William and Mary
Law Review

VOLUME 48 NO. 3, 2006

GUIDELINE INSTITUTIONALIZATION: THE ROLE OF MERGER GUIDELINES IN ANTITRUST DISCOURSE

HILLARY GREENE*

ABSTRACT

With the growth of the administrative state, agency-promulgated enforcement policy statements, typically referred to as guidelines, have become ubiquitous in the U.S. federal system. Yet, the actual usage and impact of such guidelines is poorly understood. Often the issuing agencies declare the guidelines to be nonbinding, even for themselves. Notwithstanding this disclaimer, the government, private parties, and even the courts frequently rely on the guidelines in a precedent-like manner.

* Associate Professor, S.J. Quinney College of Law, University of Utah. J.D., Yale Law School, B.A., Yale College. I am grateful to the University of Pennsylvania Law School and Harvard Law School, where I was a Visiting Scholar and Visiting Researcher, respectively, for their generous support when drafting this Article. Particular thanks extend to Joseph F. Brodley, Donald S. Clark, William E. Cohen, John J. Flynn, Wendy J. Gordon, David A. Hyman, James D. Hurwitz, Tara I. Koslov, William J. Lockhart, Daniel S. Medwed, Tina M. Miller, Gideon Parchomovsky, John J. Parisi, Edward L. Rubin, Alexander Tallchief Skibine, Manuel A. Utset, R. Polk Wagner, Spencer Weber Waller, Marc Winerman, Dennis A. Yao, and seminar participants at Boston University, University of Pennsylvania, and University of Utah Law Schools, and the Utah Appellate Judges Annual Conference. Finally, thank you to the *William and Mary Law Review* for their excellent work.

In this Article, Professor Greene examines the evolution of one system of enforcement policy guidelines—the U.S. federal antitrust merger guidelines—and finds that these guidelines have acted as a stealth force on the development of antitrust merger law. The influence of this guideline system, she hypothesizes, emerges from a process of institutionalization through which the guidelines become valued for more than the persuasive power of their ideas. This institutionalization process arguably has had an undue influence upon common law development, as courts have failed to fully engage the legal and economic substance of the guidelines. These findings raise the more general concern that the courts have frequently ceded their role as checks on administrative agency power operating through nonbinding policy statements such as enforcement guidelines. Such questions regarding the judiciary's role in the separation of powers are broadly analogous to those raised by Theodore Lowi regarding Congress's role in the legislative process.

Professor Greene chronicles the history of the guidelines through a series of case studies involving key elements in merger analysis. Then, based on a review of all rulings from 1969 to 2003 concerning section 7 of the Clayton Act, she generates basic quantitative measures regarding judicial references to the guidelines and then qualitatively assesses the extent to which judicial reference to the guidelines reflects substantive reliance on them. Both the case studies and statistical data provide strong evidence supporting the institutionalization theory. Having raised normative questions regarding guideline institutionalization, she then evaluates several strategies to counter that influence and proposes conduct-oriented recommendations.

Though specifics may vary, the unacknowledged phenomenon of guideline institutionalization is not unique to antitrust law. As such, Professor Greene concludes this Article with an examination of guideline institutionalization in other contexts, including the FCC and FERC, state consumer protection, and federal sentencing.

TABLE OF CONTENTS

INTRODUCTION

The constitutional character of key antitrust legislation, with its open-ended articulation of competitive principles, is a source of both strength and weakness. The statutory foundation of American antitrust law—the Sherman Act, section 5 of the Federal Trade Commission (FTC) Act, and section 7 of the Clayton Act—relies, by design, on common law development to infuse them with practical meaning. Common law development is, by nature, piecemeal. Since the late 1960s, the antitrust agencies have relied increasingly on guidelines, particularly in the area of mergers. Greater transparency in agencies' use of discretion is typically desirable. In this Article, however, I argue that the merger guidelines have resulted in a de facto, and ultimately undesirable, reduction in critical analysis elsewhere in the system, particularly at the judicial level.

With the growth of the administrative state, agency-promulgated enforcement policy statements, typically referred to as guidelines, have become ubiquitous in the U.S. federal system. Yet, the actual usage and impact of such guidelines is poorly understood. Often the issuing agencies declare the guidelines to be nonbinding, even for themselves. Notwithstanding this disclaimer, the government, private parties, and even the courts, frequently rely upon the guidelines in a precedent-like manner.

Consider the following example: Several prominent members of the antitrust and economic communities strongly and publicly advocate an economic measure of market concentration. Nonetheless, the antitrust bar virtually ignores the proposed measure for over a decade, and the courts resoundingly reject it on the rare occasions it is advocated. Once the Department of Justice (DOJ) endorses that theory in its enforcement policy guidelines—a document that does not bind that agency, let alone the courts—it is widely adopted by judges and litigants and quickly becomes the dominant method of analysis.

An even more extreme example characterizes the use of entry as a defense to charges that a merger would be anticompetitive. The federal antitrust agencies advocate a particular standard repeatedly and the courts reject it. Nevertheless, the agencies incorporate

that ostensibly unsuccessful standard into their enforcement policy guidelines. The courts, then, not only endorse that guideline standard, but also manage to overlook its arguable inconsistency with their own prior rulings.

This Article examines the evolution of one system of enforcement policy guidelines—the U.S. federal antitrust merger guidelines[1]—and finds that these guidelines have acted as a stealth force on the development of antitrust merger law. The influence of this guideline system emerges from a process of institutionalization through which the guidelines become valued for more than the persuasive power of their ideas. This institutionalization process arguably has had an undue influence on the common law as courts have failed to fully engage the legal and economic substance of the guidelines. These findings raise the more general concern that courts have frequently ceded their role as checks on administrative agency power operating through nonbinding policy statements, such as enforcement guidelines. Such questions regarding the judiciary's role in the separation of powers are broadly analogous to those raised by Theodore Lowi regarding Congress's role in the legislative process.[2]

Part I provides background on enforcement policy guidelines generally and the antitrust merger guidelines specifically. Part II then chronicles the history of the merger guidelines. The history is presented through several case studies of guideline usage involving key elements in antitrust merger analysis: concentration ratios and thresholds, market definition, and entry. In these case studies, to the extent possible, I trace the impact of various guideline elements on antitrust law development. Next, based on a review of all rulings from 1969 to 2003 concerning section 7 of the Clayton Act, I generate basic quantitative measures of guideline usage, such as the number of references to the guidelines, and I then qualitatively

1. Unless otherwise indicated, all references to "guidelines" pertain to the Department of Justice merger guidelines. *E.g.*, Merger Guidelines, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,101 (May 20, 1968) [hereinafter 1968 Merger Guidelines]; Merger Guidelines, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,102 (June 14, 1982) [hereinafter 1982 Merger Guidelines]; Merger Guidelines, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,103 (June 14, 1984) [hereinafter 1984 Merger Guidelines]; Horizontal Merger Guidelines, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Apr. 7, 1992) [hereinafter 1992 Horizontal Merger Guidelines].

2. THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY AND THE CRISIS OF PUBLIC AUTHORITY 128-46 (1969) (criticizing Congress for writing nonspecific legislation with delegation that arguably transferred legislative power to the administrative agencies).

assess the extent to which judicial *reference* to the guidelines reflects judicial *reliance* on the guidelines. The case studies and data provide strong evidence supporting the institutionalization theory. Such an in-depth study is necessary to understand the nature of the guideline influence and institutionalization, and the role of the courts in those processes.

In Part III, I present a general theory of guideline institutionalization and use it to interpret the history of merger guidelines. Several factors that contributed to the institutionalization of the guidelines are explored, including the key mechanisms of deference and framing. I also consider some broad trends in the use and the extent of guideline influence. At the end of this Part, I consider and reject the possibility that guideline influence could be explained solely by the congruence of the guidelines with existing law.

My interpretation of the evidence strongly suggests that the guidelines were a far more significant part of the antitrust legal development process than their technical status as mere nonbinding guides for agency prosecutorial discretion would suggest. Given this assessment, in Part IV, I normatively assess the impact of guidelines on the discourse that shapes merger law, evaluate several strategies to counter that influence, and propose conduct-oriented recommendations intended to encourage the courts, as well as other participants in the legal discourse, to exercise greater skepticism regarding guideline approaches. Finally, Part V explores additional aspects of institutionalization by examining (1) merger review policies at the Federal Energy Regulatory Commission (FERC) and the Federal Communications Commission (FCC), (2) nonbinding interpretations of unfairness powers at the FTC, and (3) the implications of deinstitutionalization—the recent change to nonbinding status—on decisions involving U.S. federal sentencing guidelines. This selective review of other nonbinding agency policy statements demonstrates the value of the institutionalization perspective for understanding the means through which nonbinding guidelines influence society. Though specifics may vary, the phenomena of guideline influence and institutionalization are not unique to antitrust. The evidence presented here, therefore, raises fundamental questions regarding the general role of guidelines in judicial discourse.

I. GUIDELINE ROLES

Before considering the different roles guidelines can play, the term "guideline" itself is worth defining. In administrative law terms, the enforcement guidelines at issue are "general statements of policy."[3] "An agency policy statement .... represents an agency position with respect to how it will treat—typically enforce—the governing legal norm.... The agency retains the discretion and the authority to change its position ...."[4] When promulgating policy statements, such as enforcement guidelines, agencies are not subject to the Administrative Procedure Act.[5] Such policy statements do not bind the courts as a matter of law.[6]

As a practical matter, enforcement policy guidelines generally consist of an integrated set of elements, each of which may include an analytical approach—for example, a method to define an antitrust market—combined with one or more concrete determinations, such as a threshold concentration level above which illegality is most likely, that provide benchmarks for the implementation of that analysis. Guideline influence occurs on two levels. First, the guidelines' analytical approach or underlying philosophy may frame the general parameters of the analysis.[7] Second, specific concrete determinations of the guidelines, such as analytical cutoff points or thresholds, may also be given weight. Though the former channel for influence is more subtle than the latter, it is potentially much more important.

Guidelines can be understood in terms of the express role the agencies intended and the related role that they were likely to play and indeed have assumed. The routinely cited goal for guidelines is increased consistency and predictability of the enforcement policy.

---

3. Administrative Procedure Act, 5 U.S.C. § 553(b)(A) (2000).

4. Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 94 (D.C. Cir. 1997). "The primary distinction between a substantive rule—really any rule—and a general statement of policy ... turns on whether an agency intends to bind itself to a particular legal position." *Id.*

5. *See* 5 U.S.C. § 553(b)(A).

6. *See infra* Part III.B.3.

7. *See generally* Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341 (1984) (discussing the psychology of choice and resulting outcomes in the context of decision making).

A second de facto guideline function is to comment on the existing law. Though less explicitly acknowledged, the provision of such commentary is an important guideline function.

A. Express Role: Explain Reasoning and Analysis Underlying Agency Exercise of Prosecutorial Discretion

On the most basic level, antitrust guidelines constitute the federal agencies' codification of their enforcement policies. In the first instance, then, these guidelines must be understood in terms of how the agencies navigate the sphere of prosecutorial discretion available to them. This function is particularly important within the antitrust realm, given that its statutory basis is extremely vague and open-ended. "In the field of economic regulation, the antitrust laws of the United States are unique for their generality. The open texture of many antitrust statutes ... elevates the importance of the design and capability of institutions assigned to implement them."[8]

Within the merger context, the lodestar for all analysis is section 7 of the Clayton Act, which proscribes mergers for which the result "may be .... [a] substantial lessening of competition."[9] Section 7 does not prohibit all mergers, not even all of those between competitors. Section 7 also does not adopt any particular test for the measurement of relevant markets, or any particular definition for what constitutes a "substantial lessening of competition."[10] Moreover, its reference to effects that "may" lessen competition indicates a concern with probabilities, not certainties.[11] The result within the merger context, as elsewhere in antitrust, is that legislative design has placed on the courts a central role in determining the scope of the law.

As a practical matter, the merger guidelines have both internal and external audiences. The internal audience includes staff attorneys and agency leadership. For example, the key agency decision makers, the Assistant Attorney General for Antitrust or the

8. William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 470 (2003).

9. Clayton Act of 1914 § 7, 15 U.S.C. § 18 (2000). Section 7 of the Clayton Act provides the primary statutory basis for challenging mergers.

10. *Id.*

11. Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962).

Commission, may use guidelines to make their enforcement policies clear to agency personnel. In addition, guidelines enhance continuity across administrations as they educate and steer new attorneys.

The external audience includes both private attorneys and businesspersons. Greater enforcement consistency results in greater certainty for businesses, thereby allowing them to make better-informed decisions. It also enhances self-policing of anticompetitive mergers by private parties. Rather than leaving the public to discern enforcement policy through disparate enforcement actions and other communications, such as speeches, the provision of a single enforcement policy statement increases the consistency and clarity of the messages conveyed.[12]

B. Implicit Role: Commentary on the Law

Even if the primary purpose of agency guidelines is to guide prosecutorial decisions, the guidelines necessarily comment on the existing law. They are an agency response to gaps, ambiguities, or judicial rulings that the agency perceives as misguided. Thus, guidelines can and have been promulgated that diverge from the common law in numerous ways.[13] For example, when the case law allows for consideration of a wide range of factors when evaluating a particular question, the guidelines may signal which factors deserve the greatest emphasis, as well as offer frameworks for analyzing them. At other times, the guidelines may aggressively introduce concepts, such as particular economic theories, which have not yet been the subject of substantial discussion in judicial settings. Though many have argued that the substantive effect of the ideas embodied in the merger guidelines has been positive,[14] the

---

12. In any event, whether a nonpublic enforcement policy could, in fact, remain nonpublic for long is also unclear.

13. *See infra* Part III.C.1-3.

14. *See, e.g.*, Timothy J. Muris, Chairman, Fed. Trade Comm'n, Antitrust Enforcement at the Federal Trade Commission: In a Word-Continuity, Speech Presented Before the ABA Antitrust Section Annual Meeting (Aug. 7, 2001), *available at* www.ftc.gov/speeches/muris/murisaba.htm (commemorating the twenty-fifth anniversary of the Hart-Scott Rodino Act, and characterizing the 1982 Merger Guidelines as "a milestone in antitrust" which "laid the foundation for today's merger enforcement").

process by which this influence has been exerted should give one pause.

II. THE IMPACT OF GUIDELINES ON MERGER LAW

This Part chronicles the rise of the federal antitrust merger guidelines. When first introduced in the late 1960s, their status in the courts was uncertain. By 1992, however, the guidelines were the impetus for the court to effectively reverse itself on a key legal matter involving the standard for entry.[15] This Part presents this extraordinary evolution. The process by which the guidelines acquired increasing influence was, in its general contours, gradual. In fact, it is only through understanding this gradual nature that one can understand how the guidelines were able to become the authority they are today. Unfortunately, this gradual transformation does not ensure that the changes resulted from careful consideration by the courts. Examples that underscore the absence of such reflection are provided subsequently.

The history of the merger guidelines can be divided into three primary phases: (1) their introduction in 1968, (2) their fundamental revision—effectively a rewrite—in 1982, and (3) the next substantial revision in 1992. For each guideline revision, I examine one or more significant guideline elements that differed from the common law that existed when the elements were introduced. Later guideline modifications included some elements that diverged significantly from the law at the time of issue but that the courts later implicitly accepted. These different guideline case studies present specific instances of guideline influence. When viewed in succession, the story is one in which the guidelines gained increasing influence over key legal interpretations. I supplement these case studies with broader quantitative measures which measure the frequency with which courts have referenced the guidelines and the degree to which they have relied on them. These quantitative measures support the story the case studies convey regarding increased guideline influence.

---

15. *See infra* Part II.A.3.

A. Case Studies in Guideline Usage

In this Section, I analyze how the guidelines influenced the development of merger law by studying several substantively significant guideline components: (1) concentration measures, (2) the thresholds applied to those measures, (3) market definition, and (4) entry. I address the guidelines in roughly the chronological order of their promulgation and analyze representative rulings, which are supplemented at times with other documents such as briefs and transcripts.

1. 1968 Merger Guidelines

On their face, the antitrust merger guidelines are statements of enforcement policy issued by antitrust agency leadership. They convey agency enforcement priorities to those both within and outside of the agency. Antitrust law traditionally categorizes mergers and the relevant markets along a continuum of anticompetitive risk. Historically, these categorizations relied heavily on concentration within an "antitrust" market, with higher concentration correlated to higher antitrust risk. The most noteworthy feature of the 1968 Merger Guidelines, reflecting the dominant analysis at the time, was their treatment of concentration measures. On this issue, the guidelines diverged considerably from the letter and spirit of the common law prevailing at the time they were issued.

Prior to 1968, courts typically employed the four-firm (CR4) concentration measure in merger analyses, representing the sum of the market shares for the four largest firms.[16] The legal standard for market concentration and increases in market concentration evolved in such a way that small acquisitions in relatively unconcentrated industries became illegal. In the Supreme Court's 1966

16. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE (2005) ("In the 1960's and 1970's courts and the enforcement agencies most often looked at the 'four-firm concentration ratio' (CR4) to determine the degree of danger present in a particular market."). Variants of CR4, such as the two- (CR2), six- (CR6), or eight-firm (CR8) ratios were also employed. *See, e.g.*, United States v. Black & Decker Mfg. Co., 430 F. Supp. 729, 748 (D. Md. 1976) (discussing CR2, CR4, and CR8).

ruling in *United States v. Von's Grocery Co.*, the Court enjoined the acquisition of a firm that would have resulted in a merged entity holding 1.4% of the stores (7.5% of the sales) in the market, with an increase of 1.1% in CR2 and a 3.3% increase in CR6.[17] By today's standards this level of increased concentration seems relatively insignificant.[18] Reflecting a concern for the direction in which the majority was taking the Court, Justice Stewart wrote in dissent, "[t]he sole consistency that I can find is that in litigation under [section 7 of the Clayton Act], the Government always wins."[19]

The 1968 Guidelines designated specific CR4 thresholds for "highly concentrated" markets and indicated that the DOJ would ordinarily challenge horizontal mergers in such markets when acquirer and acquired firm market shares were at or above particular values. For example, given a particular market concentration, a 15% market share firm acquiring a 1% market share firm would typically be challenged.[20] Though the guidelines' specific thresholds bore some relationship to the thresholds gleaned from case law, they nonetheless departed from contemporary judicial rulings. The primary deviation was that the guidelines typically raised the level at which mergers would not be challenged. In addition to their horizontal merger thresholds departing from *Von's Grocery*, the guidelines' vertical merger thresholds reflected a comparable departure.[21]

The 1968 concentration thresholds often framed the terms of the debate in subsequent arguments and judicial rulings. In *United States v. Hammermill Paper Co.*,[22] the contested areas in the parties' stipulations with respect to market concentration were framed heavily in terms of the guidelines:

---

17. 384 U.S. 270, 302 (1966) (Stewart, J., dissenting).

18. *See, e.g.*, Debra A. Valentine, Assistant Dir. for Int'l Antitrust, Fed. Trade Comm'n, The Evolution of U.S. Merger Law, Speech Presented before the INDECOPI Conference 5 (Aug. 13, 1996), *available at* www.ftc.gov/speeches/other/dvperumerg.htm#N_1_ ("Today, virtually all in the antitrust field doubt that competition was seriously threatened.").

19. *Von's Grocery Co.*, 384 U.S. at 301 (Stewart, J., dissenting).

20. 1968 Merger Guidelines, *supra* note 1, § I(5).

21. *See* Thomas E. Kauper, *The 1982 Horizontal Merger Guidelines: Of Collusion, Efficiency, and Failure*, 71 CAL. L. REV. 497, 512 (1983).

22. 429 F. Supp. 1271 (W.D. Pa. 1977).

> The Department of Justice *Merger Guidelines* consider a market as highly concentrated if the shares of the four largest firms amount to approximately 75% .... In 1971 ... the top 20 firms, with a cumulative share of 74.0%, did not reach the 75% level postulated by the *Guidelines* as a bench mark of high concentration when held by the top four firms.[23]

A contested stipulation with respect to entry also referred to the 1968 Guidelines levels.[24] The court found for the defendant and dismissed the complaint.

In *Crane Co. v. Harsco Corp.*,[25] the U.S. district court relied almost exclusively upon the guidelines for several key points. The *Crane* court, relying on the Supreme Court's ruling in *United States v. Marine Bancorporation, Inc.*,[26] stated that "the 'potential entrant' doctrine" was only applicable to "highly concentrated" industries.[27] The court then proceeded, in summary fashion, to find that the CR4 was 64%, and "thus the market is not highly concentrated."[28] The court's sole authority for this pivotal determination was the 1968 Guidelines.[29] The court's subsequent discussion of the horizontal claim involved a two-fold reliance on the guidelines as well. The court repeated its guideline-based assessment that the market was "not highly concentrated,"[30] and then it applied the guideline standard. The court stated that "the Department of Justice does not oppose [such] mergers ... on the ground that the anticompetitive effect is not substantial."[31]

Reliance on the merger guidelines, however, was by no means universal. Consider *Grumman Corp. v. LTV Corp.*,[32] which was

---

23. Revised and Final Pre-trial Stipulation at 40, United States v. Hammermill Paper Co., 429 F. Supp. 1271 (W.D. Pa. 1977) (No. 89-68 Erie).

