's recent proposed consent decree in the Sprint/T-Mobile merger suggests, where the DOJ focused exclusively on product market effects without considering labor market effects.[38] Even were the antitrust agencies solely to challenge a merger for its effects in a relevant labor market alone, it remains an open question how the agencies or the courts would balance

33. Carl Shapiro, *Protecting Competition in the American Economy*, 33 J. ECON. PERSP. 69, 88 (2019).

34. United States et al. v. Anthem Inc. et al., 855 F.3d 345 (D.C. Cir. 2017); Complaint, United States et al. v. Anthem Inc. et al., No. 16-cv-01493 (D.D.C. July 21, 2016) (challenging merger in part because merged firm's potential to suppress reimbursement rates to providers); *see also* Revised Final Judgment, United States et al. v. Aetna Inc. et al., No. 3-99CV 1398-H (N.D. Tex. Dec. 7, 1999) (imposing conditions on merger due to merged firm's ability to depress physicians' reimbursement rates in certain markets).

35. *See* Hafiz, *supra* note 1, at 8.

36. 2010 Guidelines, *supra* note 13, at § 10.

37. *Id.* at § 4.

38. Proposed Final J., United States v. Deutsche Telekom AG et al., No. 1:19-cv-02232 (D.D.C. July 26, 2019) (failing to incorporate labor market effects analysis or structural remedies in conditional approval); Competitive Impact Statement, United States v. Deutsche Telekom AG et al., No. 1:19-cv-02232 (D.D.C. July 30, 2019); *see also* NICHOLAS ECONOMIDES ET AL., ASSESSING DOJ'S PROPOSED REMEDY IN SPRINT/T-MOBILE: CAN *EX ANTE* COMPETITIVE CONDITIONS IN WIRELESS MARKETS BE RESTORED? 3 n.13 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3467663 [https://perma.cc/B4TF-4YAG]. For labor market concentration concerns raised by merger, see Adil Abdela & Marshall Steinbaum, LABOR MARKET IMPACT OF THE PROPOSED SPRINT/T-MOBILE MERGER (2018).

harm to workers with benefits to consumers when conducting that review based on current doctrine.[39] To the extent mergers harms workers but benefits consumers—when merger-specific efficiencies outweigh the anticompetitive effects of the merger to workers—current antitrust doctrine favors consumer over worker welfare.[40] Current proposals assume consumer and worker welfare are aligned because a reduction in inputs leads to a reduction in outputs, raising prices to consumers.[41] But even proponents of additional merger enforcement in labor market acknowledge that this assumption does not always hold true. On the contrary, increases in monopsony power can harm workers without harming (and sometimes even benefiting) consumers. First, prices to consumers will not increase if product markets are competitive or a sales' reduction is offset by new firms' sales.[42] Additionally, the alignment calculus assumes employers cannot wage discriminate,[43] but information asymmetries and workplace fissuring allows employers to suppress worker compensation without reducing labor inputs by hiring new workers at different pay rates.[44] When faced with conflicting consumer/worker welfare, antitrust agencies and the courts have credited cognizable economic efficiencies where harm to workers is outweighed by benefits to consumers.[45] For example, courts have upheld no-poaching and non-compete agreements executed in mergers where employers demonstrated they were conducive to increasing

39. *See* Hafiz, *supra* note 1, at 7.

40. For a fuller discussion, see Hafiz, *supra* note 1.

41. Naidu et al., *supra* note 1, at 538, 559; Marinescu & Hovenkamp, *supra* note 1, at 1061-62.

42. Naidu et al., *supra* note 1, at 559. *See also* United States v. Syufy Enters., 903 F.2d 659, 663 (9th Cir. 1990) (finding defendant exercised monopsony power only against supplier film distributors, not consumer moviegoers).

43. Naidu et al., *supra* note 1, at 558 ("[E]mployers cannot practice wage discrimination very effectively.").

44. *See, e.g.*, DAVID WEIL, THE FISSURED WORKPLACE 87-92 (2014); Krueger, *supra* note 11, at 4-5; Arindrajit Dube & Ethan Kaplan, *Does Outsourcing Reduce Wages in the Low-Wage Service Occupations?*, 63 INDUS. & LAB. REL. REV. 287 (2010); CALLACI, *supra* note 1.

45. *See, e.g.*, Weyerhaeuser v. Ross-Simmons Hardwood Lumber, 549 U.S. 312, 325 (2007) (rejecting the premise that exercising monopsony power necessarily harms downstream consumers as well as monopsonist suppliers); O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015) (viewing benefits of NCAA marketing sports to downstream consumers as trumping lack of compensation to student-athletes); Eichhorn v. AT&T, 248 F.3d 131, 145-46 (3d Cir. 2001) (finding anticompetitive harm of no-hire agreements outweighed by merger-specific efficiencies); Statement of Interest of the United States, Stigar v. Dough Dough, No. 2:18-cv-00244, slip op. at 8-9 (E.D. Wash. Mar. 8, 2019) (stating no-poach provisions between labor-market competitors *per se* unlawful "*unless* they are *reasonably necessary* to a separate, legitimate business transaction or collaboration," thus allowing procompetitive defenses to trump anticompetitive harms); Caremark Rx/AdvancePCS, File No. 031 0239, 2 (F.T.C. Feb. 11, 2004) (statement of the F.T.C.), https://www.ftc.gov/sites/default/files/documents/cases/2004/02/040211ftcstatement0310239.pdf [https://perma.cc/PZ4A-NSWC] (arguing that lower input prices passed through to consumers as decreased prices are procompetitive).

output, quality control, protecting competitively sensitive information, incentivizing training and assistance, and preventing free-riding, demonstrating the continued primacy of consumer over worker welfare in substantive merger doctrine.[46] In doing so, courts have cited a long history of judicial recognition "that covenants-not-to-compete are not violations of §1" of the Sherman Act.[47]

Further, current proposals do not contend with the burdensome restrictions on intervention in Tunney Act proceedings and the limited transparency of agency deliberations and deal-making in consent decrees. The lion's share of DOJ/FTC merger challenges result in negotiated settlements; merger policy is effectively agency-administered with limited *ex ante* mechanisms for workers to challenge them outside of Tunney Act proceedings which require judicial approval of consent decrees.[48] Under the Tunney Act, a federal judge can enter a proposed antitrust consent decree only if she finds it "in the public interest" after considering "the impact of entry of such judgment upon . . . the public generally and individuals alleging specific injury from the violations set forth in the complaint."[49] The Act provides for a public right to comment on the proposed settlement, and a judge may hold a hearing with testimony from "Government officials or experts," "appoint a special master" or outside experts to provide analysis, and allow appearances by "interested persons or agencies," among others, in order to make an informed "public interest determination."[50]

But while Congress instructed courts in the Tunney Act and subsequent amendments to review consent decrees' comportment with the "public interest," courts have abdicated their role by deferring to the Attorney General's discretion and raising the bar for intervention in Tunney Act proceedings.[51] Even after Congress imposed more stringent

46. *See* Hafiz, *supra* note 1 (collecting cases); *Eichhorn*, 248 F.3d at 146 (approving no-hire arrangement because "primary purpose" was to ensure purchaser retention of employees' skilled services and "workforce continuity").