24. *See id.* at 39.

25. 509 F. Supp. 115 (D. Del. 1981).

26. 418 U.S. 602 (1974).

27. *Crane Co.*, 509 F. Supp. at 124 n.6.

28. *Id.*

29. *See id.* By the late 1970s, the guidelines' thresholds were arguably more consistent with the case law than was true in the late 1960s. Assuming that these later cases were reasonably clear on the thresholds, the most natural reference would be to recent rulings rather than to the 1968 Guidelines.

30. *Id.* at 124.

31. *Id.* at 124-25. "Though [the 1968] guidelines are not binding on the courts, they are often paid some deference." *Id.* at 125.

32. Grumman Corp. v. LTV Corp., 527 F. Supp. 86 (E.D.N.Y. 1981).

decided seven months after *Crane* and did not reference the guidelines. The *Grumman* court adopted a definition of "tight oligopoly" as an industry in which the CR8 is greater than 50% and the largest firms control greater than 20% market share.[33] The court used this definition adopted from *Stanley Works v. FTC*[34] as the "high concentration" benchmark establishing a presumption of substantial anticompetitive effect.[35] The result was considerably more enforcement-minded than the equivalent standard in the 1968 Guidelines.[36]

While the use or nonuse of the particular guideline thresholds is instructive, what is most critical about the guidelines is their treatment of a lower threshold. Prior to the 1968 Guidelines' introduction, ever-diminishing market share increases were sufficient to justify a preliminary injunction or outright section 7 violation.[37] Therefore, the guidelines' explicit identification of a concentration level—albeit extremely low—beneath which actions likely would not be instituted, diverged profoundly from both the letter and spirit of the prevailing rulings. Former FTC Commissioner Thomas Leary, reflecting on this guideline provision, commented that "Donald Turner [the author of the 1968 Guidelines] ... has never been given sufficient credit for what some at the time considered to be an act of considerable moral courage."[38] Regardless of whether one agrees with Leary's substantive endorsement of the guidelines, clearly the guidelines, in staking out a lower threshold position, helped stem the trend towards finding increased concentration to be per se illegal.[39]

---

33. *Id.* at 95 (quoting Stanley Works v. FTC, 469 F.2d 498, 504 (2d Cir. 1972)).

34. 469 F.2d 498.

35. *Grumman*, 527 F. Supp. at 95.

36. 1968 Merger Guidelines, *supra* note 1, § I(5)-(6).

37. *See, e.g.*, United States v. Von's Grocery Co., 384 U.S. 270, 302 n.35 (1966) (noting slight increases can make a merger inherently suspect).

38. Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L.J. 105, 108-09 (2002).

39. *See* Howard R. Lurie, *Mergers Under the Burger Court: An Anti-antitrust Bias and Its Implications*, 23 VILL. L. REV. 213, 214 (1978); *see also* Dan W. Schneider, *Evolving Proof Standards Under Section 7 and Mergers in Transitional Markets: The Securities Industry Example*, 1981 WIS. L. REV. 1, 25 (noting that, "[d]espite the precautionary statements in [*United States v. Philadelphia National Bank*, 374 U.S. 321 (1963),] presumptive illegality grew increasingly irresistible analytically" in the mid-1960s).

2. 1982 and 1984 Merger Guidelines—Department of Justice; 1982 Merger Statement—Federal Trade Commission

In 1982, the DOJ extensively revised its 1968 Guidelines.[40] The same day the DOJ released its revised guidelines, the FTC released its comparable enforcement policy document, Statement of Enforcement Merger Policy (1982 Statement).[41] This Subsection's primary focus on the 1982 Guidelines reflects the fact that they more greatly influenced the courts than did the 1982 Statement. The 1982 Guidelines also received substantial attention from the FTC administrative law judges and commissioners alike.[42] Relatively minor changes were made to the 1982 Guidelines in 1984.[43]

The 1982 Guidelines must be understood both within the context of the prevailing common law and in comparison to the prior guidelines. Though a degree of continuity characterized the relationship between the 1968 and 1982 Guidelines, and between the 1982 Guidelines and the common law, several key differences exist. As one scholar and former DOJ official has observed, "[a]t a bare minimum, [the 1982 Guidelines] symbolize a more favorable attitude toward mergers. This general impression may be of greater consequence over the long run than the Guidelines' actual provisions."[44]

---

40. 1982 Merger Guidelines, *supra* note 1.

41. Fed. Trade Comm'n, Statement Concerning Horizontal Mergers, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,200 (June 14, 1982) [hereinafter 1982 Statement]. *See generally* Hillary Greene, *Agency Character and the Character of Agency Guidelines: An Historical and Institutional Perspective*, 72 ANTITRUST L.J. 1039 (2005) (discussing several key differences between the DOJ and FTC policies).

42. *See infra* Graph 3.

43. These revised guidelines, the 1984 Merger Guidelines, clarified a number of points, such as the use of the five percent test, and the consideration of efficiencies. *See* 1982 Merger Guidelines, *supra* note 1, §§ 2.11, 3.5. They also made some small changes to the 1982 Guidelines. For example, the time period to identify production substitution changed to one year from six months. *Id.* § 2.21. There was also discussion of several factors important to assessing the competitive significance of concentration data. *Id.* § 3.4. The 1984 Guidelines also emphasized that they were not rigid mathematical formulas that were unresponsive to market realities. U.S. Dept. of Justice, Statement To Accompany Release of 1984 Merger Guidelines, *reprinted in* Trade Reg. Rep. (CCH) ¶ 13,103, at 20,551-68 (June 14, 1984). This Article's references to the 1982 Guidelines encompass the 1984 revisions unless otherwise indicated.

44. Kauper, *supra* note 21, at 505.

Donald Turner, the author of the 1968 Guidelines, wrote the following about the 1982 Guidelines:

> [The Guidelines'] broadening the scope of the factors considered in making prosecutorial decisions over a wide range of cases will lead courts to incorporate those factors in the legal standards applied by them. Now, [the Supreme Court's rulings in *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974)] and *Marine Bancorporation* moved in this direction, but they could be narrowly construed, and the Guidelines will encourage a broader construction....
>
> ....
>
> ... I am inclined to believe that the new Guidelines, while highly professional from an economic perspective, go unduly far in complicating the decision-making process.[45]

Turner's observation that guideline identification of particular factors would translate into the courts' grappling with these factors epitomizes the manner in which guidelines can impact common law development. Guideline-based reasoning need not result in different outcomes (though it could), but the underlying analysis may change. Turner recognized that the guidelines might affect lower court interpretations of the landmark Supreme Court cases to some nontrivial degree. And not only did the guidelines introduce specific and more complex economic analyses into merger review, the guidelines introduced a subtle shift in expectations about the criteria necessary for any "proper" analysis of antitrust issues. Finally, Turner appeared to question the value of the 1982 Guidelines' increased economic precision given the practicalities associated with legal decision making. This theme of excessive reliance on economic theory would be echoed by others and extended to encompass the additional administrability problems that such an approach would pose to the enforcement agencies.[46]

---

45. Donald F. Turner, *Observations on the New Merger Guidelines and the 1968 Merger Guidelines*, 51 ANTITRUST L.J. 307, 308-09 (1982).

46. *See, e.g.*, Gina M. Killian, Note, *Bank Mergers and the Department of Justice's Horizontal Merger Guidelines: A Critique and Proposal*, 69 NOTRE DAME L. REV. 857, 867 (1994).

a. HHI: Changing the Frame for Concentration Measurement

As previously discussed, market concentration is a fundamental element of merger analysis.[47] The 1982 Guidelines revised the 1968 Guidelines and modified what had been common law practice regarding concentration on multiple levels. The revised guidelines introduced a relatively new concentration measure, provided different analytical approaches, and allocated a greater role for nonconcentration factors.[48]

The "new" concentration measure the guidelines employed was the Herfindahl-Hirshman Index (HHI).[49] The HHI for a market is the sum of the squares of the market shares in that market.[50] For example, a market consisting of five 20% market share firms has an HHI of 2000 ($20^2 + 20^2 + 20^2 + 20^2 + 20^2$). Because the HHI squares the market shares of the firms in the relevant market, it weights large market share firms more heavily in relation to smaller market share firms. The CR4 measure, in contrast, treats various combinations of large and small firms adding up to the same CR4 number as equally concentrated. For example, in a market in which the four largest firms comprise 80% of the market, with shares of 20% each, the CR4 will be 80%. If the fifth-largest firm has the remaining 20% market share, the HHI would be 2000. To underscore the difference between the HHI and CR4 measures, now assume that the largest firm has a 60% market share and the next three combined have a 20% market share, with the remaining share held by a large number of small firms. The CR4 of this alternative market is still 80%, but the HHI for this market increases to more than 3600.[51]

An HHI-type measure had been discussed widely in economic circles since at least the early 1960s, including in an important article by economist George Stigler.[52] It was a part of mainstream

---

47. *See supra* notes 16-21 and accompanying text.

48. *See* 1982 Merger Guidelines, *supra* note 1, §§ 2.11, 3.1, 3.4.

49. *See generally* Stephen Calkins, *The New Merger Guidelines and the Herfindahl-Hirschman Index*, 71 CAL. L. REV. 402 (1983).

50. Litton Indus., Inc., 82 F.T.C. 793, 1010 n.33 (1973).

51. The competitive significance of the switch between measures depends in part on the *levels* of concentration—or, in other words, the thresholds—that are treated as posing competitive risk. The treatment of thresholds is considered in the next subsection.

52. *See, e.g.*, Calkins, *supra* note 49, at 410-15. *See generally* George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964).

legal literature since at least 1969, when then-Professor Posner advocated its use.[53] Yet, HHI was largely absent from section 7 rulings until after the 1982 Guidelines were introduced. Prior to that time, case law was written almost entirely in terms of CR4 or its variations (CR2, CR8). Only six section 7 rulings from 1970 to 1982 reference the HHI.[54] Even more surprising than the infrequency with which HHI arose was the reception it received when considered at all.

The first ruling of any kind discussing HHI was the FTC Administrative Law Judge's (ALJ) 1972 opinion in *Litton Industries, Inc.*[55] The ALJ, relying extensively on the HHI measure, had dismissed the complaint.[56] The Commission reversed the ALJ and stated, "[w]e believe that the traditional four-firm concentration ratio analysis is well suited for the purpose of merger law enforcement and see no compelling reason to ignore it in this case."[57] Commissioner Dennison concurred with the Commission's finding of a section 7 violation, but further stated that, "[i]n view of the asymmetry of market shares ... I do not place great weight on increases in [CR2 and CR4]."[58] Therefore, he saw "no error in the use of [HHI] since economists use this or similar indices of disparity to measure concentration where there is asymmetry in market shares."[59] However, Dennison continued, the ALJ failed to recognize that the "statistical peculiarity of [HHI, unlike CR2 and CR4] ... is that it tends to be skewed toward very small values."[60]

The next case discussing HHI, *United States v. Black & Decker Manufacturing Co.*, expressly rejected the new measure.[61] Though the district court ultimately found for the defendants, it rejected the HHI method of concentration they proposed. "In lieu of concentration ratios, defendants advocate the use of the Herfindahl index .... The critical problem with the Herfindahl index, aside from its *non-*

53. *See generally* Richard C. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969).

54. *See* Calkins, *supra* note 49, at 410-15.

55. 82 F.T.C. 793 (1973), *vacated*, 85 F.T.C. 333, *modified*, 86 F.T.C. 589 (1975).

56. *Id.* at 979.

57. *Id.* at 1010.

58. *Id.* at 976 (Dennison, Comm'r, concurring).

59. *Id.* at 976 n.5.

60. *Id.*

61. 430 F. Supp. 729, 748 n.38 (D. Md. 1976).

recognition by the courts which have uniformly used concentration ratios and its concomitant lack of comparability to data from earlier authority," is that it could distort the concentration of the market if one or two firms have sizable shares and there are many smaller, insignificant firms.[62]

Five years later, in *Marathon Oil Co. v. Mobil Corp.*, the court merely observed in a footnote that the HHI, *as well as* the CR4 and CR8 indices, were "[a]ccepted measures of concentration."[63] Of course, as economist George Stigler, soon to be a Nobel Laureate, was an expert in this case,[64] one might wonder whether the court's gratuitous approval of HHI reflected more on the court's respect for Stigler than for the concept itself.

Another notable feature of these early cases referencing HHI was that in each instance a private party, invariably the defendant, introduced the HHI index. This pattern was understandable. One could well imagine that defendants, failing under traditional measures, would be most likely to employ HHI. If a plaintiff, including the government, failed under the traditional measures, it had the option not to bring the case at all. Therefore, arguably fewer incentives existed to use HHI offensively, at least not as the sole concentration measure, until either it was "endorsed" in some manner or other more traditional arguments were problematic. The same did not hold true for defensive use of HHI. In sum, despite a clear appreciation of the critical features distinguishing HHI from CR measures, as reflected in *Litton* and the economic and legal literature both in terms of the HHI's relative superiority and inferiority, the HHI measure was largely absent in rulings until the DOJ endorsed it in the 1982 Guidelines.

HHI immediately became a staple of the courts after the 1982 Guidelines were issued, though a transition period existed during which the typical judicial treatment recognized both CR4 and HHI concentration measures.[65] Even during this period of dual reliance,

---

62. *Id.* (emphasis added).

63. 530 F. Supp. 315, 323 n.15 (N.D. Ohio 1981).

64. Marathon Oil Co. v. Mobil Corp., 669 F.2d 378, 379 (6th Cir. 1981); *see* Calkins, *supra* note 49, at 413 n.75.

65. During this time, an increasing percentage of cases were brought by the agencies rather than by private parties. *See infra* note 183. That might have accounted for the HHI measure being used within DOJ cases in particular. However, that fact did not explain either the judiciary's swift adoption of the HHI measure or the dominance of the use of HHIs that

the HHI measure was typically emphasized over the CR measure. In a sample of thirty-eight rulings from 1985 to 1990 which included nearly all of the rulings involving the DOJ and private parties as plaintiffs, I found that when CR and HHIs were both mentioned, the HHI concentration measure dominated the discussion and holdings in a very strong majority of the rulings.[66]

During this transition period, one would have expected some judicial weighing of the two measures' relative merits, especially given the poor treatment of HHIs in pre-1982 cases and the potential for the two measures to produce significantly different concentration assessments in some cases. Yet, I have identified only one case including such a discussion.[67] Though most cases may not have necessitated an engagement of this issue, this lack of engagement appears to have allowed the HHI measure—with its increased weighting of large firms—to reframe the legal analysis without meaningful debate.[68] Ultimately, one cannot fully evaluate the

---

I found in cases involving only private parties. The switch to reliance on HHIs can even be seen in *Great Lakes Chemical Corp.*, a case that the FTC filed in 1981 and in which it entered a consent order in 1984. 103 F.T.C. 467, 467 (1984). The FTC's complaint only referenced CR2 and CR4. *See id.* at 469-71. However, the FTC complaint counsel's brief before the Commission in 1983 relied most heavily on HHI, though HHIs were not mentioned in the ruling. Trial Brief Supporting Complainant, *Great Lakes*, 103 F.T.C. 467 (No. 9155).

66. Of the thirty-nine rulings, eleven did not discuss concentration, and eleven were primarily concerned with the market shares of the parties to the acquisition rather than their concentration in the market. Of the remaining seventeen rulings, HHI was the primary concentration measure discussed in ten rulings, *see, e.g.*, Consol. Gold Fields v. AngloAm. Corp. of S. Africa, 698 F. Supp. 487 (S.D.N.Y. 1988), and was equally treated with CR in five other rulings, *see, e.g.*, United States v. Calmar, Inc., 612 F. Supp. 1298 (D.N.J. 1985). There were only two rulings in which the CR measure dominated. Montfort of Colo., Inc. v. Cargill, Inc., 761 F.2d 570 (10th Cir. 1985) (using only the CR measure), *rev'd*, 479 U.S. 104 (1986); Christian Schmidt Brewing Co. v. G. Heileman Brewing Co., 600 F. Supp. 1326 (E.D. Mich. 1985) (including HHI analysis in a footnote).

67. *See infra* note 81 and accompanying text.

68. This lack of debate did not appear to reflect an emerging substantive consensus on the HHI. Empirical work on the relative value of the HHI measure was inconclusive. *See, e.g.*, Calkins, *supra* note 49, at 417 ("Empirical work in the United States and other countries also has failed to result in a clear preference for the HHI over the more traditional CR's."); Kauper, *supra* note 21, at 511 ("[T]he use of the HHI as the measure of concentration is controversial. It may overemphasize the disparity in size among firms in the market ...."); *see also* Neil B. Cohen & Charles A. Sullivan, *The Herfindahl-Hirschman Index and the New Antitrust Merger Guidelines: Concentrating on Concentration*, 62 TEX. L. REV. 453, 506 (1983) ("[D]ecision-makers should look to a number of indicators of concentration in making their ultimate determination."). The FTC's 1982 Statement endorsed neither the HHI nor the DOJ's specific thresholds, and instead indicated that it would continue to look closely to concentration

significance of changing concentration measures without understanding the fate of the accompanying thresholds. This is addressed next.

b. Market Concentration Thresholds

The 1968 Guidelines helped cement the notion of a single, universally applicable market concentration threshold in merger law. But these thresholds were based entirely on CR4 and related concentration measures that did not have clear HHI equivalents. This was because, as discussed previously, the same HHI value could give rise to a range of CR4s.[69] This subsection explores the comparability of the two standards, the substantive basis for their divergence, and the nature of their adoption outside the federal antitrust agencies.

In both the 1968 and 1982 guidelines, the concentration thresholds consisted of a criterion for determining if the underlying market was highly concentrated and an indication of the increase in market concentration that was likely to trigger a challenge.[70] The 1982 Guidelines changed those thresholds. Many viewed these thresholds as relatively arbitrary. For example, William Baxter, the primary author of the 1982 Guidelines, remarked that

> [t]he lines themselves [that is, the HHI thresholds] are arbitrary, and reflect the fact that we were born with ten fingers and have gotten used to a base ten system. They have no magical qualities beyond that....

---

measures, which may come in the form of HHI or other measures, though "a more refined treatment of that data is in order." 1982 Statement, *supra* note 41, § II. Traditionally, the EU had relied more heavily on CRs rather than HHIs. Juan F. Briones-Alonso, European Study Conf., Oligopolistic Dominance: Is There a Common Approach in Different Jurisdictions?, ¶¶ 9-10 (Nov. 18, 1995), http://www.ec.europa.eu/comm/competition/speeches/text/sp1995_036_en. In their 2004 Guidelines, the EU now relies quite heavily on the HHI measure. *See generally* Council Regulation 139/2004, art. 2, 2004 O.J. (C 31) 5 (EC) (defining how the EU Commission assesses horizontal mergers).

69. *See* David S. Weinstock, *Some Little-known Properties of the Herfindahl-Hirschman Index: Problems of Translation and Specification*, 29 ANTITRUST BULL. 705, 707 (1984) (stating that "each HHI ... relates to a *range* of CR4s").

70. The 1982 Guidelines also effectively provided a safe harbor and delineated lower levels of concentration. 1982 Merger Guidelines, *supra* note 1, § III(A)(1)(a).

> ... We are fully aware of the arbitrariness of those lines and will attempt to see them as parts of a continuum and produce sensible results.[71]

Some wanted lower thresholds—one drafter proposed 1600,[72] whereas economist George Stigler proposed 2000 to 2500.[73]

The 1968 Guidelines determined the underlying market concentration using the CR4 measure and then provided some examples of market shares for merging firms that would likely lead to a challenge. The 1982 Guidelines used the HHI measure to determine both the underlying concentration and the critical level of increase. Table 1 compares the standards for merger challenge between the guidelines. Subsequent revisions to the 1982 Guidelines have not changed these critical thresholds.[74]

---

71. William F. Baxter, *A Justice Department Perspective*, 51 ANTITRUST L.J. 287, 292 (1982).

72. *See* Calkins, *supra* note 49, at 417-18; *see also* Kauper, *supra* note 21, at 525 ("This level [of 1800], in my judgment, is both higher than economic analysis dictates, and too great a departure from judicially developed standards."). Thomas Kauper served as the Assistant Attorney General for Antitrust during the Carter Administration.

73. Calkins, *supra* note 49, at 418.

74. *See* 1984 Merger Guidelines, *supra* note 1, § 3.1; 1992 Horizontal Merger Guidelines, *supra* note 1, § 1.51.