47. *Eichhorn*, 248 F.3d at 145; *see also* United States v. Empire Gas, 537 F.2d 296 (8th Cir. 1976); Lektro-Vend v. Vendo, 500 F. Supp. 332 (N.D. Ill. 1980).

48. Douglas Ginsburg & Joshua Wright, *Antitrust Settlements: The Culture of Consent*, *in* 1 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE 177 (Charbit et al. eds. 2013) ("the [Antitrust] Division resolv[es] nearly its entire antitrust civil enforcement docket by consent decree . . . . Since 1995, the FTC has settled 93 percent of its competition cases."); Douglas Melamed, *Antitrust: The New Regulation*, 10 ANTITRUST 13, 14 (1995) (describing antitrust enforcement as moving "from the Law Enforcement Model toward the Regulatory Model"); Harry First, *Is Antitrust "Law"?*, 10 ANTITRUST 9, 9 (1995) (noting "shift on the policy continuum toward bureaucratic regulation").

49. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, 15 U.S.C. § 16(e) (2004).

50. *Id.* § 16(f).

51. *Id.* § 16(e)(1). For overview of judicial "rubber-stamping" of DOJ consent decrees, see Darren Bush, *The Death of the Tunney Act*, 63 ANTITRUST BULL. 113, 117-27 (2018); John Flynn &

requirements on reviewing courts—*mandating* consideration of public interest factors—not a single court has challenged a consent decree.[52] And certainly no court has rejected a proposed final judgment on grounds that a merger was not in the public interest due to its labor market effects (or an antitrust agencies' failure to address such effects). The only judicial opinion addressing labor market effects of a merger in its Tunney Act review suggested that it would be improper as a doctrinal matter to assess the impacts of a merger on workers as part of the court's public interest review. The case concerned the DOJ's consent decree with AT&T initiating its divestiture into the "Baby Bells."[53] While AT&T negotiated its settlement and reorganization with the DOJ, it had also been negotiating with the Communications Workers of America ("CWA"), the union representing the Bell System's employees, and had reached a memorandum of understanding about protections for employees transferred to the separate AT&T subsidiaries and affiliates.[54] The CWA submitted briefs as part of the Tunney Act proceeding stating its approval for the decree, and while the district court cited that favorably in its approval, it made clear that the interests of the employees was not within its Tunney Act review:

> The purpose of the divestiture is to establish conditions which will prevent the type of anticompetitive activities which the government has charged in its complaints . . . . These activities, and hence the settlement of the lawsuits, do not involve AT&T's labor relations and . . . have nothing to do with the [CWA] or its relationship with the Bell System.[55]

The court cited the Clayton and Norris-LaGuardia Act's statutory exemption of labor from the antitrust laws as supporting the proposition that employees impacted by divestiture were not properly a subject of consideration in a Tunney Act review.[56]

Additionally, the Hart-Scott-Rodino Act forbids the FTC from disclosing merger review documents submitted by merging parties to the

Darren Bush, *The Misuse and Abuse of the Tunney Act*, 34 LOY. U. CHI. L.J. 750, 777-81 (2003); Howard Shelanski & Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1, 41-43 (2001). Courts only allow intervention in Tunney Act proceedings if movers can "point to specific defects . . . or . . . discrepancy between the remedy and substantially undisputed facts so broad as to render the decree a 'mockery of judicial power.'" Massachusetts School of Law v. United States, 118 F.3d 776 (D.C. Cir. 1997). This has limited intervention to "exceptionally rare circumstances." Bush, *supra* note 51, at 120.

52. Bush, *supra* note 51, at 123-27. *See, e.g.*, United States v. SBC Commc'ns, 489 F. Supp. 2d 1 (D.D.C. 2007) (concluding its Tunney Act review was limited).

53. United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982).

54. *Id.* at 210.

55. *Id.*

56. *Id.*

public,[57] and agency deployment of the deliberative process privilege and the Freedom of Information Act's deliberative process exemption (Exemption 5) block from public disclosure agency merger review documents.[58] Thus, in addition to the doctrinal challenges presented by integrating labor market effects in merger review, worker and union participation in, knowledge about, and ability to challenge merger approvals before they occur are very limited, and where political pressures *favor* merger approval, will have limited avenues of ensuring accountability. [59] While workers can challenge mergers after they occur under Section 7, they face considerable obstacles procedurally (arbitration clauses, class action certification, costly expert fees) and substantively (burden-shifting rule of reason analysis, wealthy counterparties with significant resources, judicial reluctance to "unscramble the egg" post-merger).[60] Having robust agency intervention on behalf of workers is a critical institutional bulwark to ensure adequate representation of their interests in merger review.

Third, the antitrust agencies have insufficient expertise in labor market regulation and labor law enforcement's role in reinforcing merger policy, contributing to long-term labor market health and preempting employer buyer power by ensuring employees' countervailing power. Exclusive application of antitrust agencies' social scientific methods—Industrial Organizations ("IO")—to labor market analysis cannot assess all labor market effects of a merger. While IO can predict compensation and reduced employment effects, it does not identify broader effects on exacerbating labor market failures (search costs, information asymmetries, heterogeneous preferences, matching costs, lock-in effects, mobility costs, and so on) or behavioral failures (cognitive heuristics hindering workers' risk assessments) that can enhance a merged firm's buyer power over

57. 15 U.S.C. § 18(a).

58. Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(5) (2018). The privilege pre-existed FOIA and has continuing application outside the FOIA context. *See N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (finding that the deliberative process privilege protects "advice, recommendations, and opinions which are part of the deliberative, consultative, decision-making processes of government").