Table 1: Partial Comparison of 1968 and 1982 Guideline Thresholds for Horizontal Mergers[75]

MG	*Highly concentrated market*	*In highly concentrated market challenge is ...*	*In less highly concentrated market challenge is ...*
1968	CR4= 75%	Likely if, 4+% + 4+%, or 10+% + 2+%	Likely if, 5+% + 5+%, or 25+% +1+%
1982	HHI=1800	Likely if, HHI increase > 100 points *e.g.*, 7% + 7%, or 25% + 2%, gives approximately a 100 increase in HHI	More likely than not, if HHI increase > 100; Unlikely, if HHI increase < 50 points *e.g.*, 5% + 5% gives approximately a 50 increase in HHI

Given that the HHI is highly responsive to disparities in relative market shares of firms, whereas the CR4 is not, for some market share configurations the 1982 Guidelines could be either more or less lenient in terms of classifying a market as highly concentrated. As discussed previously, little case law prior to the 1982 Guidelines involved HHI measures.[76]

Hence, with respect to thresholds for merger challenges, discerning the difference between 1982 common law and the 1982 Guidelines amounts to a comparison of (1) the thresholds expressed in the common law of the time for highly concentrated markets in terms of CR4 and the CR4-translated HHI and (2) the market share sizes of acquisitions likely to be challenged, again using translations from HHI to CR4. More generally, in terms of the changes in concentration likely to trigger a challenge, the 1982 Guidelines were more permissive of mergers than were the 1968 Guidelines.[77] The 1982

75. This information is based on 1968 Merger Guidelines, *supra* note 1, §§ 5-6, and 1982 Merger Guidelines, *supra* note 1, § III(A).

76. *See supra* notes 52-54 and accompanying text.

77. Based on an empirical study of market size dispersions, the DOJ noted in the 1982

Guidelines, like their 1968 predecessor, were typically viewed as differing from the common law.[78] For example, Professor Eleanor Fox's review of post-1968 merger cases led her to conclude that if the government had applied the 1982 Guidelines to the six Supreme Court merger cases after 1968, in which the Court either found the merger illegal or likely would have found illegality, depending on the facts found after remand, the government either would not have sued or probably would not have sued in four cases.[79]

Practically speaking, the difficulty translating from CR4s to HHIs also weakened the impact of the pre-HHI concentration threshold precedent. This disjunction also increased the prospect of resetting the thresholds to increase the hurdle for bringing, and winning, merger cases. As Stephen Calkins, former General Counsel of the FTC, observed, if the 1982 Guidelines merely raised the thresholds from the 1968 Guidelines,

> [t]he natural tendency, especially of adjudicators, would have been to [compare the new Guidelines' thresholds to those of the 1968 Guidelines and the case law]. Instead, adopting the HHI offers a clean break with the past. Court decisions offer no useful guidance as to what thresholds should raise concern, and the literature offers little more.... The Guidelines' thresholds, for all practical purposes, are "the only game in town."[80]

In *Pabst Brewing Co. v. G. Heileman Brewing Co.*, the first post-1982 Guidelines case to consider HHI, the court found over one party's objections that HHI should be used rather than CR4.[81]

Guidelines that an 1800 HHI averages out to a CR4 of about 70%. The 1982 Guidelines translate the 1968 provisions into an HHI triggering increases of about thirty-five points in highly concentrated markets. 1982 Merger Guidelines, *supra* note 1, § III(A); *see also* Eleanor M. Fox, *The New Merger Guidelines—A Blueprint for Microeconomic Analysis*, 27 ANTITRUST BULL. 519, 552-65 (1982) (extensively discussing differences between the two guidelines, and providing general or case law examples of when the 1982 Guidelines are more lenient than the 1968 Guidelines).

78. *See* Kauper, *supra* note 21, at 512 ("A good case can be made for the view that the 1982 Guidelines depart from contemporary judicial rulings only slightly more than the 1968 Guidelines departed from similar rulings of their time."); *id.* (noting that "low-end threshold levels" were, of course, vulnerable to the criticism that the government "is refusing to enforce 'the law'").

79. Fox, *supra* note 77, at 590.

80. Calkins, *supra* note 49, at 427-28.

81. No. 88-C-078-C, 1988 WL 237452 (W.D. Wis. Aug. 19, 1988).

Ironically, however, "[t]he parties apparently accepted the Guidelines' HHI thresholds as appropriate if the HHI was to be used, and debated only whether to use adjusted or unadjusted numbers."[82] Discussion, however, appeared to be more the exception than the rule.[83] Given the centrality of the thresholds to antitrust merger analysis, this lack of discussion on the appropriateness of the new thresholds is quite troubling. Over time, the general acknowledgement of the HHI-based concentration measure of the guidelines arguably appears to have been misinterpreted as support for the specific threshold levels.

c. SSNIP: Changing the Frame for Market Definition

The DOJ stated that "perhaps the single most important contribution" in the 1982 Guidelines was the replacement of the often "*ad hoc*" determinations of market definition with a more precise definition.[84] A market was now defined as "a group of products and an associated geographic area such that (in the absence of new entry) a hypothetical, unregulated firm that made all the sales of those products in that area could increase its profits through a small but significant and non-transitory increase in price [SSNIP]."[85] As in the case with market concentration, SSNIP hinges upon a threshold determination. With the specified 5% price increase,[86] this "5% test" that provided a precise statement of an antitrust market reflecting economic principles regarding substitution. The 1982 Guidelines also appeared to define markets more broadly than the 1968 Guidelines by not only including "market share data for current producers (sellers)"—as did the 1968 guides—but also including in the market "sellers who compete or potentially *could* compete with the merging firm."[87]

Prior to the 1982 Guidelines, antitrust markets were defined according to *Brown Shoe Co. v. United States*, which allowed for a

---

82. Calkins, *supra* note 49, at 414 (footnote omitted).

83. *See id.* at 427-28.

84. 1984 Merger Guidelines, *supra* note 43, § 1.

85. 1982 Merger Guidelines, *supra* note 1, § II n.6.

86. *See id.* § II(D).

87. E. Thomas Sullivan, *The Economic Jurisprudence of the Burger Court's Antitrust Policy: The First Thirteen Years*, 58 NOTRE DAME L. REV. 1, 45-46 (1982).

conventional market defined by "reasonable interchangeability of use or the cross-elasticity of demand," but which also allowed mergers to be proscribed on the basis of effects in "submarkets" that could be identified using a number of factors, such as a "product's peculiar characteristics and uses, unique production facilities, distinct customers, [and] distinct prices."[88] Courts found submarkets to be a convenient concept with which to find liability, whereas commentators were frustrated by the concept's imprecision and apparent tension with the conventional market definition.[89]

After 1982, the courts appeared to retreat from *Brown Shoe* and toward more economics-based views of market definition. Though the evidence of influence on this guideline change is less direct than that discussed regarding HHIs, considerable indirect evidence of influence exists. Werden, for example, identifies many post-1982 cases in which the guidelines approach was applied or cited approvingly, as well as cases in which the courts referred to other related approaches in the scholarly literature that were relatively inhospitable to the idea of submarkets.[90] In contrast, Werden also finds very few pre-1982 rulings that argued against submarkets using economics arguments consistent with what became the guidelines approach.[91] He concluded that "market delineation since the [1982] Guidelines bears little resemblance to that of the prior two decades."[92]

While SSNIP arguably contributed to a change in the law regarding market definition, courts adopted SSNIP more slowly

---

88. 370 U.S. 294, 325 (1962).

89. *See, e.g.*, Jonathan B. Baker, *Stepping Out in an Old* Brown Shoe*: In Qualified Praise of Submarkets*, 68 ANTITRUST L.J. 203, 206-07 (2000); Gregory J. Werden, *The History of Antitrust Market Delineation*, 76 MARQ. L. REV. 123, 160-61 (1992).

90. *See* Werden, *supra* note 89, at 205-08.

91. Werden carefully delineates that even among those courts that have continued to cite to *Brown Shoe*'s "practical indicia" for submarkets, these same courts "have cited them without actually applying them." *Id.* at 205. Werden further notes that a number of other courts "have held that the practical indicia are merely 'evidentiary proxies for direct proof of substitutability.'" *Id.* (quoting H.J., Inc. v. Int'l Tel. & Tel. Corp., 867 F.2d 1531, 1540 (8th Cir. 1989); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 218 (D.C. Cir. 1986)). Yet another court has held that "'[t]he use of the term 'submarket' is to be avoided; it adds only confusion to an already imprecise and complex endeavor.'" *Id.* at 206 (quoting Satellite Television & Associated Res., Inc. v. Cont'l Cablevision of Va., Inc., 714 F.2d 351, 355 n.5 (4th Cir. 1983)).

92. *Id.* at 205.

than they did the HHIs. A primary problem with SSNIP was its workability. SSNIP has been criticized as an illustration of how economics has elevated theory over practice in some parts of merger law.[93] But despite the problems that the courts and the DOJ may have had actually deploying SSNIP, it remained DOJ's formal policy for merger analysis.[94] This policy contributed to the concept's persistence despite a lukewarm reception by the courts. Continued use gave the concept time to mature and time for methods of implementation to be developed.

3. 1992 Merger Guidelines

The next major revision to the merger guidelines occurred in 1992.[95] This revision also marked the first time the DOJ and FTC issued joint guidelines. Prior iterations of the guidelines worked to refine and revise the common law at the time of their issuance. The 1992 Guidelines revealed the potential of guidelines to reject the prevailing common law and, nonetheless, later become incorporated into that law.

a. Entry

Especially since *General Dynamics*,[96] the courts were increasingly willing to allow market concentration evidence to be tempered by other factors—for example, factors that make collusion more

93. *See id.* at 200; *see also* Monfort of Colo., Inc. v. Cargill, Inc., 761 F.2d 570, 579 (10th Cir. 1985) ("[O]n the issue of market definition, a decision based on [the] Guidelines remains as inexact as the data gathered to make the assessment. Market definition is by its nature an imprecise task. The Justice Department's recent revisions of the 1982 market definition standards, only strengthen our conviction that these guidelines are more useful for setting prosecutorial policy than delineating judicial standards.").

94. *Antitrust Division's Chief Economist Defends Value of New Merger Guidelines*, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1072, at 1302 (June 24, 1982). "The kind of economic analysis required by the Justice Department's new merger guidelines has been accomplished only three times within the Antitrust Division, according to Lawrence J. White, the Division's chief economist." *Id.* White, however, "declined to name the three matters." *Id.* at 1304. He "recogniz[ed] the difficulties in obtaining the proper evidence, [and] conceded that there often will not be definitive answers. But [White] stressed: 'I think this is going to encourage us and the private sector to be looking a lot harder for econometric evidence.'" *Id.*

95. 1992 Horizontal Merger Guidelines, *supra* note 1.

96. United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974).

difficult—and by a small number of defenses.[97] The most important of these defenses has been entry. Easy entry, it is argued, undercuts the potential anticompetitive effects associated with significant increases in market concentration. Despite widespread agreement that entry was germane for determining if a merger would be anticompetitive, the best way to assess entry and to incorporate it into the analysis was unclear as reflected in the differing approaches to its treatment in subsequent years.

The 1982 Guidelines recognized entry but provided little elaboration on how to implement the entry defense.[98] In the late 1980s, the DOJ focused on whether entry *would* occur rather than *could* occur.[99] In *United States v. Baker Hughes Inc.*, the DOJ argued that entry "can rebut a prima facie case *only by a clear showing that entry into the market by competitors would be quick and effective.*"[100] The D.C. Circuit unequivocally rejected the proposed standard, stating "[w]e find no merit in the legal standard propounded by the government. It is devoid of support in the statute, in the case law, and in the government's own [1982] Merger Guidelines."[101] The court elaborated further upon the "fundamental" flaws in the DOJ's position, noting that it places an "onerous burden [on the defendant] of proving that entry will be 'quick and effective,'" and that, by requiring "a *clear* showing, the standard in effect shifts the government's ultimate burden of persuasion to the defendant."[102]

---

97. James T. Halverson, *Report to the House of Delegates on Proposed Amendments to Section 7 of the Clayton Act*, 55 ANTITRUST L.J. 673, 684 (1986) ("Subsequent lower court and FTC merger decisions have viewed General Dynamics as a point of departure for looking beyond market share and concentration levels to more particularized economic evidence bearing on competitive effect, resulting in more informed and better decisions."). Such evidence includes the existence of "entry barriers," "potential entry by new firms," and "expanded entry by existing firms." *Id.*

98. The 1982 Merger Guidelines assessed "[e]ase of [e]ntry" for horizontal mergers by considering "the likelihood and probable magnitude of entry in response to a small but significant and non-transitory increase in price," here five percent. 1982 Merger Guidelines, *supra* note 1, § III(B). A two-year time frame was used. *Id.* As one commentator observed, "[t]he most curious feature of this provision is that, having indicated the method for determining 'how much' entry is likely to occur, there is no indication of 'how much' is necessary to prevent competitors from raising prices." Kauper, *supra* note 21, at 514-15.

99. Jonathan B. Baker, *The Problem with* Baker Hughes *and* Syufy*: On the Role of Entry in Merger Analysis*, 65 ANTITRUST L.J. 353, 363 (1997).

100. 908 F.2d 981, 983 (D.C. Cir. 1990).

101. *Id.*

102. *Id.*

Yet the 1992 Guidelines provide that entry is "easy" if it could be "timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern. In markets where entry is that easy (*i.e.*, where entry passes these tests of timeliness, likelihood, and sufficiency), the merger raises no antitrust concern and ordinarily requires no further analysis."[103] As William Blumenthal, currently General Counsel of the FTC, observed shortly after the 1992 Guidelines were issued:

> There is substantial question as to whether the 1992 Guidelines are consistent with the case law that has evolved with respect to entry. "Timely" is not precisely the same as "quick," and "sufficient" is not precisely the same as "effective," but the Guidelines are similar to (perhaps indistinguishable from?) the government position that was rejected by the court in *Baker Hughes*.[104]

In 1995, the United States Court of Appeals for the Ninth Circuit quoted the guidelines' entry standard with approval, albeit within a different antitrust context.[105] Somewhat ironic was the endorsement of the District Court for the District of Columbia of the "timely, likely, sufficient" standard within the section 7 context in 1998. In *FTC v. Cardinal Health, Inc.*, the court explained the importance of entry as "one way in which post-merger pricing practices can be forced back down to competitive levels."[106] The court then proceeded to quote the 1992 Guideline standard of "*timely, likely* and *sufficient*" and observed that "[t]he Court of Appeals for this Circuit affirmed the use of ease of entry analysis in *United States v. Baker Hughes*."[107]

In sum, the federal government revised its entry guideline in response to the series of losses it suffered owing, in part, to its entry analysis. Yet, the antitrust agencies adopted a guideline standard

---

103. 1992 Horizontal Merger Guidelines, *supra* note 1, § 3.0.

104. William Blumenthal, *Thirty-one Merger Policy Questions Still Lingering After the 1992 Guidelines*, 38 ANTITRUST BULL. 593, 632 (1993); *see supra* notes 102-03 and accompanying text.

105. Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1440 (9th Cir. 1995) (concerning a section 2 action under the Sherman Act for attempted monopolization).

106. 12 F. Supp. 2d 34, 55 (D.D.C. 1998).

107. *Id.*; *see supra* notes 102-03 and accompanying text.

that, on its face, was extremely close to the standard the circuit court had rejected. This newly packaged guideline standard, containing arguments very similar to those previously rejected, *then* was met with judicial approval.

b. Treatment of Production Substitution and Entry

One issue with which both the 1982 and 1992 Guidelines grappled was distinguishing between existing supply and entry. For example, an existing supplier might have existing capacity that is not currently producing the product in question, but could quickly be converted to do so. Should this capacity be counted in determining market concentration or as potential entry? The 1992 Guidelines consider such capacity, or "uncommitted" entry, when determining market concentration, if the supply conversion could be accomplished within one year without significant sunk costs.[108] This categorization was not as innocuous as it may have seemed. As Professor Louis Schwartz aptly explained,

> Potential diversion of productive capacity ... has generally been evaluated by examining the condition of entry rather than by manipulating the market share calculation....
>
> Logically, it ought to make no difference whether the decisionmaker bases his decision on a higher market share discounted by ease of entry or a lower market share calculated by treating potential entrants as already in the market. *Practically and rhetorically, however, a significant advantage has been given to defendants, and departmental discretion has been reinforced....*
>
> ... An agency strategy that can have the effect of lowering nominal market shares will combine nicely with conventional judicial benchmarks of "excessive" concentration to ease the path to mergers.[109]

The treatment of committed and uncommitted entry underscores a significant, potentially insidious aspect of any decision framework

---

108. 1992 Horizontal Merger Guidelines, *supra* note 1, § 1.32.

109. Louis B. Schwartz, *The New Merger Guidelines: Guide to Governmental Discretion and Private Counseling or Propaganda for Revision of the Antitrust Laws?*, 71 CAL. L. REV. 575, 586-87 (1983) (emphasis added) (footnote omitted).

that involves breaking a decision into parts and sequencing the analysis of those parts. Categorizing decisions can alter the ultimate decision once the categories are treated differently, as in the case of entry, or once a decision has been made in one category, if some of the nuances associated with that decision are not accounted for in subsequent decisions.[110] For example, once a market has been defined, weaknesses in the definition are likely to be given less weight in subsequent decisions that rely on the market definition.

B. Evidence of Overall Influence of the Merger Guidelines

This Section supplements the case studies with some basic quantitative measures regarding judicial reference and reliance on the merger guidelines over time. An analysis of all rulings from 1968 to 2003 concerning section 7 of the Clayton Act further supports what the case studies revealed.[111] The guidelines have profoundly influenced antitrust law's evolution.[112] One basic index of influence is whether courts mentioned the guidelines in rulings or, more importantly, relied on them despite the guidelines' lack of precedential authority. Between 1970 and 1975, the average rate at which judges referenced the guidelines was approximately 12.5%. By the mid-1980s, the reference rate was typically above 50%. An

---

110. *See, e.g.*, Richard H. Thaler, *Mental Accounting Matters*, *in* CHOICES, VALUES, AND FRAMES, 241, 243 (Daniel Kahneman & Amos Tversky eds., 2000) (noting that "mental accounting" used in sequential decision making leads to nonneutral decision rules).

111. I constructed a dataset of all Clayton Act section 7 rulings from 1969-2003 through a two-step process. First, I compiled a list of all merger-related rulings. The primary source used to locate those rulings issued through 1981 was the MERGER CASE DIGEST published by the American Bar Association, Section of Antitrust Law. *See generally* SECTION OF ANTITRUST LAW, AM. BAR ASS'N, 1971 MERGER CASE DIGEST; SECTION OF ANTITRUST LAW, AM. BAR ASS'N, 1976 MERGER CASE DIGEST; SECTION OF ANTITRUST LAW, AM. BAR ASS'N, 1982 MERGER CASE DIGEST. From the early 1980s through 2003, the primary source used to locate federal court rulings was Trade Cases, which is published on an annual basis. Rulings by the FTC and the FTC's ALJs are available through the FTC library on Westlaw. My review of those sources was informed by several publicly available reports issued by the FTC and the DOJ, many of which are available online. *See generally* FTC Annual Reports, www.ftc.gov/os/annualreports/ (last visited Nov. 25, 2006) (listing annual FTC reports from 1916 to 2006). Second, I retained only those rulings substantively addressing section 7 issues. As such, I excluded private cases solely addressing issues of standing and government cases solely addressing jurisdictional issues. Rulings involving government consent agreements were also excluded.

112. Unless otherwise indicated, "decisions" include rulings by not only Article III judges, but also by the FTC's ALJs, and by the Commission functioning in an adjudicatory capacity.

examination of the degree to which judges substantively relied on the guidelines in their rulings reveals a similar pattern. In the early 1970s the references were not particularly positive or extensive. By the mid-1970s, however, courts evinced an increasing need to at least grapple with inconsistencies between their view and the guidelines, and by the mid-1980s courts used the guidelines in an increasingly extensive and positive manner. The remainder of this Section presents basic statistical data regarding guideline references in judicial decisions. The next Section will present basic statistical data regarding the substantive nature of the courts' reliance on the guidelines.[113]

The starting point for gauging guideline influence on judicial decision making is identifying the number of rulings that reference the merger guidelines in any given year. The number of such section 7 rulings showed modest year-to-year variability.[114] For the years 1969 to 2003, therefore, I determined both the absolute number of rulings that referenced the guidelines[115] as well as the rate at which section 7 rulings referenced the guidelines.[116] This time frame begins almost immediately after the adoption of the 1968 Guidelines and includes ten years of experience under the most recent broad-scale revision of the guidelines that occurred in 1992.[117]

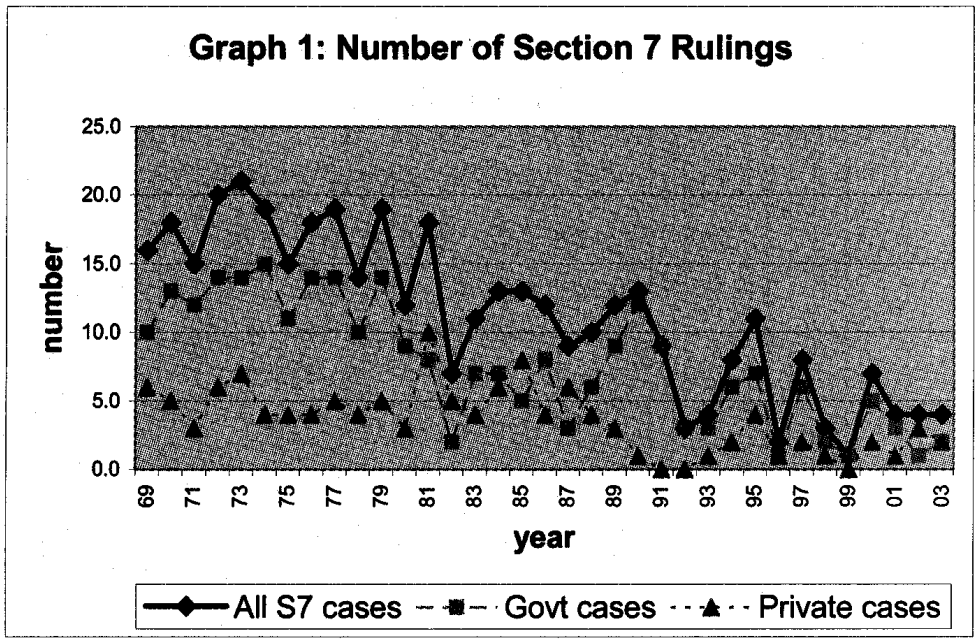
113. *See infra* Part II.C.