59. On the impact of political pressures on merger approval, see, for example, Flynn & Bush, *supra* note 51, at 755-57; Editorial Board, *Did Trump Intervene in the AT&T Merger to Destroy His Enemies? Congress Must Investigate*, WASH. POST (Mar. 6, 2019), https://www.washingtonpost.com/opinions/congress-must-investigate-whether-trump-intervened-in-the-atandt-case/ 2019/03/06/fabeaf60-4038-11e9-a0d3-1210e58a94cf_story.html?arc404=true [https://perma.cc/W8SX-W72Z]; Jane Mayer, *The Making of the Fox News White House*, NEW YORKER (Mar. 4, 2019), https://www.newyorker.com/magazine/2019/03/11/the-making-of-the-fox-news-white-house [https://perma.cc/VA44-K2MH].

60. Marinescu & Posner, *Why Has Antitrust*, *supra* note 1, at 29-30; Hafiz, *supra* note 1.

workers.[61] In addition to IO, broader labor economic, industrial relations, and socio-psychological studies of worker productivity are key for assessing merger effects on worker productivity and output—IO does not incorporate their methodologies or insights in its assessment of merger effects.[62] Finally, IO-based market power evaluations ignore the role of institutions—like labor unions and government workplace interventions—in the longer-term equalization of worker bargaining power relative to employers and as a prophylactic to the rise of employer buyer power.[63] Successful merger enforcement ensuring vibrant labor market competition would benefit from an interdisciplinary evaluation of merger effects. Similarly, the current literature ignores how labor law enforcement—through an institutional role for the Board, substantive adaptation of labor law doctrine to the post-merger setting, and application of expertise-driven remedial conditions—could bolster any antitrust conditions or remedies and even preempt a merger's adverse effects. Because unions can serve as countervailing power to reduce the effects of employer monopsony,[64] establishing a structural role for the Board in merger review will aid in developing a stronger and mutually reinforcing system of labor market regulation.

II. INTERAGENCY MERGER REVIEW

Shared jurisdiction over merger review is not uncommon. In fact, interagency jurisdiction and/or cooperation on merger review spans the spectrum of more and less aggressive intervention by agencies outside the DOJ and FTC. This Part provides an overview of three types of interagency merger review: independent and exclusive merger review authority in an agency outside the DOJ and FTC, with the antitrust agencies playing an advisory role; concurrent jurisdiction between the antitrust agencies and an outside regulatory agency; and exclusive DOJ or FTC merger review jurisdiction with regulatory agencies playing an advisory role. It focuses on regulatory agencies' incorporation of a "public interest" standard and

61. *See* Hiba Hafiz, *Structural Labor Rights* (unpublished manuscript) (on file with author).

62. *Id.*

63. *Id.*

64. Efraim Benmelech et al., *Strong Employers and Weak Employees* (Nat'l Bureau of Econ. Research, Working Paper No. 24307, 2018); Suresh Naidu & Noam Yuchtman, *Labor Market Institutions in the Gilded Age*, (Nat'l Bureau of Econ. Research, Working Paper No. 22117, 2016). For broader analysis of unions' economic impacts, see RICHARD FREEMAN & JAMES MEDOFF, WHAT DO UNIONS DO? (1984) (discussing efficiency-enhancing functions of unions); Barry Hirsch, *What Do Unions Do for Economic Performance*, *in* WHAT DO UNIONS DO?: A TWENTY-YEAR PERSPECTIVE 193-237 (James Bennett & Bruce Kaufman eds., 2007).

policy considerations beyond antitrust policy in the merger review process. As a general matter, "public interest" consideration "is not a broad license to promote the general public welfare"; rather, "the words take meaning from the purposes of the regulatory legislation."[65] This overview reveals interagency merger review, while not without its critics, can be an effective approach to regulating mergers while balancing competing substantive priorities created by the intersection of antitrust and other regulatory regimes.

A. Independent and Exclusive Merger Review Outside the DOJ and FTC

One extreme on the interagency merger review spectrum is review done within the exclusive jurisdiction of a regulatory agency not otherwise tasked with enforcing antitrust law, with the antitrust agencies serving an advisory role. This model exists in certain industries that were comprehensively regulated by pre-New Deal and New Deal agencies under a rate-making model, as in the transportation sector.[66] Currently, the Surface Transportation Board ("STB") has exclusive jurisdiction over railroad mergers.[67]

While the STB must "accord substantial weight" to any recommendations of the Attorney General when considering applications for rail mergers, it conducts an independent merger review analysis explicitly incorporating a "public interest" standard.[68] Under that standard, it may only approve a merger after considering the "effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction,"[69] and will approve a transaction unless it finds that "the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs."[70] The burden of proof for presenting a *prima facie* case for Board approval is on the merging parties.[71] The Board's "public interest" criteria include "the various goals of effective competition, carrier safety and efficiency, adequate service for shippers, environmental safeguards, *and fair working*

65. NAACP v. Fed. Power Comm'n, 425 U.S. 662, 669 (1976).

66. *See, e.g.*, Felix Frankfurter, *The Interstate Commerce Commission*, *in* OF LAW AND LIFE 235-44 (Philip Kurland ed., 1965).

67. For STB merger review authority, see 49 U.S.C. §§ 11321-28 (Westlaw through Pub. L. No. 116-68); 49 C.F.R. § 1180 (2019) (STB railroad merger regulations).

68. 49 U.S.C. § 11324.

69. 49 U.S.C. § 11324(b)(2), (c).

70. *Id.* § 11324(d)(2).

71. 49 C.F.R. § 1180.4(c)(8).

conditions for employees."[72] And mergers serve the public interest "only when substantial and demonstrable gains in important public benefits—such as improved service and safety, enhanced competition, and greater economic efficiency—outweigh any anticompetitive effects, potential service disruptions, or other merger-related harms."[73] Beyond just weighing the potential benefits and harms of a proposed merger, the STB considers the public threat to "essential services and the reliability of the rail network," making special provision for "employee protection" and preserving existing collective bargaining agreements with unions:

> The Board is required to provide a fair arrangement for the protection of the rail employees of applicants who are affected by a consolidation. The Board supports early notice and consultation between management and the various unions, leading to negotiated implementing agreements, which the Board strongly favors. Otherwise, the Board respects the sanctity of collective bargaining agreements and will look with extreme disfavor on overrides of collective bargaining agreements except to the very limited extent necessary to carry out an approved transaction. The Board will review negotiated agreements to ensure fair and equitable treatment of all affected employees.[74]

Thus, the Board balances competing interests, including employees' interests, and the balancing under its public interest test "is entitled to considerable deference" because "determining whether to approve a carrier consolidation is a complex task requiring considerable knowledge of the transportation industry."[75]

B. Agencies' Concurrent Jurisdiction with DOJ/FTC Merger Review

Another form of interagency merger review is concurrent jurisdiction. The FCC and FERC share joint jurisdiction with the DOJ over certain mergers in the media and telecommunications industry and in the natural gas and electric utility markets, respectively.[76] When agencies have concurrent jurisdiction, either agency can essentially block a merger based on its independent analysis.

The FCC has concurrent jurisdiction with the DOJ under Sections 7 and 11 of the Clayton Act and the Communications Act of 1934 to review mergers of common carriers where their effect "may be substantially to

72. *Id.* § 1180.1(b) (emphasis added).
73. *Id.* § 1180.1(c).
74. *Id.* § 1180.1(c), (e).
75. W. Coal Traffic League v. Surface Transp. Bd., 169 F.3d 775, 778 (D.C. Cir. 1999) (citing McLean Trucking v. United States, 321 U.S. 67, 87-88 (1944)).
76. *See* sources cited *supra* note 7.

lessen competition, or tend to create a monopoly."[77] The FCC's review is initiated by the merging parties' application filing to transfer ownership of FCC licenses, triggering an opportunity for interested parties to submit comments and replies to comments.[78] After an initial screening, the FCC may request additional information and documents from the parties, comparable to the DOJ's process of requesting additional materials as "Second Requests."[79] All materials submitted to the FCC are "on the record," but commercially sensitive and proprietary materials may be subject to a protective order.[80] While the DOJ bears the burden of showing the merger's increase in market concentration and the burden of persuasion on the merger's anticompetitive effects, the merging parties seeking FCC approval bear the burden of demonstrating that the license transfer will not "substantially lessen competition" and satisfies "the public interest, convenience and necessity."[81] The FCC's merger review is independent from the DOJ's and does not require any formal cooperation, but the agencies do form a joint "Transaction Team" to coordinate internal procedures for processing merger applications.[82]

The FCC considers four factors in applying its public interest review, namely, whether: (1) the transaction would result in a violation of the Communications Act or other applicable statutory provisions; (2) the transaction would result in a violation of FCC rules; (3) the transaction would substantially frustrate or impair the FCC's implementation or enforcement of the Communications Act, or would interfere with the objectives of that and other statutes; and (4) the merger promises to yield affirmative public interest benefits.[83] The FCC's review also involves an assessment of how the merger will affect its ability to regulate within its delegated authority, including its ability to promote "access to advanced telecommunications and information services . . . in all regions of the Nation" and preserve "the quality of telecommunications services," including "the provision of new or additional services to consumers."[84] In

77. 15 U.S.C.A. §§ 18, 21(a) (Westlaw through Pub. L. No. 116-68).

78. 47 U.S.C.A. §§ 214, 310(d) (West 1997); 47 C.F.R. §§ 63.03-63.04 (2002).

79. *See* 47 C.F.R. §§ 1.311-.325.

80. 47 U.S.C.A. § 154(j); FCC v. Schreiber, 381 U.S. 279, 289-94 (1965).

81. 47 U.S.C.A. §§ 214, 310; FTC v. H.J. Heinz Co., 246 F.3d 708, 715 (D.C. Cir. 2001).

82. 47 U.S.C.A. §§ 214(a), 310(d). *See Issues Memorandum for March 1, 2000 Transaction Team Public Forum on Streamlining FCC Review of Applications Relating to Mergers*, FCC, https://www.fcc.gov/issues-memorandum-march-1-2000-transactions-team-public-forum-streamlining-fcc-review-applications [https://perma.cc/9W5P-NBL5].

83. *See, e.g.*, Ameritech Corp., 14 F.C.C.R. 14,712, 14,737-38 ¶ 48 (1999).

84. Teleport Communications Group Inc., 13 F.C.C.R. 15,236, 15,242-15,243 ¶11 (1998) ("Teleport/AT&T").

evaluating these factors, the FCC's competitive analysis need not be limited to traditional antitrust principles, even if it may be informed by them and borrows from the DOJ's Merger Guidelines.[85] Instead, the FCC's authority involves a separate and distinct duty from that of the antitrust agencies to weigh any findings and conclusions related to "pertinent antitrust policies" "with other important public interest considerations."[86] For example, in the broadcast licensing context, the FCC has considered local ownership, diversity of ownership, proposed programming, broadcast experience, the character and financial status of the applicants, and whether there would be a concentration of media control.[87] And the FCC's competitive effects analysis has been broader than the DOJ's in its focus on *potential* competition and the reduction of carriers that "can act as 'benchmarks' for evaluating the conduct of other carriers or the industry as a whole."[88] Mergers that limit comparative benchmarking by reducing comparator firms can frustrate the agency's ability to calculate anticompetitive harms and challenge its industry-wide data-gathering and monitoring ability.[89] Thus, the FCC has considered in its review the merger's impact on reducing the quality of "comparisons of regulatory and market performance between" companies.[90] In doing its assessment, it has a preference for "competitive processes and outcomes."[91] The FCC's public interest determination is judicially reviewable, on the public record, pursuant to the Administrative Procedures Act "with regard to all applications for transfer or assignment of licenses."[92]

The FCC's most significant impact on mergers is not on blocking them—it has only done so in rare cases—but rather on imposing conditions and remedial schemes to meet its public interest standard, including divestiture and other structural and behavioral remedies.[93] For example, it has conditioned approval of license transfer on: distribution of detailed monitoring reports on ordering, repair, maintenance, network performance,

85. Ameritech Corp., 14 F.C.C. 14,712, 14,738 ¶ 49 n.121; NYNEX Corp., 12 F.C.C.R. at 20,008 ¶ 37. The FCC may not "subordinate the public interest to the interest of 'equalizing competition among competitors.'" Hawaiian Tel. Co. v. FCC, 498 F.2d 771, 776 (D.C. Cir. 1974).

86. *United States v. FCC*, 652 F.2d 72, 82 (D.C. Cir. 1980).

87. *See* STEPHEN BREYER, REGULATION AND ITS REFORM 73, 78-79 (1982).

88. NYNEX Corp., 12 F.C.C.R. at 20,058 ¶ 147; Rachel Barkow & Peter Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. CHI. LEGAL F. 29, 45-46 (2000).