114. The number of cases brought by the government that resulted in section 7 rulings declined substantially beginning in 1979 and through the mid-1980s. The inception of this decline roughly corresponds to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR) Act that became effective in 1978. *See* 15 U.S.C. § 18a (2000).

115. *See infra* Graph 1.

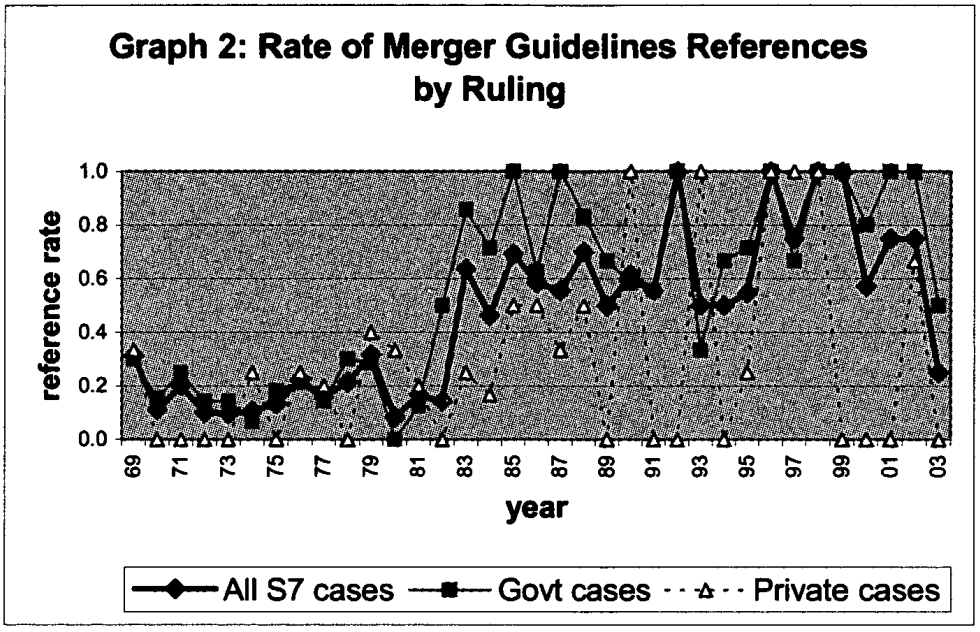
116. *See infra* Graph 2. I excluded rulings in private cases solely involving issues of standing and government cases involving solely jurisdictional issues from this tabulation.

117. The 1992 Guidelines were revised in 1997. The revision included an expanded efficiency section. Unless otherwise indicated, references to the 1992 Guidelines include the 1997 changes.



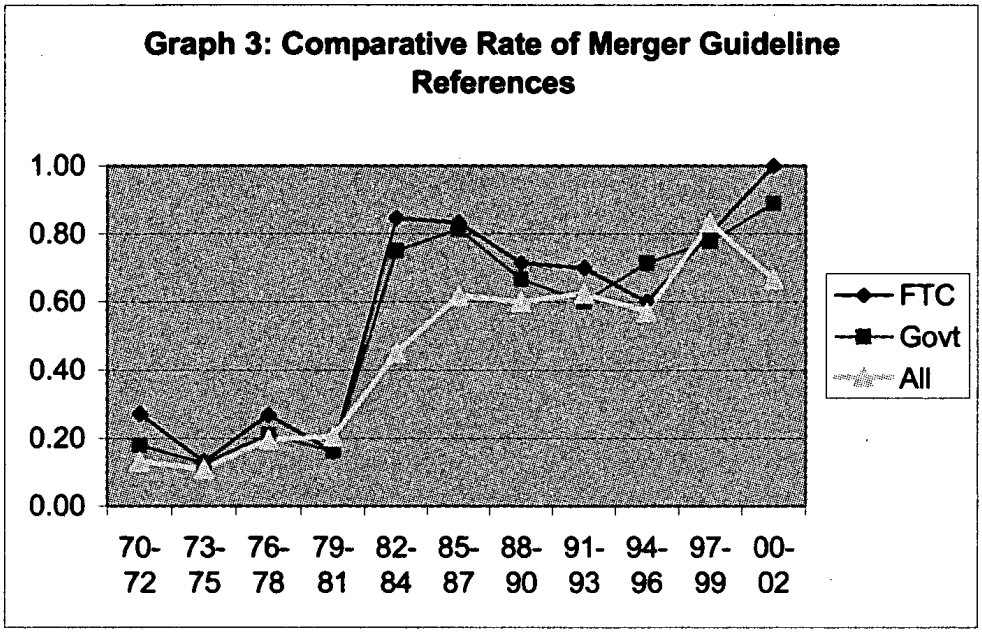
Graph 2 illustrates that the rate of reference to the guidelines rose modestly during the 1970s from typically between 10-15% in the early 1970s to between 15-20% in the late 1970s and early 1980s. During this period the 1968 Guidelines were in effect. In 1983, shortly after the 1982 Guidelines were issued, the reference rate increased to above 50% and by the late 1980s averaged 60% or somewhat higher. Stated alternatively, the courts increasingly referenced the 1968 Guidelines from their inception through 1982. After the 1982 Guidelines were issued, merger guidelines quickly became a basic reference point in section 7 rulings.[118]

118. The rate of merger guideline references could depend in part on whether the merger in question was primarily horizontal, vertical, or conglomerate. To assess this possibility, I removed from my data all section 7 rulings that were purely vertical, conglomerate, or contained only vertical and conglomerate dimensions. I then recalculated the overall rate of merger guideline references in three-year blocks beginning with 1969-1971 and ending with 1984-1986. The sample without those rulings produced rates comparable to the corresponding larger sample rates.



The data reveal several other important trends. First, the issuance of the 1968 Guidelines led to experimentation. This experimentation appears as an initial spike of merger guideline references in 1969, both in higher absolute number and rate. Second, although the guidelines were issued by the DOJ without official approval by the FTC, the FTC rulings mention the merger guidelines more frequently, a fact that holds true for both the 1968 and the 1982 Guidelines.[119] One reason this may have occurred was that the FTC commissioners who used the guidelines to help with prosecutorial decisions were more familiar with the guidelines in their adjudicatory role than were Article III judges. Finally, except for the initial increase in 1969, the number and rate of references to the merger guidelines in private-plaintiff cases was essentially zero until the mid-1970s.[120] Thus, the increase in references in the later 1970s was partially attributable to more references in these private cases.

119. *See infra* Graph 3.
120. *See supra* Graphs 1-2.



C. Reliance on Guidelines Within Reported and Unreported Decisions

Merely tallying guideline references may obscure actual guideline influence if the rulings' substantive reliance varied greatly. Therefore, I categorized each court's opinion during the early years of the guidelines in terms of the nature and extent of the reliance on the guidelines ("reliance factor"). The results illustrate the courts' broadly increasing reliance upon the guidelines over time.[121]

The "reliance factor" is a hybrid of subjective and objective features of guidelines' role within section 7 rulings. I classified each ruling into one of six categories; each category represents a distinct form of judicial reliance on the guidelines. The categories designate increasing degrees by which the opinion uses or cites the guidelines positively.

121. *See infra* Table 2.

Rejection (negative): Guidelines were discussed but rejected in the ruling.[122]
Reconciliation (negative): Discussion of the guidelines in the reconciliation category typically took the form of justifying an implicit rejection or asserting a lack of inconsistency between the opinion and the guidelines.[123]
Recognition (neutral): The guidelines were mentioned or described in terms of their express content or as an argument of one party without any further analysis or application.[124]
Support (positive): A ruling in this category cited or discussed the guidelines positively, but had an independent grounding apart from the merger guidelines.[125]
Reliance in the Alternative (positive): Such rulings relied on the guidelines to make an argument in the alternative, but the guidelines are not integral to the outcome.[126]
Reliance (positive): In this category, the merger guidelines were integral to the outcome. The ruling typically relied on the merger guidelines as the sole basis, or as the lead basis with multiple sources, for critical elements supporting the ruling.[127]

Table 2 summarizes my findings on the relative reliance on merger guidelines from 1968 to 1985, which is the primary period for the growth of guideline influence. For presentational purposes, I count the number of rulings in three-year groupings. Rulings exhibiting two distinct types of reliance are given a count of one half in each category. Though this exercise should be interpreted cautiously, the results reinforce the impression given by the raw numbers and rates discussed previously.[128]

---

122. *See, e.g.*, United States v. Am. Technical Indus., Inc., No. 73-246, 1974 U.S. Dist. LEXIS 12922, at *19 (M.D. Pa. Jan. 8, 1974).

123. *See, e.g.*, Varney v. Coleman Co., 385 F. Supp. 1337 (D.N.H. 1974).

124. *See, e.g.*, Marathon Oil Co. v. Mobil Corp., 530 F. Supp. 315, 325 (N.D. Ohio 1981).

125. *See, e.g.*, Am. Smelting & Ref. Co. v. Pennzoil United, Inc., 295 F. Supp. 149 (D. Del. 1969).

126. *See, e.g.*, F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc., 597 F.2d 814, 817 & n.5 (2d Cir. 1979).

127. *See, e.g.*, White Consol. Indus., Inc. v. Whirlpool Corp., 612 F. Supp. 1009, 1020-21 (N.D. Ohio 1985), *vacated*, 619 F. Supp. 1022 (N.D. Ohio 1985), *aff'd*, 781 F.2d 1224 (6th Cir. 1986).

128. *See supra* Graphs 1-3 and accompanying text.

Table 2: Relative Reliance on Merger Guidelines 1968-1985
(number of rulings referencing merger guidelines)

	68-70	71-73	74-76	77-79	80-82	83-85
Rejection	1	1	1	0	0	1
Reconciliation	0	0	1	1	0	0
Recognition	3.5	4	3	4	1	3
Support	2.5	2	2	3.5	3	11
Reliance (in alt)	0	0	0	1	0	0
Reliance	0	0	1	2.5	2	7

The basic message is that the judiciary's reliance on the guidelines was increasingly frequent and increasingly positive. From 1968 to 1985, a clear progression existed wherein the initial reliance was primarily neutral or questioning—both of which demonstrate recognition of the merger guidelines themselves or parties' arguments regarding them—and later the reliance became more clearly positive. The initial period of relatively high reference rates coupled with less substantive reliance suggested an initial phase characterized by experimentation.

The mid-to-late 1970s witnessed both an increase in the overall reliance on the guidelines as well as several instances of rejection and reconciliation. On its face, this pattern might have seemed somewhat inconsistent with the hypothesis of the 1968 Guidelines' increasing influence. But increased negative discussion of the guidelines likely indicated increased rather than decreased influence after one accounted for the courts' incentives to discuss the guidelines. When the guidelines were not viewed as established or legally important, the courts did not need to account for them. The relative lack of reconciliation rulings in the first six years may have reflected that courts felt no need to discuss differences between their rulings and "guideline-based" rulings. As the guidelines' prominence increased, however, courts that disagreed with the guidelines arguably felt compelled to address these differences.[129]

129. Several important legislative actions during this period (1968-1985) arguably increased the influence of the federal government. The most important development was that HSR substantially altered the antitrust agencies' institutional role, greatly increasing the government's ability to challenge mergers before consummation. This law shifted the dynamic of when and by whom mergers were challenged and gave additional power to the agencies. *See*

The 1982 Guidelines were issued in mid-1982.[130] Both the reference count and the reliance measure revealed a strong upsurge in influence after the new guidelines were introduced. Comparing the relative number of positive versus negative/neutral references for a few years following each guidelines' issuance is telling. From 1968 to 1970, three out of seven rulings were positive. From 1983 to 1985, eighteen out of twenty-two rulings were positive, with nearly one-third showing some level of reliance.

The increase in reference and reliance post-1982 is quite dramatic. Part of the explanation stems from *General Dynamics*, which created an additional need for guidance,[131] and the subsequent absence of Supreme Court precedent after the mid-1970s.[132] Additionally, within the DOJ the 1982 Guidelines were much more heavily relied on than were the 1968 Guidelines. Finally, it is possible that the courts increased the level of deference to the 1982 Guidelines in part because the guidelines were a (more) recent statement of the agency's expert knowledge, and in part because the FTC explicitly expressed generalized support for the DOJ guidelines in their 1982 Merger Statement.

III. GUIDELINE INSTITUTIONALIZATION: A THEORY REGARDING GUIDELINE REFERENCE AND RELIANCE

Part III provides both case study and statistical support for the proposition that the antitrust merger guidelines' influence has grown significantly over time despite their nonbinding character and their express purpose of merely illuminating the use of prosecutorial discretion. In this Part, I provide a theory of guideline institutionalization to account for this increasing influence and describe several specific mechanisms through which this influence process becomes manifest.

---

supra note 114.

130. 1982 Merger Guidelines, *supra* note 1 (issued on June 14, 1982).

131. United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974); *see, e.g.*, Donald G. Kempf, Jr., *Merger Litigation from the Birth of* General Dynamics *to the Death of Section 7*, 65 ANTITRUST L.J. 653, 657 & n.19 (1997) (declaring *General Dynamics* "a watershed" that "reversed abruptly the course of a Court that appeared to many to be on the verge of implementing a per se rule against horizontal mergers").

132. *See infra* Part IV.B.1.

A. A Theory of Guideline Influence Through Institutionalization

Given that the guidelines are only the antitrust agencies' statements of their enforcement policies and that they are technically nonbinding, what accounts for their influence? The history of the guidelines described previously[133] provides many important clues. In this Section, I apply the concept of "institutionalization" to the guidelines to explain that influence. This entails introducing the concept and then selectively recapping the relevant evidence as discussed in Part II.

In the sociology literature, an organization or rule becomes institutionalized when it is "infus[ed] with value beyond the technical requirements of the task at hand."[134] I modify this general definition to fit the guideline context: guidelines become "institutionalized" when they gain sufficient stature that they become valued in legal arguments by the courts and others, beyond the persuasive power of the ideas they embody. The concept of institutionalization is a useful lens through which to view guidelines.

To gain a clearer understanding of what I mean by institutionalization, consider the Hippocratic Oath, which can be thought of as a guideline for physician conduct. Despite the fact that the Hippocratic Oath had no formal status in the courtroom (that is, as precedent), even the Supreme Court felt compelled to reconcile its seminal ruling in *Roe v. Wade*[135] with the oath. In *Roe*, the Supreme Court explicitly addressed the significance of the Hippocratic Oath,

---

133. *See supra* Part II.A.

134. This definition is based on Philip Selznick's definition of "institutionalization" within the context of organizations. Philip Selznick, *Institutionalism "Old" and "New,"* 41 ADMIN. SCI. Q. 270, 271 (1996) (noting that institutionalization's "'most significant' aspect ... is infusion with value beyond the technical requirements of the task at hand"); *see* PHILIP SELZNICK, TVA AND THE GRASS ROOTS: A STUDY IN THE SOCIOLOGY OF FORMAL ORGANIZATION 256-57 (Harper & Row 1966) (1949). Several of Selznick's observations resonate strongly within this merger context. First, Selznick argues that "[m]onitoring the process of institutionalization—its costs as well as benefits—is a major responsibility [for society]." Selznick, *Institutionalism "Old" and "New," supra*, at 271. Second, "[i]nstitutionalization constrains conduct in two main ways: by bringing it within a normative order, and by making it hostage to its own history." *Id.*; *see also* John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340, 341 (1977) (discussing rules and processes as institutions).

135. 410 U.S. 113 (1973).

which prohibited abortion.[136] After a fairly extensive discussion of abortion in ancient Greece, the Court concluded that the Oath reflected "only a small segment of Greek opinion and that it certainly was not accepted by all ancient physicians."[137] Through its somewhat oxymoronic characterization of the Oath as "a long-accepted and revered statement of medical ethics,"[138] the Court thereby reconciled its ruling (permitting abortion) with the Oath (prohibiting abortion). The Court's considerable (and legally unnecessary) efforts to reconcile its ruling with the Oath was even more remarkable given that neither principal brief raised the issue.[139] These efforts reflected the Oath's power as an institution that transcended its actual content and authority.

Much like the Hippocratic Oath for physician conduct, the merger guidelines have gained special status in the antitrust debate. As this status evolved—that is, as the guidelines became a stronger general antitrust institution—the guidelines became increasingly influential by reframing the terms of proper antitrust merger analysis and by anchoring important inquiries.

When first introduced, the guidelines had limited authority outside the DOJ and even within the DOJ itself.[140] Over time, the "legitimacy" of the guidelines increased, and even when that legitimacy had not been fully established, the statistics above revealed an increased tendency among decision makers to explain or reconcile rulings with the guidelines.[141] The reputation of the guidelines, with respect to the soundness of their ideas, concurrently grew, and this, too, enhanced their status. By the mid-1980s, the guidelines were cited heavily in antitrust rulings.[142] Increased judicial recognition moved the law closer to the guidelines, further enabling the courts to accord still greater weight to the guidelines. By the early 1990s, we even find an instance when a theory of entry, arguably rejected two years earlier, appeared in a new revision of

136. *See id.* at 130-32 (citing Dr. Ludwig Edelstein).

137. *Id.* at 132.

138. *Id.*

139. *Id.* at 131.

140. *See* SUZANNE WEAVER, DECISION TO PROSECUTE: ORGANIZATION AND PUBLIC POLICY IN THE ANTITRUST DIVISION 135 (1977).

141. *See supra* Part II.B.

142. *See supra* Graphs 2-3 and accompanying text.

the guidelines that the courts then adopted.[143] In sum, each successive version of the guidelines moves the law towards it, and the strength of the "gravitational force"[144] that the guidelines exert changes over time.

This merger guideline history shows increasing levels of influence with an ongoing evolution of the relationship between the law and the guidelines. The history is not merely the result of the acceptance of superior ideas—though the appeal and soundness of the underlying ideas does matter—nor does the increase seem consistent with a simple story of (possibly unwarranted) judicial deference to agency promulgations. Rather, I believe that something more is needed to explain the history. The guidelines themselves became legitimized and valued beyond the content of their ideas. The antitrust guidelines had acquired a power to influence the law because they were the antitrust guidelines, and not just because they were good ideas or the pronouncements of expert federal agencies. By the 1990s, the guidelines had developed their own special identity. Ideas contained in the guidelines might even prevail in law against otherwise superior competing ideas. In short, the antitrust guidelines had become a strong institution.

Institutionalization occurs both with respect to specific guideline elements and with respect to the overarching approach and framework that integrates the individual elements. The institutionalization of the individual elements and the guidelines collectively reinforce one another: the legitimacy of the elements enhances the status of the set of guidelines, and the legitimacy of the guidelines enhances the likelihood that concepts introduced in guideline revisions are received more favorably than they otherwise might have been. The ability of any particular guideline version to sway judge-made law depends not only on the guideline in effect but also on the influence of its predecessors. The startlingly quick adoption of many of the 1982 Guideline ideas was based in part on the status of the 1968 Guidelines even when the ideas that were

143. *See supra* Part II.A.3.a.

144. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 111 (1977). Dworkin uses the term "gravitational force" to describe the influence of earlier decisions on those that follow "even when these later decisions lie outside [the earlier decisions'] particular orbit." *Id.*; Hillary Greene, Note, *Undead Laws: The Use of Historically Unenforced Criminal Statutes in Noncriminal Litigation*, 16 YALE L. & POL'Y REV. 169, 170 n.7 (1997).

adopted, such as the HHI, were relatively novel. Thus, the evolution of the guideline influence is cumulative and self-reinforcing.[145]

Once institutionalized, the underlying analytical approach may frame the debate about other concepts or even constrain the emergence of an alternative, potentially superior analysis for the particular case at hand. An idea's inclusion within such an institution confers upon it substantial, arguably excessive weight. In its most extreme form, courts may embrace ideas that they had previously, and often recently, rejected.[146] Moreover, the guideline approach may become dominant even though it may be no better than a number of other alternative approaches and could conceivably be worse.