89. NYNEX Corp., 12 F.C.C.R. at 20,060-61 ¶ 152.

90. *Id.* at 20,069 ¶ 177.

91. Tele-Communications, Inc., 14 F.C.C.R. 3160, 3169 ¶ 14 (1999) ("AT&T/TCI").

92. Commercial Mobile Radio Services, 16 F.C.C.R. 22,668, 22,700 (2001).

93. *See, e.g.*, Philip Weiser, *Reexamining the Legacy of Dual Regulation: Reforming Dual Merger Review by the DOJ and FCC*, 61 FED. COMM. L.J. 167, 168 (2008).

and other information to competitors and government actors; pledges to expand into new markets or face damages; discount offers to competitors and charge waivers to residential customers; provision of elements of its network to competitors based on "forward-looking economic costs"; development of special arbitration regimes to ensure that cable companies continue to receive reasonable access to programming; and continued oversight to ensure harmonization and consistent enforcement within its general regulatory regime.[94]

FERC also has concurrent jurisdiction with the DOJ in reviewing mergers under the Federal Power Act.[95] FERC's public interest standard also does not require it "to analyze proposed mergers under the same standards that the [DOJ] . . . may apply" because it is not required to "serve as an enforcer of antitrust policy in conjunction" with the DOJ or FTC.[96] Thus, while it "must include antitrust considerations in its public interest calculus . . . it is not bound to use antitrust principles when they may be inconsistent with the [agency's] regulatory goals."[97] FERC's 1996 Merger Policy Statement laid out three factors that form the basis of its review: "post-merger market power must be within acceptable thresholds or be satisfactorily mitigated, acceptable customer protections must be in place, and any adverse effect on regulation must be addressed"; beyond those broad factors, FERC has avoided any rule-based approach of the "public interest" in favor of highly flexible standards.[98] Similar to the FCC, FERC leans heavily on the DOJ/FTC's Horizontal Merger Guidelines; it uses them as a "screen" for horizontal market power and requires applicants to define geographic and product markets, offer a "delivered price test" to identify potential suppliers to those markets, and uses the HHI to measure supplier concentration.[99] Passing the screen creates a rebuttable presumption that the merger will result in market power, but if the applicants fail the screen, FERC conducts a more "detailed analysis," which includes trial-type hearings at which applicants produce evidence showing their transaction is consistent with the public interest.[100] If FERC finds an "adverse effect" on competition, and if other factors do not

94. NYNEX, 12 F.C.C.R. at 19,988 ¶ 4, 19,992 ¶ 3; Ameritech Corp., 14 F.C.C.R. at 14,964, App. C (listing all conditions); Weiser, *supra* note 93, at 194.

95. 16 U.S.C.A. § 203(a)(1)-(2) (Westlaw through Pub. L. No. 116-72). *See generally* Lawrence Spiwak, *Expanding the FERC's Jurisdiction to Review Utility Mergers*, 15 ENERGY L.J. 385 (1993).

96. Northeast Utils. Serv. Co. v. FERC, 993 F.2d 937, 947-48 (1st Cir. 1993).

97. *Id.*

98. Inquiry Concerning the Commission's Merger Policy under the Federal Power Act: Policy Statement, 61 Fed. Reg. 68,595 (Dec. 30, 1996).

99. *Id.* at 68,601.

100. *Id.* at 68,596

"mitigate or counterbalance" those effects, FERC may impose remedies like forming "an Independent System Operator, divestiture of assets, elimination of transmission constraints, efficient regional transmission pricing, and . . . an open season to allow the merging utilities' customers to escape from their contracts."[101] Applicants who fail the screen can avoid mitigation if they show their proposed transaction is consistent with the public interest under four factors: (1) the potential adverse competitive effects of the merger; (2) whether entry by competitors can deter anticompetitive behavior or counteract adverse competitive effects; (3) the effects of efficiencies that could not be realized absent the merger; and (4) whether one or both of the merging firms is failing and, absent the merger, the failing firm's assets would exit the market.[102] However, the Supreme Court has held that employee job concerns do not fall within the scope of FERC's "public interest" inquiry to ensure "just and reasonable rates."[103]

C. Agencies' Joint Review of and Guidance to DOJ or FTC Merger Review

A third model of interagency merger review is coordinated review between the antitrust and regulatory agencies and, depending on the delegating statute, involves a sliding scale of authority granted to the antitrust agencies relative to the regulatory agencies. For example, in the banking industry, bank and bank holding company mergers are highly regulated under the Bank Merger Act with merger review independently conducted by the DOJ's Antitrust Division but coordinated with the merging banks' relevant federal regulator—the Federal Reserve, the Federal Deposit Insurance Corporation, or the Office of the Comptroller of the Currency—depending on the nature of the bank and transaction.[104] Banking agencies are prohibited from approving transactions they find anticompetitive, and while they must request "reports on the [merger's] competitive factors" from the DOJ before making determinations, they need not accept the DOJ's recommendations.[105] The banking agency may approve the merger if it finds that "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the

101. *Id.* at 68,601.

102. *Id.* at 68,596.

103. *NAACP*, 425 U.S. at 670.

104. *See* Bank Holding Company Act of 1956, Pub. L. No. 511-84, 70 Stat. 133 (1956) (codified at 12 U.S.C. § 1841); Federal Deposit Insurance Act, 12 U.S.C. § 1828(c) (2018); *see also* Robert Kramer, *Antitrust Review in Banking and Defense*, 11 GEO. MASON L. REV. 111, 115-17 (2002) (collecting cases).

105. 12 U.S.C. § 1828(c)(4)-(5) (Lexis through P. L. No. 116-68).

probable effect of the transaction in meeting the convenience and needs of the community served."[106] The responsible agency must consider "the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served."[107] The burden of establishing this "convenience and needs" defense is on the merging banks.[108] The DOJ then has authority to challenge banking agency-approved mergers using the same standard used by the banking agency, meaning that the standard the DOJ applies must include the same public interest considerations that the banking agencies consider and weigh.[109]

While the DOJ has exclusive jurisdiction to review mergers in the shipping and airline industry, the Federal Maritime Commission ("FMC") reviews rate agreements between carriers and shippers, can grant limited antitrust immunity for filed ocean common carrier agreements if the immunity "will not result in substantial reduction in competition or be detrimental to commerce," and can attach conditions to exemptions or revoke them.[110] Further, the FMC monitors the competitive impact and commercial conditions of agreements under "reasonableness" thresholds: whether the agreements are likely, by a reduction in competition, to produce an unreasonable increase in transportation cost or an unreasonable reduction in transportation service.[111] The FMC can also seek injunctive relief against regulated entities that "substantially lessen competition in the purchasing of certain covered services" under the Shipping Act.[112] Also, in domestic airline acquisitions and mergers, the Department of Transportation "conducts its own competitive analysis of mergers and submits its views in confidence" to the DOJ, and the DOJ calls on the Department of Agriculture to weigh in on mergers and acquisitions in the agricultural industry.[113]

106. *Id.* § 1828(c)(5)(B).