B. Mechanisms of Institutionalization

This Section describes the primary factors that nurtured, promoted and sustained the process of merger guideline institutionalization. The first factor was a relative lack of controlling authority in antitrust merger law. Lack of controlling authority meant that the courts did not have a definitive articulation of merger analysis and, therefore, were more likely to search for help outside of established authorities. One can view this factor as a precondition for influence. Second, the guidelines offered exactly the type of comprehensive and user-friendly system of merger analysis that the courts desired. Third, the guidelines were given a presumptive credibility because they were authored by a government expert agency to which some judicial deference was owed. Finally, guideline influence further increased as the underlying structure and principles in the guidelines increasingly became the frame through which both the courts and the litigants viewed antitrust merger analysis. Below I discuss these factors and how they contributed to the increasing institutionalization of the merger guidelines.

---

145. In my guideline institutionalization theory, the guidelines have a status separate from the status accorded to the agency (or agencies) that authored the guidelines. See *infra* Part III.B.3 for a discussion of how deference to the authoring agency affects guideline status.

146. *See infra* Part III.C.

1. Demand for Guidance: The Relative Lack of Controlling Authority

The vague and open-ended character of key antitrust statutes increases *potential* guideline influence, because the discretionary sphere available to the courts is substantial.[147] *Actual* guideline influence, however, also reflects how the common law landscape has developed. This depends, in part, upon the rudimentary issue of how frequently the courts hear merger cases. As will be discussed below, in the years since the first merger guidelines were issued, courts have decided decreasing percentages of merger cases. Decreased numbers of rulings—and the corresponding decrease in precedent—provided an increased opportunity for the merger guidelines to shape the law.

The lack of definitive case law reflects a marked decrease in the number of merger cases the U.S. Supreme Court has reviewed. The Supreme Court issued a number of critical merger decisions in the 1960s, and several more important decisions in the 1970s, but has issued no additional rulings in the subsequent decades. At least one contributing factor to this "sound of silence"[148] was the enactment of the Antitrust Procedures and Penalties Act (APPA),[149] which essentially eliminated a previously available direct appeal channel from the district courts to the Supreme Court.[150]

In addition to a decrease in Supreme Court rulings, the overall number of section 7 rulings also has decreased since the mid-1970s. Enactment of HSR[151] contributed substantially to this decrease. Sims and Herman reported that the rate of district court litigation resulting from agency merger challenges decreased from 50% before

147. *See supra* Part I.A.

148. ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 439-41 (2002).

149. Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (2000).

150. *See* Bennett Boskey & Eugene Gressman, *Recent Reforms in the Federal Judicial Structure—Three-Judge District Courts and Appellate Review*, 67 F.R.D. 135, 135 (1975) (noting that the APPA "virtually eliminated the hitherto-existing direct appeals to the Supreme Court from final district court judgments in any Expediting Act case" and, therefore, reduced the likelihood of the Supreme Court ruling on any given merger case).

151. 15 U.S.C. § 18a (2000); *see supra* note 114. HSR requires those intending to merge to notify the federal agencies of their intention. A waiting period ensues to permit federal evaluation and, if necessary, challenge to the merger preconsummation. 15 U.S.C. § 18a.

HSR to 22% after HSR.[152] Moreover, it has been argued that "[t]he inevitable by-product of the 1982 Merger Guidelines is that fewer and fewer cases go to litigation. With the higher market share thresholds, firms seeking to enter into troublesome mergers ... often settle[] before [the] complaint is filed."[153] Additionally, changes in standing requirements decreased the ability of private parties to institute merger actions.[154] Milton Handler highlighted this lack of judicial guidance when he observed that "with possibly one or two exceptions," the approximately thirty Supreme Court opinions and pre-1980 rulings of lower courts cannot "be taken at face value."[155] The guidelines offered the agencies and the courts a tool to navigate this open legal terrain.[156]

Though the amount of judicial guidance arguably decreased during the late 1970s and 1980s, the demand for such guidance likely increased both in response to changing economic understandings and the *General Dynamics*[157] ruling that opened the door for additional economic analysis without providing limits or guideposts for its incorporation.[158] At a minimum, it appeared that a court confronting a myriad of economic arguments lacked a core set of merger decisions with which to deal with those issues.

---

152. *See* Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865, 866 (1997).

153. David A. Clanton, *Recent Merger Developments: Coming of Age Under the Guidelines*, 53 ANTITRUST L.J. 345, 355 (1984).

154. *See, e.g.*, Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1, 3 (1995) (discussing the "vital problem of private antitrust enforcement — the standing of private merger litigants").

155. Milton Handler, Essay, *The Dilemma of the Antitrust Practitioner*, 22 SW. U. L. REV. 393, 393 (1993).

156. Handler also attributed one's inability to merely rely on ostensibly valid precedent, in part, to the "reformulating [of] the law through the issuance of guidelines." *Id.*

157. United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974).

158. *See, e.g.*, Schneider, *supra* note 39, at 37 ("From both a legal standpoint and an economic standpoint, litigants [after *General Dynamics*] may need to contend with a variety of refined predictive evidence considered subordinate or irrelevant under the traditional approach to horizontal merger analysis."); Note, *Horizontal Mergers After* United States v. General Dynamics Corp., 92 HARV. L. REV. 491, 512 (1978) (arguing that the lower courts used this case to justify a wide range of broadened inquiries and demonstrated "no precise bounds to" its use).

2. User-friendly Guidance: The Attractiveness of the Guidelines Package

Judicial attraction to agency guidelines was, of course, due partly to the appeal of the individual ideas. Yet, as the concentration measurement debate (HHI vs. CR4) demonstrated,[159] the clear substantive superiority of the guideline-endorsed measure did not appear to fuel the swift judicial acceptance. Arguably, acceptance came largely because the ideas were contained in a user-friendly package that a federal agency endorsed. Before examining the key role that deference to the agencies played in the acceptance of the guidelines, I note several guidelines features that facilitated judicial reliance.

a. Comprehensive and Convenient

An extremely valuable feature of the merger guidelines, from the courts' viewpoint, is that they are a practical framework specifically designed to support antitrust merger decision making. This framework, unlike any developed by an individual court, benefits from the relatively huge and extensive case-by-case experience of the federal agencies. Additionally, the guidelines attempt not only to articulate general principles that can be applied to specific fact situations, but also to be relatively comprehensive. Thus, for any given fact situation the guidelines typically provide some level of guidance.

b. Economic Framework

From the mid-1960s onward, society's economic understanding of markets progressed considerably, and a corresponding trend emerged towards incorporating more economics into antitrust law. "The 1968 Guidelines were carefully drawn to incorporate the economic thinking of the time ...."[160] The same was true of the 1982 Guidelines, to such extent that they "read, in places, more like a chapter in an industrial organization economics treatise than a

159. *See supra* Part II.A.2.a-b.

160. Kauper, *supra* note 21, at 498.

simple set of guiding principles."[161] In 1992, two principal authors of the revised guidelines stated the dual purpose of the new policy document was "to clarify enforcement policy and 'get the economics right.'"[162] This general trend resulted in, among other things, a decrease in the use of per se-type rules in merger actions.[163] This, in turn, increased the potential role, if not outright need, for guidelines to meet the demand for analytical economics-based frameworks.

The trend of increasing reliance on economics was not, however, without its critics. In 1985, Commissioner Patricia Bailey wrote in dissent from an FTC ruling: "The Commission has charted a new course away from the great body of the traditional caselaw, and indeed abandoned the assumptions that have attended merger enforcement policy of both old and recent vintage, substituting a well-nigh theological—and surely theoretical—economic deus ex machina."[164] Ironically, in the same dissent Bailey also criticized the FTC for failing to meaningfully apply their 1982 Statement and the DOJ's 1982 Guidelines.[165] As the economic approach to merger law became more widely accepted by judges and the legal community, the guidelines (as one part of this trend) gained additional currency.

3. Deference to the Federal Agencies

Compared to other sources interpreting merger law, the guidelines' relative influence was enhanced by the unique status of their authors and the considerable judicial deference they received. This subsection explores the contours of that arguably excessive deference.

In *Skidmore v. Swift & Co.*, the U.S. Supreme Court held that various "rulings, interpretations, and opinions" of an agency, "while not controlling upon the courts by reason of their authority, do

---

161. *Id.* at 508.

162. David T. Scheffman, *Introduction [to Symposium on New 1992 Merger Guidelines]*, 38 ANTITRUST BULL. 473 (1993) (citing Assistant Attorney General James Rill and Deputy Assistant Attorney General Robert Willig).

163. Abbott B. Lipsky, Jr., *Antitrust Ecomonics—Making Progress, Avoiding Regression*, 12 GEO. MASON L. REV. 163, 165 (2003) (noting "the upsurge of antitrust economics has gone hand-in-hand with the abandonment of most per se rules").

164. Echlin Manuf. Co., 105 F.T.C. 410, 1985 WL 668902, at *22 (Patricia P. Bailey, Comm'r, dissenting).

165. *See id.* at **20-22.

constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[166] Under *Skidmore*, the courts could properly accord some level of influence to the merger guidelines as statements of a federal agency's enforcement policy. The standard in *Skidmore* was the nebulous "power to persuade,"[167] with the standard for "persuasion" being largely discretionary.[168] Because *Skidmore* and its progeny did not delineate a reasonably constrained range of deference, they cannot be interpreted as prescribing the actual level of influence owed the guidelines.

In the intervening decades since *Skidmore*, Supreme Court rulings frequently strengthened the level of deference owed administrative agencies. In its seminal ruling, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Court held that judges must defer to an agency's interpretation of an ambiguous statute if it was reasonable and embodied in a legislative rule.[169] *Chevron* established a much greater level of deference than did *Skidmore*. "*Chevron* deference," however, applies largely within the context of rulemaking, a context that does not apply to expressly nonbinding enforcement policies like the guidelines.[170]

On the most basic level, one would expect rulings invoking the merger guidelines to include some discussion of the level of deference actually accorded the guidelines. In fact, shortly after their introduction in the late 1960s, a few courts explicitly considered the merger guidelines' appropriate role in judicial decision making. The clearest assessment of judicial deference to such guidelines occurred in *Allis-Chalmers Manufacturing Co. v. White Consolidated Industries,*

166. 323 U.S. 134, 140 (1944).

167. Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833, 846 (2001) (internal quotation marks omitted).

168. *Id.* at 855.

169. 467 U.S. 837, 843 (1984). In essence, "[agency] interpretations entitled to *Chevron* deference must take the form ... of legislative rulemaking or binding adjudication." Merrill & Hickman, *supra* note 167, at 837. Guidelines, as nonbinding enforcement policies, do not command *Chevron* deference. Therefore, to the extent that the courts discuss whether guidelines warrant deference, it is treated as a fully discretionary, rather than mandatory, decision. *Id.*; *see infra* Part IV.B.3 (discussing the viability of rulemaking as an option).

170. None of the merger guidelines were promulgated under a grant of rule-making authority, and only recently have some guidelines been promulgated in a process consistent with the APA. In fact, the guidelines were frequently promulgated with no adherence to rule-like procedures such as public notice and comment.

Inc.,[171] which arose shortly after the DOJ introduced its 1968 Guidelines. After the district court denied the preliminary injunction sought by the target of a takeover,[172] the Third Circuit reversed and stated that the merger at issue was "very likely to have anti-competitive effects in violation of § 7 of the Clayton Act," recognizing the guidelines were not binding on it but nevertheless considering the DOJ's "position as entitled to some consideration, particularly when elements of the Guidelines find support in the developing case law."[173] The majority opinion devoted a separate section to discussion of the guidelines.[174] By contrast, the dissent assiduously avoided any reference to the guidelines and denounced "the theories advanced [by the majority] on potential entry, product extension, and reciprocity to be *devoid* of precedental support or endorsement by any *recognized* commentator."[175] In its appeal to the Supreme Court, White Consolidated argued that "this complex case leaves unresolved fundamental questions raised in the major reversing and dissenting opinions as to ... the judicial sanction to be given the Justice Department's 1968 Merger Guidelines."[176] The petition for certiorari was denied,[177] and the precise role of the antitrust guidelines continued to defy easy assessment.

Since that time, most court rulings on section 7 matters have not directly addressed the issue of deference to the guidelines.[178] Among courts that have explicitly addressed the issue, their treatment of the legal standard of deference to guidelines has been relatively constant, even with broader changes in administrative law.[179]

---

171. 294 F. Supp. 1263 (D. Del. 1969).

172. *Id.* at 1268.

173. Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc., 414 F.2d 506, 524-25 (3d Cir. 1969).

174. *Id.* at 524-25.

175. *Id.* at 532 (Aldisert, J., dissenting) (emphasis added).

176. Petition for Rehearing and Suggestion for Rehearing En Banc, Defendant-Appellee at 2, Allis-Chambers, 414 F.2d 506 (No. 17713).

177. *See* White Consol. Indus., Inc. v. Allis-Chalmers Mfg. Co., 396 U.S. 1009 (1970) (mem.).

178. For example, none of the rulings in my data set from 1968 to 2000 mention precedents such as *Skidmore* or its progeny. Moreover, only a relatively low percentage of rulings even acknowledged the general issue of deference. In 2000, the Supreme Court clarified that agency policy documents should be accorded *Skidmore* deference. *See* Christensen v. Harris County, 529 U.S. 576, 587 (2000); *infra* notes 221-23 and accompanying text.

179. The seminal case regarding deference was *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See supra* notes 169-70 and accompanying text.

Typically, the courts stated that the guidelines were relevant but not controlling, a statement which in itself was true but not particularly informative as to the guidelines' actual effect.[180] Notwithstanding the considerable consistency characterizing explicit judicial statements over time, Part II revealed that, in fact, deference accorded the merger guidelines has generally increased since the late 1960s. This is consistent with the broader trend in administrative law to accord agencies greater deference.

The rulings and briefs indicated that courts deferred to the guidelines to an extent more befitting agency rules than nonbinding agency policy statements. Moreover, given that meaningful persuasion could not have occurred without discussion, this evidence was generally inconsistent with the idea that the guideline influence resulted from persuasion based on superior ideas. Overall, the cases revealed a judiciary that all-too-frequently endorsed the merger guidelines without substantively engaging them. These vague administrative law rulings provided the guidelines room to strengthen as an institution. As noted previously, by the 1990s some courts had even taken to harmonizing inconsistent existing legal precedent with new guidelines by moving the former towards the latter.[181]

Even if courts had sought to more specifically prescribe the level of deference owed to the guidelines, such an exercise would likely have been undermined in the application. The primary contribution of the Supreme Court's rulings was the establishment of a lower bound; that lower bound did little to help illuminate precisely what level of deference was warranted and under what circumstances. As the Supreme Court has noted, deference is not "a device that emasculates the significance of judicial review."[182] Yet, the tremendous latitude courts enjoy regarding deference makes abdication a real possibility—and a danger.[183] Within this context, deference

---

180. *See, e.g.*, FTC v. PPG Indus., Inc., 798 F.2d 1500, 1503 (D.C. Cir. 1986); California v. Sutter Health Sys., 130 F. Supp. 2d 1109 (N.D. Cal. 2001); United States v. Hammermill Paper Co., 429 F. Supp. 1271, 1280-81 (W.D. Pa. 1977).

181. *See supra* Part II.A.3.a (discussing 1992 Merger Guidelines and entry standards).

182. Sec. Indus. Ass'n v. Bd. of Governors of Fed. Reserve Sys., 468 U.S. 137, 143 (1984).

183. Increasingly, the dominant players in antitrust policy are the federal antitrust agencies, even though their primary role in the system is that of law enforcement. Not only are a decreasing percentage of cases litigated, but also, in absolute terms, the number litigated is very small. This reflects a decreasing number of private suits, *see* Brodley, *supra*

provides a conduit for guideline influence. Not only did deference contribute to institutionalization, but institutionalization contributed to increased (and potentially unwarranted) deference.

Clearly, greater deference as a matter of administrative law can lead to greater guideline influence independent of any institutionalization effect. However, when, as here, the amount of deference the law confers is so clearly discretionary, and the courts themselves almost never address deference issues, deference does little to establish a band of appropriate agency influence. Influence, then, is best understood in terms of additional forces, such as institutionalization.

4. Stealth Guidance: Influence Through Framing

> Everyone operates according to some theory, or frame of reference, or paradigm—some generalized map that directs logic and conclusions, given certain facts. The influence of one's paradigm over one's decisions is enormous. It helps define what is important among the multitudes of events (i.e., it "sets one's attention"). And it literally programs one toward certain kinds of conclusions.[184]

A critical but subtle channel for guideline influence is framing the legal debate. This subsection explores the framing mechanism by considering the effect of the guidelines' underlying principles, analytical approaches, ordering of analysis, and implications for case selection. This subsection also notes how the guidelines became a universal reference point that, in turn, constrained the number and types of nonguideline arguments arising in court.

Generally, framing becomes more powerful as the agent that delivers the frame—the merger guidelines—becomes more accepted. Framing, therefore, reinforces the influence of a particular set of institutionalized guidelines, and the influence of guidelines as an

---

note 154, at 1 & n.1 (describing the "drastic curtailment of private merger enforcement" since 1986), coupled with the frequency with which the antitrust agencies enter into consent decrees, Michael L. Weiner, *Antitrust and the Rise of the Regulatory Consent Decree*, 10 FALL ANTITRUST 4 (2005) (describing consents as "more the rule than the exception" and noting that "roughly 70 percent" of all DOJ complaints end in a consent). These trends increase the importance of the judiciary's oversight role in the governmental system.

184. LOWI, *supra* note 2, at 293.

institution. The effects of these aspects of framing are difficult to gauge but can be vital. Little evidence exists in the rulings or briefs that I have examined that indicates the courts were aware of or adjusted their rulings to reflect the potentially powerful framing effects of an institutionalized agency guideline. Thus, the actual judicial deference is likely to have been greater than the deference intended.

a. Selection of Guiding Principles

The most important mechanism through which the merger guidelines established the overall terms of the legal debate was through their advancement of an economic framework for assessing mergers. Individuals and organizations that adopted various guideline elements also assumed the underlying values and premises —the economics—that support the document. Clearly, any court that consciously sought to advance an economics-based approach would have found useful "justification" in the guidelines. Though the absence of the guidelines likely would not have deterred such courts from their economic agenda, the presence of the guidelines might well have influenced the manner and speed with which it was argued and adopted.

The guidelines' economic basis manifested itself in many ways. One of the most overt was the omission and subsequent repudiation of the relevance of social and political factors when evaluating merger legality. The 1968 Guidelines did not include consideration of social and political factors from the legal calculus and focused solely upon efficiency considerations. The 1982 Guidelines reinforced this approach by explicitly rejecting any role for political and social factors when assessing mergers.[185] Though the relevance of these noneconomic factors was arguably in decline, several prominent jurists were unwilling to reject them categorically. Judge Patricia Wald wrote, "I do not believe that the debate over the purposes of antitrust laws has been settled yet.... I think it premature to construct an antitrust test that ignores all other potential concerns

185. 1982 Merger Guidelines, *supra* note 1, § V(B) n.54 ("As a general matter, the Department views the incorporation of non-competitive concerns into antitrust analysis as inconsistent with the mandate contained in the antitrust laws.").

of the antitrust laws except for restriction of output and price raising."[186] The guidelines arguably contributed to the further subordination of the social and political objectives of antitrust by both failing to recognize these factors and creating a framework that did not easily permit their recognition.

In addition to excluding non-economic-based rationales for antitrust, the guidelines' delineation of the goals of antitrust in economic terms was furthered by their affirmative deployment of economically-based legal tests. Sometimes, the increased role for economics manifested itself through the elaboration of existing guideline concepts rather than the introduction of new ones. For example, the 1992 Guidelines replaced the 1982 Guidelines' relatively brief discussion of entry with several new criteria that were based primarily on economic theory. Under the 1992 Guidelines, "entry must be likely (i.e., profitable) at premerger prices rather than the higher post-merger prices postulated under the old Guidelines."[187] The rationale was that "entry w[ould] not discipline the exercise of market power unless it c[ould] return prices to premerger levels."[188] Although this criterion may be more economically defensible, the problem became "how to prove that new entry would occur at premerger prices, when it ha[d] not already occurred at those prices."[189] In addition to altering the standard against which profitability was measured, "[t]he 1992 Guidelines ... introduced new [economic] concepts that few lawyers ha[d] previously wrestled with, called 'minimum viable scale' (MVS) and 'minimum efficient scale' (MES)."[190]

---

186. Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 230-31 (D.C. Cir. 1986) (Wald, J., concurring) (footnotes omitted). This case addressed an action under section 1 of the Sherman Act involving the prohibition on "[e]very contract, combination, ... or conspiracy in restraint of trade," in which the court relied heavily upon the 1982 Guidelines for purposes of assessing market concentration. *Id.* at 220-21.

187. Janet L. McDavid, *The 1992 Horizontal Merger Guidelines: A Practitioner's View of Key Issues in Defending a Merger*, 61 ANTITRUST L.J. 459, 465 (1993).