107. *Id.* § 1828(c).

108. *Id.* § 1828(c)(5).

109. *Id.* § 1828(c)(7)(B)-(C).

110. Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 (OSRA), 46 U.S.C. §§ 40301-07 (Westlaw through P. L. No. 116-68); American Mail Line, Ltd. v. FMC, 503 F.2d 157 (D.C. Cir. 1974).

111. 46 U.S.C. § 41307(b)(1) (2006).

112. *Id.* § 41307(b).

113. *See*, *e.g.*, *Mergers and Acquisitions*, U.S. DEP'T TRANSP., www.transportation.gov/policy/aviation-policy/competition-data-analysis/mergers-acquisitions (last visited Dec. 19, 2019) [https://perma.cc/7FTM-NV8F]. Before the Airline Deregulation Act of 1978, the Civil Aeronautics Board had exclusive jurisdiction to review airline mergers under a broader "public interest" standard. 49 U.S.C. § 488(b) (1940). For DOJ/FTC-USDA collaboration, see, for example, U.S. GEN. ACCT. OFF., BETTER MANAGEMENT INFORMATION IS NEEDED ON AGRICULTURAL-

D. Criticisms of Interagency Review

Criticisms of interagency merger review have focused primarily on the DOJ's concurrent with the FCC and FERC. Those criticisms offer guidance on what to avoid when extending interagency regulation of mergers in labor markets. For the most part, critics have focused on: the "double veto" and the costs of duplicative review, delay, and uncertainty (including intangible costs like deferring investments, important strategic decisions, attracting and retaining personnel, discouraging customers and vendors from dealing, and increasing the costs of financing); the failure of the regulatory agencies to follow "the judicial body of anticompetition review"; application of vague "public interest" standards and alternative competitive harms; and regulatory agency use of the merger review process to engage in policy-making beyond merger-specific concerns and outside traditional administrative requirements of notice-and-comment rulemaking.[114] Scholars and practitioners have also targeted agency power to withhold or delay approvals as enabling them to impose coerced and burdensome conditions in consent decrees that are effectively insulated from judicial review and public participation.[115] Further, some argue that FERC has been too lax in its public interest analysis, ignoring the cumulative effect of mergers in wholesale and retail markets, the relationship of purchase price to real transaction value and financial risks associated with acquisition debt, the transaction value contributed by the target's ratepayers, and obstacles to aligning the merged entity's performance with the public interest.[116]

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In sum, the role of regulatory agencies outside the antitrust agencies is prevalent in merger review, allowing regulators to bring their expertise about the merging firms' industry and broader expertise in fulfilling competing statutory mandates to bear on assessing and preventing the adverse effects of market concentration. Thus, not only must mergers

RELATED MATTERS (2001), https://www.gao.gov/assets/240/231337.pdf [https://perma.cc/592F-GU7T].

114. *See, e.g.*, Weiser, *supra* note 93, at 169-72; Donald Russell & Sherri Lynn Wolson, *Dual Antitrust Review of Telecommunications Mergers*, 11 GEO. MASON L. REV. 150-54 (2002); Barkow & Huber, *supra* note 88, at 67-81; William Mayton, *The Illegitimacy of the Public Interest Standard at the FCC*, 38 EMORY L.J. 715, 754 (1989); Telecommunications, Inc., 14 F.C.C.R. at 3238 (Furchtgott-Roth, Comm'r, concurring).

115. *See, e.g.*, Russell & Wolson, *supra* note 114, at 154; Barkow & Huber, *supra* note 88, at 63, 69, 73; Weiser, *supra* note 93, at 170.

116. *See, e.g.*, Scott Hempling, *Inconsistent with the Public Interest: FERC's Three Decades of Deference to Electricity Consolidation*, 39 ENERGY L.J. 233, 268-305 (2018).

accord with the "public interest" as agencies understand it through the lens of their specific policy mandates, but they often invite direct agency involvement in approval conditions and remedial mechanisms that position regulatory agencies as key institutional actors in firms' post-merger regime.

III. INTERAGENCY MERGER REVIEW IN LABOR MARKETS

To ensure a structural approach to labor market regulation, the NLRB should share concurrent jurisdiction over mergers that increase labor market concentration. Specifically, if the antitrust agencies identify and categorize post-merger labor market concentration levels as "moderately" or "highly concentrated" in their Hart-Scott-Rodino pre-approval screenings, that would trigger NLRB concurrent jurisdiction and independent Board sign-off would be required for the merger to proceed. The Board is the best agency to conduct joint merger review because of its role in ensuring workers' countervailing power against employers—the most natural antidote to employer buyer power when labor market concentration levels increase.[117] Drawing lessons from the strengths and weaknesses of existing interagency merger review, Congress should amend the labor law to repeal the ban on Board hiring of economists and establish a new Division of Economic Research that would oversee the Board's newly-granted merger review authority.[118]

The Board's merger review could track the FCC's, with some improvements to avoid pitfalls of unpredictably broad discretion and the "double veto." Merging parties would file an initial application for approval, and the Board would announce its acceptance through public notice, issuing notice of a schedule for accepting comments and oppositions. The Board and the antitrust agencies could develop a symbiotic relationship involving information-sharing from the earliest stages of merger review. First, the agencies could establish a joint "Transaction Team" to ensure transparent and uniform internal procedures for processing applications. The Team would detail staff and facilitate information-sharing about projections of labor market effects to both agencies, lending mutual expertise and assistance in reviewing merging

117. *See generally* note 64 and accompanying text.