188. *Id.*

189. *Id.*

190. *Id.* at 465-66 ("MVS and MES are applied to determine whether entry would be profitable if the entrant could capture the reduced output caused by the post-merger exercise of market power.").

b. Selection of Analytical Approach

The guidelines' underlying principles or values were also reflected in concrete analytical approaches. These analytical approaches further framed the terms of the debate. The guidelines, for example, introduced key concepts often reflected in new terms, which sometimes contained buried assumptions; recall how the HHI concentration measure implicitly increased the importance of dominant firms relative to the CR4 measure it displaced.[191]

The impact of framing depended on the extent to which the "new" analytical approaches were compatible with existing approaches. As an example, consider market definition, which is a critical but often ambiguous aspect of merger analysis. The 1982 Guidelines endorsed a strongly economics-based approach to market definition. This approach was as precise as it was abstract, and difficult to apply. Although all courts did not immediately embrace the guidelines' SSNIP test—primarily because of implementation difficulties—its prominence alone changed the relative attractiveness of alternative product market definition approaches by raising the bar regarding economic expectations. The case evidence is consistent with the view that the SSNIP test contributed to the decline of the less economically defensible submarket concept put forth in *Brown Shoe Co.*[192] As a practical matter, SSNIP was viewed as increasing the size of antitrust markets, and with it, the difficulty of bringing cases. Resistance to the measure was reflected in the National Association of Attorneys General's Horizontal Merger Guidelines (NAAG Guidelines), which incorporated other factors, including the Elzinga-Hogerty test, in its determination of geographic markets.[193] Under the NAAG Guidelines, "the geographic market will be defined as the area encompassing the production locations from which [the protected] group purchases seventy-five percent of their supplies of the relevant product."[194] With regard to product markets, NAAG

191. *See supra* Part II.A.2.a.

192. Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962); *see supra* notes 89-92 and accompanying text.

193. Horizontal Merger Guidelines of the National Association of Attorneys General, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,406 (Mar. 30, 1993) [hereinafter NAAG Guidelines].

194. *Id.* § 3.2.

stated that reliance on the DOJ/FTC guideline method "will only be considered where, in the opinion of the state Attorney General, sufficient evidence is available to implement the methodology workably and without speculation."[195]

c. Sequencing and Categorization of Decisions

Because of its complexity, merger analysis is usually broken into a sequence of simpler subdecisions. The psychology literature has demonstrated that such sequential decision-making processes are prone to biases because decision makers frequently do not revisit early subdecisions despite later evidence suggesting that they should.[196] The merger guidelines' specification of a particular sequence of subdecisions has the potential to bias results.

One example of this problem was described earlier with respect to the merger guidelines' categorization of "production substitution," which the 1984 Guidelines defined as a "shift by a firm in the use of facilities from producing and selling one product to producing and selling another ... within *one year*."[197] This substitution was considered to be market participation, which was factored into the concentration calculation, whereas production substitution that took longer was treated as a source of entry. If rigidly applied in this fashion, however, production substitution would mitigate any competitive effects of the proposed merger if treated as entry, but might be insufficient to eliminate anticompetitive concerns when

---

195. *Id.* § 3.41.

> In most situations, both the NAAG and DOJ/FTC market definition methodologies will produce the same result. In the event that the two tests produce different results, the Attorneys General will rely on the test that appears most accurately to reflect the market and is based on the most reliable evidence.

Id. Some difference in frames can be seen by comparing other laws or guidelines to the U.S. merger guidelines. For example, early EU merger analysis emphasized dominant firms much more than did the U.S. guidelines in place at the time. JAMES F. RILL ET AL., INT'L COMPETITION NETWORK, COORDINATED EFFECTS ANALYSIS UNDER INTERNATIONAL MERGER REGIMES, *in* REPORT ON MERGER GUIDELINES, ch. 4, at 4 (2004), *available at* http://www.internationalcompetitionnetwork.org/media/library/conference_2nd_merida_2003/amg_chap4_coordinated.pdf.

196. *See supra* notes 109-10 and accompanying text.

197. 1984 Merger Guidelines, *supra* note 1, § 2.21 (emphasis added); *see supra* Part II.A.3.b.

treated as production substitution to lower HHIs. If the question of where to allocate the production substitution in question were revisited during the entry analysis stage, this problem would be reduced. In fact, the 1992 Guidelines—arguably recognizing this problem—made an explicit provision for this possibility.[198]

Finally, I note that rigid adherence to a sequence of analysis, which proceeds from market definition to the determination of competitive effects and so on, carries a risk that "weaker" market definitions are sometimes not sufficiently acknowledged in later steps that depend on that market definition. Because this problem existed in merger analysis prior to the guidelines, the guidelines' explicit sequencing of analysis potentially reinforced it.[199]

d. Selection of Cases and Arguments

Merger guidelines, as statements of enforcement policy, indicate how federal agencies will conduct their merger analyses. As a result, the agencies can be expected to initiate cases that are generally consistent with the guidelines. One of the few guideline features that have remained constant over time is the rather prominent disclaimer that the guidelines do not bind the agencies themselves. But if the agencies are unwilling to bring cases inconsistent with the guidelines—effectively treating the guidelines as binding upon themselves—then the significance of the guidelines as a screen in determining which cases are pursued increases. Although in theory the government can initiate cases that contravene its own guidelines, it rarely does so in practice and rarely, if ever, acknowledges doing so.

Parties other than the federal government, such as states and private parties, can also challenge mergers. As the guidelines become increasingly institutionalized, these other parties become

198. 1992 Merger Guidelines, *supra* note 1, § 1.32. *But see* 1984 Merger Guidelines, *supra* note 43, § 2.21 (stating that production substitution that was easier may have also had less long-term impact on reducing the anticompetitive effects of a merger). Although valid, the one-year cut-off clearly is arbitrary with respect to impact.

199. *See* Malcolm B. Coate & A. E. Rodriguez, *Pitfalls in Merger Analysis: The Dirty Dozen*, 30 N.M. L. REV. 227, 247 (2000) (arguing that "naive" sequential merger analysis does not allow for consideration of all the analysis in its entirety, thereby leading to incorrect decisions). The authors appear to argue that some courts engage in this "naive" sequential analysis, whereas others correctly consider all the factors simultaneously. *Id.* at 248.

more likely to use guideline analysis in their own decision making. Namely, cases that do not lend themselves to analysis under the guidelines may be deemed weaker by potential nonfederal agency plaintiffs, who may then be less likely to bring them. Similarly, positions deemed weaker under the guidelines may result in an increased willingness to settle.[200]

The effect of using guidelines as a screening mechanism is that fewer cases that are inconsistent with the guidelines will be litigated. But these "weaker" cases may have been precisely among the best candidates for exploring alternatives to guideline analysis. The removal of such cases from the pool of litigated court cases may have indirectly affected the evolution of the law.

Moreover, if the order in which fact patterns are ruled on matters, then the diminution of fact patterns that come before the courts has consequences for the evolution of the law. Significant reasons exist to believe this does matter. For example, the 1968 Guidelines merely omitted political and social considerations from the agency's merger assessment policy; the 1982 Guidelines rejected those factors outright.[201] One could readily imagine how a decreased willingness to bring cases implicating those factors contributed to a self-reinforcing cycle whereby the factors became increasingly disused; this in turn, led to less development of theories supporting them, which then reduced the attractiveness of arguing such factors in court.

e. Primary Reference Point

The guidelines' indirect influence via the selection of cases and arguments was magnified when the vast majority of litigants employed them as a primary reference point. The merger guidelines quickly became such a reference point because, even in their early days, they were used as a tool for agency enforcement decisions

200. William Blumenthal, *Ambiguity and Discretion in the New Guidelines: Some Implications for Practitioners*, 61 ANTITRUST L.J. 469, 485 (1993) (noting that differences between the antitrust guidelines and the case law "may affect the private parties' decision on whether to litigate and the tactics they employ").

201. 1982 Merger Guidelines, *supra* note 1, § V(B) n.54 ("As a general matter, the Department views the incorporation of non-competitive concerns into antitrust analysis as inconsistent with the mandate contained in the antitrust laws.").

regarding mergers. For this reason, all agency antitrust lawyers, both in government and in private practice, needed to understand the guidelines and their rationale: knowledge of the guidelines was *de rigueur* for those practicing merger law.

This particular reference point was important because it structured the thinking of parties litigating merger cases and, as a consequence, perhaps even the thinking of the courts. Though several judges were particularly well-versed in the guidelines from their own experiences as practitioners, the significance of the guidelines as a common point of reference increased as the number of alternative, shared references decreased. This decrease in clear authoritative sources resulted from various litigation trends, including the Supreme Court's failure to issue a merger ruling that "commented upon the anti-merger provision's substantive liability standard" after the mid-1970s.[202]

C. Types of Guideline Influence

I have argued that the guidelines, through their institutionalization, developed an enhanced ability to influence the law. Here, I assess the broad trends in their influence. I begin by grouping the possible departures from the law into three categories based on whether a guideline effectively refined, revised, or rejected prevailing case law. Then I classify various components of the successive guideline generations using these categories. Institutionalization theory suggests that later guidelines were better suited to support aggressive departures from case law than were earlier ones, because the institution itself was stronger. The evidence from my assessment of the cases supports this hypothesis.

1. Refine

Refinements include clarifications and other small deviations from the legal status quo. "Refinement" guidelines could clarify a complex legal analysis or interpolate between rulings. Such guidelines could also refine the law by making the relevant factual determinations that are generally required under the law. This effect would be a

202. GAVIL ET AL., *supra* note 148, at 439.

form of operationalizing the law. Such guidelines would, in effect, demonstrate factual applications of the common law. In that way, they constitute an open advisory opinion of sorts.

Even when a guideline system only modestly refines the law, it cannot be categorized as merely "restating" the law. Because the deviation is small, the impact on antitrust discourse will be somewhat constrained in the first instance. However, not only can the guidelines "pull" the law towards themselves, but they can also resist reform otherwise underway. To the extent that the guidelines persist while the common law shifts, the guidelines that "restate" the law could possibly have a dragging effect on common law evolution.

2. Revise

A revision involves changes that are more substantial than "refinements," but in which the guidelines remain somewhat consistent with some existing case law. This category includes guidelines that focus disproportionately on one of many alternative approaches or principles existing under the common law, or accelerate trends already apparent under the common law. Whether a guideline revises, rather than refines, the prevailing common law is ultimately a question of degree.

3. Reject

Guidelines may also diverge substantially from the common law. Rejecting the law involves pursuing merger actions or proposing analytical approaches that seem unwarranted under existing law, or, vice versa, systematically ignoring actions—for nonresource reasons —for which prosecution clearly seems warranted.

4. Trends in Influence

The iterations of successive merger guidelines defy easy categorization under this system. Each guideline generation arguably contained more than one or perhaps even all three of these components. Despite this fact, on the most general level it is fair to say that each guideline generation contained increasingly aggressive departures from the prevailing common law. The 1968 Guidelines

were predominantly a refinement because their provisions were broadly consistent with existing legal principles of the time. The specific thresholds in the 1968 Guidelines represented a somewhat more aggressive change, however, than would normally qualify as a refinement.

Many elements of the 1982 Guidelines were revisions. For example, the guidelines explicitly incorporated and expanded on the trend to weigh many nonconcentration factors by delineating specifics, including the nature of purchases and differences in products.[203] Introduction of the HHI concentration measure, although broadly consistent with existing law, clearly differed from the CR4 concentration measure previously used. SSNIP constituted a new market definition approach, but again not one inconsistent with existing law focused on elasticity of substitution. Finally, the 1992 Guidelines' treatment of entry arguably constituted an example of rejection. The guidelines specified that, to be considered "easy," entry must be "timely, likely, and sufficient"[204] if it is to affect merger legitimacy, even though that same standard had been substantially rejected by the D.C. Circuit.[205]

Over time, the merger guidelines have diverged increasingly from judge-made law, and they have been increasingly successful at prompting changes in that law. In so doing, the agencies' increased willingness to codify their independent legal interpretations in the form of guidelines also acts as a barometer for gauging the increasing role agencies played or perceived themselves to play in articulating merger law.

D. The Congruence Hypothesis Is Not Supported

An alternative explanation to the institutionalization theory is that changes in the guidelines' apparent influence merely reflected changes in the guidelines' congruence with the state of the law. Under this theory, one would cite the guidelines as a short hand for the relevant precedent. Frequent guideline citation would indicate only that they effectively restated current law, and not that the

203. 1982 Merger Guidelines, *supra* note 1, § III(C)(1)(a).

204. 1992 Horizontal Merger Guidelines, *supra* note 1, § 3.0.

205. *See supra* Part II.A.3.a (discussing United States v. Baker Hughes, 908 F.2d 981 (D.C. Cir. 1990)).

guidelines influenced the content of the law. The institutionalization theory does not require a rejection of the notion that some of the apparent guideline influence arises from its congruence with the law, because feedback from congruence is explicitly incorporated in the theory. The theory does maintain, however, that the guidelines developed a strong, independent influence that shaped the law.

Graph 2 shows that the rate of reference to the merger guidelines increased slightly between 1977 and 1982, and increased much more steeply thereafter.[206] Table 2 indicates a similar pattern with respect to the rulings' reliance on the merger guidelines, though the increase is stronger throughout the period.[207] These patterns support the institutionalization hypothesis.

Can a strict congruence hypothesis also explain this pattern? Under the congruence hypothesis, reliance increases as the substance of the law and of the guidelines converges.[208] Because the leniency standard of any particular guideline is constant, the relative leniency of the law and the guidelines in the 1982 switchover can be used to distinguish the two hypotheses. This analysis depends on the leniency of each guideline relative to the common law. Overall, it is generally thought that both the 1968 and the 1982 Guidelines were more lenient than the law at the time each guideline was introduced and that the 1982 Guidelines were relatively more lenient than the 1968 Guidelines.[209] This merger enforcement trend toward greater leniency would persist throughout the 1980s.[210] Whether the 1968 Guidelines were more or less lenient than the law in 1982 is less clear. I consider both possibilities.

Assume, *arguendo*, that the common law was less lenient than the 1968 Guidelines in 1982, and that the law became more lenient.

---

206. *See supra* Graph 2.

207. *See supra* Table 2.

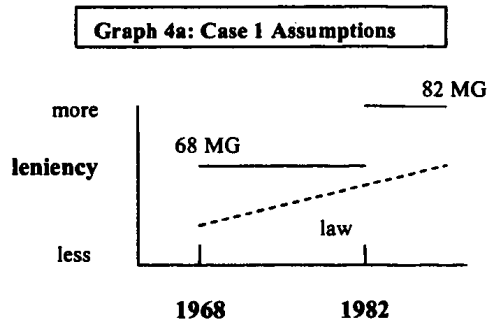
208. A more sophisticated variant of this hypothesis would allow positive versus negative differences to have asymmetric reliance effects.

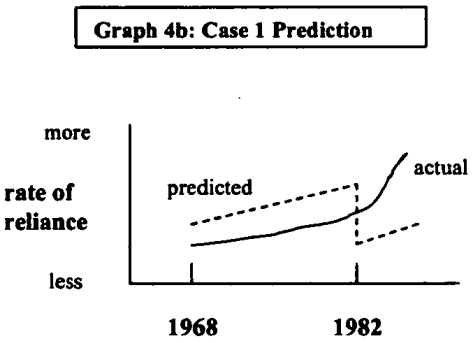
209. When the 1968 Guidelines were supplanted, the FTC wrote, "the two agencies have both concluded that continued reliance on the [1968 Guidelines] is no longer appropriate." 1982 Statement, *supra* note 41, § II. Most observers seem to believe that the change was significant: "[I]t seems reasonably clear that the 1982 Guidelines are much more permissive toward horizontal mergers than the 1968 Guidelines or court decisions." Cohen & Sullivan, *supra* note 68, at 456; *see also* Fox, *supra* note 77, at 522, 550-51, 553-55 (comparing the 1968 and 1982 Guidelines).

210. William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1140-41 (1989).

Further assume that the law became increasingly lenient through 1985, but was less lenient than the 1968 Guidelines in 1982.[211] The congruence hypothesis would predict a general increase in the rate of reference and degree of reliance on the merger guidelines through 1982 and, in fact, such increases occurred. As the 1982 Guidelines were more lenient than the 1968 Guidelines, however, the congruence hypothesis would also predict a decrease in the reference rate and degree of reliance after 1982, which is contrary to the evidence.[212]

211. *See infra* Graph 4a.
212. *See infra* Graph 4b.





Now assume the reverse scenario, in which the law became more lenient than the 1968 Guidelines by 1982. In that case, the congruence hypothesis would predict a hump pattern with the greatest rate of reference and degree of reliance occurring in the year when the guidelines and the law were most consistent in terms of leniency. In 1983 there would be an increase or decrease in reliance depending on whether the 1982 Guidelines were relatively closer or farther from the law than the 1968 Guidelines. This predicted pattern is not supported, as there is no big peak and falloff in the years prior to 1982. Thus, the rate and reliance data do not appear to support a strict congruence hypothesis.

It is also worth noting that the institutionalization theory without the congruence element also does not predict the observed pattern very well. Although the general increase in reliance fits the pure

institutionalization story, the sharp increase in reliance after the introduction of the 1982 Guidelines does not. Institutionalization with congruence, however, would allow that increase to be explained.

Finally, I note that if the law was the primary source of influence, judges would have been able to cite to precedent rather than to the less authoritative merger guidelines. Additionally, if the guidelines were being used merely as restatements of the law, courts that disagreed with guideline policies likely would not find reconciliation with them necessary. Collectively, the statistics and case studies are evidence that the merger guidelines exist as an institution with influence apart from their congruence with the law. Thus, a "strict" congruence hypothesis, which does not admit of any shaping of the law via the guidelines, is not supported.

IV. GUIDELINE INSTITUTIONALIZATION: ASSESSMENT AND RECOMMENDATIONS

Part II illustrated increased guideline influence and Part III interpreted that historical development through the prism of institutionalization. Part IV provides a normative assessment of this institutionalization-based influence and offers recommendations to identify and curb the excesses.

A. Normatively Assessing Guideline Influence

The judiciary's insufficiently critical reliance on the guidelines illuminates why they have not only failed to check that influence but also how they have become a primary vehicle for that influence. This Section argues that deference to the guidelines is excessive as both a legal and public policy matter. The widespread rise and judicial acceptance of the administrative state reflected the recognition that the legislature cannot address all contingencies in the law as enacted and, therefore, various quasi-legislative activities such as rule-making should be delegated to expert administrative agencies.[213] The

213. Rulemaking typically begins with the passage of a law that also delegates to an agency the authority to pass detailed rules that implement the basic law. The authorized agency then engages in a rulemaking process under the APA that requires the rulemaking process to meet a number of procedural requirements including public notice and comment. The resulting rules are then generally treated as binding on the courts. When administrative agencies lack

proper role and influence of agency guidelines is nested in larger questions regarding the benefits and costs associated with congressional delegation and judicial deference to agency expertise. Rather than engaging in these broader debates, I adopt the current division of powers as a starting point and explore how guideline institutionalization affects that balance of power in theory and in practice.

Over time, agencies have increasingly employed policy development that lacks many of the process protections of formal rulemaking. If delegation of rulemaking powers—even under informal rulemaking—to an expert agency is seen as acceptable, why should there be any additional concerns when a set of institutionalized (expert) agency guidelines has rule-like influence with the courts? The guidelines' rule-like influence over the courts poses two major concerns. The first concern is broad: what should be the guidelines' role given the separation of powers in the overall governmental system? The second concern is narrower and derives from the dual and frequently conflicting purposes enforcement guidelines serve.

1. Separation of Powers

As a threshold matter, the merits of the movement of regulatory agencies towards informal rulemaking are debatable from the viewpoint of the governmental process. Further, Congress has not granted the agencies rulemaking power within either the antitrust realm generally or the merger realm specifically. For guidelines to gain a status akin to rules, therefore, is inappropriate as a matter of law.[214] Indeed, for those wary of giving agencies a quasi-legislative role through rulemaking in the first place, enabling agencies to

---

rulemaking authority, they still have multiple options, involving varying levels of formality, with regard to policy articulation.

214. Articulations of policy such as the merger guidelines—unless developed under formal rulemaking authority—should not be treated as similar to rules, because such treatment would be tantamount to allowing executive or independent regulatory agencies a legislative role. *See generally* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them To Bind the Public?*, 41 DUKE L.J. 1311 (1992). Anthony's answer to the question he posed in the title was an emphatic "no." *Id.* at 1312. He then argued that "[t]o use such nonlegislative documents to bind the public violates the Administrative Procedure Act (APA) and dishonors our system of limited government." *Id.*

indirectly acquire that power via guidelines is a step in the wrong direction.[215] One scholar aptly characterized the 1982 Guidelines in the following way: "[U]nder the guise of regularizing discretion, the antitrust laws are being amended without benefit of congressional action."[216] Former Assistant Attorney General Sanford Litvak, appearing in 1985 before the House Judiciary's Subcommittee on Monopolies and Commercial Law, echoed this sentiment. Litvak stated that, despite having been "personally" involved in several antitrust guideline efforts, he was "troubled by what [he had] called the trend toward enforcement by guideline.... Clearly, guidelines can be helpful to businessmen in understanding how the Department approaches its enforcement responsibilities.... But those guidelines were not and were never intended to be a replacement for enforcement and development by case law."[217]

2. Dual Mandates

Guidelines and rules are not variants of the same species of regulatory policy. Unlike rules, the merger guidelines articulate how the agencies will exercise their prosecutorial discretion. Like rules, they also interpret the law, though the merger guidelines do so implicitly and with arguably a greater push towards advocating what the law should be. Under certain circumstances these dual mandates may become dueling mandates.

Enforcement policies necessarily reflect numerous factors such as resource constraints. Resource constraints may promote analytical short cuts and rule selection to eliminate potentially meritorious cases that consume excessive resources relative to other actions. Such policies, if adopted as law, are forces in a conservative legal

---

215. The procedural history of the promulgation of merger guidelines gives little comfort on this separation of powers issue: the record has been one of vastly differing promulgation processes representing different levels of "voluntary" consistency with the APA. In particular, the level of public participation, the linchpin of APA requirements, has varied substantially over time. In essence, the level of public participation has been subject to the discretion of the agencies themselves. *See infra* notes 237-38 and accompanying text; *see also* Greene, *supra* note 41, at 1045-47 (describing "the FTC's role as an expert body").

216. Schwartz, *supra* note 109, at 576.

217. *Oversight Hearings Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 99th Cong. 135 (1985) (statement of Sanford Litvack, Former Assistant Att'y Gen. for the Antitrust Division of the United States Department of Justice).

direction: fewer cases would be found to violate the law. The situation is not quite that simple, though, as prosecutorial enforcement policies may also reflect preferences across different types of cases and, therefore, may be more aggressive on a particular dimension. For example, during the early 1990s the FTC began pursuing a line of section 5 cases on a controversial and aggressive "invitations to collude" theory.[218] Nevertheless, though an enforcement policy will not always operate in a conservative direction on every dimension, resource constraints necessarily force the policy to be conservative on some dimensions.

The guidelines, then, are likely to reflect compromises forced by inherent tensions between prosecutorial and legal standard goals. Guidelines and rules are not that closely related. Because guidelines are motivated by multiple goals much more so than conventional rules, they pose more danger to the governmental process even if, for example, they were promulgated with procedures similar to those comprising informal rulemaking. Deference under such circumstances should be tempered. At a minimum, the courts should be aware that certain elements of the guidelines would have been different if they were written solely for prosecutorial purposes or solely to influence the law. Elements such as the 1800 HHI threshold for concern, or perhaps a statement of a safety zone, could easily reflect prosecutorial requirements in place of a preferred standard for antitrust law, even though the method of analysis, such as using HHIs, would not necessarily be adopted for prosecutorial reasons.

B. Guidance Regarding Guidelines

Given the unacknowledged phenomenon of guideline institutionalization and the consequent excessive guideline influence, I offer several recommendations for moderating the treatment of guidelines in a manner that preserves their legitimate role as both a prosecutorial enforcement tool and a source for ideas about antitrust jurisprudence. Substantial promise lies in reforming the manner in which the guidelines are used on a case-by-case basis. This reform can be accomplished by heightening awareness among

218. *See, e.g.*, YKK (USA), Inc., 116 F.T.C. 628 (1993); Quality Trailer Prods. Corp., 115 F.T.C. 944 (1992).

all participants in the legal process regarding the actual status of enforcement guidelines, notwithstanding the guidelines' institutionalization. Just as the level of today's institutionalization arose from the independent decisions of individual actors, so too will the reduction of that influence come from the cumulative effect of individual decision makers.

The proposed reforms are not predicated on the conclusion that the path along which merger law evolved during this period of institutionalization was substantively wrong. In fact, many commentators, if not most, believe that the merger guidelines have positively influenced the substantive evolution of merger law. I believe, however, that the process was flawed and that the substantive antitrust developments were not predestined and perhaps could have been better. Thus, the thrust of these reforms is to the future and not toward "unscrambling" the effects of merger guideline institutionalization in the past.

1. Guideline Usage in the Courts

Antitrust guidelines, in another context, have been characterized "as a portable amicus brief."[219] This statement accurately identified the courts as an intended—and arguably the prime—audience of the guidelines. As discussed, multiple factors suggest the wisdom of a more circumspect judicial approach regarding the merger guidelines. Certainly, judges can readily adopt such a stance without legislation or changed legal standards. Any movement of the courts along these lines would immediately have salutary ripple effects in terms of how parties argue to the court and—perhaps—how the agencies promulgate the guidelines.

For example, judges could advise parties before them that they would be well-served by supporting any important legal propositions with authorities other than, or in addition to, the merger guidelines. To the extent that litigants still relied heavily on the guidelines, the persuasiveness of the guideline content would be explored. If the court itself references the guidelines in either hearings or rulings, the court should clearly articulate the basis for and extent of its reliance on the guidelines. Ideally, judicial transparency with regard

219. H.R. REP. NO. 99-113, at 32 (1985).

to the guidelines would also encompass explicitly acknowledging divergence from the guidelines rather than obscuring divergence by choosing a nonguideline outcome without acknowledging inconsistency with the guidelines.

The danger persists that courts may be less than forthcoming in their rulings—perhaps, for example, by failing to candidly acknowledge heavy reliance on the merger guidelines when that reliance results from burdens associated with workloads. However, if courts more directly address deference issues, this possibility should be ameliorated. Substantively engaging the guidelines would render more difficult the "smuggling [of agency] views on prosecution policy into crystallized law."[220] It would not, however, interfere with the healthy process of engaging new ideas embodied in the guidelines. Additionally, this recommendation is consistent with not only the long-standing precedent regarding deference owed nonbinding guidelines, but also the Supreme Court's recent and unambiguous ruling in *Christensen v. Harris County* that the courts owe *Skidmore* deference, not *Chevron* deference, to agency policy documents.[221] Under *Christensen*, judicial deference is not automatically conferred but must be earned through persuasion.[222] Though this decision did not resolve many of the ambiguities rooted in *Skidmore*, it provided a necessary reminder regarding the very limited deference owed guidelines. In fact, this one decision already appears to have had limited salutary effects.[223] Society must seize the opportunity to expand on those positive effects.

2. Guideline Promulgation by the Agencies

The merger guidelines, as written, are relatively free-standing. That is, the guidelines do not reference the relevant legal precedent or other nonstatutory sources that give shape, substance, and direction to the prevailing legal framework. By deliberately eschewing any external point of reference, the guidelines are less con-

220. Schwartz, *supra* note 109, at 576-77.

221. Christensen v. Harris County, 529 U.S. 576, 586-88 (2000).

222. *See id.* at 587.

223. Though it is difficult to discern *Christensen*'s precise influence, *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1113-23 (N.D. Cal. 2004), indicates some judicial resistance to the merger guidelines' approach with regard to the specific issue of unilateral effects.

strained by current law. As a prosecutorial enforcement policy document, less reliance on the common law is understandable, as the two can be expected to differ. As a document with the purpose of changing the law, however, one can cynically interpret the absence of case law support as an implicit recognition that the guideline view of what the law should be, and the law itself, are not the same.

I recommend, therefore, that agencies produce a background document along with their guidelines that provides explicit common law and scholarly support and analysis for the guideline elements.[224] Many of the examples of deference given above suggest that nonspecialist judges rely on the guidelines in part because they offer a solution to understanding the merger analysis problem that is less easily or clearly distilled from analysis of relevant case law. If the merger guidelines explicitly grounded their precepts on relevant authority, judges would have easier access to that authority. This increased transparency of guideline analysis would aid critical legal discourse.

The FTC and the DOJ recently released the *Commentary on the Horizontal Merger Guidelines* (*Commentary*).[225] As the *Commentary* forward announces, its purpose is to increase "the transparency of the analytical process by which the Agencies apply the antitrust laws to horizontal mergers."[226] Another arguable purpose of the *Commentary*, like the guidelines themselves, is to influence the courts. As Paul T. Denis has observed, the *Commentary* not only explains agency thinking but also constitutes an "attempt to reclaim ground lost in litigation and to put down markers on points they hope to establish in the future."[227] Unfortunately, as Denis further notes, those *Commentary* portions seeking to reclaim or establish particular legal points "are in narrative passages that do not relate

224. Some limited, recent precedent exists for such an approach. *See, e.g.*, U.S. DEP'T OF JUSTICE & U.S. FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 4 n.10 (1995), *available at* http://www.usdoj.gov/atr/public/guidelines/0558.htm.

225. U.S. DEP'T OF JUSTICE & U.S. FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (2006), *available at* http://www.ftc.gov/os/2006/03/CommentaryonthehorizontalMergerGuidelinesMarch2006.pdf.

226. *Id.* at v.

227. Paul T. Denis, *The Give and Take of the Commentary on the Horizontal Merger Guidelines*, 20 ANTITRUST 51, 51 (2006). Denis was a principal draftsman of the 1992 Merger Guidelines.

to specific case studies."[228] By taking this approach, the *Commentary* provides a user-friendly manual to the guidelines but does not provide judges easier access to the relevant law. The Agencies should recognize that situating their interpretations and enforcement analysis within the underlying legal debates will not diminish their ability to provide meaningful practical guidance and will enhance their ability to promote meaningful legal discourse.

3. Guidelines, Rules, and Rulemaking-like Procedures

The courts, and others, frequently accord rule-like deference to the guidelines. Towards that end, it is worth considering whether the agencies should instead merely promulgate merger rules, or similarly adopt rulemaking-type procedures when promulgating their guidelines. I argue the former is not an option and the latter is not a clear improvement over the status quo.

Agency rulemaking within this context is not a viable option. The DOJ enjoys no express or implicit grant of rulemaking authority within the antitrust realm. Though in theory one could argue that the FTC enjoys rulemaking authority in the competition context, it is not clear that position would prevail, and as a practical matter it is equally unlikely the FTC would advance such a position. As the ABA's Special Committee To Study the Role of the FTC has written, "we are not optimistic about the chances that the FTC could codify antitrust-oriented prohibitions [that is, rules] on specific types of business conduct."[229] Moreover, as the two agencies are jointly responsible for enforcement of the Clayton Act, given their institutional history the FTC would not likely issue binding rules that the DOJ would not be bound to follow.

Increased transparency could also be encouraged by changing other aspects of guideline promulgation.[230] For example, given the

---

228. *Id.*

229. REPORT OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION, *reprinted in* 58 ANTITRUST L.J. 43, 91 n.103 (1989).

230. Note the distinction between imposing rulemaking procedures on guideline promulgation and authorizing actual rulemaking authority. The latter would allow the agencies to make rules whereas the former only increases transparency with respect to nonbinding guidelines. If the episode concerning the FTC's use of its unfairness authority is any indication, Congress appears deeply resistant to the idea of giving formal rulemaking

extraordinary, almost rule-like, deference given guidelines, the agencies could consider providing a greater role for public input. In the past, the agencies sometimes have shown some willingness to engage in APA-like procedures such as notice and comment when promulgating their guidelines, although this openness to public comment has been uneven at best. For example, the antitrust agencies solicited public comments regarding the Draft Intellectual Property Guidelines,[231] but not the Health Care Guidelines.[232]

Based on this experience, we cannot rely on the agencies to voluntarily engage in such transparency-enhancing actions on a consistent basis. Congress could, in theory, impose some procedural requirements like public notice and comment on agency guideline-making, but the legislative history regarding such a requirement is not encouraging. Reflecting a degree of congressional dissatisfaction with the DOJ's antitrust guidelines regarding vertical restraints, a bill arose in 1985 in the House of Representatives that, if passed, would have increased procedural requirements for antitrust guideline promulgation.[233] Representative Hamilton Fish, Jr. (R-NY), the key sponsor of the 1985 bill, reintroduced the bill in 1993.[234] Both the FTC and DOJ vigorously opposed this legislation,[235] which ultimately failed. Although these experiences do not rule out the possibility that Congress could pass such legislation, they do suggest that successful reform along these lines is likely to be difficult. After all, the antitrust agencies likely would not pioneer a movement to rethink the role of guidelines when such an enterprise could ultimately result in a diminution of guideline power—and consequently agency power.

Even if politically feasible, whether the benefit of imposing additional procedural requirements would offset the cost of such

---

authority to regulatory agencies under a mandate as broad as the Clayton Act. *See* Michael M. Greenfield, *Unfairness Under Section 5 of the FTC Act and Its Impact on State Law*, 46 WAYNE L. REV. 1869, 1873 (2000).

231. Draft Antitrust Guidelines for the Licensing and Acquisition of Intellectual Property, 59 Fed. Reg. 41,339 (Aug. 11, 1994).

232. U.S. Dep't of Justice & U.S. Fed. Trade Comm'n, Statements of Antitrust Enforcement Policy in Health Care, *reprinted in* 41 Trade Reg. Rep. (CCH) ¶ 13,153 (Aug. 18, 1996).

233. Antitrust Procedural Fairness Act of 1985, H.R. 1467, 99th Cong. (1985).

234. Antitrust Procedural Fairness Act of 1993, H.R. 489, 103d Cong. (1993).

235. *See, e.g.*, *Authorization for the Antitrust Division of the DOJ: Oversight Hearings Before the Subcomm. on Monopolies and Commercial Law, H. Comm. on the Judiciary*, 99th Cong. 147 (1985).

requirements is unclear. The most obvious drawbacks are the costs and loss of flexibility resulting from extensive formal procedures.[236] Costs involve not just the actual resources involved in promulgation processes, but also potential litigation costs predicated on abuse of the procedures and uncertainty about an agency's policy that such litigation entails.[237] Further, additional procedures may increase an agency's reluctance to make timely revisions to existing guidelines,[238] in the extreme possibly changing the guidelines from an agent of change to a barrier to change.[239] Additional procedural requirements would also limit the speed and flexibility with which an agency could alter its prosecutorial enforcement policy. Further, the same separation-of-powers argument that calls into question a regulatory agency's role in "legislation" would suggest that the agency should have discretion in its prosecutorial enforcement policy sphere. Ironically, one subtle effect of an increased procedural requirement, such as notice and comment, is that it might lead courts to *increase* their deference towards the guidelines. Unless one thinks the formulation process would be greatly improved, increased institutionalization may pose the greater threat from the viewpoint of process.[240]

V. INSTITUTIONALIZATION AND OTHER GUIDELINE SYSTEMS

Agency guidelines and guideline-like policy statements are ubiquitous in the U.S. government. Some of the guidelines, such as

---

236. These costs will be lower with fewer formal rulemaking procedures.

237. Litigation challenging the guidelines, of course, also presents a benefit by effectively constraining the discretion of the agencies in the writing of their guidelines.

238. One frequent impetus to change is that the industry facts on which guidelines are written may have changed. This problem is most salient in the case of industry-specific guidelines, such as the health care antitrust guidelines. The FTC industry guidelines, which were based on many industry facts, arguably suffered from this problem. *See* Greene, *supra* note 41, at 1041-43.

239. In the case of formal rulemaking without new antitrust statutes, the promulgating agency's discretion may also be limited by existing precedent.

240. Because my purpose was to preserve the value of the antitrust guidelines, I did not consider the alternative of eliminating the guidelines completely. Guidelines meet the challenge posed by the need for predictability in agency enforcement and allay concerns about inequity attendant to ad hoc merger challenges. Further, they expedite the development of a coherent legal doctrine for merger analysis. Litigation alone is arguably too piecemeal to provide predictability, and Congress is arguably unwilling to provide the needed level of clarification, perhaps for good reason.

Patent and Trademark Office procedures for examination of patent applications and federal sentencing guidelines, were promulgated primarily to ensure the consistency of administrative or judicial determinations, whereas others were intended to interpret statutes, such as the Equal Employment Opportunity Commission (EEOC) guidelines on various types of discrimination or the FTC unfairness policy statement. Many guidelines combine legal judgments with some findings of industry facts—for example, FTC antitrust industry guides and the FTC environmental advertising guidelines. Still others, like federal antitrust merger guidelines, have multiple goals, including, for example, explaining prosecutorial enforcement policy and advocating legal interpretations.

In this Part, I examine three additional guideline settings through the prism of guideline institutionalization. Changing the guideline context enables me to illustrate additional dimensions of guideline influence. The first example discusses how the FERC and the FCC drew upon the federal antitrust guidelines when exercising their independent merger review authority. The merger guidelines, therefore, influenced not only private litigants and the courts but also other federal agencies. The second example considers the influence of federal guidelines and their revisions on state law through consideration of the FTC's unfairness policy statement. This example reveals both how superseded policy statements will sometimes maintain a separate institutional identity and how federal guidelines can influence judicial interpretations of state law. The third example involves the federal sentencing guidelines, which recently became nonbinding through a Supreme Court ruling. This example allows an examination of "deinstitutionalization" and several factors that may determine the extent to which sentencing guideline influence changes over time. More fundamentally, then, these three distinctive examples collectively underscore the necessity of understanding the nature and extent of guideline institutionalization when considering guideline influence.

A. Interagency Guideline Influence: FERC and the FCC

Mergers are reviewed by the antitrust agencies and several additional federal agencies that exercise limited, concurrent

jurisdiction for particular industries. As such, the realm of merger guideline influence theoretically extends not only to the courts and private litigants but also to other federal agencies. This Section briefly considers the nature and extent of FERC and the FCC reliance on antitrust agency merger guidelines. These two agencies have limited authority for reviewing mergers in the energy and communications industries, respectively. Authority is granted them under section 7 of the Clayton Act ("substantial lessening of competition"),[241] but the agencies also have a broader mandate to consider whether mergers are in the "public interest." Consistent with the guideline institutionalization theory, the merger guidelines appear to have influenced these nonantitrust agencies and the legal developments within these related, but distinctive, forums.

FERC's activities from the mid-1990s to the present are particularly illuminating. Throughout the 1990s, FERC largely assessed competitive effects of mergers through the merger guideline format.[242] The wisdom of FERC's reliance on the merger guidelines can be debated, but it was clearly not required as a legal matter. Though clear political and practical reasons exist why FERC might look to the antitrust agencies' policies for "guidance," the wisdom of FERC's wholesale adoption of the agencies' value judgments and trade-offs, in terms of how it seeks to apply the law, is less clear-cut.

In the late 1990s, FERC solicited public input while formulating its own merger guidelines.[243] FERC launched this undertaking in response to criticism that its policies needed clarification and that the general, non-industry-specific antitrust guidelines were not readily applicable to the unique contours of the energy industry—particularly given the important and changing role of regulation. FERC ultimately adopted wholesale the antitrust merger guidelines within its own energy merger guidelines.[244] The antitrust guideline analysis constitutes the first prong of FERC's analysis and,

---

241. *See supra* notes 8-11 and accompanying text.

242. 18 C.F.R. § 2.26 (2006); *see also* Robert J. Michaels, *Market Power in Electric Utility Mergers: Access, Energy, and the Guidelines*, 17 ENERGY L.J. 401, 401 (1996) ("The FERC ... often uses the concentration standards of the Guidelines in its decision process.").

243. Michaels, *supra* note 242, at 402.

244. Richard D. Cudahy, *The FERC's Policy on Electric Mergers: A Bit of Perspective*, 18 ENERGY L.J. 113, 116-17 (1997).

therefore, plays a critical role in case screening.[245] Such heavy reliance on the antitrust agency framework makes it more likely that FERC will reach the same merger review decision as the DOJ.

There is arguably some merit to the persistent arguments that parties contemplating mergers should not be subjected to multiple levels of federal analysis. The outcry is even greater if the merging firm is also subjected to multiple competitive inquiries that are conducted differently. Addressing those arguments is beyond the scope of this Article. However, the ability of another agency, whether FERC or another, to challenge or at least resist the antitrust agencies' merger policy analysis will likely vary inversely with the extent to which that policy has become institutionalized.

Whether intentionally or not, the FCC apparently has followed a path that would render it somewhat more immune from the forces of institutionalization surrounding the merger guidelines. The FCC possesses jurisdiction to review mergers under both the Clayton Act and the Communications Act of 1934.[246] Despite its dual jurisdiction, the FCC invariably relies on its Communications Act jurisdiction and, at most, "pay[s] lip service" to its Clayton Act authority.[247] The FCC's reliance on the Communication Act's public interest standard means "the FCC can extend its competitive analysis far beyond the traditional approach used by the FTC and DOJ under the Clayton Act."[248] Moreover, the FCC has also resisted formulation of enforcement guidelines that would, invariably, lead to persistent comparisons to the antitrust merger guidelines. Though the FCC has often been criticized for relying too heavily upon its own unique interpretation of its public interest standard,[249] in so doing it has arguably avoided certain tensions with the antitrust agencies that are inherent in FERC's path.

---

245. *See* 18 C.F.R. § 2.26.

246. 47 U.S.C.A. §§ 151-615b (West 2001 & Supp. 2005); *see* James R. Weiss & Martin L. Stern, *Serving Two Masters: The Dual Jurisdiction of the FCC and the Justice Department over Telecommunications Transactions*, 6 COMMLAW CONSPECTUS 195, 197-98 (1998).

247. *Id.* at 198.