118. For proposal on repealing ban on Board economist hiring (29 U.S.C. § 154(a) (Westlaw through P.L. No. 116-68)) and re-establishment of a Division of Economic Research, see Hiba Hafiz, *Economic Analysis of Labor Regulation*, 2017 WIS. L. REV. 1115 (2017). The Protecting the Right to Organize (PRO) Act of 2019 advances such a repeal. H.R. 2474, 116th Cong. (2019). While mandatory Board merger approval would require congressional intervention, significant information-sharing and consultation could occur without such intervention through establishing Memoranda of Understanding between the antitrust enforcement agencies and the NLRB.

parties' production and evaluation.[119] In addition to integrating labor agency expertise into labor antitrust enforcement, the Board could benefit from antitrust agencies' information and certified findings regarding market concentration in its assessment of labor market conditions in problematic industries and could create a feedback loop alerting the antitrust agencies to concentration concerns that may not emerge from their merger enforcement. The Board could also coordinate with the DOJ and FTC on Merger Guidelines revisions to disclose how labor market effects will be assessed during merger reviews.

To avoid transparency concerns raised in other interagency review contexts, the Board could mirror the DOJ's merger review process and require document production from both merging parties and from the parties' competitors, customers, and employees in order to evaluate competitive conditions in the market.[120] Interested parties could participate in robust, on-the-record hearings, commenting on proposed merger plans, and any Board approval or conditions would be required to respond to significant comments submitted by the public.[121] Broad public participation and agency response requirements would be a mechanism for instituting "policymaking as power-building" in labor market regulation, allowing adoption of "institutional design strategies that can be employed to reform administrative processes to proactively address disparities of power and influence."[122] To avoid delays, the Board could be required to complete its review and issue an order within 180 days of accepting the application for filing.

The NLRB is uniquely situated to assess labor-market merger effects because of its labor-management relations expertise and extensive industry-specific labor market data, including information about key indicators of labor market power like unionization rates, prevalence of labor law violations, the history of union organizing, and expert analysis of the treasure trove of filed collective bargaining agreements with terms suggestive of management and labor's respective bargaining leverage.[123]

119. *See* The Effects of Consolidation on the State of Competition in the Telecommunications Industry: Hearing Before the H. Comm. On the Judiciary, 105th Cong. 21 (1998) (statement of Joel Klein, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice).

120. 15 U.S.C. § 1313(d)(1) (1980).

121. *See, e.g.*, Del. Dep't of Nat. Reserve & Envtl. Control v. EPA, 785 F.3d 1, 17 (D.C. Cir. 2015) (requiring agency response to public comments be sufficient to enable courts "to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did").

122. K. Sabeel Rahman, *Policymaking as Power-Building*, 27 S. CAL. INTERDISC. L.J. 315, 322 (2018).

123. The Taft-Hartley Act directs the Department of Labor to collect collective bargaining agreements; unions or employers submit them voluntarily. 29 U.S.C.A. 211(a) (Westlaw through Pub.

The NLRB could thus provide critical data on and analysis of exacerbating factors that may affect the significance of a given labor market concentration level.[124] These could include data and analysis within the relevant labor market of: industry-wide wage rates, including any changes resulting from prior mergers; the use of non-competition or non-solicitation clauses within the industry; the existence of salary transparency provisions in existing collective bargaining agreements in the industry; contractual restrictions on wage transparency; internal and external labor market statistics (firm reliance on employees or contracted-for labor inputs through subcontracting, temporary agencies, and independent contractors and assessment of any wage discrimination); and the use of class action waivers in employment contracts.

The Board could also serve as a centralized hub for data, information, and reporting from labor-related agencies under existing Memoranda of Understanding.[125] Information sharing with the Department of Labor and EEOC could aid the Board's analysis of mergers' labor market effects by providing raw data and agency reports on merging parties' and industry-wide wage-and-hour violations, violations of health and safety standards, violations of anti-discrimination law, and more. Existing Memorandum of Understanding with immigration enforcement agencies could provide information about parties' unlawful hiring of undocumented immigrants, the history of wage violations against temporary work visa grantees, and the history of discrimination actions for failure to properly solicit and recruit qualified U.S. applicants.[126] The Board could further solicit data and guidance from the Federal Reserve and the IRS regarding both macroeconomic data and employee/independent contractor tax filings to better assess the labor market landscape and labor's share of income. All of this information would be critical for revealing the employers' ability to profitably engage in conduct that impacts workers' wages, working conditions, and outside options without workers quitting. Thus, joint-

L. No. 116-68). They are collected at the Office of Labor-Management Standards. 72 Fed. Reg. 26159-62 (2007).

124. The 2010 Guidelines already list factors that impact the significance of concentration levels, including price discrimination effects (§3), product differentiation (§6.3), excess capacity (§6.3), the presence of powerful buyers (§8), barriers to entry (§9), and more.

125. *See* Mem. of Understanding, Wage and Hour Div. & NLRB (Dep't of Labor Dec. 14, 2016), https://www.dol.gov/whd/federal/NLRB.pdf [https://perma.cc/96WD-Z5CP]; Mem. of Understanding, NLRB & EEOC (EEOC Nov. 16, 1993), https://www.eeoc.gov/policy/docs/eeoc-nlrb-ada.html [https://perma.cc/L6KS-7YBW].

126. *See* Addendum to the Revised Mem. of Understanding, Dep't of Homeland Sec. & Labor (May 2016), https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-4684/dol-ice_mou-addendum_w.nlrb_osha.pdf [https://perma.cc/D3YA-JZFF].

agency jurisdiction and coordination would more accurately assess the impacts of post-merger concentration through more informed analysis of a merger's deeper labor market effects.

Much like other interagency reviews, NLRB approval under its "public interest" standard would tolerate differences from antitrust agency standards.[127] The Board would assess whether the proposed merger accords with the NLRA's statutory purposes and agency rules by substantially frustrating or impairing the objectives or implementation of the labor law, including ensuring equal bargaining power between employers and employees.[128] Approval would be based on its assessment of whether potential public interest benefits outweigh public interest harms.[129] Like the STB, the Board could condition approval on protections for applicants' employees affected by the consolidation, alerting applicants that it "supports early notice and consultation" between management and workers or unions that lead to "negotiated implementing agreements."[130] It could also clearly express its respect for "the sanctity of collective bargaining agreements," that it would look with "extreme disfavor" on overrides of those agreements, and that it would review negotiated agreements "to ensure fair and equitable treatment of all affected employees."[131] The Board's discretion could also be statutorily prescribed by specifying factors it would weigh, such as the merger's impact on: downward wage pressure on productivity-maximizing wages; labor's share of income; worker mobility; underemployment, misemployment, and unemployment rates; union density rates; and other considerations. To overcome criticisms about vague and unpredictable standards, the Board could refine these factors through regulations, much like FERC, or through notice-and-comment rulemaking.[132]

The Board would focus on worker welfare effects in reviewing merging parties' efficiency defenses and rebuttals. In doing so, the Board would incorporate the expertise of labor economists, behavioral economists, sociologists of work, human resources, and psychological experts to compare estimated post-merger compensation with: internal labor market wages and life-cycle earnings within a firm; union premiums

127. *See supra* Part II.