248. Harvey I. Saferstein, *Antitrust Issues for Telecom Mergers and Acquisitions*, 739 PLI/PAT 101, 110 (2003).

249. Christopher S. Yoo, *New Models of Regulation and Interagency Governance*, 2003 MICH. ST. L. REV. 701, 703-04.

Although the FCC's policy has probably allowed it greater independence in competitive impact determinations, it does not necessarily follow that the FCC's internal deliberations were not heavily influenced by the merger guidelines. Moreover, the FCC's practice of relying on the guidelines for propositions with which it agrees, but diverging from the guidelines as it deems necessary given the FCC's unique mandate and the nature of the industry it oversees, has itself been the cause of difficulties for the FCC.[250] Notwithstanding such issues regarding the FCC's actual or alleged independent thinking, it should be noted as a practical matter that the FCC rarely challenges mergers that the antitrust agencies themselves do not question, though it may obtain changes in the proposed merger, as conditions for approval, that might not be required by the antitrust agencies.

In sum, it is important to remember that the antitrust merger guidelines are "merely" antitrust agency statements of enforcement policy. Because the guidelines reflect policy preferences as well as constraints such as resources, one could readily imagine that the industry regulatory authorities might arrive at different conclusions regarding competitive effects (and, of course, different conclusions based on the public interest standard). However, the extent to which other agencies that scrutinize mergers feel able to engage in such independent merger policy formulation will depend in large part on the extent to which the dominant guidelines have become institutionalized.[251]

B. Guideline Generations and Split Institutions: FTC Unfairness Statement

The FTC Act's 1938 amendments empowered the FTC to prohibit "unfair or deceptive acts or practices" as well as "[u]nfair methods of competition,"[252] which were not allowed under the FTC's enabling

250. The Third Circuit Court of Appeals identified a tension inherent in the FCC using the 1992 Guidelines for certain propositions and then diverging from those guidelines regarding other propositions. The court required the FCC to justify this discrepancy on remand. Prometheus Radio Project v. FCC, 373 F.3d 372, 433 (3d Cir. 2004).

251. Any individual case also has an agency-to-agency set of influences based on recognition of each agency's respective expertise and sharing of information.

252. Federal Trade Commission Act, Pub. L. No. 75-447, § 3, 52 Stat. 111, 111 (1938)

legislation in 1914.[253] This expanded jurisdiction enabled the FTC to "protect[] consumers directly, as well as through its antitrust efforts."[254] In 1964, the FTC promulgated an unfairness policy statement that established the agency's guidelines for determining whether a practice constituted an unfair act or practice for purposes of the 1938 amendment. The history of the FTC's unfairness guidelines provides a unique vantage point for understanding guideline influence and institutionalization.

A fundamental difference between the unfairness guidelines and the merger guidelines is that the FTC is the sole enforcer of the law as it relates to the former at the federal level. Not surprisingly, the FTC's unfairness guidelines command tremendous deference at the federal level. However, many states have adopted "little FTC Acts," which oftentimes include unfairness provisions modeled, to varying degrees, on the FTC's guidelines. In the time since the state legislatures adopted unfairness provisions and state courts have interpreted those provisions, the FTC has revised its own guidelines. Even when superseded at the federal level, however, the FTC's earlier unfairness guidelines persisted as an institution in its own right at the state level. This Section briefly discusses this phenomenon.

In 1964 the FTC promulgated a trade regulation rule, the "Cigarette Rule,"[255] whose Statement of Basis and Purpose delineated its test for determining when an act or practice was "unfair." The rule addressed whether the act (1) "offends public policy," (2) "is immoral, unethical, oppressive, or unscrupulous," and (3) "causes substantial injury to consumers."[256] Though the Cigarette Rule itself

---

(codified as amended at 15 U.S.C. § 45(a)(1) (2000)).

253. Letter from the Fed. Trade Comm'n to Senators Ford and Danforth (Dec. 17, 1980), *reprinted in* H.R. REP. NO. 98-156, at 35 n.5 (1983) [hereinafter FTC Letter].

254. J. Howard Beales, III, Dir., Bureau of Consumer Prot., Fed. Trade Comm'n, The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection, http://www.ftc.gov/speeches/beales/unfair0603.htm (last visited Nov. 25, 2006).

255. Statement of Basis and Purpose, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8325 (July 2, 1964). The rule was never enforced, as Congress subsequently passed legislation regarding cigarette package labeling. *See* Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-1341 (2000)).

256. Statement of Basis and Purpose, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. at 8355.

was never implemented, its Statement of Basis and Purpose, which contained the three-prong test, would persist.[257] Nearly ten years later, the Supreme Court mildly endorsed this rule in *FTC v. Sperry & Hutchinson Co.*[258]

In the late 1970s, the FTC engaged in numerous rulemakings under its unfairness authority—including one particularly controversial rulemaking involving advertising that targeted children—that prompted a congressional backlash.[259] In response to the backlash, the Commission sent a letter to Congress in 1980 detailing its "Policy Statement on Unfairness,"[260] which set forth the Commission's view on the scope of its unfairness authority.[261] The Policy Statement did not merely elaborate on the Cigarette Rule's Statement of Basis and Purpose. Though it further delineated the consumer injury factor, it narrowed the range of actions that would be deemed to "offend[] public policy" and rejected outright the "immoral, unethical, oppressive, or unscrupulous" factor as an independent basis for an unfairness action.[262] The revised policy statement's overall thrust was an increased emphasis upon the consumer injury factor.

The Policy Statement's influence did not derive primarily from the gradual institutionalization process described with regard to the

---

257. Congress requested that the FTC postpone implementation of its Cigarette Rule while Congress conducted its own inquiries. Ultimately, Congress introduced legislation that addressed the issue underlying the FTC's efforts (that is, cigarette industry advertising). That legislation prohibited any other. Thus, the 1964 Cigarette Rule itself was never directly enforced. *See supra* note 255.

258. 405 U.S. 233, 244 n.5 (1972).

259. *See* Sidney M. Milkis, *The Federal Trade Commission and Consumer Protection: Regulatory Change and Administrative Pragmatism*, 72 ANTITRUST L.J. 911, 924-26 (2005) (discussing the FTC's "children's advertising" rule and ensuing congressional response).

260. FTC Letter, *supra* note 253, at 33-40.

261. *Id.* at 33-40. The Commission claimed that its Statement on Unfairness was a synthesis from "a review of the decided cases and rules and ... a concrete indication of the manner in which the Commission has enforced, and wil [sic] continue to enforce, its unfairness mandate," *id.* at 34, but the circumstances underlying the letter strongly suggested that the Commission's policy statement had political as well as legal goals. Note that the cost-benefit tests included in the Policy Statement were anticipated in the 1975 FTC rulemaking "Preservation of Consumers' Claims and Defenses." 40 Fed. Reg. 53,506, 53,522-23 (Nov. 18, 1975); FTC Letter, *supra* note 253, at 37.

262. *See supra* note 256 and accompanying text. "To justify a finding of unfairness the [consumer] injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided." FTC Letter, *supra* note 253, at 36.

merger guidelines, because the FTC controlled the primary channel to institutionalize the new definition: the channel of administrative adjudication. The Commission could enshrine its own unfairness definition in its own adjudicatory rulings, which, if reasonable, would receive deference and endorsement by higher courts. And, in fact, the 1980 Unfairness Statement quickly became the touchstone for determining the scope of FTC unfairness authority. Within a year, the new unfairness statement was applied in *Horizon Corp.*,[263] and courts later upheld the 1980 Unfairness Statement criteria.[264] In 1994, Congress largely codified the 1980 Unfairness Statement as law.[265] This brief recounting of the history of the FTC's unfairness policy reveals how nonbinding "interpretative guidelines" can quickly become influential institutions.[266] In such cases, the forces of institutionalization this Article focuses on take a back seat to the direct channel of administrative adjudication.

More interestingly, introduction of a revised standard did not foreclose the possibility that the earlier standard might maintain its own identity.[267] That is, whereas the new standard might piggyback on the institutional base of the old standard, the old standard might

263. Horizon Corp., 97 F.T.C. 464, 849-50 (1981).

264. *See, e.g.*, Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 971-84 (D.C. Cir. 1985).

265. 15 U.S.C. § 45(n) (2000).

266. The purpose of such nonbinding guidelines is to interpret the statute. When strong deference is required, owing to statutory language, the forces of institutionalization, as in the federal unfairness setting, are less likely to be important for guidelines issued by the relevant agency. Strong deference is typically given to agencies that have cease-and-desist authority over their own statute. When little deference is required, institutionalization becomes a potentially important factor in the influence of the document. The EEOC's interpretations of Title VII discrimination based on sex, religion, or national origin are examples in which interpretative guidelines are given limited deference. The EEOC lacked cease and desist powers under the Civil Rights Act, and for many years was even unable to bring suits under the Act. Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 66. However, the guidelines were quite prominent, as actions by employers following the interpretative guidelines of the EEOC were given immunity and the EEOC had a "gatekeeper" role in screening private suits. *See, e.g.*, *id.* at 88-102, 107 (concluding the EEOC has implied law-interpreting authority under the Americans with Disabilities Act, the Age Discrimination in Employment Act, and Title VII); John S. Moot, Comment, *An Analysis of Judicial Deference to EEOC Interpretative Guidelines*, 1 ADMIN. L.J. 213 (1987) (proposing that courts defer to EEOC's interpretative guidelines in certain situations).

267. A similar divergence is also possible for the merger guidelines; the fact that the states had to bring merger cases in federal court made it much harder for two separate institutions to be maintained than in the unfairness cases.

still maintain its own institutional identity. The question of a separate identity is of limited interest in the federal setting because the new guidelines effectively replace the older guidelines for policy and judicial purposes. However, the separate identity raises interesting issues for state court rulings that interpret the unfairness power created under "little FTC Act" statutes.

Michael Greenfield has investigated how a number of states have relied on the FTC's definitions of unfairness. About half of the states have enacted "little FTC Acts" with language outlawing "unfair" acts or practices, and most of these statutes direct the courts to give some level of consideration to FTC and federal court interpretations.[268] Greenfield found that "most states pay lip service to the statutory direction that they 'be guided by' interpretations of section 5 of the FTC Act, but in fact they adhere to pre-1980 articulations."[269]

Unlike with federal tribunals, a new federal unfairness policy statement is not immediately a strong institution from the perspective of the state courts. Thus, the influence of a federal unfairness policy statement would change over time as the statement strengthened—or weakened—as an institution from the states' perspective. This process of institutionalization follows lines similar to those discussed for the federal merger guidelines: the institution would strengthen to the extent that the statements frame the debates before the court, become more widely understood and argued by the litigants, and ultimately become adopted in federal and state court rulings. A substantial change to the federal guidelines, such as the 1980 Policy Statement, would reduce the strength of the previous institution—the 1964 Cigarette Rule's Statement of Basis and Purpose—because that guideline has been at least partially stripped of the benefit it gets from the "consideration" requirement in most state statutes. But such a revision does not imply the institution's demise; in fact, if the previous institution was strong and sufficiently different, it might theoretically prevail over the newer standard. In addition, most courts framed their choices as either the Cigarette Rule or the Policy Statement, and did not treat these statements as

268. Greenfield, *supra* note 230, at 1896.

269. *Id.* at 1929; *see also* Bob Lipson, *Unfairness in Consumer Protection Cases*, WASH. ST. BAR NEWS, May 2002, http://www.wsba.org/media/publications/barnews/archives/2002/may-02-consumer.htm (discussing FTC unfairness cases at both state and federal levels).

sources from which to derive a more independent definition of unfairness.[270]

Greenfield's finding that most states remained moored to the earlier FTC's Cigarette Rule and the apparent desire of the state courts to use the entire statement, rather than its component parts, support the idea that the Cigarette Rule remained an institution separate from and actually in conflict with the Unfairness Statement that superseded it in the federal arena. Apparently, old institutions just do not die, and sometimes they do not even fade away.

C. Federal Sentencing Guidelines: Deinstitutionalization

The Federal Sentencing Guidelines present a fascinating case when viewed through the lens of institutionalization or, more accurately, *deinstitutionalization*. From their inception, until relatively recently, the Sentencing Guidelines were binding on the courts. In its 2005 ruling in *United States v. Booker*, the Supreme Court declared the guidelines unconstitutional and effectively remedied the constitutional infirmity by declaring that the guidelines would be discretionary rather than binding.[271] The framework regarding institutionalization can usefully direct our inquiry into the future evolution of sentencing law. Namely, the extent to which the Sentencing Guidelines continue to influence the law—despite the judicial fiat regarding deinstitutionalization—will depend on many of the factors discussed throughout this Article.

Immediately following the *Booker* ruling, a heated debate ensued as to whether legislation was needed to prevent sentencing decisions from devolving into unprincipled, inconsistent rulings.[272] Writing one

---

270. Greenfield and others have noted that many state courts would avoid discussion of the Policy Statement—and the federal court cases applying that Statement. *See, e.g.*, Greenfield, *supra* note 230, at 1900. This phenomenon could be explained by the courts' avoidance of the problem of harmonizing two somewhat conflicting positions. Such treatment would be less troubling if the courts believed they could mix and match the factors contained in each statement. But, as Greenfield noted, the Connecticut Supreme Court seems to adopt—perhaps disingenuously—both the 1964 Cigarette Rule and the 1980 Policy Statement. *See id.* at 1916.

271. United States v. Booker, 543 U.S. 220, 258-63 (2005). The Federal Sentencing Act "still requires judges to take account of the Guidelines together with other sentencing goals." *Id.* at 223.

272. Justice Breyer, for the majority, recognized but discounted a dissenting Justice Scalia's "fears of a 'discordant symphony,' 'excessive disparities,' and 'havoc.'" *Id.* at 263.

year after the ruling, Douglas Berman and William Saxbe noted that "the *Booker* decision does not appear to have radically changed either the basic practices or typical outcomes in the federal sentencing system.... In short, a culture of guideline compliance has persisted after *Booker*."[273] To what extent is that general compliance desirable? Is that level of compliance likely to continue? As Berman and Saxbe also noted, "more time will be needed to assess *Booker*'s full impact ... [it] has the potential to transform federal sentencing law."[274] Guideline institutionalization provides a useful framework for understanding *Booker*'s influence or lack thereof.

1. Degrees of Deference

The Supreme Court declared the Sentencing Guidelines unconstitutional. The remedy to that profound infirmity was modification of the Sentencing Guidelines' status under the law. If, however, the courts continue to treat the guidelines as de facto binding, owing to their institutionalization, the question then becomes to what extent has the constitutional infirmity of the guidelines actually been remedied. This question, of course, raises the central and somewhat intractable issue that arose within the merger guideline setting—namely, how to assess whether the courts are excessively deferring to a nonbinding guideline system. As within the antitrust context, the absence of a sufficiently delineated administrative law doctrine of deference regarding such agency pronouncements provides a fertile ground for the forces of institutionalization to help shape the Sentencing Guidelines' influence. Particular attention must be paid to the extent to which the guidelines are imposed in a manner that invites debate about the proper standard, or in a manner that permits no discussion.

Even if the guidelines are not treated as de facto binding, they will invariably exert a powerful influence through framing the terms of the debate. The majority in *Booker* noted that "[t]he district courts, while not bound to apply the Guidelines, must consult those

273. Douglas A. Berman & William B. Saxbe, *Perspectives on* Booker*'s Potential*, 18 FED. SENT. R. 79, 2005 WL 4652499, at *1.

274. *Id.*

Guidelines and take them into account when sentencing."[275] Towards that end, examining the reasoning of courts that ultimately issue sentences that are inconsistent with the guidelines is important.[276] For example, do the courts still apply the guidelines in the first instance and then depart from them? Though departure from the guidelines is important, the extent to which the courts allow the guidelines to continue to frame their inquiry is equally as important. Though most attention appears to focus on the district courts, the appellate courts' treatment of *Booker* must also be considered. As Justice Scalia pondered in his dissent, "[w]ill appellate review for 'unreasonableness' preserve *de facto* mandatory Guidelines by discouraging district courts from sentencing outside Guidelines ranges?"[277] As with the merger guidelines, one must consider which avenues of inquiry are stressed, or perhaps even precluded, as a result of the guideline framework.

2. Private Party Incentives

The incentives of those before the court in sentencing cases are different than in merger cases. In merger cases, the guidelines address the courts' consideration of the issues as to which party should prevail on the merits. In sentencing cases, obviously, that issue is already resolved. Defendants have every incentive to vigorously argue whatever can assist in their sentencing hearing. In a merger case, by contrast, the guidelines' nonbinding posture results in a situation where it is unclear if it assists the private party to directly clash with the guidelines themselves, rather than to sidestep or distinguish how they are applicable.[278]

3. Expertise

The merger guidelines' express purpose was to enhance consistency in the application of the law. The guidelines also reflected the

275. *Booker*, 543 U.S. at 264.

276. *Id.* at 305 (Scalia, J., dissenting) (noting "the (oddly) surviving requirement" that the sentencing courts must articulate "the specific reason for" departure from the Guidelines).

277. *Id.* at 313.

278. The government's incentives also differ here. For example, the Federal Sentencing Commission, not the federal prosecutors themselves, generate the Sentencing Guidelines.

considered judgment or expertise of those in power when they were promulgated, and of those perpetuating them. The merger guidelines' implicit purpose was to share agency expertise regarding what is often considered to be an extremely technical area of law—a perspective that has become more commonplace as the role of economics within antitrust has become more pronounced. By contrast, the primary justification for the Federal Sentencing Reform Act of 1984,[279] which established the Sentencing Guidelines, was more clearly focused on the inequities that were perceived to arise from the inconsistency characterizing criminal sentences.[280] However, a strong line of criticism emerged in the wake of adopting the Sentencing Guidelines that forcing sentencing into an artificial framework—epitomized by the sentencing table itself—would result in injustice from the *lack* of flexibility, when at one time such injustice had been attributed to the presence of *too much* flexibility.[281] Consequently, despite the absence of recent precedent in which sentencing was discussed, one could imagine the courts' feeling better able to step more quickly into that role than would be the case with regard to antitrust.[282]

Using my theory of guideline institutionalization as a prism through which to view the Sentencing Guidelines does not yield any easy answers regarding how the law should or even will develop. However, it does identify the factors that society needs to consider when charting its future course. And, more importantly, institutionalization clearly indicates that the conversion of the Sentencing Guidelines from binding to nonbinding constitutes only the first in a series of decisions that society will need to make.

---

279. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. & 28 U.S.C. (2000)).

280. *Booker*, 543 U.S. at 305 n.3 (Scalia, J., dissenting) (noting that the Guidelines included policy determinations regarding past sentencing practices).

281. *See* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1683 (1992) (noting that guidelines must allow for some discretion).

282. *Booker*, 543 U.S. at 290 n.11 (Stevens, J., dissenting) (noting numerous district court judges whose hostility to the guidelines was well known).

CONCLUSION

Since the introduction of merger guidelines in the 1960s, antitrust guidelines have proliferated. The federal antitrust agencies have promulgated guidelines addressing, among other topics, the licensing of intellectual property, collaborations among competitors, international operations, and the health care industry.[283] Moreover, the antitrust agencies frequently receive requests for the promulgation of still more guidelines. Most recently, there have been additional calls for the antitrust agencies to devise guidelines regarding standard-setting practices[284] and slotting allowances.[285] This increased reliance on guidelines has also been mirrored in other regulatory arenas.[286]

The merger guidelines provide an ideal setting for assessing the nature of judicial reliance on administrative agencies. The merger guidelines have persisted in varying forms for nearly four decades. During that time, they have encountered substantial changes in political and social climates, the role of economics, and administrative law standards.

My analysis of the history of the merger guidelines and merger rulings shows that the courts have ceded significant responsibility to interpret the law to the antitrust agencies. I attribute this unfortunate development to the merger guidelines' institutionalization, which allowed them to acquire influence that extended beyond the persuasive power of their ideas. The process of institutionalization resulted from the convergence of many factors and evolved over time. Several of the key mechanisms that promoted or sustained the process of institutionalization were a relative lack of controlling authority and an ambiguous level of deference owed the

283. *See* Bureau of Competition, Fed. Trade Comm'n: All Bureau Guidelines, http://www.ftc.gov/bc/bcburguidelines. htm (presenting all FTC/DOJ antitrust guidelines) (last visited Nov. 25, 2006).

284. David A. Balto & Daniel I. Prywes, Standard-Setting Disputes: The Need for Guidelines, http://www.ftc.gov/os/comments/intelpropertycomments/baltoprywes (last visited Nov. 25, 2006).

285. FED. TRADE COMM'N, REPORT ON THE FEDERAL TRADE COMMISSION WORKSHOP ON SLOTTING ALLOWANCES AND OTHER MARKETING PRACTICES IN THE GROCERY INDUSTRY 66–67 (2001), *available at* http://www.ftc.gov/os/2001/02/slottingallowancesreportfinal.pdf.

286. Anthony, *supra* note 214, at 1316 ("[I]t is manifest that nonobservance of APA rulemaking requirements is widespread.").

promulgating agencies. As the guideline institution strengthened, its direct effect was augmented through more subtle mechanisms of influence, such as framing.

The evolution of the guidelines themselves has consistently been one of including greater flexibility and analysis of more factors. It must be recognized that, just as the guidelines require flexibility, so too the interpreters of the law and of the guidelines themselves require flexibility. Excessive reliance on the letter of the guidelines constitutes a violation of their spirit.