128. 29 U.S.C.A. § 151.

129. For FCC analogs, see, for example, *In re* AT&T Inc. and DIRECTV, 30 F.C.C.R. 9131, 9139–40, ¶ 18 (2015); *In re* Softbank Corp., Starburst II, Inc., Sprint Nextel Corporation, and Clearwire Corporation, 28 F.C.C.R. 9642, 9650–51, ¶ 23 (2013).

130. 49 C.F.R. § 1180.1(b) (2010).

131. *Id.* § 1180.1(e).

132. *See, e.g.*, Hempling, *supra* note 116, at 261-62.

within the industry; fairness expectations and potential effects on productivity; merger-specific workplace realities and productivity effects; and industry-specific revenue-sharing arrangements in collective bargaining agreements. These data and analysis would be integrated into evaluations of post-merger effects on workers' bargaining leverage as against their merged employer.[133] Finally, macroeconomic experts—whether internal to the Board, reporting from other labor agencies, or solicited as expert witnesses—could estimate the impact of post-merger concentration on labor's share of income within the relevant sector. As with other interagency review, the Board could shift burden-of-proof requirements: while the DOJ would bear the burden of establishing why a merger would be blocked,[134] the merging parties would bear the burden of establishing why the Board should approve a merger.[135]

Finally, much like the FCC and FERC, the NLRB could condition mergers on appropriate remedies to meet a public interest standard, including divestiture and other structural or behavioral remedies.[136] Those could include: an opt-out union; establishing card-check or rapid elections for union recognition; arbitration procedures for a first contract;[137] requiring oversight and detailed monitoring reports on hiring and terminations data, wage structures, outsourcing and subcontracting decisions; pledges to expand into new labor markets or face damages;[138] and banning non-compete and class action waiver provisions in employment contracts.

The Board's concurrent jurisdiction in merger review is preferable to it merely serving an advisory role for a number of reasons. First, as argued *infra*, the antitrust agencies' exclusive jurisdiction over merger reviews in labor markets has failed or is limited for historical, doctrinal, institutional, and expertise-based reasons, so an advisory role would either be insufficient or ineffective.[139] And there would unlikely be robust judicial review of their failure to incorporate labor market effects in any consent decree—the almost exclusive mechanisms for resolving challenged

133. For buy-side harms on bargaining leverage, see Hemphill & Rose, *supra* note 25, at 2080-82, 2093-2105.

134. *See, e.g.*, FTC v. H.J. Heinz Co., 246 F.3d 708, 715 (D.C. Cir. 2001).

135. The Communications Act places the burden on applicants in FCC merger proceedings to prove by a preponderance that the proposed merger would serve the "public interest, convenience, and necessity." 47 U.S.C. § 310(d).

136. *See*, *e.g.*, FERC MPS, *supra* note 8, at 68,610.

137. For a parallel in the FCC setting, see News Corporation Limited, 19 F.C.C.R. 473, 679, 682 App. F(III), (IV) (2004).

138. Weiser, *supra* note 93, at 194.

139. *See* note 38 and accompanying text.

mergers—because the courts' Tunney Act review has and continues to function as a rubber stamp granting significant deference to the Attorney General while also limiting workers' ability to intervene.[140] The public would not likely be able to hold the DOJ and FTC's feet to the fire because merger review negotiations do not occur nor are available in the public record.[141] A statutory amendment to the antitrust laws requiring the antitrust agencies to consider labor market effects in merger reviews would not resolve the agencies' consistent and longstanding favoring of consumer over worker welfare; the weight of judge-made antitrust doctrine has reinforced this.[142] And courts have also demonstrated their favoring of consumers over workers in antitrust challenges under the non-statutory antitrust exemption that explicitly requires balancing antitrust and labor policy.[143]

Finally, if antitrust agencies fail to consider labor market effects and reach a consent decree, workers impacted by the merger would face significant costs in an *ex post* merger challenge.[144] Formalizing a system with the Board for concurrently developing labor market merger remedies would prevent the antitrust agencies from "becoming shadow regulators and, at the same time, empower the regulatory agencies to harmonize merger remedies with industry regulation."[145] And while the antitrust agencies may "develop competence or hire a highly qualified special monitor . . . , the agencies lack the economies of scope and scale enjoyed by the regulatory body."[146] The Board is certainly more expert at understanding how the rapid changes in workplace structures (and restructuring) affect workers' labor rights, and just like in the context of dynamic technological change in the telecommunications industry, relying exclusively on the DOJ/FTC Horizontal Merger Guidelines as "the only guidepost for reviewing industry transactions could force merger review processes to rely solely upon a rigid, static view of industry structure."[147] For all these reasons, having an institutional and mandatory role for the Board in merger reviews is necessary.

140. *See* note 51 and accompanying text.
141. *See* note 58 and accompanying text.
142. *See* Hafiz, *Labor Antitrust's Paradox*, *supra* note 1.
143. *See id.*
144. *See* note 60 and accompanying text.
145. Weiser, *supra* note 93, at 197.
146. *Id.* at 196.
147. Thomas Koutsky & Lawrence Spiwak, *Separating Politics from Policy in FCC Merger Reviews: A Basic Legal Primer on the "Public Interest" Standard*, 18 COMMLAW CONSPECTUS 329, 333 (2010).

CONCLUSION

While the rise of labor antitrust has called significant and timely attention to how American labor markets have been failing workers, limiting their access to economic mobility, and exacerbating economic inequality, administering labor market fixes through antitrust law and the antitrust agencies alone is an insufficient remedy. This Essay outlines a structural solution to challenging labor market concentration at its incipiency by incorporating the National Labor Relations Board—the labor agency tasked with ensuring equal bargaining power between employees and employers—as joint regulators in the merger review process. Concurrent jurisdiction could not only make national labor market regulation more coherent, but it could also ensure the strengthening of interagency expertise and a more substantial role for the Board in effectuating labor protections in the era of corporate consolidation.